11-1

February 17, 2011

Re: Opinion Request

Dear Mr. _____:

This responds to your letter dated October 19, 2010, in which you requested a determination as to whether the _____, a nonprofit credit counseling agency (CCA) that offers and provides debt management plans (DMP) to California consumers, would be considered engaged in "money transmission" and therefore would be required to be licensed under the recently enacted California Money Transmission Act. In the alternative, you request a determination that CCAs qualify for a public interest exemption from licensing.

FACTUAL BACKGROUND.

You describe the facts as follows. _____ is comprised of _____ nonprofit CCAs and a housing counseling agency that are recognized as exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code. Nonprofit CCAs provide debtors with access to educational resources to assist in budget planning, such as newsletters, online educational content, and financial counseling support. In addition, to those that are eligible, CCAs generally offer the opportunity to enter into a DMP for the repayment of a consumer's unsecured debt. Through these plans, a debtor agrees to make regular deposits with the CCA, which in turn distributes the money to the consumer's unsecured creditors to pay the consumer's credit card bills, student loans, medical bills, or other unsecured debts according to a payment schedule that has been worked out with the consumer and his or her creditors. Typically, debtors' funds are transmitted to the nonprofit CCA either via ACH debits to debtors' checking accounts by the nonprofit CCA's financial institution or via money order. The nonprofit CCA deposits the funds into one or more trust accounts established by the CCA at a national or state chartered bank. The nonprofit distributes the funds to creditors either via a payment service or by paper check drawn on the CCA's account in accordance with the terms of the repayment plan.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 1810(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 1803(o), in relevant part, defines "money transmission" as "receiving money for transmission." FC § 1803(s), in relevant part, defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

FC § 1806 provides for a public interest exemption to the licensing requirement of § 1810. Section 1806 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO CCA ACTIVITIES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, through a DMP, a nonprofit CCA receives debtors' funds and thereafter distributes, or transmits, those funds to the debtors' creditors in accordance with the terms of the repayment plan. Thus, CCAs receive money for transmission within or outside the United States. Pursuant to FC § 1810, CCAs would need to obtain a license unless exempt.

B. Exemption.

As you note, CCAs meet the definition of "prorater" as defined in FC § 12002.1 of the California Proraters Law. As such, CCAs are already licensed and regulated by the California Department of Corporations. It would therefore be duplicative to require licensing of CCAs under the Money Transmission Act. Moreover, such licensing would result in CCAs being subject to two regulatory schemes and would confuse jurisdiction. Finally, CCAs' business of money transmission is incidental to its credit counseling activities.

For these reasons, there are hereby exempted from the provisions of Chapter 14, Division 1 of the FC, as being in the public interest and the regulation of which is not necessary, the offering and providing of DMPs to California consumers by CCAs.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

October 19, 2010

Via Overnight Mail and Email

Mr. William S. Haraf
Commissioner of Financial Institutions
California Department of Financial Institutions
45 Fremont Street, Suite 1700
San Francisco, CA 94105
wharaf(@dfi.ca.gov

RE: Request for Interpretive Ruling on the California Money Transmission Act and Debt Management Plan Services.

Dear Commissioner Haraf:

On behalf of our client, the _____ (the "_____")[2] we request an interpretive ruling and no-action position from the California Department of Financial Institutions (the "Department") confirming the foregoing analysis and conclusion that a nonprofit credit counseling agency ("CCA") will not be considered engaged in "money transmission," and therefore not required to be licensed under the recently-enacted California Money Transmission Act (the "Act"),[3] by virtue of offering and providing a debt management plan ("DMP") to consumers in your state. In the alternative, if you believe that nonprofit CCAs engage in "money transmission" by virtue of offering and providing a DMP, we respectfully request that you use your authority under the public interest exemption contained in

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[2] _____ members are nonprofit, tax-exempt 501(c)(3) organizations focused on consumer credit counseling, housing counseling, financial education and budget and debt management.

[3] California Money Transmission Act, CA A.B. 2789 (2010) (enacted Sept. 30, 2010).

Article 2, Section 1806 of the Act (the "Public Interest Exemption") to exempt nonprofit CCAs from the licensure requirements.

