April 12th, 2019

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

Via: modelpaymentslaw@csbs.org

Members of the Task Force:

Thank you for undertaking the development of a model payments law and the opportunity to comment on this endeavor.[1] Financial Innovation Now ("FIN") is an alliance of leading innovators promoting policies that empower technology to make financial services more accessible, safe and affordable for everyone.[2]

FIN strongly commends the Conference of State Bank Supervisors (CSBS) and state regulators for their efforts to modernize and harmonize the regulation of money transmission.

I. SUMMARY OF COMMENTS

Non-bank financial services providers are offering new and innovative products and services, which are of particular benefit to consumers and small businesses that do not have convenient, efficient, and affordable access on a regular basis to services provided by traditional banking organizations.

Nevertheless, the development of these novel products and services is impeded by the differing requirements under individual U.S. state money transmission laws. State requirements for licensure and for operating as a licensee, such as financial condition and financial safeguards requirements, are inconsistent, as are the examination and oversight of activities of licensees conducted by state regulators. As a result, the supervision of the industry and the protections afforded to consumers currently varies significantly.

States have recognized the problem and have attempted to provide a more efficient system, starting fifteen years ago with the creation of a model law and, recently, wider use of a multistate administrative licensing system. Uniformity of laws has not been achieved and the multistate licensing system has not been able to overcome the differences in state laws that lead to differing state regulation.

FIN thanks CSBS for launching Vision 2020 and inviting industry to participate in an advisory role to modernize state regulation of non-banks, particularly the recognition that supervision should be more efficient via standards across state lines. FIN agrees that such a system will better support innovation, promote access to new services, and protect consumers and the financial system. FIN urges CSBS to continue this important work and its commitment to fostering innovation while protecting consumers from

[1] CSBS, *State Model Payments Law; Request for Information* (February 2019), https://www.csbs.org/sites/default/files/2019-02/RFI%20for%20Model%20State%20Payments%20Law.pdf

[2] Our member companies include Amazon, Apple, Google, Intuit, PayPal, Square, and Stripe. For more information regarding FIN's policy priorities and principles, please visit https://financialinnovationnow.org

predatory products and services. FIN also encourages CSBS to work with the U.S. Congress on a federal mechanism that will ensure all states adopt and implement the model payments law uniformly, including through an optional federal licensing alternative.

II. NON-BANK FINANCIAL SERVICES PROVIDERS DELIVER CRITICAL AND INNOVATIVE PAYMENT METHODS

A. Non-Bank Financial Services Innovators

The evolution of mobile Internet access is dramatically changing the way consumers and businesses can make payments. Whether it is payments via text message, digital wallets, or voice-enabled commerce, technology companies are extending their innovations in hardware and software to make payments more convenient, faster, and more secure. In addition, entirely new payment technologies and business models have grown to address the needs of consumers and small businesses that are underserved by traditional banking organizations.

With technology and the Internet changing the way financial services are provided and consumed, non-bank financial services innovators are poised to provide enormous benefits to consumers of financial services. Non-banks have always played a significant role in the financial services realm, both as service providers to banking organizations and as direct providers of financial services to all consumers, whether banked, unbanked or underbanked.[3] In addition, the evolutionary trend toward the electronification of financial services and the emergence of electronic commerce in new forms, including mobile and voice-activated e-commerce, are creating new opportunities for payment services, facilitating access to such services and lowering costs at the same time. As innovators, non-bank providers of financial services are driving new financial products and services that empower individuals and businesses to reach financial goals and are creating jobs across the country.

The importance of non-bank disintermediation in the provision of financial services cannot be underestimated. For example, the Federal Deposit Insurance Corporation ("FDIC") found that in 2017 "underbanked" populations continued to have more access to smartphone mobile devices than the general population.[4] The FDIC also found that these underbanked groups were more likely to manage and move their money using a mobile device. Responding to this need, non-bank financial services companies have created a wide range of mobile apps that allow users to manage and transfer funds through their mobile devices. By making financial services more available to underserved populations, these payments innovators have increased access to financial services by the unbanked and the underbanked. Those services can be delivered more conveniently, more economically, and marketed at lower cost than paper-based and electronic services delivered through brick and mortar facilities.

Moreover, the products and services offered by providers of non-bank financial services create jobs and promote economic growth. For example, non-bank financial services companies contribute enormously to the e-commerce sector by providing mobile payments technologies that appeal to both underbanked and

[3] As characterized by the Federal Deposit Insurance Corporation ("FDIC"), unbanked households are those that do not have a checking or savings account. Underbanked households have an account but also obtain certain specific financial services, such as money orders, check cashing, or international remittances, from non-bank alternative financial services providers. The FDIC uses the term "underserved" to describe both the unbanked and underbanked. The FDIC estimated that in 2017 8.4 million U.S. households were unbanked and that another 24.2 million were underbanked. *See* FDIC, *2017 FDIC National Survey of Unbanked and Underbanked Households*, at 1 (Oct. 2018), https://www.fdic.gov/householdsurvey/2017/2017report.pdf.

