

DEPARTMENT OF BUSINESS OVERSIGHT*Ensuring a Fair and Secure Financial Services Marketplace for all Californians*

Jan Lynn Owen
Commissioner of Business Oversight

October 6, 2016

Re: Opinion Request

Dear Mr. _____:

This letter is in response to your request that the Department of Business Oversight (“Department”) state whether _____ is subject to the Money Transmission Act (“MTA”). Over the course of discussions with the Department and letters dated February 19, July 7, and July 29, 2016, you explained that _____ effects payments of foreign currency to third parties and, in exchange, receives reimbursement by its customers. Based solely on your representations and the documentation provided, and for the reasons set forth below, the Department agrees that _____ is not receiving money for transmission and, therefore, _____’s activities are not subject to the MTA.

I. Background

_____ is incorporated under the laws of United Kingdom and maintains its corporate headquarters in London. It provides institutional foreign-exchange services primarily to large international banks. _____’s services are not available on a retail basis. Thus, _____ does not have any retail outlets or otherwise provide services to consumers. Instead, _____ serves its customers through client meetings and its proprietary transaction execution system.

1. _____’s foreign-currency operations.

_____’s customers may request that _____ deposit foreign currency into overseas accounts that belong to them or to third parties. According to your February 19 letter, _____’s contractual arrangements with its customers are the same regardless of whether the foreign currency is deposited into its customers’ accounts or a third party’s account. You further explained that under the terms of the contract that governs _____’s institutional foreign-currency services, _____ agrees to transfer its own funds to the designated account and _____’s customers agree to reimburse it once the transaction is complete.

Each foreign-currency deposit transaction follows the same sequence. First, customers instruct _____ to send foreign currency and indicate, among other things, the number of transfers to make, the desired date of disbursement, and the account into which the deposit is to be made. _____ responds by sending the customer a price quote for

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the exchange rate and fees. If the customer accepts the quoted price, _____ electronically sends the customer an order confirmation and then executes the transaction.

_____’s customers then reimburse it by wire transfer or by an Automated Clearinghouse credit or debit. You stated in your February 19 letter that _____ was prepared to not accept reimbursement by Automated Clearinghouse debit.

2. Lockbox Solution.

In response to the Department’s concerns about the timing of a customer’s payment to _____, you provided additional information on July 7, 2016 (“July 7 letter”). In your July 7 letter, you proposed a “Lockbox Solution.” Under the Lockbox Solution, _____ would establish a deposit account, which you described as a “Lockbox Account.” The Lockbox Account would be titled “[Name of Bank] for the benefit of _____ clients.” You further explained that the Lockbox Account would be authorized to receive Automated Clearinghouse credit or wire transfer payments from _____ clients. You also stated that _____ would not receive funds from its clients by Automated Clearinghouse debit.

You further stated that under this arrangement _____ would not receive, possess, have access to, or have control over payments to the Lockbox Account unless and until _____ submits an Officer’s Certificate to the bank at which the Lockbox Account is kept. You also stated that _____ will not submit the Officer’s Certificate to the bank until it can affirmatively demonstrate that the amount of funds recited in the Officer’s Certificate has been released to the beneficiary. At that time, according to your July 7 letter, the bank will release the client’s payment to _____’s operating account. The bank will return any funds from a failed transaction to _____’s client after a reasonable amount of time in those instances where _____ is unable to resolve the failure.

Your July 7 letter also stated that _____ will revise its client agreements to reflect the following new terms and conditions under the Lockbox Solution:

1. *The Client agrees that it will pay into the Lockbox Account only.*
2. *The Client acknowledges that the Lockbox Account is an account held by Bank in escrow for the benefit of the Client, on the Client’s behalf, and as agent of the Client.*
3. *The Client acknowledges that _____ will not have possession of, access to or control over, any funds paid into the Lockbox Account, but that funds paid by the Client into the Lockbox Account will be transferred to _____’s operating account after _____ determines and certifies to Bank that a corresponding amount has been released for Beneficiaries.*
4. *The Client agrees that any reimbursement obligation to _____ will be satisfied only when funds paid by the Client into the Lockbox Account are received*

into _____'s operating account, as described in the immediately preceding numbered paragraph.

