

April 18, 2011

VIA E-MAIL & U.S. MAIL

Re: Opinion Request

Dear Mr. _____:

This responds to your letter dated April 1, 2011, in which you request a determination as to whether the proposed activities of _____ (_____) would require a money transmission license under California Financial Code § 1800 et seq.

FACTUAL BACKGROUND.

You describe the facts as follows. _____ is working with a commercial bank (Bank) to sell an FDIC insured, general purpose re-loadable, open loop stored value card that would be marketed to _____'s customers (Program). In the proposed Program, the Bank would issue the cards, enter into a cardholder agreement with the customers, hold cardholder funds in FDIC insured accounts, and honor the transactions made pursuant to the cardholder agreement. _____ would sell the cards through _____ locations as authorized by the Bank. _____ would not hold any cardholder funds associated with the Program. All funds would be immediately loaded onto a card, the Bank would immediately be liable to the cardholder for the funds, and _____ would settle with the Bank on a daily basis. Only the Bank, whose deposits are FDIC insured, would be liable to a cardholder for payment of any amount owing on a card.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) §1810(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter"

FC §1803(o)(2), in relevant part, defines "money transmission" as "selling or issuing stored value."

FC §1806 provides for a public interest exemption to the licensing requirement of §1810. Section 1806 states:

The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO _____'S ACTIVITIES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, _____ intends to sell stored value cards in this state. Thus, even though the Bank will be the issuer of the stored value cards, because FC § 1803(o)(2) broadly defines "money transmission" as "*selling* or issuing stored value" (emphasis added), _____'s activities fall within the Money Transmission Act. Pursuant to FC §1810, _____ would need to obtain a license unless exempt.

B. Exemption.

As you note, the stored value cards that _____ intends to sell are bank-issued and FDIC insured, and the risk of loss of customer funds resides with the Bank at all times. Because of these characteristics, we consider this type of stored value card to be a banking product. As such, these cards are already subject to the regulatory scheme applicable to the banking system. To require licensing under the Money Transmission Act in this circumstance would be unnecessary, would subject _____ to two regulatory schemes, and would confuse jurisdiction.

For these reasons, there is hereby exempted from the provisions of Chapter 14, Division 1 of the FC, as being in the public interest and the regulation of which is not necessary, the selling of a bank-issued, FDIC insured, general purpose re-loadable, open loop stored value card in California by _____.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca

cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

April 1, 2011

Mr. Kenneth Sayre-Peterson
General Counsel
California Department of Financial Institutions
1810 13th Street
San Francisco, CA 95811

RE: Request for Confirmation Regarding Inapplicability of Money Transmission Act

Dear Mr. Sayre-Peterson:

I am _____ for _____ ("_____"), a _____ Corporation headquartered in the _____, _____ area. I write to seek confirmation from the California Department of Financial Institutions that _____ is not required to obtain a money transmission license under California Financial Code § 1800 *et seq.* (the "*Money Transmission Act*") in order to sell a bank-issued, FDIC insured, general purpose re-loadable, open loop stored value card in California, as described below.

I. Background and Description of Program

_____ is working with a commercial bank (the "*Bank*") and its program manager to sell a FDIC insured, general purpose re-loadable, open loop stored value card that would be marketed to _____'s customers (the "*Program*"). In the proposed Program, the Bank would issue the cards, enter into a cardholder agreement with the customers, hold cardholder funds in FDIC insured accounts, and honor the transactions made pursuant to the cardholder agreement. _____ would sell the cards through _____ locations as authorized by the Bank. _____ would not hold any cardholder funds associated with the Program. All funds would be immediately loaded onto a card, the Bank would be immediately liable to the cardholder for the funds, and _____ would settle with the Bank on a daily basis. Only the Bank, whose deposits are FDIC insured, would be liable to a cardholder for payment of any amount owing on a card.

II. Licensing Requirement is Inapplicable to _____'s Proposed Activities

A. The Money Transmission Act Does Not Apply to Bank-Issued Cards

Our understanding of the Money Transmission Act is that it is inapplicable to the sale of the cards by _____ because such Bank-issued cards and activities fall outside of the purpose and language of the Act.