I. Factual Background.

A. Description of the _____

The _____ is comprised of _____ of the leading nonprofit CCAs and a housing counseling agency that are recognized as exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code (the "Code"). Each member provides financial educational and counseling services to the public. Each agency's services are heavily and effectively regulated under federal and state law, as well as standards and guidelines established by industry trade associations and independent accrediting bodies devoted to consumer protection.

B. Credit Counseling and Debt Management Plans.

Nonprofit CCAs provide debtors with access to educational resources to assist in budget planning, such as newsletters, online educational content, and financial counseling support. In addition, to those that are eligible, CCAs generally offer the opportunity to enter into a DMP for the repayment of a consumer's unsecured debt. Through these plans, a debtor agrees to make regular deposits with the CCA, which in turn distributes the money to the consumer's unsecured creditors to pay the consumer's credit card bills, student loans, medical bills, or other unsecured debts according to a payment schedule that has been worked out with the consumer and his or her creditors. Typically, debtors' funds are transmitted to the nonprofit CCA either via ACH debits to debtors' checking accounts by the nonprofit CCA's financial institution or via money order. The nonprofit CCA deposits the funds into one or more trust accounts established by the CCA at a national or state charted bank.)[3] The nonprofit CCA distributes the funds to creditors either via a payment service or by paper check drawn on the CCA's account in accordance with the terms of the repayment plan.

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[3]Many CCAs use electronic payment systems such as MasterCard RPPS, https://www.mastercardintl.com/rpps/lv12.cgi/cc_2, which provides electronic and bill payment presentment services. Note that California Financial Code section 12014(3) requires nonprofit community service organizations that provide DMPs to "transmit funds utilizing electronic payment processing when available." Cal Fin. Code § 12104(n)(3).

C. State Regulation of DMPs.

DMPs are heavily regulated under various statutes among the states, including the California Check Sellers, Bill Payers and Proraters Law, Cal Fin. Code § 12000 *et seq.* (the "Proraters Law"). In this regard, nonprofit CCAs may rely on the licensing exemption under Financial Code section 12104 if the organization is in compliance with the requirements of that section, and the organization files the document required under that section with the California Department of Corporations.[4]

Compliance with the Proraters Law:

1. Requires the organization to have as its principal functions consumer credit education, counseling on consumer credit problems and family budgets, and arranging or administering debt management or settlement plans;

2. Requires the organization to limit fees received from a debtor to no more than the following:

    a. For education and counseling combined, $50;

    b. For debt management plans, a sum not to exceed 8 percent of the money disbursed monthly, or thirty-five dollars ($35) per month (whichever is less); and

    c. For debt settlement plans, a sum not to exceed 15 percent of the amount of the debt forgiven.

3. Prohibits the organization from requiring up-front payments or deposits;

4. Prohibits the organization from requiring the payment of fees until the debt is successfully settled;

5. Requires the organization to maintain and keep current and accurate books, records, and accounts;

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[4] *See* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fin&group=12001 – 13000&file=12100-12108. A complete set of forms that are filed with the California Department of Corporations, including "Financial Institution" information, are available at http://www.corp.ca.gov/forms/financial.asp. A list of nonprofit CCAs that have filed the documents required by Financial Code section 12104 in order to rely on the exemption is available at http://www.corp.ca.gov/FSD/pdf/ncso.pdf.

6. Requires the organization to provide to the Commissioner, prior to engaging in business, information on where the trust account holding debtors' funds is maintained, and consent for the Commissioner to take possession of the account, if necessary for the protection of debtors;

7. Requires the organization to maintain a $25,000 surety bond;

8. Requires the organization to report account information to a debtor at least once every three months, or upon the debtor's request;

9. Requires the organization to submit to the Commissioner an audit report containing audited financial statements;

10. Requires the organization to maintain accreditation by an independent accrediting organization, including either the Council on Accreditation or the International Standards Organization;

11. Prohibits the organization from engaging in any unfair or deceptive acts or practices;

12. Requires the organization to adopt and implement best practices designed to prevent improper debt management or settlement practices and prevent theft and misappropriation of funds, including disbursement of funds no later than 15 days after receipt of funds, or by scheduled disbursement date, which is greater, and that a consumer's first disbursement be received (by creditor(s) within 90 days of agreeing to the DMP;

13. Requires the organization to adopt policies that specifically prohibit credit counselors from receiving financial incentives or additional compensation based on the outcome of the counseling process;

14. Requires the organization to resolve complaints from debtors in a prompt and reasonable manner; and

15. Requires the organization to provide written notice to the Commissioner of the Department of Corporations for the State of California within 30 days of dissolution or termination of engaging in the activities of a prorater.

