

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

Jan Lynn Owen
Commissioner of Business Oversight

August 3, 2016

Re: _____ - opinion request

Dear _____:

Thank you for your letter dated March 11, 2016 (“March 11 letter”), in which you asked the Department of Business Oversight (“Department”) to consider whether _____ is subject to the Money Transmission Act (“MTA”).¹ You explained that _____ operates, _____, a software technology platform that enables customers to buy and sell gold and transfer title to gold. On May 18, 2016, you provided a copy of the terms and conditions under which _____ operates _____. We have reviewed the information that you provided and determined that _____ is not engaging in money transmission in California and therefore not subject to the MTA. The reasons for our conclusion are set forth below.

Background

The following description is based on the information contained in your March 11 letter, the _____ terms and conditions, and your emails dated May 18, 2016, and June 23, 2016.

_____ facilitates the purchase and sale of gold and the transfer of title to it. Specifically, it allows customers to buy gold from _____, sell it back to _____, or transfer title to their gold to another _____ customer. Each customer is sold a discrete, identifiable, and segregated amount of gold. The gold is stored in several vaults operated by _____. After buying gold from _____ a customer may either leave it in the vault indefinitely or have it removed from the vault and take possession of it. Customers who choose to take possession of their gold must arrange to pick it up from the vault and take it away.

Customers may also sell their gold back to _____. In that case, customers may elect to receive payment by wire transfer or Automated Clearing House to their bank account or _____

¹ Fin. Code § 2000 et seq.

receive credit on a prepaid card issued to them by a bank. Customers may also transfer title to their gold to another _____ customer. Transfer of title does not include physical transfer of the gold. Rather, title is transferred from one customer to another by using _____ (rather than an intermediary-payment service) and the gold remains in the same vault. Upon taking title, however, the new owner may designate a different vault to store the gold and his or her account information will be adjusted to reflect the new location.

Discussion

The three activities defined in the MTA as “money transmission” are:

- (1) Selling or issuing payment instruments;
- (2) Selling or issuing stored value; or
- (3) Receiving money for transmission.²

If _____ engages in any of these three activities in California, it must obtain a money-transmitter license from the Department.

1. _____ is not selling or issuing payment instruments.

The definition of “payment instrument” in Financial Code section 2003, subdivision (s) does not include gold or other precious metals. Rather, Financial Code section 2003, subdivision (s) defines “payment instrument” as a “check, draft, money order, traveler’s check, or other instrument for the transmission or payment of money or monetary value...” Gold is none of the first four items listed in this subdivision or an instrument for transmission or payment. The first prong of Financial Code section 2003, subdivision (q) is therefore not met.

2. _____ is not selling or issuing stored value.

The second prong, selling or issuing stored value, is also not met for several reasons. The Financial Code’s definition of stored value requires that the monetary value that represents a claim against the issuer be stored on an electronic or digital medium.³ In addition, the stored value must also be “intended and accepted for use as a means of redemption for money or monetary value or payment for goods or services.”⁴ A sale by _____ to a customer is a completed transaction. Therefore, _____’s sale-transactions records, even if electronically maintained with a computer, do not represent a claim against it for redemption at some later, unspecified, time. For that reason, repurchases of gold by _____ from its customers are completely separate transactions as well.

² Fin. Code § 2003, subd. (q).

³ Fin. Code § 2003, subd. (x).

⁴ Ibid.

Although customers who sell their gold back to _____ may elect to receive their payment on a prepaid card, _____ does not sell or issue the card. Rather, the prepaid card is issued by a bank at _____'s instruction. As such, _____'s activities do not meet the MTA's definition of selling or issuing stored value.

3. _____ is not transmitting money or accepting money or monetary value for transmission.

Last, we must consider whether the sale or repurchase of gold, or the transfer of title to gold satisfies the third prong of Financial Code section 2003, subdivision (q): the receipt of money or monetary value for transmission. The MTA defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission."⁵ Whether gold has value or is a medium of exchange is not relevant. What is relevant is whether _____ receives money or monetary value for transmission. The sale or repurchase of gold is a bargained-for exchange. It involves only a purchaser and a seller and is completed upon settlement. It does not include transmission to a third party. _____ is therefore not engaging in money transmission when it sells or repurchases gold.

_____ 's last activity is the transfer of title to gold via _____ from one customer to another. _____ never removes the gold from the vault where it is stored to effect a transfer of title. _____ also never handles a payment from one customer to another. Thus, whether transferring title to gold constitutes money transmission depends largely on whether title to gold is received from the transferor for transmission to the transferee. Here, _____ is merely keeping records of ownership among its customers and adjusting them to reflect their agreements. _____ only receives information and instructions, not actual title to the gold (and therefore by corollary, not money or monetary value). Because there is no receipt of gold or title to the gold, there is no transmission.

For these reasons, the Department concludes that operation of a software technology platform that facilitates the sale and repurchase of gold, and transfer of title to gold is not money transmission where there is no receipt of money or monetary value. None of the _____ activities constitutes issuing or selling payment instruments or stored value or receiving money for transmission as the MTA defines those activities. Accordingly, _____ is not subject to the licensing requirement of the MTA.

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.

⁵ Fin. Code § 2003, subd. (u).

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You may call me at _____ with any questions.

Sincerely,

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Commissioner of Business Oversight

By

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