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FinCEN Reaffirms Exclusion for Debt Management Plans

On Monday, July 18, 2011, the federal Financial Crimes Enforcement Network (“FinCEN”) released a Final Rule, “Definitions and Other Regulations Relating to Money Services Businesses,” which more clearly defines which businesses qualify as “Money Services Businesses” (“MSBs”) and are therefore subject to anti-money laundering rules under the federal Bank Secrecy Act (“BSA”).

One key element of the Final Rule is that the definition of an MSB related to the definition of “money transmitter” excludes “persons that sell goods or provide services other than money transmission services, and only transmit funds as an integral part of that sale of goods or provision of services, are not money transmitters.” FinCEN states that this “limitation would apply to a debt management company that made payments to creditors as the conduit for a negotiated schedule of payments from the debtor to its creditors.” This is consistent with FinCEN’s guidance on this topic issued in 2004, as well as the position taken by many state money transmitter statutes and regulators.

The Final Rule also ensures that certain foreign-located persons engaging in MSB activities within the United States are subject to the BSA rules.

The Final Rule clarifies several other provisions, among them:

- Revising MSB definitions to make clearer what activities subject a person to the BSA rules pertaining to MSBs.
- Updating the MSB definitions to reflect past guidance and rulings and current business operations and to accommodate evolving technologies and emerging lines of business.
- Separating the provisions dealing with stored value from those dealing with issuers, sellers and redeemers of traveler’s checks and money orders in order to more readily accommodate changes to be implemented in FinCEN’s pending Prepaid Access Rulemaking.
- Making minimal nomenclature changes with respect to certain MSB categories to help clarify distinctions between them.
- Replacing the term “dealer in foreign exchange” with the new term “currency dealer or exchanger,” a term used to include the exchange of instruments other than currency as a category of MSB.

In addition, the Final Rule maintains the minimum \$1,000 worth of transactions per person per day threshold to comply with anti-money laundering rules required under the BSA for all categories of MSBs other than money transmitters. An entity that engages in money transmission in any amount is subject to the BSA rules. In a separate rulemaking, FinCEN has adopted a modified application of the \$1,000 activity threshold with respect to prepaid access products, to exempt providers of prepaid access of \$1,000 or less and pay roll products if they cannot be used internationally, do not permit transfers among users, and cannot be reloaded from a non-depository source.

FinCEN had issued a Notice of Public Rulemaking that proposed adoption of its prior guidance on May 12, 2009. The Final Rule was published in the *Federal Register* on July 21, 2011 and will be effective on September 16, 2011.

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Jonathan Pompan is Of Counsel at Venable LLP in the Washington, DC office. He represents nonprofit and for-profit companies in regulated industries, including credit counseling agencies, in a wide variety of areas such as advertising and marketing law, compliance with applicable federal and state regulations, and in connection with Federal Trade Commission and state investigations and law enforcement actions.

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