



IDAHO
DEPARTMENT OF FINANCE

C. L. "BUTCH" OTTER
Governor

GAVIN M. GEE
Director

November 17, 2009

RE:

Dear M

The Director has asked me to respond to your letter of October 29, 2009 regarding [redacted] and its proposed use of prepaid debit cards as a payment mechanism for clients who obtain loans from [redacted]. As acknowledged in your letter, stored value instruments present the possibility of regulation under state money transmission statutes.

Background – [redacted] proposes to offer its borrowers the opportunity to receive their loan proceeds on a prepaid debit card issued through Palm Desert National Bank.

Idaho Code § 26-2902(13) defines a payment instrument to include "any check, draft, money order, traveler's check, or **other instrument** or written order for the transmission or payment of money..." (emphasis added). Further, money transmission is defined to include the sale or issuance of payment instruments (I.C. § 26-2902(13)).

For your information, the Department of Finance has long taken the position that cards such as broad, multi-merchant gift cards and prepaid debit cards are payment instruments, thereby falling within the legal requirements of the Idaho Money Transmitters Act.

Issue of Licensure – Based on your description, we are of the view that money transmission is anticipated under [redacted] proposed business model and relationship with Palm Desert National Bank. The only question remaining is whether the activity can be conducted without the benefit of licensure under the Idaho Money Transmitters Act (IMTA).

Idaho Code §26-2904 provides various exemptions from the provisions of the IMTA. More specifically, I.C. §26-2904(d) states that the IMTA shall not apply to "Banks, credit unions, savings and loan associations, savings banks or mutual banks organized under the laws of any state or the United States, **provided that they do not issue or sell payment instruments through authorized delegates who are not banks, credit unions, savings and loan associations, savings banks or mutual banks**" (emphasis added).

SECURITIES BUREAU
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PROTECTING THE INTEGRITY OF IDAHO FINANCIAL MARKETS

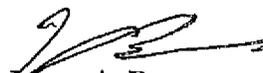
Based on the above criteria, it does not appear that _____ would be able to operate the described business model without the benefit of licensure under the IMTA. More specifically, we cannot at this time agree that _____, even if acting as an authorized delegate of Palm Desert National Bank, is entitled to the exclusion for financial institutions. As to Palm Desert Bank, it appears that they may be offering money transmission services through authorized delegates who are not financial institutions and thereby not within the ambit of the exclusory language of I.C. §26-2904.

Potential For No Action Position - While we believe that the IMTA clearly disallows any exclusion for non-bank entities that conduct money transmission business in association with an otherwise exempt financial institution, the Department has attempted to provide some latitude from state licensing provisions by issuing select "no action" letters. In this regard, the Department has taken a no enforcement action position as to the Idaho money transmitter licensing provisions if a formal request is submitted and certain structural parameters are met. We enclose a copy of one no action letter to aid in your evaluation in determining if such a course of action might be desirable for your client¹.

Conclusion - As noted herein, we believe that the proposed business model will require that at least one entity become licensed under the IMTA. Alternatively, your client may wish to consider if a no enforcement action request would be appropriate.

Should you have any questions or comments, or wish to discuss this matter in greater detail, please also contact me directly at (208) 332-8080.

Sincerely,


James A. Burns
Investigations Chief

¹ The information provided in your letter does not provide sufficient detail for us to ascertain whether such a no action position would be available to your client.

RECEIVED

2009 NOV -4 AM 10:33

STATE OF IDAHO
DEPT OF FINANCE

October 29, 2009

Via Overnight Mail

Mr. Gavin M. Gee
Department of Finance Director
Idaho Department of Finance
800 Park Boulevard, Suite 200
Boise, ID 83712

*Re: Your Licensee:
Funding Loan Proceeds with Optional Prepaid Debt Card*

Dear Mr. Gee:

I am writing on behalf of your licensee I am writing to inform the Department of a new option that wishes to offer its customers and to confirm that this option does not run afoul of any Department policies or require additional licensure.

