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Via Email to modelpaymentslaw@csbs.org

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

Re: State Model Payments Law - Request for Information

To Whom It May Concern:

This letter is submitted on behalf of The Money Services Round Table ("TMSRT")[1] in response to the State Model Payments Law Request for Information (the "RFI") issued by the Conference of State Bank Supervisors ("CSBS") on February 21, 2019. TMSRT was founded in 1988 as an information sharing and advocacy group for the nation's leading non-bank money transmitters. Since its founding roughly 30 years ago, TMSRT has worked collaboratively with states and others to assist in the passage of more than 27 state licensing laws, as well as countless revisions and amendments to such laws and their implementing regulations. Drawing on the collective experience of its members, TMSRT offers the following comments in response to the RFI.

Introduction and Background

Non-bank money transmitters such as TMSRT members provide national products and services. They are regulated on a state-by-state basis under state-specific money transmission licensing laws. The regulated activity—receiving, holding, and transmitting money—is generally the same among these entities. The intent of regulation—ensuring

[1] TMSRT is comprised of the leading non-bank money transmitters RIA Financial Services, Sigue Corporation, American Express Travel Related Services Company, Inc., Moneydart Global Services, Inc. and Travelex Currency Services Inc., Viamericas Corporation, Western Union Financial Services, Inc., and MoneyGram Payment Systems, Inc. These companies offer a variety of funds transmission services, including bill payments and funds transfers (domestic and international), through retail points of sale, the Internet, and mobile devices, as well as the sale and reloading of stored value products and other money transmission services. Each of these companies is licensed as a money transmitter in all U.S. jurisdictions that require licenses for non-bank funds transfer services (with the exception of one member that has a license application pending in New York State). Each TMSRT member is also treated as a "Money Services Business" under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, and its implementing regulations, 31 CFR Chapter X (collectively, the "BSA").

consumer protections, the safety and soundness of non-bank payments intermediaries, and the protection of the financial system from money laundering and other illicit activity—is generally the same across states. In actual practice, however, the more than 50 jurisdictions that regulate money transmitters often have very different ways of implementing their money transmission laws.

Differences between regulatory regimes can take the form of different regulations or different interpretations of identical regulatory language. As a result, the nature of the supervision of an enterprise engaged in money transmission varies depending on the state or states in which the money transmitter operates or seeks to operate. This is also the case with respect to whether the entity must be supervised and regulated in the first instance with respect to particular activities.

The RFI acknowledges the regulatory challenges facing the non-bank payments services industry, and states that CSBS's intent is to "quickly bring . . . regulatory improvements to market." TMSRT appreciates this acknowledgement as well as CSBS's stated commitment to assisting states in implementing regulatory improvements as promptly as possible. Improving the existing fractured regulatory landscape to make it more consistent, efficient and fair for all enterprises will benefit consumers, and industry, while continuing to protect the financial system and the consumers and businesses that use money transmitters' services.

TMSRT thus supports the efforts of CSBS and state regulators to create a modernized money services law (a "Model Payments Law") that can provide a roadmap toward convergence in the regulation of money transmitters. We believe there is significant opportunity to improve the current state of money transmission oversight by the states, and look forward to a continued productive engagement with CSBS and the working group of state regulators as a Model Payments Law is drafted, revised and, ultimately becomes ready for implementation.

Overview and General Comments

Through the RFI, CSBS requests comments on recommendations made by the payments subgroup of the Fintech Industry Advisory Panel (the RFI refers to the subgroup as the "Advisory Panel," and we use the same naming convention herein). CSBS commissioned the Fintech Industry Advisory Panel, including its subgroups, to "support state regulators' increased efforts to engage with financial services companies." The Advisory Panel produced a report on state money services issues and opportunities for improvement (the "Recommendations"). CSBS used the Recommendations to frame its RFI, including the four specific issue areas on which CSBS is currently seeking comment: (1) The scope of

regulated activity; (2) change of control issues; (3) prudential regulation; and (4) supervision. TMSRT offers specific comments on each of these areas below.

As an initial matter, TMSRT agrees with and supports the policy standards articulated by the RFI that build on the Advisory Panel's efforts. In doing so, TMSRT agrees that state regulation of non-bank money transmission should be based on the principles of:

- Protecting payors from harm, particularly with respect to the protection of funds held in trust by a non-bank payment services provider on behalf of the payor of funds;
- Preventing bad actors, as well as unqualified actors, from entering the money services industry; and
- Preserving public confidence in the non-bank financial services sector, including with respect to the ability to efficiently, consistently, and reasonably regulate this sector.

