



Serious Legal Traps for Money Processors

By: Brendan Collins, Esquire *

Are you a payroll processor or otherwise involved in money processing and transmission? If so, you may be facing criminal penalties and perhaps imprisonment if you have failed to obtain a state license to operate a money transmitting business and/or failed to register with the Department of Treasury, even if you were unaware of such licensing and/or registration requirements.

Recently, the Internal Revenue Service ("IRS") seized all of the assets in a payroll processor's bank account. The seizure was a rude surprise. The Seizure Notice stated that the property at issue was subject to forfeiture because it was involved in transactions in violation of 18 U.S.C. § 1960, which prohibits the unlicensed operation of a money transmitting business. Any business that engages in payroll processing, check cashing, bill payer services, accelerated mortgage payment services or any other business involving money transferring would be wise to ensure that it is in compliance with all legal requirements.

18 U.S.C. § 1960

Under 18 U.S.C. § 1960, the government can establish criminal liability by (a) proving that a person or entity failed to obtain a license to operate a money transmitting business under either state law, if the state requires such a license, or pursuant to federal law, if the business fails to register a money transmitting business with the Department of the Treasury (31 U.S.C. § 5330), or (b) by showing that the person or entity knew the money being transferred was being used for unlawful purposes. Section 1960 provides that whoever knowingly operates an unlicensed money transmitting business *shall be fined and/or imprisoned for not more than 5 years or both*. Establishing a defense to such an action is largely dependent upon the extent to which the entity can establish that it does not fall within the definitions of a money transmitting business and a financial institution under the Federal Treasury statute and regulations. Because the federal statute does not contain a *mens rea* (intent) requirement, lack of knowledge of the registration requirement is not a valid defense. Just because you didn't know doesn't mean you can't go to jail.

In order to understand Section 1960's licensing obligations, it is necessary to review the relevant statutes, which include federal statutes governing registering

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requirements and state law licensing obligations. The statute's cryptic definition of an "unlicensed money transmitting business" is that of a money transmitting business which affects interstate or foreign commerce in any manner or degree and is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, *whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable*. It also includes entities which fail to comply with United States Treasury registration requirements for those in the money transmitting business under 31 U.S.C § 5330.

The term "money transmitting" includes transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier

State definitions of money transmission vary but most are expansive. Thus, for example, the state of Maryland defines money transmission as including bill payer services, accelerated mortgage payment services, and any informal money transfer system outside conventional financial institutions.

The federal statutory definition is equally broad, including within its scope, any entity that:

. . . provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments or any other person who engages as a business in the transmission of funds

Regulations promulgated by the Treasury Department further define a financial institution as including a "money services business" as defined in paragraph (uu) of 31 C.F.R. § 103.11(n)(3). Paragraph (uu) includes a definition of a money transmitter, as:

- (A) Any 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 . . . by any means through a financial agency or institution
. . . .; or
- (B) Any other person engaged as business in the transfer of funds

Id. at 103.11(uu) (5).

An Entity Need Not Know of its Licensing or Registration Obligations to Be In Violation of the Money Processing Requirements

After September 11, 2001, 18 U.S.C. § 1960 was revised pursuant to the Patriot Act to eliminate any requirement that the entity be aware of its licensing and registration obligations. Prior to that time, Section 1960 provided that it was violation for a party to

engage in unlicensed money transmission “knowing the business is an illegal money transmitting business.” Subsequently it was revised to make such operations punishable *whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable.*”

It is noteworthy that, while legislation requiring the licensing and registration of money transferring entities was broadened to address terrorism concerns, by its plain language, an entity may run afoul of Section 1960’s requirements without having engaged in activities potentially implicating terrorism issues.

Practical Preventive Measures

Although defenses to criminal indictment and criminal and civil forfeiture actions do exist, entities that arguably engage in money transferring operations should, as a precautionary measure, consult with counsel to determine whether state licensure and/or federal registration as a money transferor is required. Such precautionary steps may avoid significant civil and criminal penalties, including possible incarceration.