The Money Transmission Act created a new regulatory framework that imposes new requirements upon certain open loop stored value card programs. According to the legislative history, the new requirements are intended to "[r]egulate the issuance of open loop, stored value cards by *non-bank entities*." Senate Floor Debate AB 2789, at 2 (June 30, 2010). Presumably, the new requirements were intended to address the heightened risk of loss to consumers when stored value cards are not backed by FDIC insurance.

Bank-issued, FDIC insured, cards pose no such risk, and bank entities and their stored value cards therefore remain exempt from the Act's licensing requirements. *See* Cal. Fin. Code § 1805(d). This approach is consistent with that taken by other states, including _____, which conclude that because FDIC insurance eliminates consumer risk, bank-issued card programs need not be regulated. *See, e.g.,* _____.

Under the Program, as discussed above, only an FDIC insured commercial Bank would be responsible for issuing stored value, while _____ would only sell the cards through its locations as authorized by the Bank. As such, the Program would not be the type of program captured by the new provisions of the Act, and therefore does not require a money transmission license.

B. _____ is Exempt as an Agent of the Bank

Even if (contrary to the legislative history) the new provisions of the Act were intended to apply to bank-issued stored value cards, _____'s proposed activities do not require a license under the Act because _____ would be selling the cards as an agent of the Bank and the Bank is exempt from the Act. _____ is therefore exempt from licensing under the Act when selling cards as the Bank's agent.

Under the Act, an agent is defined as "... a person that provides money transmission services in California on behalf of a licensee, provided that the licensee becomes liable for the money transmission from the time money or monetary value is received by that person." Cal. Fin. Code § 1803(b). An agent is exempt from licensing under the Act because the licensee for whom it is an agent is already licensed. Cal. Fin. Code § 1810(a). The licensed entity is liable for all funds loaded onto the card and provides protections to consumers as required by the Act. Agents of banks likewise are exempt from licensing because the bank is liable for all funds loaded onto the card and provides consumer protections.

Banks are exempt from the Act, Cal. Fin. Code § 1805(d), because all of the protections provided by the Money Transmission Act are already part of a bank's business model. Namely, banks protect their consumers by backing their deposits with FDIC insurance, maintaining robust compliance regimes, and undergoing evaluations by regulators who enforce net worth requirements. Consumers doing business with a bank's agent will enjoy the same protections as if conducting the transaction with the bank itself.

Specifically, under the Program, when a consumer purchases stored value from _____, the funds will be immediately loaded onto the card and the Bank will be liable for those funds. In other words, in the language of the Act's definition of an agent, the Bank will be liable for the

money transmission from the time money or monetary value is received by _____. Furthermore, as the issuer of the card, the Bank would set the terms of stored value transactions with cardholders, be liable to the holders of stored value, and be obligated to pay the stored value to cardholders. Funds deposited onto the card would be immediately insured by the FDIC.

Whether the card is sold by the Bank or the Bank's agent, the customer's risk of loss is the same in either case, low. Clearly, the rationale that exempts an agent of a licensee from being licensed under the Act is equally applicable to the agent of an exempt entity such as the Bank, provided that the agent meets the definition of an agent in Cal. Fin. Code § 1803(b) (i.e. the Bank is "... liable for the money transmission from the time the money or monetary value is received..." by the agent).

If _____ were not exempt from licensing when selling the Bank's card, then every retail outlet in California that sells a general purpose reloadable stored value gift card issued by a bank would be subject to licensing under the Act. We believe that the large number of retail outlets selling such products would render this result administratively over-burdensome. This is clearly not what was intended by the Legislature, which sought to focus on the risk to consumers posed by "... the issuance of open-loop stored value cards by non-bank entities."

III. Conclusion

For the foregoing reasons, _____ believes that its sale of cards in connection with the Program falls outside of the purpose and language of the Money Transmission Act, and that it should not be required to obtain a money transmission license in California. _____ respectfully requests that the Department issue a written response to this letter confirming the same.

_____.

Please call me at _____ or contact me by email _____ if you require additional information or if you have questions with respect to any of the information provided in this letter. I appreciate your attention and cooperation in connection with this request.

Sincerely,