



STATE OF CALIFORNIA

Department of Business Oversight

GOVERNOR **Gavin Newsom** • COMMISSIONER **Manuel P. Alvarez**

IN REPLY REFER TO:
FILE NO:

December 12, 2019

Re: _____ - Opinion Request

Dear _____:

In your letters of December 21, 2018, January 21, 2019, April 30, and July 23, and email and telephonic conversations of January 8, January 9 and October 3, you described various payment services and models of _____ (“____”) and why ____ believes that these models are not subject to the requirements of the Money Transmission Act (“MTA”). You requested confirmation regarding whether these models are subject to the MTA.

Background

Money Transmission Act

Financial Code section 2003, subdivision (q), defines “money transmission” to include receiving money for transmission. Section 2003, subdivision (u), defines “receiving money for transmission” to mean receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means.

Financial Code section 2030 prohibits a person from engaging in the business of money transmission in this state unless the person is licensed or exempt from licensure or is an agent of a person licensed or exempt from licensure.

____’s Payment Services and Models

Bill Payment Service

In your correspondence, you explained that ____ offers a bill payment service for utility service providers, institutions of higher education, and municipalities. ____’s clients’ customers use the service to send payments for taxes, business license and registration fees, court fines, motor vehicle renewals, government fees, municipal supplied utilities, private company supplied utilities, higher education services, consumer loan repayments, and property rentals.¹

¹ Separately in your letter, you also address tax payments to the _____. We address those payments below.

For this service, ____ enters into a written agreement with each biller to accept payments from customers. The contract states:

“[Biller] appoints ____ as its limited agent for the sole purpose of receiving payments on [Biller]’s behalf from [Customers]. [Biller] agrees that: (1) a payment received by ____ from [Customer] constitutes a payment made directly to [Biller] and fully satisfies the [Customer]’s obligation to [Biller] to the extent of the amount of the payment, and (2) [Biller] must fulfill its obligations to [Customer] as if [Biller] had received the payment directly from the [Customer]. Pursuant to this Agreement, ____ is responsible for remitting to [Biller] all payments received from [Customers] on [Biller]’s behalf. [Biller] acknowledges and agree that if ____ does not remit funds received from [Customer] to [Biller] pursuant to this Agreement, [Biller] will have recourse only against ____ and not against [Customer].”

Financial Code section 2010, subdivision (l), exempts from the MTA transactions in which the recipient of the money is an agent of the payee pursuant to a preexisting written contract, and delivery of the money to the agent satisfies the payor’s obligation to the payee. “Payee” means the provider of goods or services, who is owed payment of money from the payor for the goods or services.² “Payor” means the recipient of the goods or services, who owes payment of money to the payee for the goods or services.³

With regards to payments for higher education services, utility payments, and property rentals, these are payments to entities who provided goods or services and are owed payment of money from customers for those goods or services. The above contractual language demonstrates that ____ is an agent of the biller pursuant to a preexisting written contract, and delivery of the money to ____ satisfies the customer’s obligation to the biller. As such, the transactions in which ____ is receiving money for transmission to the biller, and in which ____ is acting as an agent of the biller pursuant to the contractual terms above, are exempt from the MTA pursuant to Financial Code section 2010, subdivision (l).

As you are aware, the Department of Business Oversight (“Department”) intends to propose a regulation concerning the agent-of-payee exemption in the near future. While the Department is in the rulemaking process, we decline to opine on the applicability of the exemption to ____’s proposed payment activity as it relates to the payments of government fees and loan repayments. However, the Department will not view this activity as regulated by the MTA while the rulemaking is pending.

² Fin. Code, § 2010, subd. (l)(2).

³ Fin. Code, § 2010, subd. (l)(3).

Payments

In your correspondence, you explained that another type of payment service that ____ offers is for payments to the ____ (____). You explained that ____ provides an electronic payment processing service that allows taxpayers to make _____ tax payments using debit or credit card. You explained that the customer's payment obligation to the ____ is extinguished once the customer has submitted a payment through ____'s service.

You explained ____'s position that this service should be exempt from the MTA under the agent of payee exemption described above. Financial Code section 2010, subdivision (l) states that the MTA does not apply to "[a] transaction in which the recipient of the money or other monetary value is an *agent of the payee pursuant to a preexisting written contract* and delivery of the money or other monetary value to the agent satisfies the payor's obligation to the payee" (emphasis added). Although the contract between the ____ and ____ states that ____ will provide electronic payment processing service to allow taxpayers to make ____ tax payments, nothing in the preexisting written contract explicitly states that ____ is acting as an agent of the _____. As such, ____ cannot rely on this exemption to state that transactions for the ____ payment service are not subject to the MTA.

Direct Settlement Services

You explained that ____ offers direct settlement in four different transaction models: Biller Direct – Direct Settlement; Consumer Direct – Direct Settlement; Landlord Payment Consolidators – Direct Settlement; and Bill Payment Solution Providers – Direct Settlement. For these direct settlements, you explained that ____ does not have any legal or constructive ownership or control over the funds. Instead, ____ is only sending payment data and/or providing the software and data processing services necessary to effectuate the transaction.

The term "receiving money for transmission" means actually or constructively receiving, taking possession, or holding any money or monetary value for transmission, but does not include only receiving instructions, orders, or directions to transmit money or monetary value.⁴ Because ____ is never receiving funds for the purpose of transmission in these direct settlement models, these transactions are not subject to the Money Transmission Act.

