

DIRK KEMPTHORNE
GOVERNOR



GAVIN M. GEE
DIRECTOR

STATE OF IDAHO
DEPARTMENT OF FINANCE
700 W. STATE STREET, 2ND FLOOR
P.O. BOX 83720
BOISE, IDAHO 83720-0031
Website: finance.state.id.us

February 13, 2002

Re:

Dear M

As a follow-up to our phone conversation and your letter of February 12, 2002, I wanted to clarify a few issues.

Based on our previous communications, _____ has agreed to become licensed as a Money Transmitter pursuant to the Idaho Money Transmitters Act. In this regard, we look forward to receiving this application in the near future.

I also wanted to make the record clear regarding our position on the outstanding banking issue. Idaho continues to assess state and federal developments in this area of law and will withhold any final determination of this issue at this time. In this regard, we look forward to the FDIC's response to _____ request for an advisory opinion.

Should you have any questions or need additional information, please feel free to contact the undersigned directly at (208) 332-8080.

Sincerely,

A handwritten signature in black ink, appearing to read "J.A. Burns", with a long horizontal flourish extending to the right.

JAMES A. BURNS
Idaho Dept. of Finance

Banks & Savings Banks (208) 332-8005
Credit Unions (208) 332-8003
Securities (208) 332-8004
Money Transmitters (208) 332-8004

PHONE: (208) 332-8000
FAX: (208) 332-8098
Director's Fax: (208) 332-8097
Securities Fax: (208) 332-8099

Supporting Services (208) 332-8001
Mortgage Companies (208) 332-8002
Finance Companies (208) 332-8002
Collection Agencies (208) 332-8002

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BOISE, IDAHO 83720-0031
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December 3, 2001

Re:

Dear M

Over the past months, we have conducted additional research into the issues identified in your letter of March 16, 2001. We are now prepared to continue our dialogue and provide the following information in connection with your communication.

After an extensive review of our records, I have been unable to locate your letter of July 11, 2000 or any response from this Department. However, I do note that we previously provided an opinion letter to your firm on November 9, 2000 for a set of facts that are virtually identical to the ones found in your request of July 11th. I have included a copy of the Firm's letter and our opinion in that matter for your review.

After careful consideration, we continue to believe that the previously issued opinion letter is the correct interpretation of our statute and that your client would need to be licensed as a money transmitter to conduct business with Idaho residents or entities.

Conclusion

As noted herein, we are of the view that _____ will need to obtain an Idaho Money Transmitters license if they intend to act on the requests of Idaho residents or entities for money transmission

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services. Additionally, we believe that _____ will also be engaged in money transmission in Idaho to the extent that they wire transfer funds or maintain accounts for the Idaho "recipients" of money transmission transactions.

As to the securities issue, public offers of securities must be conducted by a registered broker-dealer and, in some remote circumstances, agents of the publicly registered issuer.

We request that you advise us regarding your client's intentions as to the conduct of their money transmission business in Idaho (if any).

Your prompt attention to this matter is greatly appreciated. If you believe that there is other information or evidence that should be considered in connection with our review of this inquiry, please forward your additional commentary or information prior to January 18, 2001. Should you have any questions or need additional information, please feel free to contact the undersigned directly at (208) 332-8080.

Sincerely,

JAMES A. BURNS
Idaho Dept. of Finance

March 16, 2001

Department of Finance
State of Idaho
700 West State Street, 2nd Floor
Boise, Idaho 83720-0031

Attention: Mr. James A. Burns

Re:

Dear Mr. Burns:

forwarded your letter dated February 14, 2001 to us for review and assistance in considering the various issues raised. As a preliminary note, has done its best to contact each state, including Idaho, whose laws and regulations potentially apply to activities. On behalf of which at the time operated the service, we sent a letter to the Idaho Department of Finance, dated July 11, 2000 (by facsimile and U.S. mail), to inquire about the applicability of Idaho's Money Transmitters Act (the "Act") and our interpretation of the applicability of the Act. Although we concluded that, at that time, the Act did not apply to activities, we offered to submit an application if the Department of Finance ultimately disagreed with our analysis. We received no reply to our letter, which was not unusual because several states were in the process of considering new regulations or laws related to electronic financial services and deferred consideration of our inquiry.

This letter is intended to address the issues raised in your February 14th letter and is organized in the same fashion as your letter.

Money Transmission Issues

As noted above, on July 11, 2000, we wrote to the Department of Finance with regard to whether the Money Transmitter Act would apply to the service. We explained, in that

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letter, why we believed it would not. A copy of that letter is attached. We believe the same analysis continues to apply, as has not changed is basic service.