These principles and the regulation of money transmitters in a manner consistent with these principles are well-established industry norms. In particular, many money transmission statutes affirm the intent of these principles to protect senders of funds and the financial system generally. For example, the California Money Transmission Act states that it is intended to protect the interests of persons who use money transmission services, ensure safety and soundness in the conduct of such activities, and maintain public confidence in licensees.[2] Similarly, the Hawaii Money Transmitters Act states that it is intended to "ensure the safe and sound operation of money transmission businesses . . . to promote confidence in Hawaii's financial system, and to protect the public interest."[3]

As CSBS considers improvements to money transmission regulation, TMSRT urges CSBS to continue the existing risk-based focus of the money transmissions laws of most states. A risk-based approach ensures focus on those areas that actually present risks to senders of funds and ensures that resources are deployed in the areas that matter. The risk-based approach also ensures that regulations are calibrated to the level of risks they are designed to mitigate so as not to impose unnecessary costs on industry and, ultimately, consumers or other users of the services of non-bank financial services companies.

CSBS should also consider the Uniform Money Services Act ("UMSA") because the policy imperatives that guided its formulation still exist today. While this prior effort to unify state laws was not widely adopted, it can still be a useful resource for a Model Payment Law.

A more recent development that has affected the evolution of money transmission regulation is the adoption of the Nationwide Multistate Licensing System ("NMLS") by almost all state money transmission regulatory authorities. NMLS has provided benefits to industry by

[2] Cal. Fin. Code 2002.
[3] Hi. Rev. Stat § 489D-2.

giving licensees a single platform through which it is possible to transmit information to regulatory authorities. In some instances, however, NMLS has inadvertently facilitated divergence in state regulatory regimes. This is because it provides a platform for regulators to implement changes to licensing, renewal, and reporting requirements without going through a notice and comment rulemaking process (and, indeed, in some cases without any meaningful notice to industry at all). For example, states can create new definitions of what constitutes "control," or for what is required in connection with a change of control, through NMLS checklists (*i.e.*, application instructions). In addition, the use of NMLS has create a host of new operational challenges for applicants and licensees, particularly with respect to changes of control (as discussed below).

Notwithstanding these challenges, TMSRT is hopeful that a renewed focus on a principles-based regulation can provide a path forward, especially when updated model language for money transmission laws is combined with the technological multistate integration that NMLS makes feasible. The Model Payments Law should thus be drafted with an eye toward standards that can be implemented in uniform fashion through NMLS, and should leverage the technological opportunities that NMLS offers for streamlined regulation of money transmitters.

We believe that the development of a Model Payments Law will be an ongoing, iterative process that will require consistent and open communication between regulators, CSBS and industry. The commitment of CSBS and the working group of state regulators, and the embrace of the Recommendations, is a positive development. In furtherance of those efforts, below we offer comments on the RFI and the Recommendations.

What Should be Regulated, and Why?

TMSRT supports the fair, efficient, and effective regulation of money services companies that helps ensure that funds held in trust are protected as appropriate, financial services providers are safe and sound, and money laundering, terrorist financing, and other illicit activity is detected and prevented to the extent reasonably possible. Consistent with these aims, TMSRT agrees with the Advisory Panel that definitions of regulated activity should be harmonized so that the financial system is consistently protected, and so that the protections afforded to payors do not vary by the state in which a transaction happens to occur.

In considering how to harmonize exemptions based on definitions and current exemptions that appear in various state laws and in the BSA, CSBS should begin from the premise that money transmitters—payments companies—are regulated because they are financial services providers. Financial services providers facilitate transactions, provide consumers and businesses with access to the financial system (including, indirectly, to banks), often are responsible for significant volumes of funds, and are increasingly relied upon by consumers and businesses alike for financial service products and services that have traditionally been

provided by banks directly. These companies are thus important not only to their customers, but also to the larger American economy. Effective regulation is therefore an imperative.

In light of the foregoing, TMSRT believes that the Model Payments Law should establish a consistent and uniform scope of regulated activity based on the principles set forth in the Recommendations and embraced by CSBS in the RFI. To do so, two questions can guide the determination of what activity should be regulated: (1) are the payor's funds at risk when handled by the intermediary; and (2) does the intermediary's handling of the funds implicate anti-money laundering concerns? If the answer to either of these questions is "yes," then we believe the transaction at issue constitutes a money transmission transaction that should be subject to regulation. That is, money transmission regulation should address risks that are inherent in the business of money services, and so covered activities should be those that involve a risk of loss or the potential to harm the financial system, such as from money laundering or other illicit activity.