5. *The Client agrees that if the Client and _____ are unable to resolve a Failed Transaction following _____'s standard reconciliation procedures, Bank will transfer the corresponding transaction amount from the Lockbox Account to the Client.*

Your July 7 letter also provided representations that _____ will ensure that funds are disbursed to beneficiaries before 9:00 a.m. Pacific Time on the date specified by the customer. This timing further ensures the lapse of time between disbursement and release of funds to _____'s operating account. In addition, you stated that _____ will monitor its foreign accounts for confirmation of release of funds to the beneficiaries.

In response to the Department's further concerns and questions regarding the Lockbox Solution, you submitted additional information by letter on July 29, 2016. In your July 29 letter you provided a sample Officer's Certificate. And you explained how _____ will use it to demonstrate to the bank where the Lockbox Account is kept that corresponding funds have been released to the beneficiary.

II. Discussion

1. _____ is paying beneficiaries with its own funds before receiving money from customers.

_____ is subject to the MTA if it is engaging in money transmission and does not qualify for an exemption. _____ is engaging in money transmission under the MTA if it is receiving money for transmission. Whether _____ is receiving money for transmission turns on whether _____ receives funds from its customers in advance of or contemporaneously with its payments to beneficiaries.

The MTA, in relevant part, defines "money transmission" as "receiving money for transmission."¹ The MTA further provides that "receiving money for transmission" or "money received for transmission" means receiving money or monetary value for transmission within or outside the United States by electronic or other means.²

Both phrases "receiving money for transmission" and "money received for transmission" share the same element that is most essential to this discussion: "for transmission." The phrase "for transmission" refers to the precise purpose for which money is entrusted to a transmitter. In other words, "for transmission" refers to the temporary entrustment of money (i.e. until the transmitter forwards it). A consumer who entrusts money to an unlicensed money transmitter risks the loss of that money until the beneficiary receives it. The regulatory supervision that accompanies a money transmitter license protects against

¹ Fin. Code § 2003, subd. (q)(3).

² Fin. Code § 2003, subd. (u).

this particular kind of loss. Only money that is intended for transmission to a beneficiary is money received for transmission within the meaning of MTA.

As stated in your July 7 and July 29 letters, under the Lockbox Solution, _____ pays beneficiaries with its own funds, not the funds of its clients. Furthermore, according to your July 7 and July 29 letters, the bank at which the Lockbox Account is held will not release a _____ customer's funds to _____'s operating account until _____ has demonstrated to the bank that the beneficiary has been paid. Thus, _____ bears the risk of loss in the event the customer does not reimburse _____ for the money received by the beneficiary, because _____ has paid the beneficiaries before receiving money from its customers. Thus, the customer is reimbursing _____ rather than sending _____ money for transmission.

2. _____ is receiving reimbursement.

The Lockbox Solution described in your July 7 and July 29 letters is structured in such a way that _____ does not receive money from its customers until after it has satisfactorily demonstrated to the bank holding the Lockbox Account that the beneficiary has already been paid. Were _____ to receive its customers' funds in advance of or contemporaneously with its payment of funds to their beneficiaries, _____ would be receiving money for transmission since it was entrusted with customer funds before the beneficiary was paid. Since there would be no break in time between the transmission and the receipt of money, _____'s customers would risk losing their funds.

Because _____ does not receive its customers' funds until after it demonstrates to the bank holding the Lockbox Account that the beneficiary has been paid, _____'s customers do not risk losing their funds. The funds that _____ receives from its clients are therefore reimbursement and not transmission money.

III. Conclusion

For these reasons, the Department concludes that the payment of funds to a beneficiary is not money transmission where the customer's funds are received subsequent to the payment and not in advance or contemporaneously with it. Accordingly, _____ is not engaging in money transmission and therefore not subject to the MTA. Whether _____ qualifies for an exemption from the MTA is therefore irrelevant.

This opinion is based solely on the facts presented in your correspondence. Any changes in the facts or circumstances, as we understand them, could lead to a different conclusion.

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You may call me at _____ with any questions.

Sincerely,

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cc: Robert Venchiarutti, Department of Business Oversight, San Francisco