

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

Jan Lynn Owen
Commissioner of Business Oversight

June 26, 2014

Re: _____ - Opinion Request

Dear _____:

This is to follow up on your request that the Department of Business Oversight (Department) make a determination of whether _____ is engaged in a business which is regulated by the California Money Transmission Act (commencing with FC 2000) (MTA). As used herein, the term “FC” means “Financial Code Section.”

It is the Department’s understanding from your letter, and our telephone conversations and emails, that _____ is engaged in providing point of sale terminals, mainly to small businesses. Businesses with _____ that have entered into a Marketplace Terms of Services Agreement (Marketplace Agreement) with _____ may purchase certain software products (Applications) through their _____ terminals. The Applications can only be used on the _____. The Applications are licensed and delivered through the _____. Payments for the Applications, including any periodic payments of subscription fees for the use of the Applications, are also collected by _____ through the _____. Some subscriptions fees can be billed in advance of usage of the Application.

The Applications have been developed by either _____ (including its affiliates) or a third-party-developer (Developer). In either case, the use of each Application is governed by an End User Application License. In the case of Applications developed by Developers, _____ enters into a Developer Distribution Agreement with each Developer, pursuant to which, among other things, _____ is authorized to distribute the Developer’s Applications and to remit payments for the sale of the Applications to the Developer, for which _____ provides payment processing. _____ acts as an agent for the Developer when it provides customers with an Application and the End User Application License through the _____. _____ is not a party to the license between the customer and the Developer. The End User Application License is a direct license between the Developer and each customer, not a sublicense through _____. A Developer is solely responsible for its Applications, including any claims that customers may have relating to the Applications. Customers pay for the Applications by credit or debit cards through the _____ in accordance with the Marketplace Agreement. The payments are handled through a standard payment card

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network settlement process and the limited license to use the Application is immediately delivered in "real time" by _____ to customers. _____ then apports each payment between itself and the Developer and sends the Developer its share.

Based upon all the foregoing, it appears that _____ engages in receiving money for transmission via its _____ customers. Thus, _____ must be licensed under the MTA in order to provide, in California, the software application license and delivery services described in your letter. It is the Department's view that _____ is receiving money for transmission when _____ accepts payments for the Developer as the authorized agent of the Developer even if payment to _____ constitutes payment to the Developer. That the transaction is complete, from the customer's perspective, at the time money is tendered to _____ because the customer's payment obligation to the Developer is extinguished when the customer pays _____ is not determinative of whether the Provider is engaged in money transmission under the MTA.

Pursuant to FC 2003(s), "receiving money for transmission" is not defined by the respective liability of the transaction's parties; it is defined as "receiving money... for transmission." The fact that the customer's liability to the Developer is satisfied when the customer's bill is paid has no bearing on whether money is being received for transmission. Moreover, whether or not _____ is acting as a payment agent for a Developer, _____ is nonetheless transmitting money between the customer and the Developer. All of the Developer's agents in the transaction (i.e., _____) hold the Developer's funds before transmitting the money to the Developer.

In summary, _____ stands as the intermediary between the customer and the Developer, transmitting monetary value between them. The conduct of transmitting money from one person to another person falls squarely within the meaning of money transmission under the MTA. Thus, any Developer transactions involving the payee-agent structure require licensing under the MTA. There is no statutory exemption from the MTA for an agent of a payee.¹

Please be advised that Assembly Bill 2209, introduced in the 2013-2014 regular session of the Legislature, provides for a statutory exemption from the MTA for certain transactions involving agents of a payee. Should this bill be passed by the Legislature and signed by the Governor this year, it would become effective on January 1, 2015.

This opinion is based solely on the facts presented in your correspondence, and the Department's understandings of those facts. The Department may reach a different conclusion under other facts and circumstances. This letter does not express any opinions regarding the payment processing activities of _____ or _____ on behalf of merchants

¹ See also Payee-Agent and Factoring Arrangements under the MTA, Department of Business Oversight, March 3, 2014. Available at: http://www.dbo.ca.gov/Laws_&_Regs/dfi_orders_files/2014_MTA_redacted_letter.3.4.14.pdf

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that use _____ point of sale terminals and the customers of those merchants. If you have any questions or comments, please contact me at 213.897.2172.

This opinion will be made public on the Department's internet website as required by FC 2174(b). The Department will redact _____ name in the version of the opinion that is posted on the Department's website.

Sincerely,

JAN LYNN OWEN
Commissioner of Business Oversight

By

WALLACE M. WONG
Senior Counsel

WMW:jg