Since that time has instituted a new program, called for individuals who wish to use to receive payments funded by credit cards in an aggregate amount of \$100 or more per month, or who desire to use certain premium features. As with any user, a user is not charged a fee of any kind for using to send money. A user is, however, charged a fee for receiving funds via. The fee is an attempt to recover costs, and varies depending on whether the payment transaction is funded by a credit card or by an electronic funds transfer from the payor's bank account. users are generally individuals who are not using principally for consumer purposes, but are instead using to receive payments for goods sold over the internet. users, in addition to not being subject to the \$100 credit card limit, are also eligible to use various premium features of the service that facilitate the integration of into the user's online auctions or website sales. Consumers who do not regularly receive funds through can continue to establish personal accounts, which are free for both sending and receiving payments.

Based upon our review of the Money Transmitter Act, we have determined that it does not apply to the program. Our conclusion is based upon the fact that, as before, does not charge a consumer a fee for sending (i.e., transmitting) money. Nor does have any offices or agents located in Idaho. Thus, as Idaho's statute does not address the program, it does not apply, and we do not believe that is required to be licensed under the Money Transmitter Act. As noted in the July 2000 letter, however, will promptly submit an application under that Act to the Department of Finance if you conclude after reviewing this additional information that a license is required.

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Prospective Banking Issues

Under the definition of "banking business" cited in your letter (Idaho Code §26-106), in order for the service to constitute banking, money within the service would have to qualify as a "deposit." The Idaho Code appears to track federal law with respect to banking definitions. The definitions set forth in the Federal Deposit Insurance Act (the "FDIA"), including the definition of "deposit" set forth in Section 3(1) of the FDIA, are consistent with many states and appear to be consistent with Idaho law as well. According to the Federal Deposit Insurance Corporation (the "FDIC"), stored value products such as the service do not constitute "deposits" for purposes of the FDIA. Thus, as transactions under the service do not constitute "deposits," the service does not constitute banking.

As is expressly set forth on the website, the service does not hold itself out as a bank or as providing any banking services (see the "Terms of Use" on the home page). Customers are not required to carry any balance to use the service, and many do not, choosing instead to fund payment transactions as they go, from a credit card or bank account unaffiliated with the service. For those customers who choose to carry balances in the system, the service has established a sweep arrangement under which funds are invested daily in shares of the service, an SEC-registered non-bank investment product that is offered through a prospectus and distributed by the service. For those customers who choose not to participate in the money market sweep, any balances they carry with the service (average balance is approximately \$15) function as a stored value product, where customers choose to pre-fund a small balance so it is available at any time for spending, without the delay of bank-funded transfers or the debt incurred with a credit card transfer.

As a stored value computer network payment product, the service does not share the common indicia of bank products. It does not constitute an escrow service or a trust account. Moreover, and most significantly, it does not constitute a "deposit" for purposes of federal banking law.

In its analysis of stored value payment products, the Federal Deposit Insurance Corporation ("FDIC") has identified as the "primary legal issue" the question of whether or not the funds underlying the stored value system constitute "deposits" within the meaning of Section 3(1) of the Federal Deposit Insurance Act, 12 U.S.C. §1813(1) ("FDIA"). Opinion No. 8, at 6.²

¹ "In such systems funds may be accessed using a personal computer, and transferred to individuals, merchants, or companies." See 61 Fed. Reg. 40489 (Aug. 2, 1996), available for viewing or download at <http://www.fdic.gov/deposit/deposits/stored/cgo-08.html>. ("Opinion No. 8"), at 2.

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In the opinion of the FDIC, in order to constitute a deposit under Section 3(1), the funds in question must represent: (1) An unpaid balance of money or its equivalent received or held by an institution; (2) in the usual course of business; and (3) either (a) the institution must have given or be obligated to give credit to a commercial, checking, savings, time, or thrift account; or (b) the funds must be held for a special or specific purpose. *Id.* at 12.

Under these guidelines, the FDIC has determined that stored value payment systems do not constitute "deposits" under the FDIA. *See generally*, Opinion No. 8. The FDIC's determination was based upon the nature of the stored value payment product as a non-deposit product. When a user loads value onto a stored value payment product, he or she "may have no idea as to what transactions he will use the card to engage in" – thus not meeting the requirement that a payment be received "for a special or specific purpose." *Id.* at 6, 23. Moreover, the funds directed to do not create an "obligat[ion] to give credit to a commercial, checking, savings, time, or thrift account." *Id.* at 6, 16-17. While Opinion No. 8 focused on stored value card products, the FDIC noted that "in general the principles discussed herein would apply equally to stored value computer network payment products." *Id.* at 6.

As the above demonstrates, stored value payment transactions do not constitute "deposits" under federal law because they do not create an "obligat[ion] to give credit to a commercial, checking, savings, time, or thrift account." As a result, the service does not constitute "banking business" under Idaho law.

* * * * *

We trust that this additional information is useful to you in your further review of activities and that it relieves your preliminary concerns expressed in your letter. We would be pleased to discuss any aspect of these issues further at your convenience.

Very truly yours.

cc:

(...continued)

² The FDIC cited Opinion No. 8 in Op. Gen Counsel 97-4 (May 12, 1997), holding that the payments made via internet payment systems "provid[ing] a method of payment from one personal computer to another over the Internet" do not constitute "deposits" under the FDIA.

