Money Services Business Association
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November 15, 2019

Attn: MSB Model Law
Conference of State Bank Supervisors
1129 20th Street NW, 9th Floor
Washington, D.C. 20036

Submitted via email to:
modelpaymentslaw@csbs.org

Re: Conference of State Bank Supervisors Model Money Services Businesses Law

Dear Mr. Lambert:

The Money Services Business Association ("MSBA") greatly appreciates the opportunity to comment on the Conference of State Bank Supervisors (CSBS) proposal to modernize state regulation of non-banks through a model money services business ("MSB") law (the "Proposed Model Law").

Established in 2015, the MSBA is the largest trade association focused on the non-bank money services industry. Specifically, we represent licensed money transmitters and their agents and/or authorized delegates, payment card issuers, distributors, payment processors, international remittance companies, bill payment companies, mobile payment application providers, payment aggregators, virtual currency exchanges and administrators, money order providers, eWallet providers and other similar money services businesses ("MSBs") and non-MSB payments businesses that are engaged in payments. The MSBA encourages the continued innovation and development in the payments industry while promoting education and communication with federal and state regulators.

MSBA commends the efforts of the CSBS and the state regulators through the Vision 2020 project to drive toward an integrated and uniform state licensing and supervisory system that leverages technology and smart regulatory policy to

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modernize the interaction between industry, regulators, and consumers. MSBA believes that uniformity and consistency of the regulatory landscape is critical to the development of a vibrant money services industry. State regulators and industry participants are developing new regulatory interpretations and structures to apply existing laws and regulations to innovative products and services that are developing in fintech. Uniform standards will ease the regulatory burden on new innovative companies operating or entering the market. Uniform standards would also make supervision more efficient and effective, as well as assist consumers who could be offered consistent consumer experiences.

These comments will focus on three areas addressed in the Proposed Model Law: (1) definitions that subject an activity to licensure and supervision, (2) control and change of control requirements for licensees and (3) financial condition of a licensee. Presently, these are areas that are inconsistent, and often unclear, as drafted and interpreted amongst the state regulators. Lack of clarity and inconsistency leads to delays in the licensure of new companies and the development of products and services, and results in voluminous requests to regulators for clarification. MSBA concurs with the working group that uniformity in these three areas could significantly improve the MSBs' experience in obtaining licensure.

Draft Model Law Framework

The Proposed Model Law is not being considered as a complete replacement for existing state laws, but rather is being proposed as an overlay of existing laws for national companies. MSBA members commend the efforts towards uniformity and encourages CSBS to go further and propose a single set of uniform rules and definitions. The proposed dual model with national and single state companies being subject to different standards raises significant issues regarding how, in practice, the dual standards will work in the course of the licensing and supervisory process. Who will decide whether a regulated entity should follow the national model or single state model? Will it be a question of solely of size, states? Will the regulated entity get to opt into one or the other framework? How will state regulators interpret, examine and supervise on two different standards? Clarity

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with respect to the Proposed Model Law and its impacts is critical to achieving the goal of uniformity. If CSBS adopts a model law that is unclear, or subject to differing guidance by the different state regulators, uniformity is undercut. MSBA suggests that the CSBS adopt a process for uniform interpretive guidance and is happy to help facilitate these efforts and to coordinate the questions with industry.

CSBS states that the Proposed Model Law is based on and overlays the Uniform Money Services Act ("UMSA"). However, further clarification is needed regarding how it would be implemented, and what the impact would be on other provisions in the Uniform Money Services Act, which to date has only been implemented by a handful of states. Specifically, 1) Is the inclusion of the Proposed Model Law into the UMSA an endorsement of the entire UMSA by the working group 2) Is it contemplated that states would need to adopt the entire UMSA or just the provisions included in the Proposed Model Law? 3) Are other provisions of the UMSA being proposed? In particular, MSBA has questions – see below – concerning the potential applicability of UMSA provisions regarding permissible investments.

I. Definitions

MSBA strongly urges the adoption of consistent and uniform definitions for "money transmission," "stored value/prepaid access," "sale of payment instruments" "money" and "virtual currency." Harmonizing the key definitions that drive a licensing determination would be of significant value to the industry. It is quite burdensome and difficult to assess whether a particular product or service would require licensure – the laws and exemptions of each state need to be addressed one by one, and reviewing the statutes or regulations is generally not sufficient because state law is often developed through interpretations and guidance. Achieving uniformity of core definitional terms would enable industry participants to focus on the substantive regulatory requirements and make appropriate submissions for each state demonstrating the safety and soundness of the products they issue, control of their organizations etc., rather than spend time trying to work through a maze of assessing what products or services require

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approval in each state. MSBA supports the uniformity proposed with respect to these core definitions that determine whether a particular activity or product requires licensure. There are some areas in the definitions that we would like to highlight:

Closed-loop Prepaid Card. The proposed definition of closed-loop prepaid access is very restrictive and narrower than other current definitions. Closed-loop prepaid access under the Proposed Model Law requires the card to be "…redeemable *by the issuer* for goods or services." Many prepaid access products are issued by a bank or other service provider and would not be exempt under this definition. Prepaid access products do not present consumer risk. Purchasers can redeem the card as soon as it is issued and are not at risk of a loss no matter whether the issuer of the card is the retailer or another program manager or bank. As such, there is no additional risk to the cardholder if he or she purchases a gift card from a third-party seller rather than directly from the issuer. Accordingly, FinCEN defines Closed loop prepaid access as "access to funds or the value of funds that can be used only for goods or services in transactions involving a defined merchant or location . . ." MSBA proposes that the working group consider adopting the FinCEN definition.

Currency Exchange or Foreign Currency. The proposed definition of "Currency Exchange or Foreign Currency Exchange" includes "advertising, soliciting, or accepting for a fee" currency to exchange for another currency. This is a broad definition that would be useful to clarify. Businesses that offer money transmission services/currency exchange services generally waive fees for businesses depending on whether foreign currency is involved. If there is a forex transaction and no fees are charged, the profit is made off of the spread and therefore would not be classified under the currency exchange definition. Therefore, most transactions involved would be under the realm of money transmission and double regulation would be unnecessary. Some states are requiring this information be separated out for reporting purposes; however, it would be much more manageable to have one consistent standard for money transmission and have everything reported together rather than different rules for the states. Businesses could also avoid having two licenses

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and stop charging fees to avoid having the additional licensing requirements. The level of regulation associated with licensing, state registration, and other regulatory reporting requirements should exempt the transaction from additional levels of scrutiny.

Virtual Currency. With respect to the definition of virtual currency, MSBA submits that the definition is overbroad in that it could cover digital instruments that are not used as a payment instrument. As presented, the definition could encompass digital instruments including tokens created for games, reward programs, and other non-monetary transactions. Accordingly, MSBA submits that the definition should include a limitation that the virtual currency must be capable of being "converted into, or redeemed for, fiat currency or virtual currency."[1] MSBA also suggests that in defining virtual currency subject to licensure the model law should make clear that it is not intended to cover products that are already licensed as payment products, i.e., does not require separate licensure and supervision of the same product.

Exemptions

MSBA welcomes a uniform definition of an agent of the payee ("AOTP"), which includes payment processors. This exemption is of particular importance to our members. They have a direct interest in the AOTP exemption because it impacts their licensing and business model operational decisions. The AOTP exemption is widely recognized in statutes, regulations or published guidance in at least twenty-

[1] See also, 23 CRR-NY 200.2 Definition of Virtual Currency that includes exclusions for virtual assets that are not used for payment purposes including gaming and reward tokens.

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one (21) states[2] and under federal Bank Secrecy Act[3] regulations[4] ("Federal Regulations") and guidance therein published by the Financial Crimes Enforcement Network ("FinCEN").[5] The AOTP exemption is supported by the common law of agency.

The Proposed Model Law appropriately focuses on the legal relationship between the agent and the payee and any risk of loss to the consumer. Thus, the Proposed Model Law includes requirements that are consistent with states that recognize the exemption, including requiring that the agent can demonstrate that: a) there exists a written agreement between the payee and the agent directing the agent to collect and process payments on the payee's behalf; b) the payee holds the agent out to the public as accepting payments on the payee's behalf; and c) payment is treated as received by the payee upon receipt by the agent so that there is no risk of loss to the individual initiating the transaction if the agent fails to remit the funds to the payee. These requirements are already familiar to state regulators and should be supportable.

MSBA respectfully asks CSBS to reconsider the omission of the exemptions for business-to-business activities and payment of business taxes from the recognized exemptions. Business-to-business activities are not consumer facing and do not

[2] Arkansas; No Action No. 17-NA-004, California; Cal. Fin. Code §2010(l), Connecticut; Memorandum No Action Position on Money Transmission License Requirements for Persons Acting as an Agent of the Payee October 24, 2017, Hawaii; Department of Commerce and Consumer Affairs, Financial Institutions General Money Transmitter FAQs, Idaho; Department of Finance Licensing No Action Letter March 25, 2016, Illinois; Illinois Department of Financial and Professional Regulation Press Release July 29, 2015, Kansas; Guidance Document MT 2016-01, Kentucky; KRS §286.11-007, Michigan; Senate Bill 729 effective March 28, 2019, Montana; no licensing regime, Nebraska; Neb. Rev. Stat. §8-2716, Nevada; NRS 671.040, New York; NY Banking L §641(1), North Carolina; N.C. Gen. Stat. § 53-208.44(a)(8), North Dakota; N.D. Cent. Code §13-09-02 (13), Ohio; Ohio Rev. Code §1315.02(7), Pennsylvania; 7 P.a. Cons. Stat. §6103(4), Texas; Texas Department of Banking Opinion No. 14-01, Virginia; 10VAC5-120-10 and Washington; RCW 19.230.020(9)(c), RCA 208-690-018.

[3] 31 U.S.C. 5311-5314e.

[4] 31 CFR Chapter X.

[5] FinCEN Ruling 2003-8 - Definition of Money Transmitter (Merchant Payment Processor); FinCEN Ruling 2012-R004 - Application of Money Services Business Regulations to Daily Money Management Services; FinCEN Ruling 2009-R004 Determination of Money Services Business Status and Obligations Under the Funds Transfer Recordkeeping Rule, and Request for Regulatory Relief; FinCEN Ruling FIN-2014-R009, August 27, 2014, Application of Money Services Business Regulations to a Company Acting as an Independent Sales Organization and Payment, that also cites earlier guidance on related topics.

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carry consumer risk. A client transmitting from one business to another in either a domestic or foreign jurisdiction with reasonable levels of transparency is significantly safer and already more regulated than a business to consumer, consumer to consumer or consumer to business transaction. While MSBA supports a broad business to business exemption on these grounds, if that broad exemption is not adopted, MSBA requests *at least* consideration of a business to business exemption for *at least* some money transmission products. The current money transmission definition broadly covers currency exchange and requiring businesses to obtain multiple licenses would be unduly burdensome and unfair considering the volume and transactions are already covered under current regulation. With respect to prepaid and prefunded services, MSBA supports the possibility of an exemption for business to business transactions given the lack of any consumer risk.

II. Change of Control

The administrative burden involved in state regulatory approval of a change of control is extraordinary. Adding a person to the board, or accepting a new investor, can create significant complex approval processes that vary state-to-state. Developing consistent definitional standards for when a particular event constitutes a change of control would ease this burden. Adopting consistent practices to implement change of control applications would also ease the burden.

The Proposed Model Law proposes consistent definitional standards, proposing standardized definitions for what constitutes a "control person" and the triggers that constitute a change in control. For a "control person," the Draft Model Law proposes a threshold of 10% ownership of a class of voting securities and creates a standardized exemption for a "passive investor" that meets certain thresholds, including entering a standardized passivity attestation. These efforts to create uniformity are commended. However, the Proposed Model Law does not adopt a consistent change in control process for the states, and therefore does not address the significant burden that exists in following different processes and checklists for to achieve multi-state regulatory approval for a change of control.

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The development of NMLS has been a significant improvement, allowing the industry to make collective submissions to its varied state regulators. The inclusion of call reports into NMLS was an improvement and MSBA encourages further coordinated submissions and processes. We suggest that further improvements to the process could be made by bringing the states and business together to strategically discuss and collaborate on improving the submissions processes and reduce the work and burden on both sides. In the change of control area in particular, the use of NMLS is challenging both in substance of the information required, and the timing. Often, companies do not know that there will be a new control person, or other change of control event will occur, 60 days prior to the event. Further collaboration regarding the change of control processes could be useful for both industry and the state regulators.

The proposal for a uniform attestation for passivity would be a significant improvement, both by creating consistency and a clear standard in an area that has been prone to unclear and inconsistent application of existing state rules. With respect to the attestation, MSBA would seek further clarification on the words "employed by" and "managerial duties," which are potentially subject to, and have previously been, interpreted differently by the various states. Are these terms meant to be limited to the licensee, or employment and management positions within the licensee's parent company or corporate family? How will states address indirect managers, employees and control officers who may have some responsibilities with the licensee, or perhaps solely are responsible for the management of the parent company? To achieve the desired consistency, clarity of precisely who will be covered is critical as this has been an area of significant complexity when navigating existing state laws.

III. Financial Condition

The Proposed Model Law proposes two approaches to the calculation of financial condition – the traditional three prong stool and the suspension bridge.

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Three-Legged Stool

The Proposed Model Law suggests consistent standards for the current financial condition components – net worth, surety bonds and financial condition. By adopting consistent standards for these important measures of a company's financial condition, states will ease the regulatory burden of having to calculate net worth, permissible investments and other measures of financial condition differently for different states and therefore reduce the burden, and chance or errors or omissions, involved in undertaking multiple complex financial calculations. In particular, the standardization of the permissible investment rules, and haircuts required for different asset types, is very helpful. Firms operating on a national basis will benefit from the structure of having uniform capitalization and bonding requirements. The uniform requirements also, however, provide discretion to the state regulators to increase the net worth requirements. Additional clarity on the factors that would lead to increased net worth requirements would be helpful to ensure that uniformity is created for a national MSB.

The Proposed Model law working group indicated that it was seeking more clarity for funds held at foreign banks, without a haircut. MSBA submits that cash held in foreign banks should be a permissible investment. If a foreign bank has been approved by a state to have a branch or otherwise do business in the US, a money transmitter should be able to use 100% of the balances as permissible investments. To be able to deliver desirable and accurate value dates with cross-border payments, funds need to be moved internationally unencumbered. Restrictions that currently exist in some states, for example requiring funds to be held in an FDIC insured bank, cause a considerable financial and operational burden, and are not an accurate indicator of financial stability. Foreign institutions that may not be FDIC insured in the US, but are significant institutions that meet international capitalization and stability standards and have been approved to do business in the U.S. hold assets that are prudentially safe and regulated, and money transmitters should be able to hold funds at such foreign banks that without a permissible investment haircut.

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Overall, the strive for consistency with respect to permissible investment is ideal, and uniform standards to calculate permissible investments would be of significant value to money transmitters who are challenged by calculating capitalization differently for different regulators. Large money transmitters outstanding payment obligations fluctuate daily and staying in compliance will be difficult with the large haircuts being proposed, including the 30% haircut on corporate bonds. Overall, investment grade paper is a relatively safe investment and a 30% haircut on it is too conservative. In addition, MSBA suggests that the working group reconsider the definition of these instruments, using the terminology investment grade, rather than AAA-A investments, which is vague and could result in differing interpretations. MSBA also suggests that the guidance address split rating situations, where two different rating agencies give a bond two different ratings by requiring the investment to be graded investment grade by all rating agencies that have rated it. MSBA further seeks clarification as to whether by incorporating the definitions into the UMSA, the working group is proposing to adopt the additional limitations on permissible investments that are contained therein, several of which would raise concerns.[6]

The Suspension Bridge

The proposal to eliminate the existing three-prong structure and replace it with a newly proposed "Suspension Bridge" would create more flexible alternatives for national companies. This requirement develops more stringent financial requirements with a greater focus on liquidity.

MSBA members are more familiar with the three-legged stool approach and have developed systems and procedures to manage. MSBA is uncertain as to the impact of the alternative Suspension Bridge Model and would like the opportunity for companies to select an option that affords it flexibility to demonstrate its financial stability to regulators.

[6] The UMSA has references to the duration of investment instruments that are not indicative of the safety of the security. In addition, the UMSA includes other permissible investments, e.g. "debenture of a person whose equity shares are traded on a national securities exchange," that could be considered risky to include.

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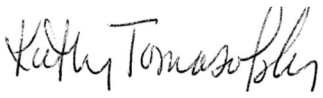
Conclusion

In sum, the MSBA supports CSBS' continued efforts to develop uniform standards for MSBs and respectfully submits the foregoing comments as possible improvements thereon. MSBA would be interested in collaborating with the CSBS on future steps and would be interested to learn about CSBS's intended next steps with respect to the development of a plan for outreach to the state regulators. The MSBA is grateful to have the opportunity to comment on the applicability of the exemption.

We would be pleased to meet with you and discuss our comments and recommendations.

Sincerely,



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