The Proraters Law vests enforcement authority for these requirements with the California Department of Corporations.[5]

III. Request for Interpretive Ruling or No-Action Position.

A. DMPs Do Not Meet the Definition of Money Transmission.

CCAs engaged in DMP activity are not engaged in "money transmission" as defined in the Act inasmuch as such CCAs are not: "(1) selling or issuing payment instruments; (2) selling or issuing stored value; [or] (3) receiving money for transmission."[6] CCAs that provide DMPs do not engage in the transmission of funds solely for the purpose of transmitting funds from one party to another, as is commonly done by traditional money transmitters. CCAs only provide DMPs in connection with education and counseling services. The plain language of the statute does not evidence intent to sweep CCAs that provide DMPs into the purview of the Act's enforcement. In addition, the discussion in legislative committee reports focuses on the Act's regulation of travelers' checks, payment instruments, stored value cards, securities and money transmission entities with no physical presence in California, all of which are integrally related, not incidental, to money transmission.[7] By contrast, a DMP is only used to make payments to creditors on behalf of debtors in conjunction with a pre-determined schedule and counseling that has been provided to the consumer. Accordingly, DMP activities do not constitute "money transmission."

Further, it is important to highlight that the Financial Crimes Enforcement Network ("FinCEN") of the U.S. Department of Treasury has held that DMPs do not constitute money transmission as defined in the Department of Treasury regulations found at 31 C.F.R. § 103.11(uu). The FinCEN position is relevant as it provides insight into activities that do not meet the regulatory definition of a money transmitter, even though such activities may involve accepting and transmitting funds on an incidental basis.

In *FinCEN Ruling 2004-4 - Definition of Money Services Business (Debt Management Company),* dated November 24, 2004, FinCEN determined, under virtually identical facts and circumstances as represented herein, that a debt management company, with respect to its

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[5] CA Fin. Code § 12105.

[6] California Money Transmission Act, A.B. 2789. Art. I § 1803(o) (2010).

[7] CA Assembly Banking and Finance Committee, California Money Transmission Act, A.B. 2789, Comm. Report (Aug. 18, 20I0); CA Senate Banking and Finance Committee. A.B. 2789, Comm. Report (June 28, 2010).

submission of payments to creditors in conjunction with a DMP, was "not an MSB as defined in 31 C.F.R. § 103.11 (uu).[8]" In so holding, FinCEN stated the following:

> Whether a person is a money transmitter for BSA [Bank Secrecy Act] purposes is a matter of facts and circumstances. Based on the information contained in your letters, we conclude that [the business]'s debt management service does not constitute money transmission. As set forth in 103.11(uu)(5)(ii), FinCEN will generally not treat as a money transmitter a person engaged in the acceptance and transmission of funds "as an integral part of the execution and settlement of a transaction other than the funds transmission itself..." The general service that [the business] provides is to help debtors create a plan for payment and/or adjustment of their debts, and to obtain the agreement of creditors to accept payment under that plan. FinCEN views the money transmission that [the business] conducts as ancillary to the debt management service that [the business] provides, and incidental to a debtor's primary purpose in using the services of [the business]. To the extent that the money transmission conducted by [the business] is limited to submitting payments to creditors on behalf of debtors in conjunction with a debt management plan, FinCEN would not deem [the business] a money transmitter for purposes of 31 CFR 103.11(uu)(5).[9]

Also instructive is *FinCEN Ruling 2003-8 - Definition of Money Transmitter (Merchant Payment Processor)*, November 19, 2003, in which FinCEN held that:

> The nature of the transactions you describe is the transfer of funds through the ACH system from a customer to a merchant as payment for goods and services. [ ]'s role in the transactions is to provide merchants with a portal to a financial institution that has access to the ACH system. [ ] acts on behalf of merchants receiving payments rather than on behalf of customers making payments. For these reasons, the service that [ ] provides through [ ] more closely resembles payment processing/settlement than money transmission. Therefore, to the extent that the role of [ ] in such transactions is limited to submitting payment instructions obtained from a merchant to a bank for ACH processing, and

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[8] FinCEN Ruling 2004-4 (Definition of Money Services Business (Debt Management Company)) (Nov. 24, 2004). *See also* Notice of Proposed Rulemaking, Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations - Definitions and Other Regulations Relating to Money Services Businesses, 74 Fed. Reg. 22129-22142 (May 12, 2009) (Proposed incorporation of the exclusion for debt management plans into proposed regulatory revisions of the definition of "money services business.").

[9] *Id.*

> remitting the funds received through the ACH process to the merchant (or in some cases, refunding money to the merchant's customer through an ACH transaction), FinCEN would not deem [ ] a money transmitter for purposes of 31 CFR 103.11(uu)(5).[10]

For your convenience, we have attached the above-referenced FinCEN administrative rulings.

Together, Ruling 2004-4 and Ruling 2003-8 provide strong support that DMPs, when provided by nonprofit CCAs that primarily engage in budget and debt education and counseling, are not money transmitters. DMP providers do not transmit money as a business transaction itself, but only to the extent necessary to effectuate a client's DMP. It is a logical and reasonable extension of Ruling 2004-4 to conclude that a nonprofit CCA's DMP services would not constitute money transmission under the facts and circumstances presented. Like the facts analyzed by FinCEN, the general service provided by a nonprofit CCA is to provide counseling and creation of a repayment plan. The payment portion of a DMP is ancillary to the consumer's main purpose in enrolling in the program. Thus, the services provided by a nonprofit CCA are not the practice of money transmission as contemplated by the Act.

Moreover, money transmission conventionally is regulated by the government in order to protect consumers with regard to payment instruments, stored value, and other money transmission activities as well as to address concerns about potential money laundering. Some examples of industries covered by money transmission regulation include providers of wire transfer services and stored value cards. In these industries, regulation under money transmission statutes is routine, and companies that violate the statutes are subject to fines and penalties.

Conversely, regulation of DMPs provided by nonprofit CCAs under the California Department of Corporations is directed at ensuring fees are fair and meet the standards set by the legislature as well as enforcing consumer protections tailored specifically to DMPs, which have evolved over half a century.[11] As referenced above, this regulation and oversight is accomplished by the requirement that nonprofit CCAs file documents with the California Department of Corporations and satisfy a long laundry-list of requirements in order to rely upon an exemption from the Proraters Law. Effectively, however, the exemption requirements are essentially a form of licensing and, to be clear, the California Department of Corporations has

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[10] FinCEN Ruling 2003-8 (Definition of Money Transmitter (Merchant Payment Processor)) (Nov. 19, 2003).

[11] The Prorater's Law was originally named the Check Sellers and Cashers Law and was enacted in 1947. *See* http://www.corp.ca.gov/FSD/check.asp.

proactively used its enforcement power under the Proraters Law in cases of alleged unlicensed prorater activity by organizations that had operated in reliance upon the exemption.

Because providing a DMP will not fall within the definition of money transmission under Section 1802(o) of the Act, a CCA should not need to obtain licensure as a money transmitter in California or avail itself of an exemption from the licensing requirement. Given that the regulation of DMPs by the California Department of Financial Institutions would differ from the conventional notion of regulation of money transmitters, we request that your office issue an interpretative ruling to the effect that CCAs may rely upon the fact that their DMP activities fall outside of the scope of the Act. Alternatively, we request your assurance that your office would not take enforcement action against a CCA if it were to offer and provide DMPs in your state in reliance on the Public Interest Exemption.

B. Adequate Regulation under the California Proraters Law.

In the event that the Department finds that nonprofit CCAs engage in money transmission, nonprofit CCAs should be exempt from licensure as money transmitters under the Act's Public Interest Exemption because an exemption in the instant case would be consistent with the public interest, and licensure is not necessary in order to achieve the purpose of the Act. Under the Act's Public Interest Exemption, the Commissioner may grant an exemption from the Act as follows:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter. [12]

As noted above, a DMP, when provided by a nonprofit CCA, is already heavily regulated by various broad and highly-detailed federal and state regulatory schemes, including in California. In this regard, we believe that the offer and provision of DMPs to consumers should fall within the Public Interest Exemption when the provider is already regulated by the state with respect to its fees, how it holds funds, and other key characteristics when it relies upon an exemption from the Proraters Law under Financial Code section 12104.

In California, CCAs meet the definition of "prorater" under the California Proraters Law, enforced by the California Department of Corporations. Under the Proraters Law:

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[12] California Money Transmission Act, A.B. 2789, Art. 2 § 1806 (2010).

> a prorater is a person who, for compensation, engages in whole or in part in the business of receiving money or evidences thereof for the purpose of distributing the money or evidences thereof among creditors in payment or partial payment of the obligations of the debtor. [13]

The Proraters Law, however, provides a specific exemption for nonprofit CCAs in Financial Code section 12104 under which the organization is still required to comply with many of the requirements otherwise necessary for licensure as a prorater, including (among many described above): prohibitions on unfair and deceptive conduct; filing of paperwork; fee caps; record-keeping requirements; maintenance of separate client trust accounts; an irrevocable written consent that the Commissioner of the Department of Corporations may seize assets of the organization; maintenance of a bond; reporting obligations including audit reports; consumer disclosure requirements; policies and procedures specifications; and notice requirements. [14]

The Proraters Law and the Department of Corporations closely regulate DMP providers that are nonprofit organizations. In their totality, the Proraters Law exemption requirements for nonprofit CCAs are stricter than those found in the Act and are closely tailored to DMPs. The public interest is more than adequately protected by the Department of Corporation's enforcement of the Proraters Law. Duplicative regulation of nonprofit CCAs under the Proraters Law *and* the Money Transmission Act would not be in the public interest. Further, unlike other transactions that involve money transmission for the sake of money transmission, as discussed above, funds transmission is only ancillary to a DMP when provided by a nonprofit CCA. As a result, to the extent the transmission of funds takes place at all, it would only be incidental to a consumer's primary purpose of utilizing the services of the nonprofit CCA, which are primarily counseling and education, as well as assistance with obtaining creditor acceptance of a personalized budget plan created by the organization based on information obtained from the consumer. Therefore, to the extent that a nonprofit CCA engages in money transmission when providing a DMP, the Department should not deem the business to be that of a money transmitter for purposes of the Act.

III. Conclusion.

Accordingly, for the reasons set forth in this letter, we believe it is appropriate for the Department to issue an interpretive ruling to the effect that nonprofit CCA providers of DMPs are not required to be licensed as money transmitters because they do not engage in activities that constitute money transmission within the meaning of the Act. In this regard, we request your

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[13] Cal. Fin. Code § 12002.1.

[14] Cal. Fin. Code § 12104.

assurance through an order that your Department would not take enforcement action against nonprofit CCAs in connection with the offer and provision of DMPs in your state. In the alternative, if such activity were to be considered money transmission, we respectfully request that, pursuant to Article 2, Section 1806 of the Act, the Department grant nonprofit CCAs an exemption from the requirements of the Act and advise us of any filings, additional notices or conditions required in connection with such an exemption by individual nonprofit CCAs.

As noted above, subject to the requirements of the Pro raters Law, nonprofit CCAs provide DMPs to consumers in financial distress. Due to the January 1, 2011 effective date of the Act, we respectfully request that you provide as soon as possible, and in any event before January 1, 2011, the above-requested confirmation or exemption, or advise us if an application or additional filings are required, so as to allow time for us to provide you with additional information that you may need prior to the effective date. We will endeavor to respond as quickly as possible to any questions or informational requests to facilitate this timing. Further, if the Department determines that licensure is necessary, we respectfully request a reasonable grace period for obtaining licensure be allowed in order for organizations to file a formal application.

* * * * * *

Thank you for your attention to this matter. If you require any additional information or have any questions please feel to contact the undersigned at _____.