July 11, 2000

BY FAX AND U.S. MAIL (208) 332-8098

State of Idaho
Department of Finance
Financial Institution Bureau
P.O. Box 83720
Boise, ID 83720-0031

Re: Idaho Money Transmitters Act

Dear Sir or Madam:

As part of our representation of _____, a Delaware corporation whose headquarters are in _____, we are in the process of determining whether the money transmission and check sale laws of the several states apply to the _____ service offered by _____

The _____ service is a unique consumer-to-consumer payment service offered free of charge to United States residents who have a working e-mail address. Using the _____ website _____ a consumer ("Sender") can send a payment to another consumer ("Recipient") by using his or her Visa or MasterCard, or from an ACH debit of his or her bank account, with the requirement that the payment be directed to the Recipient's e-mail address.³ The Sender is given immediate notification as to whether the transaction is approved or declined by Visa or MasterCard. Contemporaneous with transaction approval, the Recipient is notified by e-mail that the Sender has sent a payment. The Recipient is then asked whether he or she would prefer that _____ (a) deposit the payment directly into the Recipient's United States bank _____

³ When the Sender uses Visa or MasterCard to generate the _____ transaction, the funds transferred are protected by all Visa or MasterCard fraud policies, and _____ is required to abide by all Visa and MasterCard rules. When the sender authorizes the ACH debit of his or her account, the transaction is protected by federal law, as well as by NACH Rules.

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account; (b) send the Recipient a check in the amount of the payment; or (c) keep the money on account so that the Recipient may use the balance to send a payment to another consumer.

is widely recognized as a cost-effective, secure and expeditious method for sending consumer-to-consumer payments. Since its introduction in late 1999, has gained the support of the on-line auction house which recommends as a payment method for its auction participants.

conducts the entirety of its operations via the internet from its headquarters in It does so without any "delegates," "agents" or "licensees" - i.e., there are no physical offices in Idaho or any state where a consumer can go to initiate a transaction.

We have reviewed the Money Transmitter Act, and believe that, as it is currently written, it does not apply to activities. This is because, although Idaho residents may use services as either the Sender or the Recipient, none of the activities are performed in Idaho, and no fee is charged to the consumer. However, we would appreciate your confirmation as to whether or not the Money Transmission subtitle applies, so that may submit a Money Transmission application if you deem that the subtitle applies to activities.

If you have any questions regarding the above, please do not hesitate to contact me at I look forward to receiving a response from your office regarding this matter.

Thanking you in advance for your prompt attention to this matter, I am,

Very truly yours,

DIRK KEMPTHORNE
GOVERNOR



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DIRECTOR

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www.state.id.us/finance/dof.htm

February 14, 2001

Re: Idaho Activities

Dear Sir or Madam:

The Idaho Department of Finance is charged with the administration and enforcement of the Idaho Money Transmitters Act, the Idaho Securities Act and Idaho banking statutes. In this regard we have regulatory oversight responsibilities for many financial services activities.

In a recent review of an on-line Idaho money transmission operation, a banner for _____ was displayed. In researching this linkage, the _____ com site was also reviewed.

Money Transmission Issues - Idaho Code §26-2902(11) defines money transmission as the "sale or issuance of payment instruments or engaging in the business of receiving money for transmission or the business of transmitting money within the United States by any and all means..."

Based on your website, it does appear that your activities fall within the definition of "money transmission".

Idaho Code §26-2903(1) states that "no person...shall engage in the business of money transmission without a license as provided in accordance with the provisions of this chapter." To the extent that you have conducted monetary transmission business with or to Idaho residents or entities, you may have operated in violation of the Idaho Money Transmitters Act.

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Prospective Banking Issues - The Idaho Bank Act states that “it shall be unlawful for any person to engage in or transact any banking business” without the proper authority (Idaho Code §26-202). Further, the Idaho Bank Act defines “banking business” to include “soliciting, receiving or accepting money or its equivalent on deposit as a regular business...” (Idaho Code §26-106).

Coincident with the offer of the _____ Fund, it appears that you are carrying funds held on account with _____ “the money in your _____ account”). In this regard, it may be possible that _____ is conducting “banking business” as defined under the Idaho Bank Act.

Summary and Request For Information – As noted herein, we are concerned that _____ may be operating in violation of various Idaho statutes. As to the Idaho Securities Act, we believe that broker-dealer registration is required due to the public nature of the securities offering.

We request that you write us and provide detailed information regarding any financial services business conducted by your firm with Idaho residents or entities. We also invite you to provide any legal arguments that you are relying upon in not registering as a broker-dealer in Idaho. To the extent that you have transmitted funds into or out of Idaho, please provide any legal arguments that you are relying upon for not registering under the Idaho Money Transmitters Act.

Your prompt attention is appreciated and your written response is requested not later than March 16, 2001. If you have any questions or need additional information, please contact the undersigned directly at (208) 332-8080.

Sincerely,

James A. Burns
Idaho Dept. of Finance