Whether there is risk to payors should be the primary test for whether activity should be regulated under the Model Payments Law

To assess whether there is risk to payors, CSBS and state regulators should primarily look to how states have approached the scope of regulated activity, as well as to the exclusions set forth in the UMSA. The core exclusions relevant to payments services companies can generally be grouped into two buckets as follows:

- **Exemptions based on the intermediary not holding the payor's funds in trust.** These types of transactions can also be thought of as transactions that do not constitute regulated money transmission in the first place. The most prominent example is a properly structured agent of a payee arrangement. In this construct, the intermediary's payment service should not constitute money transmission because the funds are deemed received by the principal upon receipt by the agent. Thus, no money is received for transmission, and no funds are held in trust on behalf of a payor. After the funds are delivered to the agent, the payor's obligation to the payee is fully extinguished. Thus, the function of money transmission law to protect the payor's funds—to ensure that the intermediary will deliver on its promise to its payor—is not necessary in this situation.

- **Exemptions based on the presence of an alternative regulatory regime.** Exemptions from money transmission regulation, such as for agents or service providers of banks, or for insured prepaid cards, are not grounded in the notion that regulation by money transmission authorities is unnecessary. In these transactions, funds are indeed held in trust by an intermediary, and there is a (theoretical) risk of loss of consumers' funds. The distinction is that the intermediary responsible for the funds at all times is an entity that is exempt from the money transmission licensing

> regime *because the entity is already appropriately subject to regulation and oversight* under other laws and regulations. For example, with respect to bank-issued prepaid access, one state banking department has observed that the cardholder funds are held in FDIC insured accounts and that risk of loss of customer funds resides with the issuing bank at all times.[4] There appears to be little incremental benefit from a safety and soundness perspective of separately regulating these types of transactions under the money transmission laws because they are already sufficiently regulated.

Current exemptions, though inconsistently applied across the regulatory landscape, are generally consistent with these two concepts. An additional category of exemptions under a few state money transmission laws, however, pertains to non-consumer payments services. These include business-to-business payments (e.g., invoicing services), payroll services, and tax-payment services. In many cases, the processing of payments may be only a component of a larger suite of software services (such as managing accounts payable or payrolls). Nevertheless, CSBS and state regulators should give careful attention to whether these services nonetheless involve risk to the payor's funds held in trust by the payments intermediary.[5] We also encourage CSBS to evaluate whether these services should be regulated not only in the context of the current state of money transmission regulation, but also in a future state under the Model Payments Law. To put it another way, it may seem particularly burdensome to include these activities within scope of regulated activity under the current fractured 50-state licensing and oversight regime relative to the risk such services pose. But, assuming a much-improved regulated landscape under the Model Payments Law, the incremental costs of regulation for these activities may not be nearly as burdensome.

The money laundering risk associated with particular transaction types should also inform the scope of regulated activity under the Model Payments Law

To assess money-laundering risk, CSBS and state regulators should primarily look to the BSA and its implementing regulations promulgated by the Financial Crimes Enforcement Network ("FinCEN"), as well as FinCEN's interpretations of the same. The BSA regulations defines "money transmission" as "the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means."[6] This definition does not hinge, for example, on whether the intermediary holds funds in trust on

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[4] *See* Cal. DBO Opinion Request letter (August 16, 2018). *See also, e.g.*, Rev. Code Wash. 19.230.020(14) (exempting "A seller or issuer of prepaid access when the funds are covered by federal deposit insurance immediately upon sale or issue").
[5] State money transmission licensing laws generally do not include the concept of an exclusion for "incidental" money transmission activity. One exception is the Kansas Money Transmission Act, which includes an exemption for "the distribution, transmission or payment of money as a part of the lawful practice of law, bookkeeping, accounting or real estate sales or brokerage or as an incidental and necessary part of any lawful business activity." Kan. Stat. Ann. § 9-511(b).
[6] 31 C.F.R. § 1010.100(ff)(5)(i)(A).

behalf of a payor or otherwise makes a promise, or incurs an obligation, to transmit funds *on behalf of* a payor. Instead, the BSA (with respect to money transmission) focuses on an intermediary that moves money. Thus the regime does not differentiate, for example, between payments initiated by a consumer and business-to-business payments. That distinction is not germane to the underlying money laundering risk of the transaction.

In turn, exclusions from regulation under the BSA are based on whether the intermediary's activity poses a risk of money-laundering-related activity, and not based on whether a payor's funds are at risk. Thus, the BSA exempts a person that only "[a]cts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller."[7] In promulgating this exemption, FinCEN explained that:

> . . . a contractual agreement for transmission services between the creditor or seller and the money transmitter is a relatively controlled flow of money that poses little money laundering risk, provided that the funds are transmitted only to the creditor or seller with whom the payment processor has contracted and not to another location or person.[8]

While FinCEN's approach is instructive, we caution that it should not be dispositive from the perspective of state regulatory regimes. The BSA is an anti-money laundering regime only, and not a broader safety and soundness law. The primary consideration for regulation of activity under state money transmission law should be the protection of the payor's funds. But, consideration should still be given to activities that would make an entity an MSB under the BSA, as such activities also may warrant regulation under state money transmission laws.

