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Re: CSBS Draft Model Language - Request for Comments

To Whom It May Concern:

This letter is submitted on behalf of The Money Services Round Table ("TMSRT")[1] in response to the request for comments on the MSB Model Law[2] issued by the Conference of State Bank Supervisors ("CSBS") on October 1, 2019. TMSRT was founded in 1988 as an information sharing and advocacy group for the nation's leading non-bank money transmitters. Since it was founded more than 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 regarding the MSB Model Law and related materials.

General Comments

As we affirmed in our comments to CSBS in response to the model payments law request for information in February of this year (the "RFI"), TMSRT supports efforts to create harmonized and modernized regulation and supervision of money transmitters. Improving the existing fractured regulatory landscape to make it more consistent, efficient and fair for

[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 and is a "Money Services Business" under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, and its implementing regulations, 31 C.F.R. Chapter X (collectively, the "BSA").

[2] *See* https://www.csbs.org/msblawcomments.

all enterprises will benefit all industry participants, while continuing to protect the financial system and the consumers and businesses that use money transmitters' services. TMSRT appreciates all of the efforts of industry participants, CSBS, and state money transmission regulators to develop the Draft Model Language and the accompanying commentary.

Our comments in this letter focus primarily on specific proposed statutory language (the "Draft Model Language") that CSBS published, as well as the proposed alternatives for prudential regulation and for supervisory coordination. We continue to believe that the development of an updated, model uniform money transmission law is an ongoing and iterative process that will require consistent and open communication between regulators, CSBS and industry, and we are happy to serve as a resource for CSBS as the efforts continue. This letter is intended to assist CSBS's continuing efforts to establish a new model money transmission law that can be successfully adopted on a state-by-state basis.

One significant outstanding question TMSRT has is what CSBS intends to do next with the Draft Model Language. The Draft Model Language proposes statutory language addressing some key areas of regulation such as: the scope of regulated activity; information required for new officers and directors; the process of applying to acquire control of a licensed money transmitter; and net worth and surety bond requirements. These are important building blocks for the regulation of payments services activities. The Draft Model Language, however, does not address a number of provisions that are relevant to the day-to-day regulation of money transmission activity but have not yet been addressed in the Draft Model Language, including: additional definitions and exemptions; reporting and recordkeeping obligations; the timing and scope of outstanding money transmission obligations; and receipt, disclosure and posting requirements. We believe all of these issues, and others, will need to be covered so that a true uniform money transmission regime can be established. We reaffirm our willingness to support CSBS in its efforts to build out a model law that addresses these issues.

In addition TMSRT believes that all persons engaged in money transmission should be subject to the model money transmission law. Statements in the Executive Summary appear to suggest that CSBS is considering alternative structures for companies with smaller scopes. For example, the Executive Summary states that "[t]he model law language should apply to companies operating or seeking to operate on a national scale. Companies that only operate in one state or that are otherwise uninterested in integrated standards should not be subject to a uniform law." It also asks how states should "***bifurcate*** the applicability of the model law language and existing law" (emphasis added), and proposes options including:

> 1) The model law language is adopted as an overlay of existing state law, allowing those interested to transition from a current state license to a multistate license. 2) The model law language is inserted into existing state laws as an alternative means of compliance. 3) The model law language replaces existing state laws, but states retain their preexisting regulatory requirements for small or single state companies.

Based on our understanding of these proposals, these options would appear to be at odds with the premise underlying the efforts to develop a model payments law: there are agreed upon principles that drive the regulation of money transmitters, and the different treatment of the same activity in different states (and the resulting disparity in, among other things, consumer protections) is inefficient and does not enhance consumer welfare. One of the most important goals of money transmission regulation is to protect a payor of funds. The standard used to protect the customers of payments services providers should be the same regardless of the size and scope of the company engaging in the activity, and regulated under the same set of laws.

TMSRT also seeks clarification of another aspect of the model law materials as they relate to implementation. The Executive Summary suggests that the next steps for the Draft Model Language include using the language "as a ***policy foundation*** for all other aspects of MSB regulation and supervision: streamlining implementation, process, and supervision based on the standards adopted in the model law" (emphasis added). We understand that CSBS seeks to facilitate greater uniformity in state regulation of money transmission—and we support this effort—but we are concerned about the ramifications of seeking to establish national money transmission *policy*, implemented through the Nationwide Multistate Licensing System ("NMLS"), irrespective of the current state laws regulating money transmission. Any policy must be consistent with the actual laws and regulations that support it; policy implemented through NMLS cannot alter what state statutes and regulations require. Without statutory or regulatory changes we are concerned that states will embrace NMLS policy as additive and not as a replacement for current requirements (and state-specific interpretations of requirements).

