STATE OF CALIFORNIA
Department of Financial Protection and Innovation
GOVERNOR **Gavin Newsom** · COMMISSIONER **Manuel P. Alvarez**

IN REPLY REFER TO:
FILE NO: _____

January 25, 2021

VIA EMAIL

Re: Request for Interpretive Opinion – _____

Dear Ms. _____ :

Thank you for your letter dated October 26, 2020, as supplemented by your letter dated December 14, 2020, requesting an interpretive opinion from the Department of Financial Protection and Innovation[1] ("Department") as to whether your client, _____ ("_____"), must obtain a license under the Money Transmission Act ("MTA").[2]

Background

_____ plans to offer its merchant clients ("Merchants") an online payment processing solution through which the Merchants' customers ("Customers") may use their bank accounts to purchase goods and services ("Pay-in"), including stored value, from Merchants. The Merchants, located within the United States, operate in the following industries: e-commerce, digital goods, financial services, travel, and online gaming/sports betting.

Each Pay-in transaction is initiated by the Customer on the Merchant's website through _____'s widget embedded in the Merchant's online check-out page as a payment option. When a Customer selects the "pay by bank" option, _____ will connect with the Customer's bank to verify the Customer's identity, account ownership, and availability of funds. Once the transaction is approved, _____ will return an authorization code to the Merchant to process the Customer's order. At the same time, _____ will, via ACH, pull money from the Customer's bank account into _____'s account and then transfer funds from its own account to the Merchant's settlement account for the purchase (less _____'s processing fee).

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[1] The Department of Financial Protection and Innovation was previously the Department of Business Oversight.
[2] Fin. Code, § 2000, et seq.

For each Pay-in transaction involving payments by a Customer in exchange for stored value issued and sold by the Merchant, you confirm the Customer's stored value can only be redeemed with the issuing Merchant and not with any other entity. For example, Customers may use credits purchased from and issued by a particular Merchant to access and participate in that Merchant's internet-based Daily Fantasy Sports tournaments, but not with any other Merchant.

Each Pay-in transaction is governed by the Master Services Agreement between _____ and its Merchants, which states:

> [Merchant] represents and warrants that each transaction it submits for processing in connection with this [Merchant] Agreement is solely in payment for [Merchant]'s provision of bona fide goods and/or services to [Merchant]'s customers... [Merchant] hereby designates Third Party Processor, and Third Party Processor hereby agrees to serve, as [Merchant]'s limited agent for the receipt of Customer Payments by (i) originating ACH Entries to debit Receiver's accounts and (ii) electronically crediting [Merchant]'s account…, and to electronically debit such account for returned transactions, errors or other adjustments. The receipt by Third Party Processor of money from Customers hereunder shall be considered payment to [Merchant], extinguishing Customer's payment obligation to [Merchant] (in the principal amount paid by Customer and received by Third Party Processor) as if the Customer had paid the [Merchant] directly, even if the Customer Payment is not received by [Merchant] from Third Party Processor. Third Party Processor, and not the Customer, is solely liable to [Merchant] for Customer Payment funds if Third Party Processor fails to remit any Customer Payment to [Merchant] following its receipt, including by off-set against any obligation of [Merchant] owed to Third Party Processor.

_____ also proposes to process refunds ("Refunds") and, in some cases, payouts of winnings for online gaming/sports betting ("Pay-outs") in the reverse direction from the Merchant's account to the Customer's bank account through _____. If the Merchant has a high daily volume of purchases, funds for the Refunds and Payouts will be netted against purchases. Otherwise, Merchants must maintain a three-day reserve with _____ to fund the Refunds and Payouts.

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 an agent of a person licensed or exempt from licensure.[3] "Money transmission" includes "receiving money for transmission," defined as receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means.[4]

"Money transmission" also includes "selling or issuing stored value."[5] Stored value is "monetary value representing a claim against the issuer… stored on an electronic or digital medium… and… intended and accepted for use as a means of redemption for money or monetary value or payment for goods or services" but does not include "closed loop" transactions, where the stored monetary value is only redeemable for goods or services provided by the issuer or its affiliate.[6]

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. An "agent" is one who represents another, called the principal, in dealings with third persons.[7] A "payee" is the provider of goods or services, who is owed payment of money from the payor for the goods or services.[8] A "payor" is the recipient of goods or services, who owes payment of money to the payee for the goods or services.[9]

Analysis

For each Pay-in transaction, _____'s services constitute "receiving money for transmission" because _____ receives money from the Customers for transfer to the Merchants. However, based on the information provided, _____'s Pay-in activities qualify for the agent-of-payee exemption. For each Pay-in transaction, the Merchant is the Payee, the Customer is the Payor, and _____ is the agent of the Merchant (i.e., agent of the payee). Also, the Master Services Agreement states _____'s receipt of funds from the Customer satisfies the Customer's payment obligation to the Merchant for the goods or services.

The agent-of-payee exemption is generally unavailable for payments for money transmission because the term "goods or services" as used in Financial Code section 2010, subdivision (l)(2) and (3), does not include money transmission. However, the exemption can be applied to transactions involving payments owed for closed loop stored value because the sale or issuance

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[3] Fin. Code, § 2030, subd. (a).
[4] Fin. Code, § 2003, subds. (q)(3) and (u).
[5] Fin. Code, § 2003, subd. (q)(2).
[6] Fin. Code, § 2003, subd. (x).
[7] Fin. Code, § 2010, subd. (l)(1); Civ. Code, § 2295.
[8] Fin. Code, § 2010, subd. (l)(2).
[9] Fin. Code, § 2010, subd. (l)(3).

of closed loop stored value is not money transmission. Here, the Pay-in transactions involving stored value are all closed loop because the Customer's stored value is only redeemable for goods or services provided by the issuing Merchant or its affiliate. Therefore, the exemption applies to the Pay-in transactions.

So long as the agent-of-payee exemption applies to a Pay-in transaction, the exemption also applies to a Refund of the same transaction.

However, the agent-of-payee exemption does not apply to transactions involving Pay-outs of winnings. For each Pay-out transaction, _____'s services constitute "receiving money for transmission" because _____ receives money from the Merchants for transfer to the Customers. The agent-of-payee exemption does not apply to these transactions because the Customer does not provide any goods or services to the Merchant for which payment is owed.

Conclusion

To the extent the Pay-in services facilitate payment for goods and services, the Pay-in services and their associated Refund transactions are exempt from the MTA. With respect to payments processed by _____ and owed by Customers to Merchants for stored value, the exemption only applies to closed loop transactions and would not apply to open loop stored value.

The Pay-out services are not exempt from the MTA.

Please note some of the proposed payments described in your request may involve illegal activities in California, such as sports betting.[10] This opinion applies only to activities that are currently legal in California and does not relieve _____ from its obligation to comply with other applicable state and federal laws. By issuing this opinion, the Department is not taking a position on the legality of Merchants' activities. Also, the Department cannot issue an MTA license to _____ to engage in the transmission of money to facilitate unlawful activity.

This opinion is limited to the facts and circumstances described above. Should any of the facts or circumstances change, the Department's opinion may also change.

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[10] *See* Sen. Const. Amend. No. 6 (2019-2020 Reg. Sess.)

Please contact me at _____ with questions regarding this matter.

Sincerely,

Manuel P. Alvarez
Commissioner
Department of Financial Protection and Innovation

By

_____

Senior Counsel

cc: Robert Venchiarutti, DFPI, Money Transmitter Division