Respectfully submitted,

Attachments

cc: Robert Venchiarutti, Deputy Commissioner, California Dept. of Financial Institutions

Financial Crimes Enforcement Network
Department of the Treasury

FinCEN Ruling 2004-4 -Definition of Money Services Business (Debt Management Company)

November 24, 2004

Dear [ ]:

This letter responds to your letter dated June 16, 2004, requesting a determination as to whether your client, [the business], is a money services business ("MSB") for purposes of regulations promulgated by the Financial Crimes Enforcement Network ("FinCEN"), under the Bank Secrecy Act ("BSA"). In response to our subsequent request, you provided additional information about [the business] by letter dated October I2, 2004. Pursuant to 31 CFR § 103.85 governing FinCEN's authority to issue administrative rulings, FinCEN has determined, based on the representations in your letters, that [the business] is not an MSB as defined in 31 C.F.R. § 103.11(uu).

You have represented that [the business] proposes to enter into business as a debt management company. In general, a debt management company holds itself out as providing services to debtors in the management of their debts. Debt management companies contract with a debtor for a fee to (i) effect the adjustment, compromise, or discharge of debts, and (ii) receive funds from debtors, and to remit such funds to creditors on a debtor's behalf. [I] Creditors that accept payments from debt management companies grant benefits to their client debtors, such as interest rate reductions, waiver of late charges, and reduction in monthly payment amounts. [The business] would make monthly payments to creditors on behalf of its client debtors. [The business] also provides debtors with access to educational resources to assist in budget planning, such as newsletters, online educational content, and financial counseling support.

A debtor client of [the business] would make a monthly payment consisting of the payment to be made to creditors on the debtor's behalf by [the business], and a fee for [the business]. Debtors' funds would be transmitted to [the business] either via ACH debits to debtors' checking accounts by [the business]'s financial institution, or money order made payable to [the business]. [The business] would deposit the funds into one or more trust accounts established by [the business] at a national banking association. [The business] would distribute the funds to creditors either via Mastercard's Remote Payment and Presentment Service, or by paper check drawn on [the business]'s account. While the majority of creditors that accept payments by [the business] on behalf of debtors are

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[I] See, e,g., S.D. Codified Laws § 22-47-1 (2004).

credit card companies, a small number of medical services providers and utility companies also participate. [The business] requests a determination whether FinCEN would deem it an MSB by virtue of the debt management service it would provide.

Money services businesses, a category of financial institution for purposes of regulations implementing the BSA, are defined at 31 CFR § 103.11(uu) and include currency dealers and exchangers, check cashers, issuers, sellers, and redeemers of traveler's checks, money orders, or stored value, money transmitters, and the United States Postal Service. MSBs must comply with various reporting and record-keeping requirements, and must implement anti-money laundering programs. In addition, certain MSBs are subject to the requirement to register with FinCEN. The only MSB category into which [the business]'s business would possibly fall is money transmitter. The definition of money transmitter for purposes of BSA regulations found at 31 CFR 103.11 (uu)(5) includes:

> (A) [a]ny person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or
>
> (B) [a]ny other person engaged as a business in the transfer of funds.

Whether a person is a money transmitter for BSA purposes is a matter of facts and circumstances. Based on the information contained in your letters, we conclude that [the business]'s debt management service does not constitute money transmission. As set forth in 103.II(uu)(5)(ii), FinCEN will generally not treat as a money transmitter a person engaged in the acceptance and transmission of funds "as an integral part of the execution and settlement of a transaction other than the funds transmission itself...." The general service that [the business] provides is to help debtors create a plan for payment and/or adjustment of their debts, and to obtain the agreement of creditors to accept payment under that plan. FinCEN views the money transmission that [the business] conducts as ancillary to the debt management service that [the business] provides, and incidental to a debtor's primary purpose in using the services of [the business]. To the extent that the money transmission conducted by [the business] is limited to submitting payments to creditors on behalf of debtors in conjunction with a debt management plan, FinCEN would not deem [the business] a money transmitter for purposes of 31 CFR 103.11(uu)(5).