Currently, funds all its loans with a company check. While the check can be deposited by the customer into their bank account without cost, the company believes that the vast majority of its customers choose to cash the check at either a branch of the bank where has its account or at a check cashing facility. I'm sure you're aware that check cashers charge customers a large fee for their service. You may not be aware that banks across the country have also begun to charge a fee for cashing these "on us" checks. Usually this fee is \$5.00 but the company has seen fees as high as \$10.00. views this development as the beginning of a trend and believes that these bank fees will only increase and become more commonplace. As the majority of customers are unbanked, their ability to obtain their loan proceeds without cost is disappearing.

In an effort to provide better customer service, proposes to offer its borrowers the option of receiving their loan proceeds by way of a

prepaid debit card instead of a check. Importantly, the company is not going to “sell” these cards but rather offer them free of charge as an alternative funding method. The customer will be able to choose either a check or debit card to receive their loan proceeds. If the customer opts for the card, they will be able to obtain 100% of their loan proceeds without cost and thereafter simply throw away the card if they wish.

The card is the “Futura Card” and it is issued by Palm Desert National Bank. You may view the card’s website at www.futuracards.com. intentionally structured its use of this card so that all initial costs associated with the card would be borne by _____ and so that borrowers would have the opportunity to receive 100% of their loan proceeds without fees.

The relevant aspects of this program are:

- 1) Receiving loan proceeds via the Futura Card will be optional. Customers can still receive a check;
- 2) If the borrower opts to receive their loan proceeds via the card, the card’s \$2.75 activation fee will be paid by _____ ;
- 3) If the borrower opts to receive the card, they will have one month to access their loan proceeds without any cost by utilizing either:
 - a. Free card to bank transfer. The customer can call Futura and request that the card balance, or any portion, be electronically transferred from the card to the customer’s bank account. There is never a fee for this service, even after the first month. Funds will be electronically transferred into the customer’s bank account and available to them in the same period of time, or less, than a deposited check would be.
 - b. Free point of sale purchases. The card can be used to make fee-free purchases nationally and internationally at any merchant that accepts PIN-based debit cards. This will likely be the primary use. Tens of thousands of merchants accept PIN-based debit cards for purchases so the company’s borrower will be provided almost limitless options.

After the borrower has exhausted all funds from the card they can simply discard it without further obligation. If they used the card as described above, the borrower would have received 100% of their loan proceeds without any fees or cost. Alternatively, if the borrower decides to keep the card beyond one month, or use other card features (like ATM withdrawals), they will be charged the small fees disclosed in the cardholder agreement. These fees are reasonable, however. For example, the ATM fee is only \$2.50. A full list of the fees is attached. _____ does not receive any portion of these fees or any commission for offering the card. In fact .

_____ is incurring a cost by offering these cards (the \$2.75 activation fee) but believes that in so doing it is gaining customer loyalty.

In terms of legal compliance and licensing, the company has retained
of the law firm to help it roll out this method of loan funding. Ms.
helped develop some of the first pre-paid and stored value products while in-
house counsel at American Express and is considered to be a legal expert in this field.
Attached please find a memo from Ms. wherein she opines that
should not need to obtain any further licensing, including any state
money transmitters licenses, to offer this funding option. The company would obviously
like for you to inform it if you disagree with this position, however.

The company believes that this is a very straightforward and beneficial option for
its customers. There does not appear to be any legal impediment to the company offering
this option. However, because the company values its relationship with the Department,
the company wanted to notify you and request that you contact me if you have any
questions or concerns about this program.

Thank you for your time.

Sincerely,

, Esq.
Executive Vice President &
General Counsel

October 28, 2009

VIA E-MAIL

Re: MSB Registration and State Money Transmitter Licensing Law Analysis

To Whom It May Concern:

Our client, _____ helps oversee the legal compliance for a group of affiliated loan companies. Although each lender is a separate corporate entity licensed to make loans within its respective state, for convenience all such entities will hereinafter be referred to as

_____ operates as a provider of loans secured by a consumer's motor vehicle. Historically, _____ has used checks as the payment instrument of choice to disburse loan proceeds. It is now being proposed that _____ offer consumers the loan proceeds via an electronic prepaid card.

