

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

Jan Lynn Owen
Commissioner of Business Oversight

April 7, 2017

Re: Opinion Request – Exemption from the California Money Transmission Act

Dear _____:

Thank you for your letter dated December 22, 2016 to Jan Lynn Owen, Commissioner of the Department of Business Oversight. As Counsel for the Legal Division, I have been asked to respond to this matter. Your letter requests confirmation that the California Money Transmission Act (“MTA”) does not apply to the tax payment function of cloud-based tax compliance software offered by _____. For the reasons discussed below, the Department concludes that _____’s tax payment function is not exempt.

Background

_____ offers a software service that allows businesses to manage their tax filings and accounts payable processes on a cloud-based web portal (the “Platform”). Services offered on the Platform are fee-based and include, but are not limited to, tax data upload, preparing a tax payment transaction history, check printing, mailing tax returns, and tax payment reporting. Additionally, the Platform is able to accept electronic payments from business clients for the payment of state, federal, and local government corporate-tax obligations. Businesses using _____’s service can upload their tax payment information to the Platform directly, or through an accounting firm linked to the Platform. _____ then initiates a transfer from the business’ bank account to an account _____ holds at a national bank. Finally, _____ sends the tax payment from its account, using ACH or check, along with the client’s tax return, to the appropriate government department.

Money Transmission Act

The MTA provides that a person shall not engage in the business of money transmission in California unless the person is licensed or exempt from licensure under the MTA, or is an agent of a person licensed or exempt from licensure.¹ Financial Code section 2003, subdivision (q) defines “money transmission” in relevant part as receiving money for transmission. Financial Code section 2003, subdivision (u) defines “receiving money for

¹ Fin. Code, § 2030, subd. (a).

transmission” as receiving money or monetary value in the United States for transmission within or outside of the United States by electronic or other means.

“Receiving Money for Transmission”

_____ accepts money for corporate tax payments on its Platform and sends that money to government agencies. More specifically, business clients transfer funds to cover their tax obligations to a bank account held by _____, and from that account _____ sends the client’s tax payment to the appropriate government department via ACH or check. Because the bank account to which businesses transfer money is controlled by _____, and the money owed to the government is sent from that controlled account, _____ receives and holds the money or monetary value for transmission.² _____ is therefore “receiving money for transmission” under Section 2003, subdivision (u). As a result, the Platform’s tax payment function is subject to the licensure requirements of the MTA unless there is an exemption for those transactions.

Your letter does not dispute that _____’s activities fall within the definition of money transmission as set out in Financial Code section 2003, subdivision (q). However, you argue that _____ ought not be treated as a licensable money transmitter in California because _____ falls outside the definition of “money transmitter” as set forth in federal regulations. Specifically, Part 1010.100(ff)(5)(ii)(F) of the Financial Crimes Enforcement Network (“FinCEN”) Regulations (31 C.F.R. (2016)) excludes from the federal definition of “money transmitter” a person that only accepts and transmits funds as an integral part of its non-money transmission services. You claim that _____’s tax payment function falls within that definitional exclusion. But even if that were true, the MTA does not contain a similar exclusion in California’s definition of “money transmitter.” Therefore, your argument that _____ is not a money transmitter under *federal* law does not establish that _____ is not a money transmitter under *California* law. In sum, we reject your argument because even if _____ is excluded from the federal definition of “money transmitter,” it may be subject to the MTA.

Section 2010 Exemptions

Alternatively, you argue that as a matter of public policy, _____ should be exempt from the MTA because its activity is similar to activity exempt under Financial Code sections 2010, subdivisions (h) and (j), even though it does not meet the requirements of those subdivisions. We disagree.

Financial Code section 2010, subdivision (h) exempts from the MTA any operator of a payment system where the system provides processing, clearing, or settlement services *between or among* persons Section 2010 otherwise excludes from California money

² Section 2003, subdivision (u) definition of “receiving money for transmission” means actually or constructively taking possession of or holding money or monetary value for transmission. Cal. Code Regs., tit. 10, § 80.129.

transmission laws. To qualify for this exemption, _____ must provide payment processing only for persons and to persons exempt under Section 2010. Your letter correctly identifies federal, state, and local governments as exempt persons under Section 2010.³ However, businesses using the Platform to pay their corporate taxes are not categorically excluded from the MTA under any subdivision of Section 2010. Because the parties to the transactions facilitated by _____ are not all excluded from the MTA, the exemption provided in Section 2010, subdivision (h) does not apply.

Financial Code section 2010, subdivision (j) exempts from the MTA any person that facilitates the payment of payroll taxes to state and federal agencies, or that transmits funds on behalf of an employer in connection with transactions related to employees. Your letter states that transactions on the Platform are exclusively for the payment of taxes by businesses to government departments. Your letter also indicates that taxes paid through the Platform are not limited to payroll taxes, nor is the transmission of funds through the platform limited to transactions related to employees. Because _____'s Platform accepts payment for corporate taxes that are not limited to payroll taxes or employee-related transactions, the exemption provided in Section 2010, subdivision (j) does not apply.

Order of Exemption under Section 2011

In addition to the statutory exemptions set forth in Section 2010, Section 2011 provides that the commissioner may, by regulation or order, exempt a person or transaction from the MTA if she finds such exemption would be in the public interest and the regulation of such person or transaction is not necessary for the purposes of the MTA. The California Code of Regulations, title 10, section 80.3002, subdivision (b) provides that the commissioner may assess whether money transmission is integral to a person's business as just one of five factors that can be considered in determining whether a person or transaction will be granted an exemption from the MTA under Section 2011.

Although your letter discusses reasons it is not in California's interest to regulate _____, you have not argued that the commissioner should exempt _____ pursuant to Section 2011, and your letter does not enable us to conclude that _____ would qualify for such an exemption. Therefore, to the extent your letter was intended to be an application for an order of exemption under Section 2011, the commissioner declines to issue such an order at this time.

Conclusion

The exemptions provided in Financial Code section 2010 are distinguishable from the tax payment function of _____'s cloud-based tax compliance software. _____'s money transmission activity does fall within the purpose and scope of the MTA. It is therefore necessary for _____ to apply for a money transmission license.

³ Fin. Code, § 2010, subd. (b).

This opinion is limited to the facts and circumstances described above regarding the application of the MTA. Should any of the facts or circumstances change, the Department's opinion may also change.

Should you have any questions, please contact the undersigned at _____.

Sincerely,

Jan Lynn Owen
Commissioner
Department of Business Oversight

By

Shavaugn I. Lewis
Counsel

SIL:acp

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