



STATE OF CALIFORNIA

Department of Financial Protection and Innovation

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

IN REPLY REFER TO:
FILE NO: _____

January 28, 2021

VIA EMAIL ONLY

Re: _____ – Opinion Request

Dear Mr. _____:

Thank you for your letters to the Department of Financial Protection and Innovation dated July 31, 2020 and September 25, 2020 on behalf of California state-licensed money transmitter _____ (“_____”). You request an interpretive opinion regarding the activities of four companies with which _____ has “intermediary” client relationships and the applicability of various exemptions under the Money Transmission Act (“MTA”).

BACKGROUND

A. Intermediary Client Relationship #1:

_____ (“_____”) is a _____ corporation with a principal place of business in _____. _____ provides an online marketplace that allows travel operators to market travel services to travelers, enables travelers to reserve the travel services, and facilitates payment for reserved travel services.

The payment processing services available through _____’s online marketplace are provided by California state-licensed money transmitter _____ (“_____”). Additionally, _____ uses licensee _____’s money transmission services to facilitate cross-border payments to travel operators located outside of the United States. Therefore, when travel operators are located in foreign countries, the flow of funds is:

Traveler (in U.S.) → _____’s account with _____ → _____ → Travel Operator (outside of U.S.)

_____ maintains a contractual relationship with all parties that use its online marketplace. Parties agree to _____'s Terms of Service prior to conducting activity on the online marketplace. The Terms of Service state: "Each Trip Organizer hereby appoints _____ as the Trip Organizer's limited payment collection agent solely for the purpose of accepting the Trip Cost from Travelers. Each Trip Organizer agrees that payment made by a Traveler through _____, shall be considered the same as a payment made directly to the Travel Organizer, and the Travel Organizer will make the Trip available to the Traveler in the agreed-upon manner as if the Trip Organizer has received the Trip Cost."

_____ seeks confirmation that _____ is exempt from licensure under the MTA by Financial Code section 2010, subdivision (l).

B. Intermediary Client Relationship #2:

_____ ("_____") is a _____ corporation with a principal place of business in _____. _____ provides a proprietary software as a service solution that allows employers to make payments of remuneration and supplemental benefits to employees. _____'s software primarily focuses on the delivery of wages and payments related to benefit plans for employees domiciled in the United States to bank accounts maintained in Mexico.

To carry out its payroll processing activity, _____ receives funds from payroll accounts of domestic employers in a U.S. bank account. The funds are then transferred to licensee _____ for conversion of the United States Dollars into Mexican Pesos. _____ then remits the converted Mexican Pesos to _____'s Mexican bank account. Lastly, _____ delivers the funds to the Mexican employee. Therefore, the flow of funds is:

Employer (in U.S.) → _____ (U.S. bank account) → _____ (to exchange U.S. Dollars into Mexican Pesos) → _____ (Mexican bank account) → Employee (in Mexico)

_____ seeks confirmation that _____ is exempt from licensure under the MTA by Financial Code section 2010, subdivision (j).

C. Intermediary Client Relationship #3:

_____ ("_____") is a _____ corporation with a principal place of business in _____. _____ offers an online marketplace that allows people to connect with independent contractors for the performance of various business outsourcing services. Parties are required to agree to _____'s Terms of Services prior to receiving access to the online marketplace. The online marketplace provides people seeking to outsource business activities the ability to search for independent contractors with experience performing such activities.

Similarly, the online marketplace allows independent contractors to seek work from people who have a need to outsource such work.

Parties use the _____ platform to negotiate the terms of outsourcing arrangements. Once an agreement is reached, the independent contractor is responsible for rendering services in accordance with the terms of the agreement. Correspondingly, the person receiving services from the independent contractor must deliver payment for such services in accordance with the terms of the agreement. This is achieved through the online marketplace. _____ collects funds from the recipient of the outsourced services and then uses _____ and other licensed money transmitters to deliver funds to the foreign independent contractor. Therefore, the flow of funds is:

Person receiving services (in U.S.) → _____ → _____ or other licensed money transmitter → Independent Contractor (outside of U.S.)

_____ requires independent contractors and recipients of outsourced services to agree to its Terms of Use prior to making use of the _____ online marketplace. The Terms of Use state: "When a _____ (recipient of outsourced services) authorizes the payment of the _____'s (independent contractor's) Fee for a Milestone or Hourly Fee Contract on the Website, _____ automatically and irrevocably authorizes and instructs _____ to charge _____'s designated Payment Method for the _____ Fees or otherwise credit _____'s _____ in the amount of the _____ Fees."