In arriving at our decision, FinCEN relied upon the accuracy and completeness of the representations made in your letters and submissions. Nothing precludes FinCEN from seeking further action should any of this information prove inaccurate or incomplete. FinCEN reserves the right to publish this letter as guidance to financial institutions with information redacted in accordance with your request under 31 CFR §

103.81(a)(5), and as indicated in your June 16, 2004 letter. You will have 14 days after the date of this letter to identify any other information you believe should be redacted and the legal basis for the redaction. Should you have any questions, please telephone Anna Fotias, Senior Regulatory Compliance Specialist, at 202-354-6413.

Sincerely,

//signed//

William D. Langford, Jr.
Associate Director
Regulatory Policy and Programs Division

Financial Crimes Enforcement Network
Department of the Treasury

FinCEN Ruling 2003-8 -Definition of Money Transmitter (Merchant Payment Processor)

November 19, 2003

Dear [ ]:

This letter responds to your letter dated February 5, 2003, requesting an administrative ruling with respect to whether [ ] is required to register with FinCEN as a Money Services Business in accordance with 31 CFR 103.41 by virtue of operating [ ]. Based on the representations contained in your letter, FinCEN has determined that [ ] is not a Money Services Business as defined in 31 CFR 103.11(uu), by virtue of the ACH processing services provided by [ ], and is therefore not required to register with FinCEN.

According to your letter, [ ] operates a service called [ ] that provides third-party origination services for Automated Clearing House ("ACH") transactions on behalf of merchants. Through [ ], merchants can accept customer payments for purchases made through a merchant's web site, or by telephone, in the form of a checking account debit. [ ]'s merchant customers obtain payment instructions to debit a customer's checking account and submit these payment instructions to [ ] through [ ]. [ ] batches and submits the debit information to [ ]'s bank for processing through the ACH system. Once [ ]'s bank initiates the ACH, the depository institution at which the merchant's customer maintains a checking account debits the account of the customer, and sends a credit instruction through ACH to [ ]'s bank, which then credits the amount to an operating account maintained at the bank by [ ]. After a temporary holding period to ensure that the transaction initiated by the merchant is not returned, [ ] remits the funds to the merchant. Through [ ], merchants are also able to initiate credits to provide refunds to customers. You have asked whether [ ] would be deemed a money transmitter in accordance with 31 CFR 103.11 (uu)(5) by virtue of providing this service.

The definition of money transmitter for purposes of BSA regulations found at 31 CFR 103.11(uu)(5) includes:

> (A) [a]ny person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the

Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or

(B) [a]ny other person engaged as a business in the transfer of funds.

FinCEN does not currently interpret the definition of money transmitter to include the third-party origination service that is described in your letter. The nature of the transactions you describe is the transfer of funds through the ACH system from a customer to a merchant as payment for goods and services. [ ]'s role in the transactions is to provide merchants with a portal to a financial institution that has access to the ACH system. [ ] acts on behalf of merchants receiving payments rather than on behalf of customers making payments. For these reasons, the service that [ ] provides through [ ] more closely resembles payment processing/settlement than money transmission. Therefore, to the extent that the role of [ ] in such transactions is limited to submitting payment instructions obtained from a merchant to a bank for ACH processing, and remitting the funds received through the ACH process to the merchant (or in some cases, refunding money to the merchant's customer through an ACH transaction), FinCEN would not deem [ ] a money transmitter for purposes of 31 CFR 103.11 (uu)(5).

In arriving at our decision in this matter, FinCEN relied upon the accuracy and completeness of the representations made in your February 5, 2003 letter. Nothing precludes FinCEN from seeking further action should any of this information prove inaccurate or incomplete. Finally, we note that you have requested that certain information contained in your letter be held in confidence and exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. FinCEN reserves the right to publish this letter as guidance to financial institutions with all identifying information about you, [ ], [ ], and [ ], redacted. You will have 14 days after the date of this letter to identify any other information you believe should be redacted and the legal basis for the redaction. Should you have any questions, please telephone Christine Del Toro of my staff at (703) 905-3590.

Sincerely,

//signed//

Judith R. Starr
Chief Counsel

cc: David M. Vogt, Executive Associate Director, Office of Regulatory Programs
Deborah Silberman, Chief, MSB/Casinos/IRS Programs