

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

Jan Lynn Owen
Commissioner of Business Oversight

November 29, 2016

Re: _____ Service

Dear _____:

Thank you for your letter to the Deputy Commissioner of the Money Transmitters Division, Robert Venchiarutti, dated August 3, 2016, as supplemented by information you provided on August 24 and October 25, 2016. As Counsel for the Legal Division, I have been asked to respond to this matter. In your letter, you seek an interpretive opinion regarding whether _____ is engaging in activity subject to the California Money Transmitter Act (“MTA”). Specifically, you ask whether _____’s prepaid card reloading service constitutes money transmission, and if it does, whether it qualifies for an exemption from the MTA.

You state that you submit this request based on guidance received from the Department that the activity in question constitutes licensed activity under the MTA. You state that this guidance appears at odds with the position the Department had taken on a November 24, 2014 telephone call. The facts you presented in the 2014 phone call are different than the facts presented in your letter. Additionally, you were told during that conversation to seek a legal opinion from the Department’s Legal Division on whether or not this activity constituted money transmission under the MTA. You waited almost two years to seek a legal opinion from the Department on this matter.

_____’s _____ service (“_____ Service”) is money transmission and does not qualify for an exemption. The reasons are set forth below.

I. _____ Background

_____ is a California-licensed money transmitter. Since September 2011, _____ has provided its _____ Service in California. The _____ Service allows consumers to add money to certain prepaid cards. To use this service, a customer first goes to a _____ -contracted retailer and purchases a _____ Pack (“Pack”). The Pack, in itself, is not a prepaid card that may be redeemed for goods or services. It is a physical card with a unique 10-digit code. Each _____ Pack can be loaded with funds that can be transferred to a prepaid card, such as a gift card, offered by entities who have contracted with _____ (“card issuers”). In your letter, you stated that all card issuers are either

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 (916) 445-7205

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 San Francisco, CA 94104-4428
 (415) 972-8565

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 Los Angeles, CA 90013-2344
 (213) 576-7500

1350 Front Street, Room 2034
 San Diego, CA 92101-3697
 (619) 525-4233

45 Fremont Street, Suite 1700
 San Francisco, CA 94105
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 Los Angeles, CA 90013
 (213) 897-2085

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 San Diego, CA 92108
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licensed money transmitters or FDIC-insured banks.¹ _____ holds the customer's funds from the _____ Packs with the funds of other customers in a pooled trust account.

_____ holds the customer's funds until the customer makes a request to transfer the funds to a prepaid card. Upon such request, _____ verifies that there are sufficient funds in the customer's _____ Pack. The prepaid card issuer verifies that the designated prepaid card belongs to the customer and that it can be loaded for the desired amount. If _____ and the card issuer both approve the customer's request, _____ transfers the money from the pooled trust account to the card issuer. The card issuer then holds the funds in a pooled custodial account until the customer uses the funds by redeeming the prepaid card to pay for goods or services.

II. MONEY TRANSMITTER ACT

A. _____ is engaging in money transmission by issuing stored value to be redeemed for money or monetary value.

A person may not engage in the business of money transmission in California unless he or she is licensed or exempt from licensure under the MTA.² Money transmission includes selling or issuing stored value.³

Stored value is monetary value stored on an electronic medium that is intended and accepted for use as a means of redemption for money or monetary value or payment for goods or services.⁴ The term "stored value" does not apply to transactions where the stored value is only redeemable for goods or services provided by the issuer.⁵ In those instances, known as "closed loop transactions," the money stays with the issuer and is not transferred. In other words, a card issued by a merchant that may be used only with that merchant is not stored value under the MTA.

_____ Packs are a type of electronic media that store monetary value. These Packs are intended and accepted for use as a means of redeeming monetary value in the form of gift cards offered by card issuers. As such, _____ is selling stored value and is therefore engaging in money transmission.

B. _____ is not providing any goods or services.

As stated above, the MTA's definition of stored value excludes closed loop transactions. You argue that the _____ Service is a closed loop transaction. This argument is based

¹ _____'s card issuers include American Express, PayPal, netSpend, and readyCARD.

² Fin. Code, § 2030, subd. (a).

³ Fin. Code, § 2003, subd. (q).

⁴ Fin. Code, § 2003, subd. (x).

⁵ *Id.*

on the premise that customers are paying for a service, which is the transfer of funds from a _____ Pack to a specific prepaid card. We disagree.

Redeeming monetary value or transferring money is not a service as that term is used in the definition of stored value. _____ is not selling a service within the definition of stored value. Under your argument, all money transmitters would be paradoxically exempt from the definition of “stored value” because the customer is paying for the transfer of money. Instead, “payment for goods or services” refers to goods or services *other than* money transfer.

Additionally, the _____ Service is not a closed loop transaction because the customers’ funds are ultimately being redeemed as payments for goods and services sold by third-party merchants. Thus, the monetary value from the _____ Pack is transferred to entities other than _____. Accordingly, the _____ Service does not qualify for the closed loop transaction exception from the MTA’s definition of stored value.

C. _____ is not the agent of the card issuers and is therefore not eligible for an exemption based on an agency relationship.

Financial Code section 2030, subdivision (a) provides that an agent of a licensed money transmitter, or of a person exempt from licensure, does not need a money transmitter license.⁶ Based on this, you argue that _____ does not need a license because it is acting as an agent of the card issuers, who are all either licensed money transmitters or FDIC-insured banks. We disagree.

i. _____ is not the agent of a money transmitter licensee.

You argue that the MTA does not apply to _____ because it acts as an agent of licensed money transmitters. Financial Code section 2003, subdivision (b) states that an agent is a person: (1) who is not licensed as a money transmitter in California, and (2) provides money transmission in California on behalf of a money transmitter licensee, provided that the licensee becomes liable for the money transmission when money is received by the agent. The first element in the definition of an agent of a money transmitter licensee is that the agent is not licensed as a money transmitter in California. Here, _____ is a licensed money transmitter. As such, it cannot be the agent of a money transmitter licensee.

ii. _____ is not the agent of a person exempt from the MTA.

You also argue that the MTA does not apply to _____ because it acts as an agent of FDIC-insured banks, which are exempt from the MTA. Although the MTA mentions agent of exempt persons (in Financial Code section 2030), it does not provide a definition for it.

⁶ Fin. Code, § 2030, subd. (a).

Under Civil Code section 2295 and common law, to establish an agency relationship, the principal must express its assent for the agent to act on its behalf.⁷ Additionally, the agent must act or agree to act on the principal's behalf and subject to its control.⁸

Here, there would need to be assent from the principal, which in this case is the card issuer, to the agent, _____, for the agent to act on its behalf. We have reviewed the agreement between _____ and the card issuers and see no evidence of this assent.

Another element that _____ would have to satisfy is that it is acting or agreeing to act subject to the card issuer's control. The agreement shows _____ does not consent to be subject to the card issuer's control. Paragraph 17 on page 17 of the agreement states:

...The Parties are independent. This Agreement does not create or evidence a partnership or joint venture between the Parties, and no Party has any authority hereunder with respect to any of the employees or agent of any other Party.

No provision in the agreement establishes any agency relationship between the card issuer and _____. _____ is not an "agent" of either a licensed or exempt person.

III. CONCLUSION

_____ 's _____ Service is an activity regulated by the MTA because it involves the selling of stored value. When performing this service, _____ is not acting as an agent of a licensed or exempt entity and therefore does not qualify for an exemption from licensure under the MTA for purposes of this service. Accordingly, _____ must report this service as a regulated activity.

Accordingly, please provide the following information to the Department no later than December 30, 2016:

- 1) Total number of sales and dollar volume of sales of the _____ Pack in California for each quarter in the 2015 calendar year and for each of the first three quarters of 2016;
- 2) Outstanding stored value liability in California for the _____ Pack as of the end of each quarter in 2015 and as of the end of each of the first three quarters of 2016;
- 3) Current outstanding stored value liability in California for the _____ Pack;
- 4) Total number of sales and dollar volume of sales of the _____ Pack in the United States for each quarter in the 2015 calendar year and for each of the first three quarters of 2016;

⁷ *France Telecom S.A. v. Marvell Semiconductor Inc.* (N.D. Cal. 2015) 82 F. Supp. 3d 987, 995; see Rest.3d Agency, §1.01; see also Civ. Code, § 2295.

⁸ *Id.*

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- 5) Outstanding stored value liability in the United States for the _____ Pack as of the end of each quarter in 2015 and as of the end of each of the 3 quarters of 2016; and
- 6) Current outstanding stored value liability in the United States for the _____ Pack.

Please send the above information to the attention of: _____ .

If you have any questions, you may call me at _____.

Sincerely,

Jan Lynn Owen
Commissioner of Business Oversight

By

Julie L. Jacob
Counsel

JJ:is

cc: Scott Cameron, Department of Business Oversight, Sacramento
Robert Venchiarutti, Department of Business Oversight, San Francisco