

April 12, 2019

Attn: Emerging Payments Task Force
Conference of State Bank Supervisors
1129 20th Street NW, 9th Floor
Washington, D.C. 20036

**RE: First Data's Comments in Response to the Conference of State Bank Supervisors'
Request for Information on a State Model Payments Law**

Dear Members of the Emerging Payments Task Force:

On behalf of First Data, I appreciate the opportunity to comment on the Request for Information issued by the Conference of State Bank Supervisors (CSBS) on efforts to create a model payments law to be promulgated among the 50-state capitals. First Data applauds the CSBS for acknowledging the challenges that inconsistent application of money transmission laws by state legislators and regulators has upon the financial services sector writ large. Moreover, we appreciate the time that the CSBS has invested to convene an industry working group, the FinTech Advisory Panel, to provide serious and thoughtful input about the best path forward. First Data participated on that working group and is supportive of the recommendations that the Payments Subgroup of the FinTech Advisory Panel submitted on this issue. However, there are two particular areas within the RFI, pertaining to the definition of money transmission and the supervision process, that are significant enough to First Data that we wanted to submit a separate comment letter in order to detail our perspective.

As background, First Data is a global provider of technology solutions and services to merchants and financial institutions with clients in 118 countries. With our services, First Data enables 6 million merchants to accept electronic payments such as credit, debit, and prepaid cards, processing 2,800 transactions per second and handling \$2.2 trillion in payments annually. We also perform a number of back-office services for over 4,000 financial institutions of all sizes and own the STAR debit network.

As a transaction processor for financial institutions and merchants, First Data is seeing the marketplace change significantly with the introduction of financial technology intermediaries and alternative payment networks. We acknowledge that state money transmission laws play an important role in regulating these intermediaries by providing for consumer protection and overall systemic soundness. However, we are finding that legacy money transmission laws across the country as well as varying interpretations of these laws by state legislators and regulators are increasingly acting as an unintended barrier to commerce, especially to the growth of startup FinTech companies that could otherwise provide innovative products and services to consumers. Therefore, the CSBS's efforts to harmonize varying approaches into a more uniform, model money transmission law are both welcome and necessary.

Definitions of Money Transmission - Exemptions

As referenced at the outset of this letter, First Data fully supports the recommendations of the Payments Subgroup of the FinTech Industry Advisory Panel. In particular, the Payments Subgroup has recommended that CSBS incorporate various exemptions into the definition of money transmission. **The list of exemptions is comprehensive, but should CSBS be unwilling or unable to incorporate the entire list of exemptions into the definition, we would strongly encourage the CSBS to incorporate three particular exemptions, at a minimum: one for Agent of the Payee, one for payment processors, and one for business-to-business transactions.**

Agent of the Payee Exemption

Many states have recognized that once a payment is received by an authorized agent acting on behalf of a payee, the payment is complete to the same extent as if the funds had been received by the payee directly (“Agent of the Payee”). The cornerstone of the Agent of the Payee exemption is founded in common law, which, in most states, is a well-established legal doctrine known as “agency theory.”

Under common law, the purpose of agency theory is to enable a principal to conduct business through the use of an agent who will act on behalf of the principal such that the actions of the agent are the same as the actions of the principal. Furthermore, the Restatement (Third) of Agency (2006)¹ defines agency as the “fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”

The legal doctrine of agency theory applies in virtually every facet of commerce and is being applied, albeit inconsistently, in several states with respect to the application of money transmission regulations. First Data understands that the primary concern of state regulators is the protection of consumers and the assurance that a consumer who uses a money services business to remit consumer funds will have essentially no risk that his/her funds will be subject to theft or illiquidity of the transmitter.

The use of the Agent of the Payee model removes the consumer risk *entirely*.

Payments made to a proper Agent of the Payee are considered payment to the payee, and even if the agent fails to remit the payment to the payee, the consumer’s obligation to pay the payee is extinguished. Accordingly, when there is no significant risk to the consumer, there is no need for money transmission regulation on a product or service that fits within a proper Agent of the Payee model.

While many states have adopted an Agent of the Payee exemption, we are increasingly seeing states veer away from Agent of the Payee models. We believe that the regulation of Agent of

¹ REST 3d AGEN § 1.01

the Payee payment models under money transmission law is an improper allocation of resources for both the industry and the regulators. Thus, we ask that a consistent and uniform Agent of the Payee model be employed across the country to codify a consistent interpretation of the requirements of the Agent of the Payee relationship.

The agency doctrine requires consent on both the agent and the payee to establish a lawful appointment and delegation of the right and authority to act on the payee's behalf within the bounds of the agreement. To that end, we support the Agent of the Payee model being subject to stipulations, such as (i) requiring a written agreement between the agent and the payee evidencing the capacity in which the agent is entitled to act on behalf of the payee, and (ii) that the collection and receipt of funds by the payee unequivocally satisfies and extinguishes the payment obligation of the consumer.

As state policymakers continue to scrutinize the payments industry in reaction to new payment models and technological developments, we think it is critical that CSBS clearly push for this type of exemption to the money transmitter definition while encouraging a shift in focus to place greater attention on money services activities that present *material* risk to consumers (such as where the money services entity receiving funds is not acting as an Agent of the Payee, but is acting on its own behalf).

A consistent Agent of the Payee exemption across the states will provide certainty to the money services industry and will align with existing common law principles. The result will be a category of money transmission activities that do not warrant such prescriptive oversight, reporting, or disclosures being properly removed from the scope of money transmission regulation. In turn, this will allow the industry and regulators to focus on meaningful regulation to protect consumers and the financial money services system of each state.