The prepaid card will be a reloadable open-loop network branded card issued by a bank. The card will provide cash access at ATMs, but consumers will not be able to redeem the cards for cash at _____ locations. Furthermore, it is our understanding that _____ will pay, on behalf of such consumers, any upfront fees and initial load fees so that the consumer receives the loan proceeds on the card without charge. Further, we understand that the consumer will have the ability to receive 100% of their loan proceeds without cost or deduction by utilizing the card's "card to bank" transfer option to transfer loan funds from the card into their bank account. In such event, transferred funds will be available to the consumer in approximately the same amount of time as had the consumer deposited a loan proceeds check into their account. If the consumer chooses to use the card in this manner, the card could thereafter be discarded and would have cost the consumer nothing.¹ Alternatively, if the consumer chooses to keep the card, the card will be subject to monthly and other fees as charged by the issuing bank. _____ will not be the beneficiary of any portion of any such fees.

_____ has asked us whether the payment of loan proceeds via a prepaid card requires _____ to (i) register as an MSB under federal law and/or (ii) become licensed

¹ Unbanked consumers may not have the ability to utilize the "card to bank" transfer option, however, we note that traditional check cashing fees are notably higher than ATM fees. Thus, unbanked consumers would still benefit.

October 28, 2009

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under state money transmitter licensing laws. Based on the analysis provided below, we believe that _____ does not need to register as an MSB under current law, and in most states _____ would not need to become licensed under state money transmitter licensing laws.

1. MSB Registration

As you know, the Bank Secrecy Act (“BSA”) applies to the category of non-bank financial institutions defined as “money services businesses.” The term “money services business,” or “MSB,” is defined in the regulations as each agent, agency, branch or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the following capacities: (i) a currency dealer or exchanger, (ii) a check casher, (iii) an issuer, seller or redeemer of traveler’s checks, (iv) an issuer, seller or redeemer of money orders, (v) *an issuer, seller or redeemer of stored value*, (vi) a money transmitter, or (vii) the United States Postal Service. A threshold of \$1,000 per person per day in one or more transactions applies to capacities (i) through (v) above. (Emphasis added.)

An MSB registration requirement applies to many, but not all, MSBs. The general rule requires all MSBs to be registered except: (1) a legal person that is an MSB solely because that person serves as an agent of another MSB; (2) *a legal person that is an MSB solely because that person issues, sells or redeems stored value*; (3) the U.S. Postal Service; and (4) agencies of the United States, of any state, or of any political subdivision of any state. (Emphasis added.)

In order to determine whether _____ falls under the MSB registration exemption, it is necessary to fully evaluate the terms “issuer,” “seller,” and “redeemer” in the context of the business at hand.

The MSB registration statement² issued by the Financial Crime Enforcement Network (“FinCEN”) sets forth relevant definitions in the “General Information” section. According to the registration statement, the term “issuer” is defined as “...the business that is ultimately responsible for payment of money orders or travelers checks as the drawer of such instruments, or a money transmitter that has the obligation to guarantee payment of a money transfer.”³ This definition reflects the prepaid card industry’s usage of the term as well, as most banks and related financial institutions are ultimately responsible for payment, thus making such cards true bank products. In the case at hand, _____ clearly does not qualify as an issuer since it is not the party responsible for payment. Rather the bank issuing the prepaid cards will be such party, and thus such bank will be the ultimate obligor. _____ role is simply to provide loan funds that will be made available to consumers on the card.

The MSB registration statement defines “redeemer” as “a business that accepts instruments in exchange for currency or other instruments for which it is not the issuer” in excess \$1,000 in cash for any one customer on any day. According to FinCEN transcripts, the term “redeemer” is meant to

² FinCEN Form 107a.

³ Note: Although the definitions focus on money orders and travelers checks, it is reasonable to include stored value under these definitions as well.

deal only with encashment, and “[i]t is not meant in any way to touch people who redeem for goods or services, but instead, people who exchange one monetary instrument for currency with another monetary instrument.”⁴ Since [redacted] will not provide consumers with cash redemption of such cards or allow consumers to reload the card at [redacted] locations, [redacted] does not qualify as a redeemer of stored value.