The Terms of Use also state: "_____ hereby authorizes _____ and its Affiliates to process Payment Methods, to store information concerning Payment Methods to ensure the timely payment of _____ pursuant to Contracts and for the Services, or charge a User's (an independent contractor or recipient of outsourced services) Payment Method for any purpose authorized under these Terms of Use or to otherwise compensate _____ for a User's failure to abide by these Terms of Use."

_____ seeks confirmation that _____ is exempt from licensure under the MTA by Financial Code section 2010, subdivision (l).

D. Intermediary Client Relationship #4:

_____ ("_____") is incorporated, and has a principal place of business, in _____. _____ provides a bundle of services and technologies that allow companies to carry out business relationships with independent contractors. Specifically, _____'s service caters to companies that use independent contractors to sell their goods. Through _____'s service, a company can deliver commissions to its independent contractors for the sale of goods. To carry out this activity, _____ enters into an agreement with both

the company and the independent contractor to act as an escrow agent. The escrow arrangement serves to provide both parties assurance that funds will be delivered in accordance with the commission agreement between them. That is, it provides the company with assurance that funds are not delivered until the independent contractor's actual sale of goods. Likewise, the arrangement provides the independent contractor with assurance that it will be duly compensated by the company for its sale of goods.

As an escrow agent, _____ is responsible for the safekeeping of funds maintained in escrow between the company and the independent contractor. Funds are held in escrow accounts at financial institutions until _____ has received and reviewed documentation that evidences each party's performance of its duties under the commission agreement. Once _____ verifies that both the company and independent contractor have satisfactorily performed their duties, _____ is obligated to deliver the commission to the independent contractor. To deliver the commission to any foreign independent contractor, _____ uses licensee _____ to carry out the conversion of currency and cross-border payment. Therefore, the flow of funds is:

Company (in U.S.) → _____ (as escrow agent) → _____ → Independent Contractor (outside of U.S.)

However, _____ is in the process of altering its business model to become an agent of a U.S. bank. Therefore, the flow of funds will be:

Company (in U.S.) → _____ (as agent of a U.S. bank) → _____ → Independent Contractor (outside of U.S.)

_____ seeks confirmation that _____ is exempt from licensure under the MTA by Financial Code section 2010, subdivision (l).

MONEY TRANSMISSION ACT

The MTA prohibits a person from engaging in the business of money transmission in California, unless the person is licensed or exempt from licensure or is an agent of a person licensed or exempt from licensure.¹ Financial Code section 2003, subdivision (q)(3) defines "money transmission" to include receiving money for transmission. Financial Code 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.

¹ Fin. Code, §2030, subd. (a).

A. Intermediary Client Relationship #1:

_____ receives funds from travelers in its account with state-licensed money transmitter _____ for payment to travel operators. This constitutes receiving money for transmission pursuant to Financial Code section 2003, subdivision (u).

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 for the goods or services provided. "Agent" is defined as one who represents another, called the principal, in dealings with third persons.² "Payee" means the provider of goods or services, who is owed payment of money from the payor for the goods or services.³ "Payee" means the recipient of goods or services, who owes payment of money to the payee for the goods or services.⁴

To use _____'s online marketplace, parties must agree to _____'s Terms of Service. The Terms of Service state that each travel operator appoints _____ as its limited payment collection agent for the purpose of accepting the trip cost from travelers. The Terms of Service also state that payment made by a traveler through _____ shall be considered the same as a payment made directly to the travel operator and the travel operator will make the trip available to the traveler as if the travel operator has received the trip cost. The requirements of Financial Code section 2010, subdivision (l) are satisfied because _____ acts as the agent of the payee pursuant to a preexisting written contract and receipt of payment by _____ satisfies the traveler's (payor's) obligation to the travel operator (payee). Therefore, _____ is exempt from licensure under the MTA. _____'s use of licensed money transmitter _____ to transmit funds to a domestic travel operator, or its use of _____ and licensed money transmitter _____ to transmit funds to a foreign travel operator, does not prevent the exemption from applying.

B. Intermediary Client Relationship #2:

_____ receives money from domestic employers in a U.S. bank account for payment to employees. This constitutes receiving money for transmission pursuant to Financial Code section 2003, subdivision (u).

Financial Code section 2010, subdivision (j) exempts from the MTA a person that delivers wages or salaries on behalf of employers to employees or facilitates the payment of payroll taxes to state and federal agencies, makes payments relating to employee benefit plans, makes

² Fin. Code, § 2010, subd. (l)(1) and Civ. Code, § 2295.

³ Fin. Code, § 2010, subd. (l)(2).