Control and Change of Control

Issues relating to "control" of a money transmitter are one of the most vexing aspects of the current 50-state arrangement for applicants, licensees, and, one assumes, regulators. The RFI notes that the Advisory Panel reported "differences in standards and procedures for change in control," and that these inconsistencies "create significant administrative burden." TMSRT agrees. Furthermore, it is important that changes of control be managed effectively because appropriate oversight of the control of a licensed money transmitter is an important safety and soundness measure. As the RFI notes, the change of control process is a gatekeeping exercise that ensures that the financial system is protected by identifying who will be in control of the applicant or licensee. As the Advisory Panel observed, the control person onboarding process is a mechanism to "ensure that only appropriately qualified and vetted parties participate in the money transmission system."

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[7] *Id.* at § 1010.100(ff)(5)(ii)(B).
[8] 76 Fed. Reg. 43585, 43593 (Jul. 21, 2011).

To fulfill this gatekeeping function, states define "control persons" and subject them to various vetting and background check requirements. There is, however, a significant lack of harmonization in how states treat the various aspects of "control," including: (i) who qualifies as a control person, (ii) what triggers a "change of control" process for money services licensees, and (iii) the notice and approval process for a change of control itself. These inconsistencies are among the least justifiable aspects of the current regulatory regime because the same individuals "control" the licensee as a single entity. State deviations thus do little to enhance safety and soundness, while causing substantial burden to licensees (including their management, owners and investors).

TMSRT thus agrees with the Advisory Panel's recommendation to streamline the standards for a change in control, as well as the process to follow once a change in control occurs. By harmonizing these processes, CSBS can help to preserve confidence in the money transmission regulatory regime and improve industry regulation, with no loss of protections. TMSRT believes that the following principles, which will continue to ensure the safety and soundness of licensees and the financial system, should guide the drafting of uniform control and change of control provisions for the Model Payments Law.

The Model Payments Law should establish a fixed definition of "controlling individual"

The purpose of identifying and vetting individuals who are "control persons" is to assess the backgrounds of such individuals to affirm that they are fit to control a regulated financial institution, *i.e.*, a money transmitter. Because the management of a licensee does not vary by states, state standards of who constitutes a "control person" among the management of a licensee also should not vary by state.

The concept of control with respect to the management of a licensee should be understood as the power to direct the affairs of and control and establish policy for the licensee with respect to its regulated money transmission services.[9] Members of the board of directors of the licensee should be understood to be control persons given their ability to oversee and manage the policies of the licensee. Additionally, the individuals within an organization's management that control the licensee under this definition are the Chief Executive Officer, the Chief Financial Officer, and the Chief Compliance Officer (or any person in a functionally equivalent role). To the extent that any other person within an organization plays a significant role in the management or policies of the licensee with respect to its money transmission activity, such a person would ultimately be accountable to the personnel in these three roles. By focusing on these roles, the vetting and onboarding process for

[9] *See, e.g.*, Ga. Code Ann. § 7-1-680(5) (defining control to include "possession of power to direct or cause the direction of the management and policies of a person"); N.Y. Banking Law § 652-a(4) (defining control as "the power to direct or cause the direction of the management and policies of a licensee . . .").

control persons can be streamlined and simplified without compromising the safety and soundness of licensees or the financial system.

The Model Payments Law should establish a fixed definition of "controlling ownership"

Based on the same principles as set forth above, a controlling interest in a licensee should be a fixed percentage of ownership of either (1) aggregate voting interest in a licensee or (2) economic interest in a licensee. TMSRT supports the establishment of a uniform standard of "control" ownership of shares that constitute 25% or more of the total voting power of the licensee, or 25% or more of the *economic* ownership of the licensee. This threshold is consistent with the standard proposed by the UMSA, and definitions of a controlling ownership share with respect to depository financial institutions.[10]

The Model Payments Law should establish uniform information that is required of control persons

The individual control persons, as identified above (*i.e.*, "Control Individuals"), should be required to provide specific pieces of information, and should be required to provide the information only once. There should be a presumption of acceptability if the required information is provided. The information should be uniform across states and should be furnished through NMLS only, as follows:

- The only biographical information that a Control Individual should be required to provide is the information requested by the NMLS MU2 form.
- Background checks based on fingerprints must be streamlined to a single, uniform process.[11] State-specific background authorization and background check forms should be eliminated.
- Control Individuals may be subject to a credit report *through NMLS*, but no other personal financial information should be required of a Control Individual unless the credit report indicates that further inquiry may be required.[12]

With respect to Control Individuals who do not or have not resided in the United States for the last 5 years, subject to the above limitations, TMSRT supports the adoption of the New

[10] As the UMSA explains, it relied on the definition of control—including the 25% threshold—contained in the Bank Holding Company Act, 12 U.S.C. § 1842(a)(2) and Federal Reserve Regulation Y, 12 C.F.R. § 225.2(e)(1), in establishing a definition of "control" for purposes of state money transmission regulation.
[11] Currently Control Individuals of a national licensee may be required to go through multiple fingerprinting processes, both through NMLS and independent of NMLS.
[12] The UMSA commentary suggests that requiring individuals to provide personal financial information would be "an unnecessary invasion of privacy, because the financial well-being of the company would bear no connection to the officer's personal wealth." We also note that almost all states have eliminated requirements that Control Individuals provide personal financial statements, to no ill-effect of which we are aware.

York approach[13] of obtaining an independent criminal background report that meets specified criteria in lieu of criminal background checks and credit reports obtained through NMLS.

Additionally, no criminal background checks should be required of Control Individuals of a licensee that is a publicly traded company or that is a subsidiary of a publicly traded company.[14] In such cases, the regulatory scrutiny of a publicly traded company should be sufficient to affirm that Control Individuals are fit to oversee the licensee.

The Model Payments Law should establish a uniform process for changes to Control Individuals

With almost all states now using NMLS, the change of a Control Individual should be handled through a streamlined process that involves only:

- The timely uploading of a letter to NMLS explaining the changes;
- Appropriate amendments to the licensee's MU1 form, timely submitted after the change occurs;
- The provision of fingerprints through NMLS for a criminal background check to the extent required; and
- A credit report.

This information should suffice to provide regulatory authorities with comfort that the Control Individual is not unfit to control the money transmitter's regulated activity. In the event that the review of these materials raises issues of concern for a regulator, then the regulator can make additional inquiries as warranted. Again, however, with the provision of this information there should be a presumption of acceptability with respect to a licensee's Control Individuals.[15]

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[13] *See* https://mortgage.nationwidelicensingsystem.org/slr/PublishedStateDocuments/NY_Money_Transmitter-Company-New-App-Checklist.pdf (at p13).

[14] *See, e.g.,* N.J. Stat. 17:15C-7(9) (excluding from the fingerprinting requirements "a publicly traded corporation, its subsidiaries and affiliates"); S.D. Cod. Laws 51A-17-11 (exempting publicly traded corporations and their subsidiaries from the requirement to "submit to a state and federal criminal background investigation by means of fingerprint checks by the Division of Criminal Investigation and the Federal Bureau of Investigation").

[15] Additionally, we do not believe that any fees should be charged to licensees in connection with an ordinary-course change of a Control Individual. Fees associated with a change of a Control Entity are understandable in the context of fees for adjudication and oversight (roughly akin to fees relating to applications and renewals). By contrast, a change of a Control Individual is a general administrative matter and does not warrant the imposition of fees (and, indeed, only a small number of states currently impose fees for these matters in any event).

We also note that the Model Payments Law should expressly affirm that neither advance notice nor approval is required for a change of a Control Individual (unless it occurs as a result of a change in ownership of the licensee, as discussed further below). Doing so can mitigate the risk of inconsistent state interpretations of advance notice requirements for changes of a Control Individual.[16] While we are not aware of any current state money transmission statute that expressly requires advance notice and approval for a change of a Control Individual, some state statutes are not entirely clear.[17] The Model Payments Law should ensure that there is no ambiguity on this matter.

The Model Payments Law should establish a separate process for changes in ownership

There is a fundamental distinction between a change in the management of a licensee (i.e., of Control Individuals) and a change in the ownership of a licensee (i.e., of a "Control Entity"). A change in management such as the replacement of an officer or director is an ordinary course event that should not warrant excessive regulatory scrutiny. As discussed above, the Model Payments Law should affirm that no advance notice or approval is required for a standalone change in a Control Individual.

A change in ownership—a change in a Control Entity—is a different matter, as money transmission licenses are generally not transferable.[18] Thus, TMSRT agrees that, consistent with most states' approaches today, a change in the ownership of a licensee should generally be subject to an advance notice and review process to protect the financial system. Such a change can result in a wholesale change in management or the direction or operations of the licensee at once, as well as entirely new owners who may never have been involved in financial services. As noted, however, we believe that the threshold should be an ownership share of 25% or more of a licensee.[19]

The Model Payments law should reflect the distinction between a change of a Control Individual and a Change of a Control Entity and provide clear statutory language to establish

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[16] For instance, some states currently seek to impose, through NMLS checklists, advance notice requirements with respect to ordinary course changes to Control Individuals that are not part of a change of ownership.

[17] For example, some state statutes do not expressly differentiate between a change of Control Individuals and a change of Control Entity, and thus could be mistakenly interpreted to treat a change of an officer or director in the same fashion as a wholesale acquisition of the licensee.

[18] *See, e.g.,* S. C. Code § 35-11-200(B) ("A license issued pursuant to this chapter is not transferable or assignable").

[19] To be clear, we do not believe that 25% should be a rebuttable presumption of control but rather a bright line control trigger. With a relatively streamlined change of control process and a presumption of approval, acquirers should have less incentive to seek to rebut the presumption. And, regulators would be freed from adjudicating whether "control" exists, which could lead to inconsistent outcomes in different states. Furthermore, a 25% threshold would also be likely to significantly diminish the impact of control person vetting requirements on early stage companies that obtain multiple rounds of funding from investors such as private equity or venture capital firms (and on the investors themselves).

separate requirements for a change of a Control Entity. In this regard, TMSRT supports the adoption of a uniform standard of a 60-day advance notification and request for approval of a change in ownership. The following uniform elements should be required to be included with the notice:

- The submission of an ACN through the licensee's MU1, to include information about the proposed ownership share of the new Control Entity or Control Entities;
- A narrative description of the transaction, to be uploaded to NMLS only;
- The uploading in NMLS of an organizational structure chart illustrating the ownership of the licensee after the consummation of the transaction;
- The identity, on the MU1, of any new officers or directors of the *licensee* upon consummation of the transaction; and
- Audited financial statements of the new Control Entity

Upon provision of this information, there should be a rebuttable presumption of approval at the end of 60 days, provided that any new Controlling Individuals submit required information (as set forth above) prior to this deadline. In addition, where a licensee in good standing acquires another licensee, the rebuttable presumption of approval should be limited to 30 days. These types of firm deadlines can help ensure that transactions involving licensees can be timely and predictably consummated, which will encourage more innovation and investment in the industry. Finally, in the event of an acquisition of control of a publicly traded company through purchases of shares on the open market, notice should be required only *after* the 25% threshold is crossed, and the information listed above should be required at that time.[20]

Prudential Regulations

Building on the Advisory Panel's work, the RFI identifies three prongs of money services prudential regulations—net worth, surety bonds, and permissible investments—that form the foundation of safety and soundness requirements for money transmission licensees. As both the RFI and the Advisory Panel note, these types of requirements are intended to measure the solvency of a licensee, mitigate potential losses, and ensure the liquidity of funds during operations and in the event of failure. That said, the RFI notes that the Advisory Panel generally found that states require all three of these requirements to be met independently, without considering the effect of the other requirements. Nevertheless, the purposes (and effect) of each prudential requirement may overlap, and having all three in place in almost all

[20] This provision could be based on current provisions regarding acquisition of publicly traded entities, such as Idaho Code § 26-2913(1) ("Within fifteen (15) days of a change or acquisition of control of a licensee that is a publicly traded corporation or is a direct or indirect subsidiary of a publicly traded corporation, the licensee shall provide notice of such event to the director in writing.").

jurisdictions is redundant, costly, and provides little to no incremental safety and soundness benefit, especially for large national money transmitters.

TMSRT believes that prudential regulation of money transmitters is critical but that inconsistent and overlapping requirements undermine the goals of fair and efficient regulation that protects the financial system. As a general matter, TMSRT agrees with the Advisory Panel's recommendation to establish a national standard for net worth, bonding, and permissible investments requirements. TMSRT believes that the Model Payments Law should embrace the following standards for consistent application of safety and soundness requirements.

The Model Payments Law should establish a uniform net worth standard

The Advisory Panel points out that net worth requirements vary significantly. Each state sets its minimum net worth requirement independently. States do so based on different formulas. In some states, the requirement is as low as $1,000, while in others it may be as high as $1,000,000.[21] State licensing laws also provide regulators with the discretion to raise minimum net worth requirements, up to a maximum of $3 million in some jurisdictions.[22] TMSRT agrees with the Advisory Panel that such variance results in inconsistent application of prudential requirements and complicates a licensee's ability to comply with each state's specific regime. The state-by-state variance in net worth requirements does not reflect the reality of a national (or even regional) money transmitter—namely, that whether or not a licensee is safe and sound is not a state-by-state proposition. The financial health of a licensee can be considered only at the entity level, and not with respect to activities in a particular state.