[4] *See id.* at 28.

traditionally served populations.[5] According to U.S. Census data, e-commerce sales increased more than 14% in 2018 from 2017, and accounted for 11.2 percent of total retail sales in the fourth quarter of 2018.[6]

Nevertheless, despite the beneficial impact of non-bank financial services providers, these innovators are often significantly hampered by the current U.S. regulatory regime governing the provision of non-bank financial services. Of particular concern are state money transmission laws that, in the aggregate, have unnecessarily increased costs to consumers and small businesses, complicated regulatory compliance and enforcement efforts, and reduced consumer and small business access to critical financial services. While state money transmission laws are primarily safety and soundness measures that are intended to protect users of certain non-bank financial services, the current money transmission regulatory regime in the U.S. has struggled to keep pace with advances in technology and the evolving national market for such services. That is, the efficient and effective regulation of money transmission is of central importance in order to provide a safe and sound financial environment and to instill confidence in the users of money transmission services, but such effective and efficient regulation cannot be realized by the current fractured licensing and oversight landscape.

B. Money Transmission and the Regulation of Non-Bank Financial Services Innovators

While it is impossible to synthesize a uniform definition of money transmission across all state jurisdictions, such state laws generally define a money transmitter very broadly and typically include an entity that engages in "receiving money for transmission" or "transmitting money" or issuing or selling stored value.[7] As a result, the handling of funds or the facilitation of payments, either as a core component of a product or service or incidentally as a result of providing some other non-payments-related product or service can be subject to state-by-state regulation as money transmission. These activities could include "sharing economy" services, facilitating bill payments, providing peer-to-peer funds transfer services, managing payroll, issuing stored value, and so on. A partial list of the types of products and services offered by non-bank financial services innovators includes:

- **"Traditional" Money Transmission**. The "traditional" funds transfer service is generally a "cash-in, cash-out" transaction provided to consumers directly at brick-and-mortar retail locations through "authorized agents." In addition to person-to-person transmissions and international remittances, these "walk-up" services may also include the sale of money orders and other payment instruments, and person-to-business transmissions.

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[5] *See, e.g.*, Consumer Financial Protection Bureau, *Mobile financial services: A summary of comments from the public on opportunities, challenges and risks for the underserved*, at 4–5 (Nov. 2015), http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf.

[6] U.S. Dep't of Commerce, *U.S. Census Bureau News: Quarterly Retail E-Commerce Sales 4th Quarter 2018* (Mar. 13, 2019), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

[7] *See, e.g.*, Cal. Fin. Code § 2003(u) (defining "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means"), Cal. Fin. Code § 2003(q)(2) (defining regulated "money transmission" activity to include "selling or issuing stored value"); Colo. Rev. Stat. § 11-110-103(11) (defining "money transmission" to include "engaging in the business of receiving money for transmission or transmitting money within the United States or to locations abroad by any and all means including but not limited to payment instrument, wire, facsimile, or electronic transfer"); Tex. Fin. Code § 151.301(b)(4) (defining "money transmission" to mean "the receipt of money or monetary value by any means in exchange for a promise to make the money or monetary value available at a later time or different location"), Tex. Fin. Code § 151.301(b)(4)(A)(i) (defining regulated "money transmission" activity to include "selling or issuing stored value or payment instruments . . ."); Wash. Rev. Code § 19.230.010(18) (defining "money transmission" as "receiving money or its equivalent value (equivalent value includes virtual currency) to transmit, deliver, or instruct to be delivered the money or its equivalent value to another location, inside or outside the United States, by any means . . .").

- **Online P2P Services**. Online P2P services enable people to pay each other digitally without the need to share bank account information or via digital wallets that contain credit card, debit card or prepaid card information for the parties to the transactions. These types of transactions are generally enabled through the Internet or a mobile application, and funds go "bank to bank," rather than through the traditional authorized agent location model.

- **Stored Value**. Stored value devices are pre-funded and hold monetary value maintained through an electronic record. They can come in many forms, including physical or virtual cards or, as mentioned above, virtual account-based "wallets" that can be used to store funds either for future person-to-person funds transfers, purchase transactions, or transfers to a linked bank account.

- **Bill Payment**. Another common model involves facilitating bill payments (i.e., consumer-to-business transactions), such as for wireless carrier or cable bills, or other utilities. Such services can be provided in a variety of ways, including payment in cash at walk-up locations or debit card or credit card payments through the Internet or a mobile application. In addition, in many cases, the companies that offer these services may have a direct contractual relationship and technical integration with the biller, which can enable payments to be credited in real time or in near real time.

- **Business-to-Business Services**. Many companies also provide business-to-business payments services, including funds transfers and invoicing functionality.

Almost all U.S. states and territories require entities engaging in the business of money transmission, which may include any or all of the above depending on regulators' interpretations of their laws, within their borders to be licensed as a money transmitter in that particular jurisdiction.[8] As a result, unless covered by an explicit statutory exemption, an entity must obtain appropriate state money transmitter licensing in order to "engage in the business of 'money transmission' or [to] advertise, solicit, or hold itself out as a person that engages in the business of money transmission."[9] And, failure to do so could result in the imposition of both civil and criminal penalties at both the state and federal levels.[10]

However, this style of state-by-state regulation and licensing is inconsistent with the rise of the national money transmission industry. The state-by-state regulatory regime as a whole has resulted in the prioritization of varied and competing individual state interests at the cost of an efficient national set of regulations. And, in doing so, has made it more difficult for non-bank financial services providers to bring innovative financial services to consumers and small businesses, including those aimed at helping the financially underserved.

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[8] The only U.S. state that currently does not require a license to engage in money transmission is Montana, which does not have a money transmission licensing law. Massachusetts requires a license to engage in international but not domestic-only funds transfer services (Massachusetts does separately regulate domestic sellers of checks (e.g., money orders)). In addition to the states, the District of Columbia, as well as Puerto Rico, the U.S. Virgin Islands, Guam, and other U.S. territories require a license to engage in the business of money transmission.

[9] *See, e.g.*, Tex. Fin. Code § 151.302(a).

[10] Under state laws, engaging in money transmission without first obtaining a license is generally punishable by civil penalties that may range from $1,000 to $5,000 per violation per day, and some state money transmission statutes provide for criminal penalties for violations (which would include unlicensed activity). *See, e.g.*, 7 Pa. Stat. Ann. § 6116. At the federal level, an entity that fails to register with the Financial Crimes Enforcement Network ("FinCEN") when required to do so could be subject to civil fines and criminal prosecution. *See* 31 U.S.C. § 5330(e); 31 C.F.R. § 1022.380(e) in addition to criminal penalties. FinCEN also can seek injunctive relief for a failure to register. *See* 31 U.S.C. §§ 5320, 5330(a); 31 C.F.R. § 1022.380(e). Furthermore, federal criminal prosecution could occur for engaging in money transmission without any required state licenses, and penalties include fines or imprisonment for at least 5 years for any person who "knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business…." *See* 18 U.S.C. § 1960(a).

III. INCONSISTENT STATE LAWS PREVENT A NATIONAL MONEY TRANSMISSION MARKET FROM BEING REGULATED EFFICIENTLY

A. Inconsistent State Laws Result in Uneven Customer Protections

1. Uneven Vetting of Applications and Supervision Results in Uneven Protection of Money Transmission Customers

Under the current state-by-state money transmission regulatory framework, there is significant variance in what information state authorities require to be provided in licensing applications and, in turn, what is required of a potential money transmitter in order to receive a license. While most states require the same general core components for their separate state money transmitter applications—including entity history information, a business plan, financial statements, and information about the applicant's anti-money laundering program—the depth and breadth of the information, as well as the substantive content required, depends on the state.

States vary in the financial responsibility requirements imposed upon applicants, such as minimum net worth and surety bond amounts. In addition, some states require in-depth financial projections for applicants, as well as significant detail in business plans—such as target markets, strategies for growth, plans for profitability, etc.—and other materials. Furthermore, some states conduct extensive background checks on the officers and directors of an applicant—including requiring detailed biographical and personal financial information, as well as running criminal background checks—while other states do not require such information.

As a result, the level of vetting and supervision of potential and current money transmission licensees will vary significantly depending on the state or states in which the money transmission applicant seeks licensure or is currently licensed. Therefore, the protections afforded customers may vary depending on the state in which the customer is located.

2. Uneven Coverage of Money Transmission Transaction Types

Customers of money transmitters also experience varying degrees of protection—and conversely, varying degrees of oversight—depending on the state or states in which particular products or services are offered. For example, some states exempt payroll processing services, bank-issued stored value products, and business-to-business and/or business-to-consumer funds transfers. Some state statutes appear to cover only activity involving the *receipt* of funds for transmission in the state, while other state statutes appear to apply to any activity involving *transmitting* funds in the state (and not just receipt of funds for transmission).[11]

Of particular significance, in the past four years, roughly two-thirds of U.S. jurisdictions that license money transmitters have explicitly—by statute, regulation, or formal opinion or guidance—affirmed that so-called "payee agent" transactions that meet certain criteria are not subject to regulation as money transmission.[12] It is generally understood that such transactions are facilitated pursuant to a written

[11] *See, e.g.*, N.H. Rev. Stat. Ann. § 399-G:2, I (requiring a license for any person that "acts as a money transmitter while physically located in New Hampshire, or with, to, or *from* persons located in New Hampshire . . ." (emphasis added)); Conn. Gen. Stat. § 36a-597(a) (deeming a person subject to regulation under the money transmission law if the person "transmits money or monetary value from a location in this state or to a person located in this state").

[12] *See, e.g.*, Cal Fin. Code § 2010(*l*) (exempting 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").

agreement with the recipient that appoints the intermediary as its agent to receive funds on behalf of the principal. The receipt of funds by the intermediary is, therefore, deemed by the agreement to constitute the receipt of funds by the principal. Prior to the recent trend of states passing laws or publishing interpretations explicitly exempting the "payee agent" model from money transmission laws, industry participants considered the model universally exempt. Thus, even the laws explicitly exempting certain activities have caused confusion as to applicability of a similar exemption in other states. As a result, financial technology companies face uneven regulation with respect to this type of activity.

Compounding matters, even within the states that have affirmed an explicit exemption, there is significant variance in the criteria for the exemption and the requirements for an exempt entity. These requirements (such as an obligation imposed on the payee to hold the agent out to the public as accepting payments on the payee's behalf) cannot be found in the basic common law agency principles that underlie payee agent interpretations—namely that whoever acts through another (i.e., an agent) does the act himself.[13] As a result, even with states that have deemed these types of transactions to be lower risk and, therefore, not warranting the full array of customer protections under the money transmitters law, there is still variance in the compliance obligations imposed in connection with such transactions.

3. Uneven Customer Protections Regarding the Safety of Funds Held by Money Transmitters

Under the current state-by-state approach, dissimilar safety and soundness protections are in place in various states, meaning that customers—and customers' funds—are protected in a different manner depending on the state in which the customer happens to be located. Commendably, CSBS recognizes this in its Request for Information ("RFI").[14] As the RFI notes, there are three key requirements for licensed money transmitters with respect to the protection of customer funds: (1) maintenance of minimum net worth, as confirmed by audited financial statements; (2) maintenance of surety bonds that run to the benefit of the licensing authority and/or persons affected by the licensee's actions; and (3) holding "permissible investments" (i.e., dollar-for-dollar funds equivalent to funds outstanding for transmission).

There are significant variations in each of these requirements and state regulators can prescribe higher amounts. For example, in some states, minimum net worth requirements may be as low as $10,000 to $25,000, while in other states the minimum net worth requirement is $500,000 or even $600,000. Similarly, in some states, the minimum bond amount is as low as $10,000 to $25,000, while in other states the minimum required bond amount ranges from $500,000 to $1 million. As a result, fundamental safety and soundness protections vary based on the state or states in which an entity happens to be licensed, and the state in which a consumer happens to be located when engaging in a money transmission transaction.

Similarly, state protections with respect to customer funds outstanding diverge significantly. While licensees are generally required to maintain permissible investments in an amount equal to their outstanding obligations, state licensing regimes vary both with regard to what constitutes permissible investments and

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[13] *See, e.g., People v. Treadwell*, 69 Cal. 226, 236 (1886) (an agent acts "not only *for*, but *in the place of*, his principal")*; accord Channel Lumber Co. v. Porter Simon*, 78 Cal. App. 4th 1222, 1227 (2000); Restatement (Third) of Agency § 1.01 (2006) ("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").; *Baldwin v. Polti,* 101 S.W. 543, 544 (Tex. Civ. App. 1907, writ ref'd) ("It is a general rule that the act of an agent is the act of his principal . . ."); *Rhine v. Blake & Jenkins*, 59 Tex. 240 (1883); *Shaw v. First State Bank of Abilene*, 231 S.W. 325, 327 (Tex. Comm'n App. 1921) ("It is well-established rule that the payment of a note or other obligation is complete when money intended for its payment or discharge has reached the hands of an agent authorized to receive it.").

[14] CSBS, *State Model Payments Law; Request for Information,* at 7, (February 2019), https://www.csbs.org/sites/default/files/2019-02/RFI%20for%20Model%20State%20Payments%20Law.pdf

what constitutes outstanding obligations requiring coverage. In some states, for example, licensees may hold as permissible investments receivables due from a bank, certain types of bonds, and commercial paper. In other states, however, the range of permissible investments is more limited. Furthermore, the extent to which certain funds may be counted as permissible investments varies. For example, in some states, receivables due to a licensee from an authorized delegate can only be used to cover a certain percentage of the licensee's obligations, typically between 20% and 40%. In other states, however, the same types of funds do not have any aggregate limitations. As a result, the extent to which customers are protected by permissible investments requirements varies by the state or states in which an entity is regulated. And, in turn, regulated entities must contend with managing the vagaries of these different requirements.

State requirements with respect to the other side of permissible investments—outstanding obligations—also vary. As a result, the extent to which customer funds are protected depends on the state or states in which the entity is licensed and where the customer is located. Some states, for example, require that permissible investments cover outstanding payment instruments and stored value obligations, while other states require that permissible investments cover outstanding money transmission liability as well.[15]

4. Uneven Examination Processes

One of the core components of the supervisory and oversight regime for licensed money transmitters, as for any regulated financial institution, is the examination process. Examinations enable regulators to assess the compliance of their licensees, and to confirm that the entities remain safe and sound.

Under the current state-by-state money transmission framework, the examination approach taken by state authorities is inconsistent and duplicative. Some states, for example, conduct examinations rarely, if at all. Other states conduct examinations regularly, though it is generally understood that large, national licensees are examined with greater frequency than smaller participants in the market. Furthermore, the nature of state examinations themselves varies—some state examinations are more in depth than others, some focus more on financial indicators, others on anti-money laundering, and still others now incorporate information security practices. As a result, the oversight of licensees—and the protections that should be afforded customers by regular and efficient oversight—is inconsistent and burdensome. Indeed, as CSBS recognizes in the RFI, in an effort to alleviate some of the burden, states have begun to coordinate to some degree by participating in multi-state examinations of their joint licensees. Unfortunately, because of the differing examination practices across states, as well as differences in underlying laws within each state, each state that forms part of that multi-state examination still enforces its own regulations and requires of the licensee separate information and documents and issues separate findings. In other words, a multi-state examination has tended to become multiple examinations by multiple states at once.

As a result of these characteristics of examination and oversight, customers are subject to different degrees of oversight protection based on the state in which they happen to be located and the licensed entity that they choose to patronize. Moreover, multiple examinations increase costs and complicate compliance for the regulated financial institutions, and these costs are inevitably passed on to consumers.

B. Multiple Licensing Procedures and Duplicative Examinations Increase Costs of Operations and, Therefore, Costs to Customers

As discussed above, states take varying approaches to the regulation of money transmitters and, in turn, to protecting customers. The state-by-state licensing regime, which results in national money

[15] There are additional variances by state that implicate customer protections, such as different receipting and customer disclosure requirements, differing requirements regarding the timing of delivery of funds received for transmission and for refunds, as well as for fraud protection, and so on.

transmitters being subject to more than 50 individual sets of obligations and numerous examining authorities, imposes significant operational costs on money transmitters.

Money transmitters must bear the cost of obtaining and maintaining licenses in almost every U.S. jurisdiction in which they operate. In addition to direct costs—application and renewal fees, bond premiums, background checks, and so on—licensees also must build and maintain compliance programs simply to manage the day-to-day requirements of having more than 50 sets of regulatory obligations. These costs are necessarily passed on to customers. The inefficient regulation of money transmission, therefore, results in a general cost to consumers and small businesses without a corresponding benefit due to the inflated costs of money transmission services.

C. Uneven Enforcement Delays the Offering of, and Results in Uneven Access to, New Financial Services

1. Uneven Enforcement Makes Payment Innovation More Difficult

Providers of new financial services suffer the consequences of uneven enforcement and are suppressed in their efforts to introduce innovative financial solutions, including those aimed at improving access to financial services. As previously highlighted, the financial services industry is increasingly a national industry. Economies of scale enable the offering of lower-cost services, and broader experience enhances identification of and response to changing customer preferences. Accordingly, in order to optimize new financial services products, financial innovators often must provide for national or near national coverage of their products, but in each state jurisdiction in which an innovator operates it is faced with that state's individual statutes, interpretations, and enforcement personnel. As a result, innovators are often forced to choose between innovating and meeting customer needs, and making the expenditures required to address the ever-growing costs of coordinating their response to duplicative state laws, regulations and enforcement priorities. To do otherwise would present the equally unacceptable risk of enforcement actions in every state where their services could reach.

2. Uneven Access to Financial Services for Underserved Consumers and Small Businesses

Underbanked consumers, unbanked consumers, and small businesses are often underserved by traditional banks. Both consumers and small businesses require financial services that are affordable and convenient. However, individuals and small business owners often find that banks offer insufficient methods through which they can control and access their funds.

Federal agencies acknowledge and support the notion that innovative non-bank financial services can meet the needs of the underserved in areas that traditional banks cannot. The FDIC has found that "mobile banking helps meet consumer needs in areas where traditional banking is perceived to be weak. It improves the convenience of banking services, consumers' control over finances, and in some cases the affordability of banking services."[16] Thus, the FDIC's research demonstrates strong support for continued development of mobile banking services. In 2016, the FDIC published a request for comment on plans to create mobile financial services that would enhance the banking experience of underserved customers.[17] Similarly, the United States Postal Service has suggested that it could "fill the gaps to reach [traditional banks'] efforts to

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[16] FDIC, *Opportunities for Mobile Financial Services to Engage Underserved Consumers*, *supra* note 15, at 1.

[17] *See* FDIC, *Financial Institution Letter FIL-32-2016* (May 3, 2016), https://www.fdic.gov/news/news/financial/2016/fil16032.pdf.

reach the underserved" by offering non-bank services such as reloadable prepaid cards, mobile transactions, and other e-commerce products.[18]

Despite recognition that financial innovation helps to provide financial services to underserved markets, the higher costs and other difficulties posed by inconsistent state licensing and regulation of non-bank payment services ultimately amount to a regressive tax imposed on underserved communities, which would otherwise benefit from access to lower-cost services afforded by new technology-enabled financial services. This regressive tax serves to discourage competition and innovation.

IV. THE HISTORICAL APPROACH TO ADDRESSING THESE ISSUES HAS FOCUSED ON STATE-BY-STATE SUPERVISION

A. States Have Recognized the Need for Consistency in the Internet Era and Have Made Attempts over Three Decades to Bring Uniformity to the State Money Transmission Regulatory System

Money transmitters are regulated by state banking departments (or similar agencies) for safety and soundness and customer protection. The state regulation model was based upon brick-and-mortar retail locations that provided money transmission services directly to consumers and often via agents. These companies often provide person-to-person transmissions, international remittances, money orders, other payment instruments, and person-to-business transmissions. Transmission may be local or may cross state or international borders. This traditional model was a "cash-in, cash-out" transaction. Nevertheless, the commonality among each of these activities was that a money transmitter received funds from one person or entity for the purpose of transmitting those funds to another person or entity.[19]

Beginning in the late 1990s, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") began working on a "uniform" money services law for adoption by U.S. states. In 2000, the Uniform Money Services Act ("UMSA") was released.[20] In prefatory language to the 2004 final UMSA, the drafters of the act noted that "state regulation of money transmission . . . is extremely varied," and that "only a few States have attempted to create statutory frameworks which tie together the various types of MSBs in a manner that assists regulators and attorneys generally in terms of law enforcement and the prevention and detection of money laundering."[21] The drafters also noted that:

> The UMSA provides a unique opportunity for States ***to take a consistent approach to the licensing and regulation*** of stored value and other forms of emerging Internet and electronic payment mechanisms. ***A uniform and consistent approach will provide less of a barrier to competition and growth in these new sectors.*** For the majority of States, this Act will provide a new approach to the treatment of stored value and electronic

[18] Office of the Inspector General, United States Postal Service, *Providing Non-Bank Financial Services for the Underserved* (Jan. 27, 2017), https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-14-007_0.pdf.

[19] While the state regulatory model was originally based on these types of services, it nonetheless relied on a potentially broad definition of regulated activity, i.e., "money received for transmission." To address this potential overbreadth, state statutes have generally contained lists of exclusions (such as for a bank), though the specific exemptions set forth in each state's statute vary.

[20] UNIF. LAW COMM'N, *Legislative Fact Sheet—Money Services Act*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Money%20Services%20Act.

[21] UNIF. MONEY SERV. ACT, Prefatory Note, *supra* note 10, at 1, (2004), http://www.uniformlaws.org/shared/docs/money%20services/umsa_final04.pdf

> currency at the state level. A handful of States have begun to license and regulate such diverse entities as nonbank stored value issuers, Internet bill payment services and Internet money transfer services. Rather than create a varied and complex regulatory system for these emerging payment service providers, the UMSA attempts to provide a simple and consistent set of licensing requirements for these new entities.[22]

In spite of this effort, because the adoption of laws drafted by NCCUSL is left up to the individual states, money transmission licensing laws remain far from uniform. In the last few years alone, for example, there have been numerous changes to state money transmission laws, including new state-specific receipt requirements;[23] changes to net worth calculations[24] and bonding requirements, calculations, and bond forms;[25] and new "payee agency" exemptions.[26] In fact, since its introduction, the UMSA has only been enacted in 10 U.S. states[27] and none of those states have enacted a truly "uniform" version of the UMSA. Indeed, the two states that most recently implemented money transmission licensing laws—New Mexico and South Carolina—also enacted laws that diverged from the UMSA.

B. Both the Federal Government and the States Have Recognized Difficulty with the Current System

Federal authorities have already recognized the need for federal regulation and enforcement of money transmission. The Financial Crimes Enforcement Network, a department of the U.S. Treasury, was created for purpose of ensuring compliance with the federal BSA. In addition, 12 U.S.C. § 1860 makes it a federal crime to operate as an unlicensed state money transmitter.

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[22] *Id.* (emphasis added).

[23] *See, e.g.*, Vt. Stat. Ann., tit. 8, § 2511 (imposing state-specific money transmission receipt disclosure and customer refund requirements).

[24] Ark. Code § 23-55-207(a) (modifying net worth requirement to calculation based on volume of regulated money transmission activity).

[25] *See, e.g.*, Ala. Code 8-7A-7(f) (changing bond requirement to calculation based on licensee's daily outstanding obligations for money received for transmissions); Neb. Rev. Stat. § 8-2727(2) (changing bond requirement to calculation based on licensee's total volume of money transmission); Md. Code Ann., Financial Institutions § 12-412 (establishing new requirements for bond issuance, obligations and liability); 205 ILCS 657/30(b) (modifying calculation method for required bond amount).

[26] *See, e.g.*, Mi. Comp. Laws §§ 487.1004(g) (exempting persons appointed by a payee to collect and process payments as an agent of the payee, provided the agent can demonstrate that a written agreement between the payee and agent exists, that the payee holds out to the public that the agent accepts payments on its behalf, and payment is treated as received by the payee upon receipt by the agent); , N.C. Gen. Stat. § 53-208.44(a)(8) (same); W. Va. Code § 32A-2-3(a)(11)(C) (effective June 7, 2019) (exempting persons "facilitating payment for goods or services (not including currency transmission or money transmission itself) pursuant to a contract with the payee and either payment to the person or persons facilitating the payment processing satisfies the payor's obligation to the payee or that obligation is extinguished"); Wash. Rev. Code § 19.230.020(9)(c) (exempting a person that, among other criteria, facilitates payment for goods or services (not including money transmission itself) or bill payment through a clearance and settlement process using Bank Secrecy Act-regulated institutions); 7 Pa. Stat. Ann § 6112 (exempting an agent of a payee that meets numerous criteria, including a written agreement with the principal that provides "the agent is subject to the control of the person on whose behalf the agent is acting, meaning that the licensee or exempted person takes complete financial responsibility for the money being transmitted from the moment an individual initiates the transmission of money until the intended recipient receives the transmitted money" and "individuals doing business with the agent are aware that the agent is working on behalf of the person on whose behalf the agent is acting.").

[27] UNIF. LAW COMM'N, *Legislative Fact Sheet—Money Services Act*, *supra* note 26.

The U.S. Treasury recently issued a report examining non-bank regulatory issues, pointing out that the "definition of money transmission can vary significantly by state (as can exceptions from the definition), posing operational challenges and potentially chilling economically beneficial money transmission activity — particularly innovative, technology-based money transmission."[28] The report further states that the "cumulative challenges of operating in the state-based regulatory regime result not only in excessive regulatory costs, but also constrain the ability of nonbank firms, including start-ups, to innovate and to scale nationally."[29]

In the face of uneven and inconsistent state-by-state regulation of money transmission services in the context of a national market, some states have tried to bring greater coherence to the current regulatory framework. Most notably, in recent years almost all[30] U.S. jurisdictions have transitioned their processes for applications and the management of licenses to the NMLS. The NMLS allows for a single, simultaneous electronic filing of applications, and enables licensees to maintain and update their licenses through the system.[31] The NMLS was originally created in 2008 by the Conference of State Bank Supervisors ("CSBS") and the American Association of Residential Mortgage Regulators to function as a unified system for the registering and licensing of mortgage companies. The system's goal was to ease the licensing and reporting burdens of regulated mortgage companies and to improve coordination and information-sharing among regulators.[32]

The NMLS provides a means for money transmission applicants to manage their money transmission licensing. The transition of money transmission state licensing to the NMLS has been beneficial, but challenges remain. For example, the NMLS enables money transmission licensing applicants to submit one general biographical form for each of the officers and directors of the applicant, and to submit basic information about the applicant, such as its financial statements and business plan. Nevertheless, the NMLS has not been able to overcome the differences in state laws that lead to differing state regulations. With respect to applications, many states require additional materials to the standard NMLS application requirements, including state-specific background check forms and personal financial forms. Many states also require additional state-specific and nationwide information to be submitted through the NMLS to meet bespoke state application requirements.[33] Moreover, the majority of the states that process applications through the NMLS *also* require state-specific information to be submitted directly, on paper (or via e-mail), to the respective licensing authority. Simply put, the increased use of the NMLS only partially addresses the issues that plague the state regulatory framework. That is, while the NMLS does bring uniformity to certain aspects of the money transmitter licensing/renewal processes, meaningful improvements outside of those areas have been negligible because the NMLS only serves as a tool for managing licensing—it cannot

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[28] U.S. DEPARTMENT OF THE TREASURY, *A Financial System that Creates Economic Opportunities; Nonbank Financials, Fintech, and Innovation,* at 64 (July 2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf.

[29] *Id* at 65.

[30] So far in 2019, Alabama and Missouri have transitioned the management of their licensees to NMLS, and legislation in Virginia authorizing the transition to NMLS will take effect July 1, 2019, as Public Act of 2019 Chapter 634. The remaining states that do not use NMLS at all for money transmission licensing are Colorado, Delaware, Florida, Nevada and New Jersey.

[31] Roughly nine states still require that money transmission licensing applications be submitted entirely on paper. In addition, Florida, though not on the NMLS, uses a proprietary online application filing system.

[32] NMLS Resource Center, *About NMLS* (2017), https://mortgage.nationwidelicensingsystem.org/about/Pages/default.aspx.

[33] Some states, for example, require information about Gramm-Leach-Bliley Act compliance, about the applicant's employees and staffing plans, about general policies and procedures (in additional to the BSA anti-money laundering compliance program), about compliance with other state-specific provisions (such as anti-fraud laws or escheatment laws), and so on.

rewrite divergent state laws nor, on its own, eliminate redundant and bespoke state regulatory requirements, including with respect to oversight and examination.[34]

Despite these difficulties, the states and CSBS are taking constructive steps forward. FIN applauds these actions. In announcing "Vision 2020," CSBS recognized the above challenges, stating that its Board approved a policy statement:

> CSBS, the states and territories will create consistent and data-driven solutions that support innovation by minimizing friction in the state regulatory system. By 2020, state regulators will adopt an integrated, 50-state licensing and supervisory system, leveraging technology and smart regulatory policy to transform the interaction between industry, regulators and consumers.[35]

The subsequently formed Fintech Industry Advisory Panel, which includes some FIN members, produced a report that encouraged "regulatory harmonization" and "uniformity" in several areas that constitute significant parts of state money transmission law. Notably, the report states:

> The variations in definitions and related exemptions, as well as varied licensing and supervision regimes among states lead to operational challenges that hinder innovation, drive up the cost to customers, and limit access to financial services. These impacts are particularly significant for money transmitters that operate or offer products to consumers on a nationwide basis.[36]

CSBS deserves significant commendation for embracing many recommendations of the Advisory Panel and working with industry in a collaborative way. FIN encourages CSBS to maintain all of the actions announced on February 14, 2019, including "creating uniform definitions and practices, increasing transparency and expanding the use of common technology *among all state regulators*."[37]

While the efforts of CSBS are very welcome and worthwhile, FIN is concerned that CSBS does not have a means to ensure that its actions and eventual model payments law will be adopted consistently *among all state regulators.* U.S. based money transmitters are subject to more than 50 separate and independent statutory money transmission regimes. While we are thankful and hopeful, as an industry, about the efforts of the CSBS to harmonize and modernize these statutory regimes, the question still remains whether this can be done in practice. Again, none of this should suggest any pause or slowing of the CSBS effort. If anything, FIN encourages CSBS to redouble its work.

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[34] There is also a recent trend in states changing their requirements relating to licensing and maintenance of licenses (including change of control obligations) using the NMLS checklists. In some cases, they have converged, but in other cases the flexibility afforded by the checklist has been used to establish new and divergent requirements that are not expressly required by statute or regulation.

[35] CSBS, *CSBS Announces Vision 2020 for Fintech and Non-Bank Regulation* (May 10, 2017), https://www.csbs.org/news/press-releases/pr2017/Pages/051017.aspx.

[36] CSBS FINTECH INDUSTRY ADVISORY PANEL, *Recommendations of the Payments Subgroup of the Fintech Industry Advisory Panel* (January 2019), https://www.csbs.org/sites/default/files/2019-02/FIAP%20roll-out%20press%20release.pdf.

[37] CSBS, *State Financial Regulators Embrace Recommendations from Fintech Advisory Panel* (February 14, 2019), (emphasis added), https://www.csbs.org/sites/default/files/2019-02/FIAP%20roll-out%20press%20release.pdf

V. THE ROLE OF CONGRESS

FIN believes that a federal mechanism is necessary to ensure maximum uniformity among the states, particularly for firms operating at national scale. Without a commitment and agreed approach to achieve uniformity, the CSBS process, contrary to its stated intention, may invite further fragmentation among state laws and regulations. As such, FIN respectfully urges CSBS and the task force to continue developing a model payments law and simultaneously begin working with the U.S. Congress on legislation that would help ensure uniform adoption and implementation throughout the states. This legislation could take many forms, and FIN is committed to finding a solution that maintains the important role that states have in the shared mission of money transmission regulation.

Given the history of inconsistencies in state regulation outlined in this submission, this work with Congress should begin now. FIN looks forward to discussing this federal mechanism with CSBS and the states.

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FIN again reiterates its appreciation for CSBS leadership on this important effort. Now is the time to ensure all U.S. consumers have adequate protections and access to new services under a modern regulatory regime appropriate for the 21st century.

Respectfully,

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