⁴ Fin. Code, § 2010, subd. (l)(3).

distribution of other authorized deductions from employees' wages or salaries, or transmits other funds on behalf of an employer in connection with transactions related to employees.⁵

_____ facilitates the payment of wages and supplemental benefits to employees domiciled in the United States with bank accounts maintained in Mexico. To carry out the payroll processing activity, _____ receives funds from payroll accounts of domestic employers and transfers the funds to employee bank accounts in Mexico. This activity is exempt under Financial Code section 2010, subdivision (j) because _____ is delivering wages on behalf of employers to employees and making payments relating to employee benefit plans. _____'s use of licensed money transmitter _____ to convert U.S. Dollars into Mexican Pesos and transmit the funds from _____'s U.S. bank account to _____'s Mexican bank account does not prevent the exemption from applying.

C. Intermediary Client Relationship #3:

_____ collects funds from recipients of outsourced services for delivery to independent contractors. This constitutes receiving money for transmission pursuant to Financial Code section 2003, subdivision (u).

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 for the goods or services provided. "Agent" is defined as one who represents another, called the principal, in dealings with third persons.⁶ "Payee" means the provider of goods or services, who is owed payment of money from the payor for the goods or services.⁷ "Payee" means the recipient of goods or services, who owes payment of money to the payee for the goods or services.⁸

You argue that _____ has met the requirements of the agent of payee exemption because _____ receives funds from recipients of outsourced services (payors) and delivers the funds, using _____ and other licensed money transmitters, to foreign independent contractors (payees) pursuant to a preexisting written contract. You state that under the Terms of Use, _____ receives money on behalf of independent contractors for outsourced services and that _____'s receipt of such money satisfies the payment obligation owed by the recipient of services to the independent contractor. However, the Terms of Use agreement does not contain the language necessary to meet the requirements of the agent of payee exemption. The agreement does not state that an independent contractor appoints _____ as its agent to accept payment from recipients of outsourced services on the independent contractor's behalf.

⁵ Fin. Code, § 2010, subd. (j).

⁶ Fin. Code, § 2010, subd. (l)(1) and Civ. Code, § 2295.

⁷ Fin. Code, § 2010, subd. (l)(2).

⁸ Fin. Code, § 2010, subd. (l)(3).

Nor does the agreement state that payments made by a recipient of outsourced services to _____ satisfy the recipient's obligation to the independent contractor.

Without explicit language in the Terms of Use stating that _____ is the agent of the payee and that delivery of funds to _____ satisfies the payor's obligation to the payee, the requirements of Financial Code section 2010, subdivision (l) are not satisfied.

D. Intermediary Client Relationship #4: _____

The Escrow Law⁹ prohibits a person from engaging in business as an escrow agent in California except by means of a corporation duly organized for that purpose licensed by the Commissioner as an escrow agent.¹⁰ Financial Code section 17004.5 defines an "internet escrow agent" as any person engaged in the business of receiving escrows for deposit or delivery over the internet. With regard to internet escrow companies, "escrow" includes any transaction in which one person, for the purpose of effecting the sale or transfer of personal property or services to another person, delivers money, or its Internet-authorized equivalent, to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter.¹¹

To provide its services, _____ enters into agreements with each company and independent contractor to act as an escrow agent. As an escrow agent, _____ is responsible for the safekeeping of funds maintained in escrow between the company and the independent contractor. Funds are held in escrow accounts at financial institutions until _____ has received and reviewed documentation that evidences each party's performance of its duties under the commission agreement. Once _____ verifies that both the company and independent contractor have satisfactorily performed their duties, _____ delivers the commission to the independent contractor. If the independent contractor is located outside of the U.S., _____ uses licensee _____ to carry out the conversion of currency and cross-border payment. Based on its business activities, _____ appears to be acting as an internet escrow agent rather than engaging in money transmission. Therefore, the agent of payee exemption under the MTA is inapplicable and _____ requires licensure under the Escrow Law unless it is exempt.

Financial Code section 17006, subdivision (a)(1) exempts from the Escrow Law any person doing business under any law of California or the United States relating to banks, trust companies, savings and loan associations, credit unions, or insurance companies. However, it does not

⁹ Fin. Code, § 17000 et seq.

¹⁰ Fin. Code, § 17200.

¹¹ Fin. Code, § 17003, subd. (b).

exempt an agent of a person doing business under the laws relating to banks. Therefore, _____ will not be exempt from the Escrow Law even if it acts as an agent of a bank.

This opinion is based solely on the facts represented in your correspondence. If any of the facts or circumstances change, the Department's opinion may also change.

If you have any questions, please feel free to contact me at _____.

Sincerely,

Manuel P. Alvarez
Commissioner
Department of Financial Protection and Innovation

By

Counsel

cc: Robert Venchiarutti, Department of Financial Protection and Innovation, Money
Transmitter Division