Check Fulfillment

Your correspondence also included an explanation of ____'s check fulfillment service. These services are offered under three models: (1) Disbursement Services, for payments from ____'s clients to their customers (e.g. cash-back rewards, insurance settlements, or return of deposits); (2) _____ service for banks providing customers with ability to make payments to

⁴ Cal. Code Regs., tit. 10, § 80.129.

billers; and (3) LMT Services for other licensed money transmitters who provide bill payment services to their consumers. Under these models, ____ simply provides check printing and mailing services. ____ never has possession, ownership, or control over the funds. Instead, the funds are pulled directly from the payor's account at its financial institution (or from an account maintained by the bank for the benefit of the customer) and then the check is either deposited into the payee's bank account or is cashed.

Similar to the direct settlement services described above, because ____ is never receiving funds for the purpose of transmission in these check fulfillment services, these transactions are not subject to the Money Transmission Act.

Debt Collections

You explained that ____ provides funds transfer services to DFS Services, LLC, the successor company of Discover Card Services, Inc. ("Discover"). Funds are collected by the attorneys of DFS Services, LLC for the collection of debts owed to Discover for credit services provided to consumers. The contract between Discover and ____ explains that Discover appoints ____ as its agent for purposes of processing and receiving payments, and that a customer's payment to ____ will constitute full and final settlement of the amount payment by the customer to Discover. You explained that ____ believes this debt collection service is not subject to the MTA pursuant to the agent of payee exemption.

Again, because the Department intends to propose a regulation concerning the agent-of-payee exemption in the near future, we decline to opine on the applicability of the exemption to ____'s debt collection service. However, the Department will not view this activity as activity regulated by the MTA while the rulemaking is pending.

Advanced Funds or Prefunding Transactions

____ offers services where it advances funds or prefunds transactions to its clients for payments the client expects to receive from its customers.⁵ You explained that ____ calculates and sends ____'s funds to its clients before ____ receives the funds from the customer's credit/debit card or ACH payment. You explained that ____'s position is that this activity is not subject to the MTA because ____, and not the customer, bears the risk of losing its funds.

You explained that this model is analogous to the prefunded service described in the Department's opinion letter dated October 6, 2016. There, the subject entity offered a service whereby it deposits foreign currency into overseas accounts that belong to the entity's client or

⁵ In your letter dated April 30, 2019, you explained that, with the exception of refunds from the ____ to a consumer, if an ____ client (e.g. a biller) instructs ____ to issue a refund, that refund is issued in a similar manner to the transactions that ____ considers as being "prefunded."

a third party (collectively, the “beneficiary”). To do this, the entity created a lockbox account and would be authorized to receive Automated Clearinghouse credit or wire transfer payments from the entity’s clients. The entity would not receive, possess, have access to, or have control over payments to the Lockbox Account unless and until the entity sent an officer’s certificate to the bank at which the lockbox account was kept. That officer’s certificate would verify that the entity’s payment to the designated beneficiary was received. Only at that time would the bank be able to release the client’s payment to the entity’s operating account. There, controls were established to ensure that the beneficiary received its payment before the entity received money from its client.

As discussed above, the term “receiving money for transmission” includes constructively receiving, taking possession, or holding money or monetary value for transmission. Initiating payment from a customer (an ACH or credit/debit card in the examples OPC gives) is considered constructive payment. You provided several different examples that illustrated the timing of when the beneficiary received funds in relation to payment being initiated. In those examples, time lapses from when ____ initiates the payment to when the beneficiary is paid. Therefore, because the beneficiary is not necessarily paid before payment from the customer is initiated, this is not truly prefunding in the sense that there is no risk of loss to the customer. As such, absent another exemption or exception, this activity is subject to the MTA.

Transaction Performed as an Agent of a Bank

In one iteration of its Disbursement Service payment model, ____ acts as an agent of a bank. You explained that the bank will instruct ____ to issue payments from funds provided by the bank to an FBO account. The example contract between a bank and ____ that you provided states that the Bank appoints ____ as “its agent and authorized delegate for the limited purpose of receiving payments and payment instructions from [the bank] and forwarding such payments to [the Bank’s] payees pursuant to the payment instructions.”

Financial Code section 2030, subdivision (a) prohibits a person from transmitting money in California without a license unless the person is exempt from the MTA, or is an agent of a person licensed under or exempt from the MTA. Financial Code section 2010, subdivision (d) exempts from the MTA a commercial bank, the deposits of which are insured by the FDIC.

The contract you provided states that ____ is acting as the bank’s agent for the purpose of receiving payments and forwarding those payments to the bank’s payees. In our telephone conversation of October 3, 2019, you confirmed that these contracts are only entered into with FDIC-insured banks, which are entities exempt from the MTA. As such, ____, as an agent of the bank, is also exempt from the MTA pursuant to Financial Code section 2010, subdivision (d).

December 12, 2019

Page 6

This opinion is based solely on the facts presented in your correspondence and only addresses the specific payment models and services discussed herein. Any changes in the facts or circumstances, as we understand them, could lead to a different conclusion.

You may call me at _____ with any questions.

Sincerely,

Manuel P. Alvarez
Commissioner
Department of Business Oversight

By

Senior Counsel