

November 1, 2019

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



Via: [modelepaymentslaw@csbs.org](mailto:modelepaymentslaw@csbs.org)

**Re: Request for Comments - MSB Model Law**

To Whom It May Concern:

On behalf of Financial Innovation Now (“FIN”), thank you for your continuing efforts to develop an MSB model law. FIN appreciates the opportunity to comment on the specific proposed draft model language (the “Model Language”) relating to the scope of regulated and exempt money transmission activity, as well as the change of control process and prudential regulation of money transmitters.

FIN is an alliance of leading innovators promoting policies that empower technology to make financial services more accessible, safe and affordable for everyone.<sup>1</sup> FIN supports efforts to modernize and harmonize the laws to which money transmitters are subject.

**I. INTRODUCTION**

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. The development of these novel products and services is impeded by the differing statutory and regulatory requirements, and differing interpretations of those requirements, under individual U.S. state money transmission laws. Thus, FIN thanks CSBS for launching Vision 2020 and for involving industry in efforts to develop a uniform set of laws to govern money transmission activities, including through the introduction of the Model Language.

We believe it is important, however, that final Model Language does not serve as another alternative regulatory regime in addition to the existing fractured regulatory landscape. FIN continues to believe that the appropriate regulatory regime for money transmitters is a consistent and uniform regime for all industry participants, formally adopted as governing law and then implemented consistently by all money transmission regulators. In particular, we do not believe there should be one set of laws for money transmitters operating in multiple states and a different set of laws for money transmitters operating in only a few states—consumers should be subject to the same protections, and money transmission companies subject to the same obligations, wherever the activity occurs. To do otherwise would defeat the purpose of efforts to establish convergence in the state-by-state money transmission regulatory regime. Regulators would be able to pick and choose when they would apply the Model Language and

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<sup>1</sup> 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>

when some other set of laws, interpretations, guidance or rules would be applicable to a money transmitter.

To ensure regulatory certainty, grounded in statutes and regulations, we support CSBS in its efforts to use the Model Language as a starting point to develop a complete and updated model money transmission act for adoption by each jurisdiction. We are concerned that a continuation and enhancement of the current practice of using the Nationwide Mortgage Licensing System (“NMLS”) to establish uniformity—such as by converging application, material change, and renewal requirements through the use of NMLS checklists—risks increasing the uncertainty about what states actually require, whether through NMLS or outside of NMLS. In spite of CSBS’ best efforts to date, money transmitters continue to face uncertainty about what may be required of them because requirements established by states through NMLS are not necessarily express legal requirements set forth in statute or regulation; such requirements can be an addition to express requirements under the existing money transmission laws, or can replace them, or can be an interpretation of them. We are concerned that there is already a tendency among states to pick and choose what is required of licensees on the vague grounds of “policy” as expressed through NMLS, and that states are able to use NMLS to paper over real differences in how they actually regulate money transmitters and what they require of them.

In light of these concerns, we are supportive of CSBS efforts to drive convergence but caution that as this Model Language moves into more substantive and basic regulatory questions—such as what activity is subject to regulation—tethering states to express positions with the force of law on a jurisdiction-by-jurisdiction basis is even more important. We urge CSBS to continue its important work and its commitment to fostering innovation while supporting states in their efforts to protect the financial system through consistent regulation of non-bank financial services providers. In this regard, we are happy to serve as a resource for CSBS as it moves forward with the development of the Model Language and builds upon this effort to develop a comprehensive model law. And, to help further its efforts to develop uniformity, we also continue to encourage 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. DEFINITIONS AND EXEMPTIONS

As an initial matter, we appreciate the following three primary policies set forth by CSBS and share a belief that those policy goals should underpin the creation of the Model Language and any future adoption and implementation of the Model Language: (1) protecting consumers from harm (i.e., protecting consumer funds); (2) maintaining a regulatory system that prevents bad actors from entering the money services industry; and (3) preserving public confidence in the financial services sector (“**Shared Goals**”). Our comments on the key definitions and exemptions focus on ensuring that the scope of regulated activity is consistent with the Shared Goals.