Finally, the MSB registration statement defines “seller” as “a business that issuers authorize, through written agreement or otherwise, to sell their instruments or their send and receive transfer services.” Generally speaking, the term “sale” represents the transferring of title or possession from one party to another in exchange for consideration.⁵ Of the three categories, this is the most problematic for [redacted]. However, we believe that [redacted] would not fall under this definition due to the fact that the transferring of the funded card from [redacted] to the consumer does not involve exchange of monetary consideration. Rather, [redacted] will offer consumers a prepaid card loaded with the loan proceeds just as it does when the exchange involves a check: the full value of the loan proceeds will be available to consumers free of any upfront fees or charges. As it seems clear that [redacted] does not need to register as an MSB by virtue of its issuing loan proceeds via a check, the result should be the same when a card is used in the same manner.

Given the above analysis, we believe that [redacted] offering of loan proceeds via a prepaid card that does not provide cash access and that is provided to consumers free of charge does not result in [redacted] qualifying as an MSB for federal MSB registration purposes. However, please note that we have not discussed these issues with any federal regulators on this topic. Furthermore, FinCEN is currently drafting new anti-money laundering regulations (which are expected to be released as “proposed” regulations next month, and are due to be released in final version by no later than February 2010) regarding stored value, and therefore, from a long-term perspective, this area of the law remains uncertain.

2. State Money Transmitter Licensing Laws

State money transmitter licensing laws address payment products where consumer funds are received in advance and are held or transmitted to others on behalf of consumers. These laws are intended to regulate non-bank businesses that perform financial services involving the receipt of consumer funds. There are a few reasons why we believe it is unlikely that such laws would apply to distribution of cards to hold the loan proceeds.

- First, there is an argument that loading the loan proceeds on a card does not fall under state money transmitter licensing laws due to the fact that consumer does not pay his or her funds in advance. Typically these laws involve consumers paying their own funds to a third party. In this instance, if the funds loaded on cards were lost or stolen by [redacted] staff or employees, the loss would be [redacted] not the consumers.

⁴ See *In the Matter of Money Services Businesses Proposed Anti-Money Laundering Rules* (Chicago, Illinois, August 15, 1997).

⁵ See *Black's Law Dictionary* and the model *Uniform Commercial Code*, Article 2.

- In addition, generally speaking, state money transmitter licensing laws do not apply to state and federally chartered depository financial institutions. Since these cards will be issued by a national bank, as a true “bank product,” we believe the product should be exempt.
- Furthermore, many state money transmitter licensing laws exempt agents or authorized delegates of such financial institutions. In such states, can take the position that it is exempt since it is acting as the issuing bank’s agent or authorized delegate, provided that the contract between and the bank explicitly provides such appointment. However, in those states where there is no exemption for agents or authorized delegates, must rely upon the statutory language to determine whether licensing is required. Such states include Alaska, Arkansas, Idaho, Maine, New Jersey, North Dakota, Washington and Wyoming.
- Finally, like most states, these states generally require a company to obtain a money transmission license if the company “engages in the business of money transmission.” While definitions vary, the term “money transmission” typically includes the selling or issuing of payment instruments or stored value. Therefore, once again our analysis must consider the definitions of “selling” and “issuing,” but this time from the perspective of state law as opposed to federal law.
 - Most states do not define the terms “sale” and “issue” within the money transmitter licensing statutes themselves. However, the Uniform Commercial Code, adopted by each of these nine states, defines a “sale” as “the passing of title from the seller to the buyer for a price.”⁶ Like the analysis provided above, we believe that it is likely that a consumer’s receipt of loan proceeds on a prepaid card would not fall under this definition due to the fact that there is no additional price being charged for the consumer to obtain the loan via a prepaid card versus a check.
 - Regarding the definition of “issue,” such term is also not defined within each state’s money transmitter licensing statutes. However, as noted above, the term is generally used as a term-of-art in the banking industry to represent the ultimate party liable for payment of the funds in question. As a result, we believe that would not qualify as an issuer in the case at hand since it is the bank alone that is the party responsible for payment.

As a result, it is our view that distribution of loan proceeds on a prepaid card should not qualify as the sale or issuance of stored value under the state money transmitter laws cited above.

⁶ See Alaska Stat. § 45.02.106, Ark. Code Ann. § 4-2-106; I.C. § 28-2-106; 11 M.R.S.A. § 2-106; N.J.S.A. § 12A:2-106; ND Cent Code § 41-02-06; RCW 62A.2-106; and Wyo. State. Ann. § 34.1-2-106.

October 28, 2009
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Very truly yours,

Cc: