
From: Jim Burns
Sent: Monday, January 13, 2014 9:15 AM
To:
Subject: FW: No Action Request

From: Jim Burns
Sent: Monday, January 13, 2014 9:09 AM
To:
Cc: Norman Real; Ginnie Sorensen
Subject: RE: No Action Request

Hi

Based solely upon the representations provided in your email (see below) and the related attachments, the Department of Finance will take a no-action position as to the licensing provisions of the Idaho Money Transmitters Act in the matter of the _____ and its affiliates operating stores in the state of Idaho.

Any change in the facts underlying your request of December 26, 2013 may necessarily lead to a different conclusion.

Please let me know if you have any questions or need additional information.

Regards,

Jim Burns, MBA, CFE, CRCP
Securities Investigations Chief / Money Transmitter Program Mgr.
Idaho Dept. of Finance
P.O. Box 83720
Boise, ID 83720-0031
(208) 332-8080

From:
Sent: Thursday, December 26, 2013 8:01 AM
To: Jim Burns
Subject: No Action Request

Dear Mr. Burns:

Our client, The _____, respectfully requests that the Idaho Department of Finance ("Department") issue a no action opinion with respect to the Idaho Money Transmitters Act ("Act"), *Idaho Code* §§26-2901 – 26-2928, in connection with the future sale of Cards and Reload Value (as defined below) by The _____ and its affiliates that operate stores in the State of Idaho _____ without a license under the Act under the facts and circumstances described below.

markets, distributes and sells network-branded, open-loop reloadable and non-reloadable stored value cards (each a "Card") and reload value packs with which a Cardholder can add value to a reloadable Card ("Reload Value") in its grocery and multi-department retail stores across the United States, including under the _____ and _____ brands in Idaho. The Cards participate in an open-loop card network (e.g. Visa or MasterCard). Accordingly, Cardholders are able to use the Cards where debit cards participating in the designated card network are accepted, including to withdraw cash. The Cards and Reload Value are issued by _____ ("Bank"), a federally insured national bank supervised by the Office of the Comptroller of the Currency ("OCC"). Accordingly, the program under which the Cards and Reload Value are sold and issued are subject to federal laws and regulations and to the examination and supervision of the OCC, the primary regulator of the Bank.

We understand that the Department takes the position that open-loop prepaid cards, such as the Cards and Reload Value constitute "payment instruments" under the Act. Further, we understand that the Department takes the position that while a national bank, such as the Bank, would be exempt from licensing under the Act, a non-exempt seller of open-loop prepaid cards would not be exempt from licensing under the Act solely on the basis of its status as an authorized delegate of an entity that is itself exempt from licensing under the Act. Accordingly, the Cards and Reload Value are currently sold under the authority of a _____ affiliate duly licensed under the Act. However, from our earlier discussion, we understand that the Department may be willing to consider taking a no action position with respect to the Act's licensing requirement for a seller of open-loop prepaid card products if (i) the card issuer is an exempt entity that accepts the financial obligation to the cardholder for the entire amount of the card value at the moment the seller receives funds from the purchaser and (ii) the cardholders are not exposed to any risk of loss as a result of the seller's receipt of funds on behalf of the exempt issuer.

Unlike in the traditional money transmitter model, where consumer funds are subject to risk of loss until funds are properly delivered to the designated recipient, there is no such risk to the purchaser of a Bank-issued Card or Reload Value sold at _____ or _____ stores. Pursuant to an agreement between The _____ and the Bank ("Agreement"), _____ is designated as the agent of the Bank in connection with the sale of the Cards and Reload Value. By the terms of the Agreement, the Bank makes the full face value of a Card or Reload Value available for use by the purchaser/holder of the Card or Reload Value immediately upon sale by _____, regardless of when (or whether) the Bank receives funds from _____ in respect of the sale of such Card or Reload Value. Thus, _____, obligation to transmit the customer's funds is satisfied immediately upon sale of the Card or Reload Value. When the customer leaves the point of sale register, s/he leaves in possession of a payment instrument that represents precisely the value that the customer intended to have available. It does not matter whether the customer has yet drawn down the funds; the fact is that the funds are immediately available for use by the customer due to the Bank's express contractual undertaking. In fact, Cardholders can use funds associated with the Cards before _____ settles funds to the Bank. Thus, the Cardholders are never exposed to the credit risk of _____ in connection with the Bank's obligation to honor the cards. Any risk of loss, such as fraud of _____ employees or _____ failure to settle to the Bank, is borne entirely by the Bank.

By contrast, in a traditional money transmission model, whereby a consumer delivers cash to a money transmitter for delivery to the consumer's designated recipient at a later time, the consumer's funds are subject to risk of non-delivery until such time as the funds are properly delivered to the account of the intended recipient. Accordingly, many states, such as Idaho, have adopted money transmitter licensing statutes that include various requirements designed to protect consumer funds pending proper delivery to the consumer's designated recipient. For example, the Act requires licensees to maintain permissible investments equal to the value of the outstanding payment instruments and to report the value of outstanding instruments. *Idaho Code* § 26-2906 & § 26-2911. The Act defines "outstanding payment instrument" as "any payment instrument issued by the licensee which has been sold in the United States directly by the

licensee or by an authorized representative of the licensee, which has been reported to the licensee as having been sold and which has not yet been paid by or for the licensee." *Idaho Code* § 26-2902(12) (emphasis added).

The qualification that such prepaid cards constitute "outstanding payment instruments" of a licensee only when "issued by" the licensee is not an oversight. The purpose of the eligible investment obligation under the Act is to ensure that funds being held by a licensee for a consumer are fully protected until delivered. If a licensee issues its own prepaid cards, the consumer is exposed to the licensee until those funds are withdrawn or further transferred. If the cards are issued by an exempt national bank, however, the consumer is not exposed to the credit of licensee in connection with the bank's obligation to honor the cards. In the case of the Cards and Reload Value sold by [redacted] and issued by the Bank, because the prepaid card products are not themselves outstanding payment instruments of [redacted], there cannot be an "outstanding payment instrument" of [redacted] in these circumstances unless the consumer is somehow exposed to the credit risk of [redacted]. As explained above, the consumer has no such exposure. Moreover, the settlement arrangements that [redacted] has entered with [redacted] are irrelevant to the question whether [redacted] has an "outstanding payment instrument." As explained above, regardless of whether [redacted] has completed settlement with the Bank as to the loading of any particular Card or Reload Value, the cardholder has full use of those funds. Accordingly, the provisions of the Act applicable to money transmitter licensees that are designed to protect consumers against loss prior to receipt by the intended recipient would not provide any additional consumer protection that is not already inherent in the structure adopted between [redacted] and the Bank pursuant to the Agreement.

In light of the foregoing, [redacted] requests that the Department issue a no action opinion with respect the Act in connection with [redacted] future sale of Cards and Reload Value in Idaho. In furtherance of [redacted] request, the Bank has executed a letter (attached hereto) acknowledging its acceptance of liability with regard to funds associated with Cards and Reload Value immediately upon receipt of funds by [redacted] as described herein. Please let me know if you require any additional information to consider the request set forth herein. If the Department takes the requested no enforcement action position, [redacted] intends to surrender its money transmitter license in Idaho, the renewal of which is currently pending. Accordingly, [redacted] appreciates your prompt attention to this matter.

CONFIDENTIAL TREATMENT REQUESTED

This communication contains confidential commercial information of [redacted] and Bank. The release of such information would result in substantial harm to [redacted] and Bank if disclosed by permitting competitors to learn details of their proprietary business arrangement. Accordingly, we request confidential treatment of this communication and the attachment hereto. Also, we request that you notify us if anyone requests access to, or submits a request for a copy of, this communication.

Regards,