### **Key Definitions**

#### *Money Transmission*

The definition of “receiving money for transmission” should be specific with respect to the jurisdiction in which the regulated activity occurs. Because one primary purpose of money transmission laws—as implied by the Shared Goal of protecting consumers—is the protection of a sender of funds, we believe it is appropriate for the definition to affirm that the regulated act of

money transmission occurs in the jurisdiction in which the sender of funds is located. For the same reason, we also believe the definition should more precisely articulate the regulated activity that constitutes receiving money for *the purpose of transmission*.<sup>2</sup> Language to this effect should clearly convey that regulated money transmission occurs when an intermediary makes a payment *on behalf of a payor*. It is the making of the payment on behalf of a payor—the receipt of funds and the promise to transmit the funds—that is the activity that poses a risk to a payor and therefore should be subject to regulation.<sup>3</sup> Thus the proposed definition of “money transmission” should be amended to affirm this point and to: (i) clarify what it means for a sender to be located in a state for purposes of determining the applicability of a jurisdiction’s money transmission law; and (ii) expressly exclude the activity of paying out to a beneficiary’s bank account in a state from a location outside of the state, as follows:

“Receiving money for transmission” or “money received for transmission” means receiving money or monetary value in the United States for the purpose of transmission within or outside the United States by electronic or other means. If a person receives money for transmission at a physical location, then the state in which the transaction occurs is the state in which money is received for transmission. If a person receives money for transmission electronically, then the state in which the sender is located is the state in which money is received for transmission. In such instances, the location of the sender may be determined based on the location of the sender’s electronic device used for the transaction at the time of the transaction, or by other location-specific information collected by the person about the sender, such as the sender’s bank account address or home zip code.<sup>4</sup>

Payment to a beneficiary does not constitute receiving money for transmission.

We also believe that the definition of “money transmission” activity subject to regulation should recognize, as does federal law, that whether a person is acting as a money transmitter may be a matter of facts and circumstances.<sup>5</sup> Consistent with this approach, the Model Language should provide for commissioner discretion to determine by regulation or order, or upon written request, whether an activity is covered under the applicable state money transmission law. The Model Language should affirm that such determination shall be made in a manner consistent with the Shared Goals.

### *Payment Instrument*

The definition of “Payment Instrument” should expressly exclude “stored value/prepaid access” in order to mitigate confusion about whether stored value/prepaid access is subject to regulation as a payment instrument in addition to regulation as stored value/prepaid access. We believe that stored value/prepaid access is *not* a payment instrument because it is a means of access to funds that have been paid in advance as opposed to an instrument that is itself accepted for payment, such as a money order or traveler’s check.<sup>6</sup> In addition, the proposed definition of regulated activity (*i.e.*, “money transmission”) differentiates between: (1) Selling or issuing payment instruments; (2) Selling or issuing stored value/prepaid access; and (3) Receiving

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<sup>2</sup> See, *e.g.*, Fl. Stat. 560.103(23).

<sup>3</sup> This approach is also consistent with the common law principles underlying the agent of a payee exemption, as discussed further below.

<sup>4</sup> See, *e.g.*, Va. Code Ann. § 6.2-1902. See also CFPB Remittance Transfer Rule, official staff commentary 30(c)-2 to 12 C.F.R. § 1005.30(c).

<sup>5</sup> See, *e.g.*, 31 C.F.R. § 1010.100(ff)(5) (“Whether a person is a money transmitter as described in this section is a matter of facts and circumstances.”).

<sup>6</sup> We also note that under current BSA definitions, a money order or traveler’s check is a monetary instrument but a prepaid access device is not. See 31 C.F.R. § 1010.100(dd).

money for transmission. Consistent with these three separate elements of “money transmission,” the underlying definitions of each element should be separate and independent. Thus a sentence should be added to the definition of “Payment Instrument” as follows:

“Payment instrument” means a written or electronic check, draft, money order, traveler’s check, or other written or electronic instrument for the transmission or payment of money or monetary value, whether or not negotiable. The term does not include any instrument that is redeemable by the issuer for goods or services provided by the issuer or its affiliate. **A payment instrument does not include “[stored value/prepaid access]” as defined under this [chapter].**

We also note that an exclusion for certain types of payment instruments is proposed within this definition of payment instrument, while other exclusions (e.g., for certain types of stored value) are discussed separately in the “exemptions” section. We believe that it is important that these exemptions mirror each other. We have addressed exemptions for both concepts in our discussion of exemptions below.

#### *Stored Value/Prepaid Access*

The Model Language proposes the following definition of stored value/prepaid access:

Monetary value representing a claim against the issuer stored on an electronic or digital medium, or device (for example a card), and evidenced by an electronic or digital record, intended and accepted for use as a means of redemption for money or monetary value, or payment for goods or services.

We believe this definition is not entirely consistent with current state and federal definitions or with the Shared Goals. In particular, consistent with protecting a *payor’s* funds, prepaid access/stored value should be defined in the context of funds that have been *paid in advance*.<sup>7</sup> This clarification affirms that the funds belong to the paying customer and are being received and held by the licensee (or an issuing bank) on behalf of the customer. We also believe that the definition should: (i) focus on the *use* of the device to *access funds*, and should not be directed at *the underlying funds*; and (ii) be drafted in a manner that does not risk inadvertently conflating stored value/prepaid access with payment instruments (e.g., a money order). Given that these elements are already present in the federal Bank Secrecy Act (“BSA”) approach to prepaid access, CSBS should give consideration to leveraging this definition as follows:

Monetary value evidenced by an electronic record that is prefunded and for which value is reduced on each use, including prepaid access as defined by 31 C.F.R. § 1010.100(ww).<sup>8</sup>

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<sup>7</sup> As discussed later in this letter, we believe there should be an express exclusion from the definition of stored value/prepaid access for loyalty and rewards programs. Nevertheless, a definition that affirms the *pre-payment* element of stored value/prepaid access will help mitigate confusion about the applicability of money transmission licensing laws to loyalty, rewards, and other promotional stored value products that do not involve the holding in trust of a consumer’s paid-in funds on her behalf.

<sup>8</sup> While the BSA is an anti-money laundering regime and state money transmission (as indicated by the Shared Goals) addresses additional regulatory imperatives, looking to the BSA in this context is appropriate because this definition is technical in the sense that it addresses the types of products and services that come within the realm of prepaid access/stored value. The BSA separately addresses the *regulation* of prepaid access products and participants in an arrangement to provide prepaid access through the definition of a money services business (“MSB”); that is where the BSA anti-money laundering policy manifests with respect to prepaid access.

We also believe that the exclusions from the definition of stored value/prepaid access should align with the applicable federal definition. Our specific comments on this exemption are included in the general discussion of exemptions below.

Finally, we note that as new payments models evolve, the distinction between what constitutes stored value/prepaid access as opposed to money transmission can be challenging to navigate across jurisdictions, particularly in light of varying definitions and treatment of regulated activity in these two categories. We propose two guiding concepts to enable regulation of money transmission and prepaid access/stored value as distinct activities: (i) where funds are received without onward payment instructions, the funds received constitute stored value/prepaid access; and (ii) if funds are paid as stored value/prepaid access, they should always be treated as stored value/prepaid access.<sup>9</sup> The implication of this second concept is that when stored value/prepaid access funds are subsequently redeemed for payment, whether for goods or services or for payment to a third-party beneficiary, the redemption of the funds is a stored value/prepaid access redemption *and not a separate funds transfer transaction*.

Consistent with these concepts, we propose the following language that could be added to the definition of stored value/prepaid access:

The use of [stored value/prepaid access] to fund a funds transfer transaction processed by a licensee that is also the redeemer of the [stored value/prepaid access] shall be deemed a redemption of the [stored value/prepaid access] by the licensee and does not separately constitute receiving money for transmission by the licensee.

In the alternative, this treatment of stored value/prepaid access in the context of funding a funds transfer transaction by the same licensee could be affirmed through explanatory guidance accompanying the proposed new Model Language.

### *Virtual Currency*

We understand that CSBS and state regulators are still working through the appropriate regulatory treatment of virtual currency. We do want to note, however, that we believe it is important that any approach to virtual currency regulation preserve the distinction between “virtual currency” on the one hand and prepaid access/stored value and payment instruments on the other hand. Specifically, virtual currency is *itself value*—it is a medium of exchange, unit of account, or store of value. By contrast, payment instruments and prepaid access/stored value devices are *not* of themselves a media of exchange, unit of account, or store of value. A payment instrument is a method of making a payment with a currency, and while the underlying currency (e.g., the U.S. Dollar) is a medium of exchange, etc., the payment instrument itself is not. Similarly, a stored value/prepaid access device is a mechanism for *access to* currency to *make a payment with the currency*. It is not itself a medium of exchange, etc., even though, again, it provides access to a currency that is a medium of exchange.<sup>10</sup> Preserving this

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<sup>9</sup> We note that this distinction for purposes of state money transmission regulation should not be construed as commentary on the distinction between prepaid access and money transmission under the BSA. Under the BSA funds paid prior to a funds transfer instruction may still constitute money transmission activity from the perspective of regulation of the activity if the funds are not accessible through an “electronic device or vehicle.” See FIN-2014-R006, *Whether a Company that Provides Online Real-Time Deposit, Settlement, and Payment Services for Banks, Businesses and Consumers is a Money Transmitter rather than a Provider of Prepaid Access* (Apr. 29, 2014).

<sup>10</sup> One may pay for something in a virtual currency such as bitcoin where a merchant denominates the price of its products or services in bitcoin or is willing to accept bitcoin based on the value of the bitcoin in U.S. dollars. By contrast, merchants do not denominate goods or services in “stored value” or “money order” amounts; stored value or a payment instrument is a mechanism to pay in U.S. dollars.

distinction will mitigate potential regulatory confusion about the relationship between virtual currency and payment devices.

### *Currency Exchange*

Not all (or even many) jurisdictions regulate currency exchange activities, while almost all jurisdictions regulate money transmission. Therefore currency exchange should be defined with precision to affirm that a funds transfer that also includes currency exchange is: (i) regulated as money transmission only; and (ii) not excluded from regulation in a state that does not regulate “currency exchange.”

To address these issues, “currency exchange” should encompass only the physical exchange of currency, which can be achieved by adding the following bolded language to the current proposed definition:

Currency exchange” means ~~advertising, soliciting, or physically~~ accepting, for a fee, the currency or other negotiable instrument denominated in the currency of one government **in exchange and physically exchanging the currency** for the currency ~~or other negotiable instrument denominated in the currency~~ of another government.

Affirming that “currency exchange” constitutes only the physical exchange of currency would also implicitly affirm that funds transfers that include changing currency are nonetheless one money transmission transaction only, and not money transmission as well as currency exchange activity. Thus, the revised definition should clarify that providing payment processing services that include settlement to the merchant (*i.e.*, the payee) in a different currency from the buyer’s currency would not constitute possibly regulated currency exchange as an activity separate from the exempt payment processing services.

In addition, it follows from the focus on the physical exchange of currency that the mere advertising of currency exchange services should not alone constitute “currency exchange” and we believe it would create industry confusion to include this concept.<sup>11</sup>

Finally, we note that exchanging currency for a negotiable instrument (*e.g.*, a payment instrument) should be regulated as the sale of a payment instrument—the changing of currencies should not alter the underlying nature of such a transaction as the purchase of a payment instrument. Our proposed definition addresses this element as well.

### **Exemptions**

#### *Agent of a Payee and Payment Processing*

We appreciate the proposed language affirming that agent of a payee activity is not within the scope of regulated money transmission activity. Confirming an agent of a payee exemption will mitigate uncertainty about whether such transactions may be deemed by a particular state regulator to be subject to regulation as money transmission, even though we firmly believe that a properly structured agent of a payee arrangement does not meet the definition of “receiving money for transmission” in the first instance. Pursuant to a duly executed agency agreement,

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<sup>11</sup> If a regulated entity performs all the otherwise regulated activities related to handling funds, mere involvement in advertising and solicitation by a third party should not be sufficient to trigger licensing, if applicable. Indeed, most substantive requirements of licensees make no sense in the context of an entity that merely advertises a service performed by another entity.

when a payment processor receives a payment—*i.e.*, transaction settlement proceeds from an acquiring bank—the funds are being received, as a matter of the common law of agency, by the ultimate recipient.<sup>12</sup> It follows such transactions should not be considered money transmission activity subject to regulation under state money transmission licensing laws because there is no receipt of funds for the purpose of “transmission” to another party, nor is there a promise made to any sender to make the funds available at another location or to another party.<sup>13</sup>

Nevertheless, to the extent that the Model Language includes an agent of a payee exemption (and we think it should), we recommend that the exemption be construed broadly but be based on a more-streamlined California definition, as follows:

This [chapter] does not apply to 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.

This type of definition provides flexibility for agents and their principals to structure arrangements between the parties in a manner that makes sense for their particular operations, while still ensuring that the core elements of an agent of a payee arrangement are in place.

We also believe that the Model Language provides CSBS with an important opportunity to clarify the regulatory treatment of payment processing activities as distinct from agent of a payee transactions. The concept of a “payment processor” often arises in discussions regarding payee-agency, but the services provided by a payment processor are not the same as those provided by other types of payee agents. The term “payment processor” should be understood to relate to an agent that provides services to enable a consumer-facing merchant to accept payments from consumers directly. Payment methods facilitated may include ACH payments (*i.e.*, payments made from the consumer’s checking account) or credit cards or debit cards (“Payment Cards”). In each case, the payment processor enables the merchant to confirm that the payment transaction is authorized at the moment the consumer makes the purchase (whether point-of-sale or online). The payment processor subsequently receives funds through applicable settlement networks on behalf of the merchant.

In particular, with respect to Payment Card transactions the merchant treats the consumer as having paid, and the cardholder/consumer receives her goods or services, when the transaction is authorized by the cardholder’s issuing bank. Subsequently, issuing banks and acquiring banks clear and settle funds for authorized transactions through the applicable payment card networks, and the acquiring bank settles transaction proceeds to the merchant. The involvement of a “payment processor”—also sometimes referred to as a “payment facilitator”—

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<sup>12</sup> See, *e.g.*, Restatement (Third) of Agency § 6.07(2) (a “third party’s payment to, or settlement of accounts with, an agent discharges the third party’s liability to the principal if the agent acts with actual or apparent authority in accepting the payment or settlement”); see also 60 Am.Jur.2d Payment § 60 (2008) (“[p]ayment to an obligee’s agent discharges the debt if the agent has actual or apparent authority to receive payment, regardless of whether the agent ever pays the money over to the principal”).

<sup>13</sup> See, *e.g.*, Tex. Dept. Banking Opinion No. 14-01 (May 9, 2014) (observing that when the “agent” receives the funds, “it is the biller receiving the funds . . . In essence, the agency relationship renders the exchange a two-party transaction between the biller and the customer. Without receipt of money in exchange for a promise to make it available at a later time or different location, there is no money transmission.”); Kansas Office of the State Bank Commissioner, MT 2016-01, *Regulatory Treatment of an Agent-of-the-Payee* (Nov. 30, 2016) (“Kansas agency common law recognizes the customer’s transaction is completed once the agent-of-the-payee receives payment in certain situations. Because the customer’s transaction is completed upon the agent-of-the payee receiving payment, there is no money transmission.”).

in a Payment Card transaction does not alter this fundamental structure and does not alter in any material sense the interaction between the consumer and the merchant. The only distinction, from a flow of funds perspective, is that in addition to providing data processing services, a payment processor also receives transaction settlement proceeds funds from an acquiring bank as an agent of a merchant, and then settles those transaction proceeds to the merchant.

It should be clear from this description that no “money transmission” transaction takes place when a consumer uses a Payment Card to purchase goods or services, regardless of whether a payment processor is involved. CSBS should take the opportunity to clarify via the Model Language that these payment processing activities—receiving settlement funds from a bank on behalf of a merchant for a purchase transaction that has already been authorized and completed—should not be treated as money transmission and, as a result, do not implicate the Shared Goals.

### *Stored Value/Prepaid Access*

First, we believe CSBS should encourage states to adopt a uniform definition of exempt “closed loop” prepaid access that starts with the BSA definition but also affirms that incentive and promotional products, such as in-game rewards for online video games, are not subject to regulation as stored value.<sup>14</sup> For example:

Stored value/prepaid access does not include an electronic record that is: (A) loaded with points, miles, or other nonmonetary value, whether for incentive and promotional purposes or otherwise; (B) not sold to the public but distributed as a reward or charitable donation; or (C) redeemable only for goods or services from a specified merchant or set of affiliated merchants, such as: (i) a specified retailer or retail chain, including a retail chain operating under a franchise model or other arrangement where such chain participants operate under a common brand name; (ii) a set of affiliated companies under common ownership; (iii) a college campus; or (iv) a mass transportation system.

This definition is more consistent with the nature of how closed loop products are currently issued to customers of retailers, including online e-commerce marketplaces.

Second, we believe that a parallel exclusion using the same language should be affirmed for payment instruments. These exclusions should be included in the definitions of these terms and not in a separate exemptions section in order to mitigate the implication that the activities would be within the scope of regulated activity unless otherwise expressly exempt.

### *Bank-Issued Stored Value Prepaid Access*

The Model Language suggests that FDIC insured general purpose reloadable stored value/prepaid access would be “Exempted under agent of bank exemptions.” This language should be amended to clarify that if prepaid access/stored value is issued by an FDIC-insured bank and the consumer’s funds are protected by FDIC insurance at the moment of purchase, then the issuance, sale, or reloading of such prepaid access should not be subject to regulation as money transmission (provided in all such cases that the funds are and remain FDIC-insured

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<sup>14</sup> Even though dollar-denominated loyalty and rewards value should not be deemed stored value as set forth in our proposed definition of prepaid access/stored value (because the consumer has not paid any funds in advance but rather is being *given* the value), we believe that the exclusion should cover such products expressly to mitigate any confusion on this point.



in this manner). To be clear, however, the FDIC insurance must run to the benefit of the consumer, and not a non-bank seller of the prepaid access/stored value. Only in the former case is the consumer ensured protections at the point of sale. And, we note that this exclusion necessarily implies that the consumer has undergone a customer identification process prior to the purchase, so that the customer is identifiable as the person on whose behalf the funds are being held by the issuing bank.

### *Virtual Currency*

Given the potential breadth of any adopted definition of “virtual currency,” we believe that CBS should also ensure that associated exemptions are correspondingly broad so that activities such as offering incentives, rewards and loyalty programs are not inadvertently subjected to regulation as virtual currency activity. For example, if states or CSBS look to the definition of virtual currency established by the Uniform Law Commission, the corresponding exclusions from the Uniform Law Commission definition should be utilized as well.

Furthermore, an exemption that mirrors the “closed loop” exemptions discussed above should be incorporated into any definition of virtual currency. Assuming a state determines it is appropriate to regulate virtual currency activity, this type of carve out would mitigate the risk of inadvertently sweeping into that regulation activity that is otherwise excluded by the “closed loop” exemption. Thus virtual currency potentially subject to regulation would not include:

Virtual currency that is: (A) issued for incentive or promotional purposes and usable to purchase points, miles, or other nonmonetary value; (B) not sold to the public but distributed as a reward or charitable donation; or (C) usable only for purchases of goods or services from a specified merchant or set of affiliated merchants, such as: (i) a specified retailer or retail chain, including a retail chain operating under franchise model or other arrangement where such chain participants operate under a common brand name; (ii) a set of affiliated companies under common ownership; (iii) a college campus; or (iv) a mass transportation system.

### *Charitable Contribution Exemption*

Because 501(c)(3) charities are subject to oversight by the Internal Revenue Service and because donors to nonprofits are different than consumers of traditional money transmission services, such charities should be excluded from money transmission regulations. That is, while consumers use money transmitters to pay for the necessities of life and for transmitting money to family members, donations are not payments for consumer goods or services, nor are they typically directed at a specific beneficiary.<sup>15</sup> Thus the Shared Goals are not implicated in connection with charitable contributions in the same manner as for typical funds transfer services.

### *Agent of an Exempt Entity*

The Model Language proposes an express exclusion from money transmission regulation for an agent of, or service provider to, an exempt bank (*i.e.*, an “Insured Depository Financial Institution”). We believe that this exemption should be expanded to affirm as exempt an entity that acts on behalf of and as a duly appointed agent of *any* type of exempt entity.<sup>16</sup> This

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<sup>15</sup> See, *e.g.*, California Department of Business Oversight, Addendum to the Initial Statement of Reasons for the Rule Changes under the Money Transmission Act, *available at*: <https://dbo.ca.gov/wp-content/uploads/sites/296/Laws/SupplementInitialStatementOfReasons.pdf>.

<sup>16</sup> See, *e.g.*, Cal. Fin. Code § 2030(a).

proposed exclusion is consistent with the common law of agency, which provides that an agent acts for its principal when acting within the scope of the agency appointment.<sup>17</sup>

### III. CONTROL AND CHANGE OF CONTROL

FIN appreciates the effort by CSBS to provide states with a framework for streamlining the processes for managing control person changes and changes of control via acquisition. We have the following specific suggestions with respect to these proposed provisions.

#### *Definition of Control*

The Model Language proposed definition of control would include “at least 10 percent of a class of voting securities or voting interests of a licensee or person in control of a licensee.” We believe that control should be determined based on total voting share as opposed to a percentage share of a certain share class. Total voting power is a more accurate determination of the ability to control a licensee than ownership of a particular share class. For example, if there are 100 “Class A” and “Class B” shares, and each Class A share can be voted as equivalent to 100 Class B shares, then ownership of all of the Class B shares should not be treated as a controlling interest because the shares are tantamount to less than 1% of the total voting power.

FIN also believes that it is important to distinguish between a controlling person (e.g., an officer or director who would be listed on the NMLS MU1 form and required to complete an MU2) and a controlling “person” in the sense of an owner of, or investor in, the licensee. The distinction is important because a change to an officer or director is an ordinary-course event that should not require advance approval or advance notice. By contrast, a change of ownership or an acquisition of a controlling interest of a licensee through a purchase of a triggering equity or voting interest is generally understood to be the type of event that requires notice to, and approval from, applicable banking departments. Thus we believe that the Model Language should establish separate concepts of a “Control Person” and a “Control Individual,” with the latter category constituted of the *individuals* responsible for the day-to-day management and oversight of the licensee. Such Control Individuals would generally be the licensee’s officers and directors, and these would be the individuals listed on the MU1 and in turn required to complete an MU2.

#### *Change of Control Processes*

In light of the distinction between a “Control Person” and a “Control Individual,” the following proposed Model Language for “Procedures for Control Persons” should be struck: “Whenever this [act] requires a person to be approved by the [superintendent] to serve as an organizer, incorporator, director, executive officer, or control person of a licensee . . .” It should be replaced with language along the lines of the following:

In connection with a change to the executive officers or directors of a licensee, notice shall be provided to the [superintendent] through NMLS no later than the date on which such

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<sup>17</sup> See, e.g., *Channel Lumber Co. v. Porter Simon*, 78 Cal. App. 4th 1222, 1227 (2000) (“The essence of an agency relationship is the delegation of authority from the principal to the agent which permits the agent to act ‘not only for, but *in the place of*, his principal’ in dealings with third parties. (*People v. Treadwell* (1886) 69 Cal. 226, 236, italics in original.) ‘The heart of agency is expressed in the ancient maxim: ‘*Qui facit per alium facit per se*.’ [He who acts through another acts by or for himself.]’ (*Wallace v. Sinclair* (1952) 114 Cal. App. 2d 220, 229; see 3 Am.Jur.2d (1986) Agency, § 2, p. 510.)”).

change occurs. For each new individual who is an executive officer or director of the licensee, the following additional information shall be provided through NMLS within 15 days of the notice of the change...

With respect to the specifically required information for a new Control Individual, we believe that controlling individuals of licensees that are publicly traded companies or that are wholly owned subsidiaries of publicly traded companies should not be required to undergo the credit report and criminal background check processes. The personal credit of a Control Individual of a publicly traded company is not material to the safety and soundness of a money transmitter and is therefore an unnecessary invasion of privacy. Furthermore, existing regulatory oversight and scrutiny of publicly traded companies already provides a sufficient regulatory framework that should obviate the need for state regulators to duplicate those efforts, including requiring additional criminal background checks. We do, however, appreciate that the proposed required information does not include personal financial information (other the credit report) of control individuals. Nevertheless, because of the burden and invasion of privacy that would result if any state continued to require this information, the Model Language should expressly affirm that:

No such controlling individual shall be required to provide personal financial information solely because such person is a control individual.

We also believe that states should be encouraged to transition toward a framework under which prior approval is not required for a licensed money transmitter to obtain control of another licensed money transmitter in any jurisdiction in which the acquiring entity is a licensee in good standing. The acquisition of control approval process is superfluous in the case of a licensee that has already obtained approval from the applicable banking department to engage in regulated money transmission activity. By enabling this type of transaction to proceed without requiring the full approval process licensees will be able to consummate at least some change of control transactions more efficiently.

As a final matter, while the Model Language would exclude “a public offering of securities” from the acquisition of control application requirements, we also believe that purchase of the publicly traded shares of a licensee should not trigger preapproval requirements *unless the purchase is subject to an agreement with the licensee*. In other words, if a party seeks to obtain a controlling interest in a licensee by accumulating public shares of the licensee, it is impractical to require that the licensee—who is not a party to the transaction—undertake the notice and approval process through NMLS. The acquiring entity should be required only to provide notice after having obtained the controlling interest.

#### **IV. FINANCIAL CONDITION**

FIN believes that further discussion and engagement with industry participants is necessary in order to help finalize proposed model language for adoption by state legislatures relating to prudential regulatory requirements applicable to licensees. In particular, any further actions relating to the proposed “suspension bridge” approach should not be taken until CSBS, state regulators, and industry participants are able to engage in further discussion. FIN is particularly concerned that a “suspension bridge” type of arrangement has the potential to impose significant new costs and burdens on licensees. It is not clear, however, what possible shortfalls in the current prudential regulatory regime the “suspension bridge” alternative is intended to address. Notwithstanding FIN’s strong recommendation for further discussion, the following are initial comments regarding specific elements of the proposed approach to creating a uniform set of requirements for the prudential regulation of money transmitters.

### *Permissible Investments*

FIN is **strongly opposed** to the proposed 30% limitation on the holding of highly liquid, high-quality “AAA-A investments, commercial paper, corporate debt or bonds” as permissible investments. This proposed haircut is without precedent in state money transmission licensing laws and would be extremely disruptive to licensees that have developed permissible investments strategies based on holding these types of assets. It is also unnecessary, as there are sufficient controls in place to ensure that the types of triple-A rated investments that licensees hold as permissible investments are sufficiently safe and liquid.

Nevertheless, FIN acknowledges that under the current “three-legged stool” approach, permissible investments requirements are a key mechanism by which state regulators seek to ensure that licensees are safe and sound and are able to meet their payment obligations to their customers. Thus, FIN is open to discussions about alternative structures for ensuring that customer funds are appropriately protected such as the PSD2 safeguarding approach. We note, however, that the PSD2 approach consists of measures that work together to protect customer funds and that this approach does not lend itself to piecemeal adoption. For instance, requiring safeguarding but not permitting licensees to rely on a line of credit or restricting how funds can be utilized may wind up creating a more burdensome regime than the current U.S. structure.

We also support an effort to standardize across all states the holdings that may be used as permissible investments. In addition to creating a uniform set of permissible investments holdings, the Model Language should affirm that both permissible investments and outstanding obligations shall be calculated and reported in accordance with U.S. generally accepted accounting principles (“GAAP”). Licensees, including FIN members, must prepare their financial statements in accordance with GAAP, and when money transmission reporting cannot be done in accordance with GAAP—including on the same timeframes as licensees’ financial reporting—it creates incongruities in the reports as well as imposing a significant burden on licensees to develop multiple calculations and then reconcile them across reporting regimes.

In addition, to ensure consistency with GAAP as well as consistent reporting of permissible investments, a uniform definition of what constitutes an outstanding obligation should be included in the Model Language. One key consideration to address is when an obligation is incurred and when it is extinguished. We believe that Model Language should establish that an obligation is incurred when funds are actually received by the licensee or when the licensee confirms the transaction to the payee, whichever occurs first. We also believe that licensees should be permitted to extinguish an obligation when funds for an ACH payment are debited from the licensee’s bank account by the originating depository financial institution. As a general matter, 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 be used as permissible investments.

### *Net Worth*

FIN is concerned that a net worth requirement of 3% of total assets could result in an unreasonable and unnecessarily high net worth requirement for larger money transmission licensees. As discussed above, the primary mechanism to ensure the safety and soundness of licensees—to ensure they are able to meet their payment obligations—is the permissible investments requirement. The net worth requirement was intended as a baseline assurance

that companies seeking to engage in money transmission meet basic minimum standards to do so. We believe that the net worth requirement should largely remain a requirement for the purposes of this basic gating functionality. Thus, if an approach such as net worth floor based on a percentage of total assets is maintained as a final recommendation, then it should be capped at \$10 million. This ceiling is much higher than any express statutory net worth requirement today and should provide reasonable assurances to regulators of the relative health of a licensee while also not imposing an undue burden.

#### *Surety Bond*

FIN is also concerned that the proposal to enable state banking departments to increase state-specific surety bond requirements to \$7 million creates the risk of unreasonably high aggregate surety bond obligations. We believe that if this discretion is maintained in the Model Language, it should be subject to specific parameters so that state banking departments do not have unfettered discretion to increase surety bond amounts.

#### **V. NEXT STEPS**

FIN reiterates its appreciation of CSBS's efforts to work with state regulators and industry to develop proposed model language for the uniform and consistent regulation of money transmission activity, and looks forward to ongoing engagement with CSBS as these efforts move forward. We are hopeful that a more consistent state money transmission regulatory regime can be developed by CSBS in tandem with state regulators, and we also encourage CSBS to work with U.S. Congress on a federal mechanism that will support uniform state adoption and implementation of a fully updated model payments law.

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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 21<sup>st</sup> century.

Respectfully,



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