TMSRT therefore believes that money transmitters should be subject to a single national net worth standard based on volume (in U.S. dollars) of money services transactions per year, with both statutory minimums and maximums established. As noted by the RFI and the Advisory Panel, net worth requirements serve as a valuable proxy for a licensee's ability to operate. But, they are only a proxy. The licensee's net worth cannot be a standalone guarantee of a licensee's ability to meet its payment obligations; unlike deposits held by a bank, a payor's funds delivered to a money transmitter are not insured by the Federal Deposit Insurance Corporation ("FDIC") (or any other governmental entity) on behalf of the payor. So, while net worth is a helpful predictor of a licensee's ability to remain solvent, it is *not* a mechanism to actually guarantee the payor's funds (or a licensee's survival). In short, a baseline net worth requirement affirms that a licensee (or applicant) meets a basic threshold capability to engage in money services activity. An entity should not be permitted to handle

[21] *See, e.g.*, Haw. Rev. Stat. § 489D-6(a) ($1,000); Kan. Stat. § 9-509(e)(1) ($250,000); Ky. Rev. Stat. § 286.11-011 ($500,000); Ind. Code § 28-8-4-24(12) ($600,000); Utah Code Ann. § 7-25-203(1)(a) ($1,000,000).
[22] *See, e.g.*, Wash. Rev. Code § 19.230.060.

funds on behalf of others unless it has an operational cushion and the ability to draw on a reserve of funds for operating or other purposes, so that it can safely and appropriately operate its business.

Surety bonds should not be required for licensees that meet other prudential requirements

Surety bonds serve as a proxy for a licensee's financial stability and also provide a relatively limited backstop of funds that can be called upon by the banking department commissioner (or equivalent) to mitigate payors' losses in the event a licensee fails. The surety bond requirement is therefore largely redundant, especially for larger licensees, in light of net worth and permissible investments requirements. That is, the assurances provided by surety bonds can also be met by the maintenance of a substantial net worth and by holding permissible investments.

Surety bond provisions also provide uneven and inconsistent protections in light of the variance among states. Some states calculate the required bond amount based on annual money transmission volume (calculated based on a percentage of total volume in some states, a percentage of average volume in others, and by tiered bands based on actual volume in still others). Other states calculate the bond amount based on an entity's physical locations in the state (including authorized delegate locations[23]) and whether the entity conducts business through the Internet. Other state laws provide the regulator with the explicit authority to increase the bond amount at its discretion, including based on criteria such as the financial condition of the licensee.

Nevertheless, for any licensee of material size, the surety bond would do very little to mitigate losses (relatively speaking) in the very unlikely event of sudden collapse. Thus, we believe that the following principles should guide the establishment of the surety bond requirements set forth in the Model Payments Law:

- Surety bond requirements should be volume-based to ensure that any required bond amount is commensurate with the activity in which the licensee engages, with minimum and maximum bond amounts established.
- Surety bonds should be perpetual and should not require yearly renewal.
- The surety bond requirement should not apply to licensees with a net worth of greater than $10 million.

[23] We note that calculating bond requirements—or any other prudential requirement, or any assessment—based on the number of a licensee's physical locations is outdated. When licensees operated only through physical locations, such locations could serve as a rough proxy for volume and, thus, potential prudential risk. Because of the proliferation of money transmission services provided through the Internet, a licensee's authorized agent locations is no longer a reliable measure of the licensee's activity, its prudential risk, or the resources expended to examine and oversee the licensee. The Model Payments Law should thus not rely on location-based assessments or calculations for prudential requirements.

The $10 million number is roughly based on the minimum aggregate face value currently required by states for surety bonds for an applicant. Therefore, if an applicant or licensee maintains tangible net worth in an amount greater than this baseline level, the "screening" function of the surety bond requirement is mooted. Additionally, by maintaining a net worth at or above this level, the licensee provides to regulators—and to the public—a similar degree of assurance as would be provided by the issuance of surety bonds. This exclusion could be implemented by the Model Payments Law with language such as:

> In the event that the applicant or licensee maintains a tangible net worth of greater than $10,000,000, determined in accordance with generally accepted accounting principles, the surety bond requirement shall be waived. In the event, however, that the applicant or licensee's net worth subsequently is determined to be less than $10,000,000, the licensee shall have 30 days to comply with the requirements of [the surety bond provisions of the Model Payments Law].

The Model Payments Law should establish uniform standards of permissible investments

One of the most significant differences between money transmitters and depository financial institutions, from a safety and soundness perspective, is that the consumer's funds received, held and transmitted by a money transmitter are not insured on behalf of the consumer—unlike consumers' deposit accounts held with banks.[24] As a result, permissible investments are currently the most important mechanism by which the safety and soundness of licensees can be assured. However, permissible investments are a blunt instrument for this assurance, and the nature of state requirements can create significant burdens, and unnecessarily high operating costs, for licensees. Furthermore, as with other items addressed by the RFI, there is considerable variance with respect to permissible investments requirements amongst states. While licensees are generally required to maintain permissible investments in an amount equal to their outstanding obligations, different states define permissible investments differently—both in terms of what can be used as a permissible investment and also to what extent.[25] For example, in a number of states, licensees can only use a certain percentage (typically 20-40%) of receivables due from an authorized agent as permissible investments. In other states, however, there are no such restrictions. Thus, the amount of funds a licensee may be required to use as permissible investments depends on the state or states in which the licensee operates and is regulated.

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[24] As noted above, in some cases, money transmitters may facilitate the sale of bank-issued stored value products that are FDIC-insured on behalf of the cardholding consumer, and such products are generally excluded from money transmission regulation because the funds are already protected. *See, e.g.*, Cal. Code Regs., tit. 10, § 80.3002(a)(1).

[25] States also have different definitions and interpretations of what constitutes an outstanding obligation (*i.e.*, the amount of permissible investments that the licensee must hold). The Model Payments Law should also address a uniform standard of an outstanding obligation to align with the uniform standards of permissible investments.

TMSRT believes that the Model Payments Law should establish a standardized, national permissible investments definition and accompanying requirements. Permissible investments should uniformly include those listed in the UMSA, such as cash, certificates of deposit, investment securities, and so on. In addition, we believe the following concepts should be incorporated into the Model Payments Law permissible investments provisions, and that state regulators should also seek to adopt provisions along these lines through regulation or other authority in the interim[26]:

- Receivables payable to a licensee from its authorized delegates that are not past due or doubtful of collection should be acceptable for use as permissible investments with *no* discount.

- "Cash in transit"—*e.g.*, receivables due a licensee from a bank and resulting from an automated clearinghouse ("ACH"), debit, or credit-funded transmission[27] should also be acceptable for use as permissible investments with *no* discount.

- Licensees should be able to use *outbound* "cash in transit" funds—*i.e.*, payments that have been submitted for payment through the ACH—until the funds are received by the beneficiary. The liquidity and risk profile of ACH transactions, from the point at which they are originated until such time as they settle to the beneficiary, is similar to other types of funds that may currently be used as permissible investments.

- Licensees should also be able to use funds held outside of the United States in foreign currency as permissible investments in an amount up to their outstanding payment obligations in any such foreign currency. For example, if a licensee has pending obligations to beneficiaries in the amount of £1,000,000, the licensee should be permitted to hold £1,000,000 as permissible investments.

Finally, the Model Payments Law should embrace alternative forms of permissible investments, including a line of credit. By enabling a licensee to rely on a line of credit underwritten by a bank, licensees will be able to free up more capital, and lower operating costs, without creating any increased material risk to customers or the financial system. In essence, the line of credit would be a bank guarantee that the licensee can perform its obligations, roughly analogous to the effective guarantee provided by the government that an FDIC-insured bank will perform its obligations to its depositors.

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[26] For example, in recent years, states including Idaho, Kentucky, Michigan, and Nebraska have issued orders expressly authorizing the use of bank receivables as permissible investments, albeit subject to varying criteria and conditions.

[27] *See* Cal. Fin. Code § 2082(b)(12); see also Wash. Admin Code § 208-690-085(2) (defining permissible investments to include "receivables from banks and credit cards").

Supervision

The RFI notes the fitful progress made in improved coordination of examinations of licensees. TMSRT fully agrees with the opportunities for improvement identified by the Advisory Panel, including with respect to: (1) examination cadences; (2) consistency in the substance and formatting of requested information; and (3) streamlining information requests to eliminate duplicative requests.

That said, we believe that improvements to the statutory and regulatory structure of oversight of money transmitters generally will also improve the examination process itself. One particular area of emphasis, not specifically addressed by the RFI, is convergence on recordkeeping and reporting requirements. If uniform reporting requirements are established—such as the exclusive use of the NMLS MSB Call Report—then at least some of the variance in what could be requested for examinations would be reduced. Thus, TMSRT supports the recommendations of the Advisory Panel, as summarized by the RFI, to "prescribe unified reporting formats and parameters" and to leverage NMLS for the maintenance and delivery of relevant information.

TMSRT also believes that there are ample opportunities for state regulatory authorities to rely on examinations conducted by other states to ensure that licensees are not subject to repeat examinations that cover the same ground. Again, we believe that convergence toward a uniform statutory regime governing money transmitters will facilitate the convergence of the examination process; the incremental value of additional examinations should decrease because the regulatory regime underlying the examinations conducted by different states would be the same.

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TMSRT appreciates the opportunity to comment on the RFI and looks forward to continued engagement as a Model Payments Law is developed. If you have any questions concerning the above comments, or if TMSRT may otherwise be of assistance at this time, please do not hesitate to contact me at blui@mofo.com or (202) 887-8766, or my colleague Adam Fleisher at afleisher@mofo.com or (202) 887-8781.

Sincerely,

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