Payment Processor Exemption

In 2003, the Financial Crimes Enforcement Network (FinCEN) issued Ruling 2003-8 which laid out particular circumstances in which a payment processor would not be considered a Money Transmitter Money Services Business. Specifically, FinCEN wrote in the ruling that where a particular company acts on behalf of merchants receiving payments rather than on behalf of customers making payments, this is payment processing/settlement rather than money transmission.²

Additionally, several states have adopted a payment processor exemption that exempts from money transmission an entity that provides processing, clearing, or settlement services in connection with established electronic fund transfer networks such as wire transfers, credit card transactions, and debit card transactions.

² https://www.fincen.gov/sites/default/files/administrative_ruling/fincenruling2003-8.pdf

Further, the Uniform Money Services Act promulgated by the National Conference of Commissioners of Uniform State Laws adopted similar exemptions from the purview of money transmission licensing under Section 103 of the Act.³ The Act exempts an entity to the extent the entity provides payment processing services “between or among” federally and state chartered financial institutions. The Act provides color with respect to the rationale behind the exemptions stating “[m]any of the new exclusions apply to organizations that provide clearing and settlement services (which do involve the transmission of money). Clearing and settlement often involves the transfer of funds from one participating financial institution's bank account to another . . . The clearing and settlement organizations listed in the exemptions are already subject to supervision by other federal or state regulators.”

The activity of payment processing is a critical function of the financial services systems in the country. Processors are the backbone of multiple payment rails, which are regulated and only admit chartered banks. For example, ACH payments, card based payments, and wires solely operate through admitted banks that carry the ultimate burden of ensuring the settlement of funds.

Banks contract with payment processors to leverage technology and innovation to ensure electronic fund transfers can efficiently clear and settle in large amounts every day. A bank member of the Visa network, for example, must be either an acquiring merchant bank or an issuer of an access device (e.g., credit card). Both banks have obligations under the Visa rules to accept authorization requests and clear and settle payment transactions. Acquiring banks utilize the services of payment processors to assist in the movement of money, but the acquiring banks remain liable to the merchant, Visa, and the issuing bank for settlement.

To the extent a payment processor received settlement within this payment system and failed to remit payment, the acquiring bank is ultimately responsible for the settlement of funds despite the payment processor’s failure. Thus, payment processors that merely process monies between regulated banks do not infuse or otherwise create a new risk to consumers. The settlement of consumer funds could not be any more secure; the regulated bank remains liable for the settlement and transmission of said funds. In this context, to the extent a payment processor touches funds, it does so as part of an overall electronic fund transfer and does not *hold* funds for any meaningful period of time. The payment processors are simply a conduit of the bank that engaged the processor for its services, and the actions are tantamount to the actions of the bank. It is under this lens that we ask the CSBS to review an expanded exemption for payment processing, provided the exemption is curtailed to processors that process payments in a clearing and settlement system that only admits regulated banking institutions.

Despite the application of payment processing models by FinCEN under the Federal Money Services Business regime and the Uniform Money Services Act (providing for the exemption of certain payment processing activity that involves the receipt and transmission of funds in

³ See § 103(8)-(9).

connection with a clearing and settlement system that only admits prudentially regulated financial institutions), some state policymakers have indicated a desire to subject payment processors to their respective states' money transmission statutory requirements. Thus, we feel that inclusion of a clear payment processing exemption in CSBS's model law will send a strong message to the states not to venture down that path, while also upholding the spirit of the payment processing rulings and guidance from FinCEN and the National Conference of Commissioners of Uniform State Laws.

Business to Business Activities Exemption

Numerous states define money transmission as engaging in the business of receiving money or monetary value for transmission *primarily for personal, family, or household purposes*. Business-to-business ("B2B") money transmission activity in such states is not a regulated activity, and we support a model approach for a similar commercial-centric exemption.

Exempting B2B activity is aligned with the CSBS's goal of protecting consumers. In a purely B2B payment stream, an entity's receipt and transmission of funds should be left unregulated under the auspices of state money transmission, as there is no material risk of consumer harm. Businesses engaging a money services provider to transmit payment on their behalf are competent, commercial-minded organizations that are capable of understanding risk. The underlying concerns of safety and soundness for the resident consumers of a state are not applicable. While many states informally have adopted a policy supporting this position, we believe an explicit exemption across the country would provide much needed clarity.

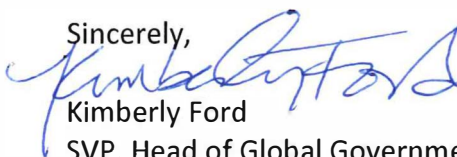
Improvements to State Supervision

As a licensed money transmitter in jurisdictions across the country, First Data's IPS business has been subject to annual supervisory examinations for many years and has witnessed firsthand some of the inefficiencies that exist within this process. **As such, we agree with the four areas that the FinTech Advisory Panel identified for improvement within the supervision process: the number of annual exams to which large companies are subject; the significant variation in information requested; the repetitive information requests; and the duplication of information produced for other states.**

We believe that CSBS should promulgate a model law that adopts a centralized supervision and examination process, resulting in one standard audit that is conducted each year and comprehensive sharing of the examination results among the state supervisors.

Thank you again for your leadership in constructing a model state law, and we appreciate your consideration of our comments. Please do not hesitate to contact me with any questions.

Sincerely,



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