Ultimately, states have the final say in what the money transmission law is. Licensees must comply with the state laws and regulations in effect, and they are at risk of significant state-imposed penalties if they fail to comply with these laws.[3] It is already the case that licensees, including TMSRT members, must navigate divergent requirements not just among states, but also between state statutory requirements and requirements imposed by states through NMLS.[4] As we noted in our comments on the RFI, there are many instances in which regulators use NMLS to establish new requirements that are not expressly set forth in statute or regulation. Even if it were inadvertent, creating further divergence between what is required through NMLS and what is expressly set forth in state law and regulation would not be consistent with the goals of a uniform law. In addition, if the model language results in a broader scope of issues that are defined and determined through NMLS (such as the

[3] In addition, federal criminal prosecution could occur for engaging in money transmission without any required state licenses, and penalties include fines or imprisonment for not more than 5 years for any person who "knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business…" *See* 18 U.S.C. § 1960(a).

[4] For example, some states have implemented streamlined NMLS licensing application checklists but as a matter of "policy" require extensive additional information that is not listed on the checklist.

definition of activity within the scope of regulation) without actual uniformity in the statutes and regulations, challenges of the current arrangement of state-by-state regimes plus NMLS will be exacerbated. Therefore, while we support CSBS's efforts to improve the regulation of money transmission, we believe that state money transmission statutes and regulations govern and must continue to govern money transmission activity. Hence the importance of achieving greater convergence in these laws so that money transmitters can be regulated in a more uniform manner.

Comments on Activity Definitions

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. As a starting point, definitions of regulated activity should be harmonized consistent with these aims so that the financial system is consistently protected, and so that the protections afforded to payors do not vary based on the state in which a transaction happens to occur. Comments on particular definitions of interest to TMSRT are provided below, but as an initial matter we want to address the question raised in the Executive Summary regarding how states should ensure consistent interpretation of definitions.

We reiterate our above comments that we believe CSBS's final work product should be a comprehensive updated model money transmission law. We believe that this model law can use the Uniform Money Services Act[5] ("UMSA") as a starting point. Like the UMSA, the updated model law could include prefatory language explaining agreed-upon principles underlying the state money transmission regulatory regime as well as commentary explaining the bases for each of the relevant definitions of regulated activity (and excluded activity), among other provisions. We also note believe that uniform and more granular definitions, based on a set of agreed-upon principles, could help states—and industry—better understand what activity is subject to regulation and what is not. And, with uniform definitions, states should be encouraged, and should be more willing, to look to interpretations and publicly available determinations from other states in the course of undertaking their own interpretations.

Receiving Money for Transmission

TMSRT agrees that the definition of money transmission activity subject to regulation should be limited to receiving money *in the United States*. This clarification mitigates the potential

[5] Uniform Money Services Act (National Conference of Commissioners on Uniform State Laws 2004), *available at* https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=cf8b649a-114c-4bc9-8937-c4ee17148a1b&tab=librarydocuments.

applicability of U.S. money transmission laws (and, therefore, obligations such as permissible investments) to activity occurring outside the United States (and, accordingly, subject to applicable local regulatory regimes).

We believe, however, that a model definition of money transmission should also provide clarity about what constitutes receiving money for transmission—and therefore regulated activity—*in a particular state*. Because of the increasing popularity of conducting money transmission transactions online and through mobile applications, a clear delineation of what it means for a payor to be "in a state" would benefit regulators and industry participants. For example, the definition of receiving money for transmission could be elaborated upon to affirm that:

> A person engages in money transmission in the state in which the customer is located at the time at which the customer gives money or control of their funds or credit into the custody of the person for transmission. A licensee may determine the location of the customer based on the customer's physical location for transactions conducted in person, and based on the location of a consumer's electronic device or address on file, or similar information, for a transaction conducted online or through a mobile device. Electronic payment of funds to a beneficiary in a state does not, alone, constitute engaging in the business of money transmission in the state.

Payment Instrument

Because prepaid access[6] (and exempt prepaid access) is defined separately from "payment instrument," we believe that the definition of the latter should expressly exclude prepaid access. Affirming this distinction will mitigate confusion about the regulatory treatment of prepaid access and payment instruments such as money orders. The distinction is also consistent with the proposed model definition of money transmission, which separately includes "selling or issuing payment instruments" and "selling or issuing [prepaid access]."

Currency Exchange

Because "currency exchange" activities are not subject to licensing and regulation in all (or even most) states, we believe that the Draft Model Language should delineate activity that constitutes "currency exchange" and activity that *involves currency exchange* but is in fact money transmission. The distinction is material because of the increased prevalence of payments services provided electronically that involve changing currencies as part of the service. That is, we believe that any electronic "currency exchange" should in fact fall within the definition of money transmission because regardless of whether the intermediary delivers a different currency to the paying party or to a third-party payee, funds are

[6] The Model Payments Language uses "stored value" or "prepaid access." We use only "prepaid access" herein for readability, but our views apply to "stored value" and "prepaid access."

transmitted from an account to the intermediary and then to another account.[7] Thus, the definition of currency exchange should affirm that this activity is limited to the in-person, *physical* exchange of currency.[8]

Business to Business Activity

The Draft Model Language does not include a proposed exemption for business-to-business payments. We believe this approach is consistent with the policies underlying money transmission regulation. As we stated in our comments on the RFI, there are two primary questions that can guide the determination of what activity: (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? Payments services provided to a business can pose the same risk of nonperformance as payments services provided to an individual consumer. And, given the relative dollar size of business payments, the risk to the payor, and to the financial system, may even be greater than the risk associated with consumer payments.

In addition, anti-money laundering concerns are manifest in business-to-business payments as well as in consumer payments. The BSA (with respect to money transmission) focuses on an intermediary that moves money. The regime does not differentiate between payments initiated by a consumer and by a business because that distinction is not germane to money laundering risk.[9]

These questions are also generally consistent with the policies underlying Draft Model Language, as set forth by CSBS in the Executive Summary: (1) protecting consumers from

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[7] UMSA commentary states, for example, "currency exchangers pose less safety and soundness concerns because customers . . . are provided with cash immediately. There are no unpaid obligations and . . . currency exchangers do not hold a customer's money but provide an immediate exchange." UMSA § 202, cmt. 1. This commentary makes clear that "currency exchange" is contemplated to be the physical and immediate exchange of funds and not a payment transmitted to a bank account, for example.

[8] *See, e.g.,* California Department of Business Oversight, *Opinion – "Foreign Currency Exchange Services – Not Subject to Money Transmission Act"* (Dec. 6, 2011), *available at*: http://www.dbo.ca.gov/Laws_&_Regs/dfi_orders_files/Opinion-Foreign_Currency_Exchange_Services.pdf (A money transmission license would not be required for a currency exchange service provided in person at an exchange window because the exchanger would "not hold customer funds for future transmission nor be financially liable to the customer." The customer would walk into a physical "business location and purchase a commodity (pesos) at which time the transaction will be complete.").

[9] We note that the Executive Summary states that "payments between businesses are a crucial underpinning to state economies." Be that as it may, we believe that the reasons articulated herein form a stronger basis for the regulation of such payments under money transmission laws. In addition, we note that while the Executive Summary states that one of the three key policies underlying the Draft Model Language is "protecting consumers from harm, including all forms of loss," consistent with the inclusion of business payments we believe a more precise articulation of this policy would be protecting *payors* from harm, including all forms of loss.

harm, including all forms of loss; (2) enabling states to prevent bad actors from entering the money services industry; and (3) preserving public confidence in the financial services sector.

Exemptions

TMSRT stated in its comments on the RFI that a model payments law should establish a consistent and uniform scope of regulated activity based on two themes that operationalize the above-noted principles of money transmission regulation. First, whether there is risk to payors should be the primary test for whether activity should be regulated under money transmission laws. And, second, the money laundering risk associated with particular transaction types should also inform the scope of regulated activity. Below we provide comments on proposed exemptions in the Draft Model Language consistent with these principles.

Insured Prepaid Cards and Bank Agency Exemption

The exemption relating to bank-issued prepaid access is not dependent on the seller of the prepaid access being an agent of the bank. Instead, the basis for excluding bank-issued prepaid access is that such funds are credited immediately by the issuing bank to the consumer and "covered by federal deposit insurance immediately upon sale or issue" *to the benefit of the consumer* (and not, for example, a third-party non-bank issuer, program manager, or seller of the prepaid access). Therefore if the Draft Model Language includes an express exemption for bank-issued prepaid access, it should be modeled on the Washington exemption set forth at Wash. Rev. Code § 19.230.020(14) as follows:

> This chapter does not apply to a seller of prepaid access when the customer's funds are directly covered by federal deposit insurance immediately upon the sale the prepaid access.

We believe that this type of definition more precisely establishes the requirement that the customer's funds must be deemed received by the issuing bank, and covered by FDIC insurance, at the point of sale. We also note that the party selling the prepaid access, *e.g.* a retailer, still likely needs to transmit funds to the issuing bank to settle its independent obligation. If it does so through an intermediary (such as a distributor of prepaid access on behalf of an issuing bank) that intermediary may still be engaged in providing a business-to-business funds transfer service.

As a related matter, we believe that it is necessary for any express exemption for an agent of an insured depository financial institution to be more precise. A general exemption for bank agents risks financial system instability and has the potential to harm consumers. It provides too much latitude for persons to offer their own financial products and services to payors seeking to make payments to third parties under the guise of bank "agency" without the services truly being bank services, as implied by the concept of agency.

Without specific criteria for a bank agency exemption, customers may not understand that they are truly doing business with a bank and that the bank is responsible for their funds and the associated regulatory compliance. In some cases, the principal bank may also not understand the extent of its responsibility for the service and the implications for the bank's overall safety and soundness (*e.g.*, any outstanding customer obligations would be the bank's outstanding obligations and therefore should be on the bank's balance sheet). Thus, consistent with the general notion of agency, and with the authorized delegate/licensed money transmitter structure, bank agency should be permissible only to the extent that the agent is providing a service on behalf of (or to) the bank in connection with a payments service offered by the bank to the customer. Such an exemption could be modeled on the current Texas exemption for an agent of a bank,[10] as follows:

> This chapter does not apply to an agent of an Insured Depository Financial Institution provided that the agent and the Insured Depository Financial Institution submit a description of the proposed agency arrangement along with information and materials sufficient to demonstrate to the satisfaction of the [superintendent] that:
>
> > (1) the agent and the Insured Depository Financial Institution have executed a written agreement establishing the agency arrangement and setting forth the scope and limits of the authority of the agent under the agreement;
> > (2) such agreement establishes that the Insured Depository Financial Institution:
> > > (A) assumes all legal responsibility for satisfying the money services obligations owed to payors upon receipt of the payor's money or monetary value by the agent; and
> > > (B) assumes all risk of loss that a payor may suffer as a result of the failure of the agent to transmit or otherwise make available the funds in accordance with the payor's instructions
> >
> > (3) the Insured Depository Financial Institution is held out to the consumer as the party holding all legal responsibility for satisfying the money services obligations owed to payors upon receipt of the payor's money or monetary value by the agent and as the party assuming all risk of loss that a payor may suffer as a result of the failure of the agent to transmit or otherwise make available the funds in accordance with the payor's instructions.

Agent of a Payee

The agent of a payee exemption as currently drafted would exclude:

> [A]n agent appointed by a payee to collect and process payment as the agent of the payee, provided the agent can demonstrate that: a) there exists a written agreement between the payee and the agent directing the agent to collect and process payments on the payee's behalf; b) the payee holds the agent out to the public as accepting payments on the payee's behalf; and c) payment is treated as received by the payee upon receipt by the agent so that there is no risk

[10] Tex. Fin. Code Ann. § 151.003(5); 7 Tex. Admin. Code § 33.3.

> of loss to the individual initiating the transaction if the agent fails to remit the funds to the payee.

We believe that this exemption should apply only to transactions involving payments for goods or services other than money transmission.[11] That is, there must be some purpose for an underlying transaction other than a payor seeking to deliver funds to a beneficiary. The requirement of an underlying transaction mitigates the risk to the payor of nonperformance by the intermediary. To put it another way, if no obligation of the payor to the payee is extinguished upon receipt of funds by the agent—such as for a utility bill or a mortgage payment—then all the payor is doing is sending funds to the payee. In this case, the payor is not truly protected by an agent of a payee arrangement because the payor is relying on the intermediary to deliver his or her funds to the payee. Without tethering the exemption to the extinguishing of a payment obligation, we are concerned that there is a risk of an interpretation of the exemption that would enable an intermediary to appoint itself as agent of beneficiaries of funds transfers and therefore seek to exclude funds transfers—payments untethered from a transaction—from regulation as money transmission.[12]

Based on these principles, the first sentence of the exemption could be modified as follows: "[A]n agent appointed by a payee to collect and process payment as the agent of the payee **in connection with transactions other than money transmission between the payor and the payee**..."

Prefunding

While no model language is provided, the Executive Summary asks, Should "businesses that only take payor funds after they've sent money to the payee at the payor's instruction (prefunding) be exempt?" We believe that prefunding is an area where state regulators must tread very carefully to ensure that any express exclusion from regulation is not inconsistent with the principle of protecting payors and the financial system from harm. In particular, the obligation of a money transmitter is to *deliver* funds, not to *send* funds, and therefore the receipt of funds after the intermediary has *sent* funds cannot be sufficient to exclude the activity from money transmission regulation.[13] In addition, because of the prevalence of electronic money transmission services, many money transmitters make funds available to

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[11] *See, e.g.,* Cal. Fin. Code § 2010(*l*). *See also* 31 C.F.R. § 1010.100(ff)(5)(ii)(B) (excluding from the term "money transmitter" under the BSA a person that only "[a]cts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or . . . by agreement with the creditor or seller").

[12] *See* Ca. DBO, *Request for a Legal Opinion under Financial Code Section 2010(l)* (February 6, 2018), *available at:* https://dbo.ca.gov/wp-content/uploads/sites/296/2019/03/Agent-of-Payee-Exemption-Goods-or-Services.pdf.

[13] *See, e.g.,* Cal. Fin. Code § 2003(r) (defining an outstanding money transmission obligation to include funds received "not yet paid to the beneficiaries"); Wash. Rev. Code § 19.230.010(21) (defining outstanding money transmission as funds received but "not yet completed" by "delivering the money . . . to the person designated by the customer").

payees well before they have received good funds from the payor, *e.g.*, through the ACH or credit and debit settlement processes. Finally, money transmission licensing laws generally prohibit an unlicensed person from "holding itself out" as a money transmitter. Thus, an intermediary that holds itself out as providing a service to enable payors to make payments to payees may still be engaged in regulated money transmission regardless of the temporal structure of the payments.

Furthermore, the "temporal" element of money transmission is less salient with respect to anti-money laundering compliance. Here, the primary concern is funds moving from one party to another through an intermediary, and not the timing of receipt and payment. Thus, the BSA definition of "money transmission services" entails acceptance of funds "*and* the transmission" of funds, without expressly requiring that acceptance come prior to transmission.[14] As FinCEN elaborated in the final rule promulgating this definition:

> One commenter suggested that the phrase ''the acceptance of currency * * * from one person AND the transmission * * * to another location or person,'' indicated that acceptance by the money transmitter of funds had to precede any transmission to satisfy the definition. If this were the case, however, it would be easy—particularly in an electronic environment—to circumvent this definition by the simple expedient of transmitting funds a fraction of a second before accepting them. The activity of money transmitting, for the purposes of FinCEN regulations, involves both acceptance and transmission, but not necessarily in that order. FinCEN is concerned about the ability to circumvent regulation if it were to require that the acceptance of currency must always precede transmission.[15]

In light of these considerations, any exclusion based on "pre-funding" should, at the least, have the following characteristics:

- The payor understands that the intermediary is not providing a money transmission service but rather a prepayment service.
- The intermediary takes on full credit risk for the payment.
- Payor funds are not accessed, held, impounded or otherwise guaranteed to the intermediary prior to the payment being made by the intermediary to the payee.
- Payment from the payor is not due to the intermediary, and cannot be received by the intermediary, until after the intermediary provides proof to the payor that the payment has been received by the payee and credited to the account of the payor with the payee.

[14] 31 C.F.R. § 1010.100(ff)(5)(i)(A).
[15] 76 Fed. Reg. 43585, 43592 (Jul. 21, 2011).

Control and Change of Control

TMSRT noted in its comments on the RFI that issues relating to "control" of a money transmitter are one of the most challenging aspects of the current 50-state arrangement for applicants, licensees, and, one assumes, regulators. We thus appreciate the efforts made by CSBS to begin developing a process for uniform treatment of control persons and the change of control process. Our below comments focus on how proposed definitions and processes relating to control and change of control should be further clarified and streamlined to ensure that the financial system is protected without disrupting the ability of money transmitters to operate effectively.

Definition of Control Person

In our comments on the RFI, we noted the importance of clearly distinguishing a control person with respect to ownership of a licensee (*e.g.*, economic ownership, voting power, power to elect or remove officers, etc.) from a control person with respect to *management and oversight* of the licensee (*e.g.*, the executive officers and Board of Directors). We believe the Draft Model Language should make this distinction more clear, particularly because of the implications for change of control.

With respect to controlling ownership, we continue to believe that a 10% threshold is too low and that an appropriate uniform standard of "control" with respect to ownership is ownership of shares that constitute 25% or more of the *current 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 with definitions of a controlling ownership share with respect to depository financial institutions.[16] In addition, this approach does not differentiate control based on any class of shares but only based on total voting power. Among other concerns, information regarding a particular class of shares cannot readily be provided in NMLS, as we understand that the direct ownership share of a licensee must total 100% on the MU1 form "Direct Owners and Executive Officers" section.

We also believe that a separate concept of a controlling *individual* should be included to help distinguish the types of control events triggering the preapproval process (*e.g.*, acquisition of control) and the types of control events requiring only timely notice to state money transmission authorities (*e.g.*, officer and director changes). As the issue of control, and the process of changing control, continues to be very burdensome for industry participants, there is significant opportunity for improvement. These types of changes should therefore garner broad support. As we stated in our comments on the RFI, the concept of control with respect

[16] 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.

to the individuals that oversee and manage the licensee should be expressly defined to include: (1) members of the board of directors of the licensee, given their ability to oversee and manage the policies of the licensee; and (2) the Chief Executive Officer, the Chief Financial Officer, and the Chief Compliance Officer. 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 control persons can be streamlined and simplified without compromising the safety and soundness of licensees or the financial system.

Control Person Exclusion

We understand that the carve-out from the definition of control is intended to address passive investors[17] but this mechanism requires clarification. As drafted, the carve-out states that the term "control" does not include a person that, *inter alia*, "has no power to vote, directly or indirectly, any class of voting securities or voting interests of a licensee or person in control of a licensee" and "does not participate in decisions relating the day-to-day operations of the licensee." Given that the proposed definition of control includes 10% voting interest or power to exercise a controlling interest, ***it is not clear how any person that met the carve-out criteria would be at any risk of being deemed a control person in the first place.***

We believe that this element in particular requires further discussion between industry and CSBS to ensure that the exemption is understandable, relevant, and not inconsistent with the principles-based regulation of the industry.

Procedures for Control Persons

As noted above, the Draft Model Language should clarify the distinction between a change in a controlling individual, *e.g.*, an executive officer or director of the licensee, and a change in ownership or control of the licensee itself. In this regard, it is very important that no suggestion be given that a change in a controlling individual requires *approval* by the state regulatory authority (unless it occurs as a result of a change in ownership of the licensee, as discussed further below).[18] And, as indicated by the proposed language below, we also believe that the Draft Model Language should expressly affirm that no advance *notice* of a change of a controlling individual is required. This can help mitigate current inconsistent

[17] As stated in the Executive Summary materials, "To except passive investors, the definition excludes individuals not employed by the licensee who do not have the power to vote and do not participate in operations and decision making."

[18] While state regulatory authorities have the general authority to seek to require a licensee to remove an officer or director who is found unfit to serve through the appropriate administrative processes, pre-approval of controlling individuals of a licensee is not consistent with the current regulation of money transmitters and risks being tremendously disruptive to a licensee's business operations.

state interpretations of advance notice requirements for such changes.[19] While we are not aware of any state money transmission statute that expressly requires advance notice and approval for a change of a controlling individual, some state statutes are not entirely clear.[20] The Model Payments Law should ensure that there is no ambiguity on this matter.

Therefore, the change of control procedures should set forth a standalone uniform process for changes to controlling individuals as well as uniform required information. This information should be limited to the information required on the MU2 form and thus states should, if necessary, be encouraged to modify statutory language to eliminate the need for state-specific supplemental materials.[21] For example:

> (a) A licensee shall provide notice no later than the effective date of any change to the controlling individuals of the licensee.
> (b) Unless otherwise excluded by this section, for new controlling individuals, the following information, and only the following information, shall be furnished to the nationwide multistate licensing system and registry within 30 days of the notification:
> (A) The person's fingerprints for submission . . .

We also believe that the process for new controlling individuals should:

- Exclude from the fingerprinting/background check requirements the controlling individuals of a licensee that is a publicly traded company or that is a subsidiary of a publicly traded company, as we stated in our comments on the RFI.[22] We continue to believe that in such cases, the regulatory scrutiny of a publicly traded company is sufficient to affirm that control individuals are fit to oversee the licensee. And, in any event, state background checks using fingerprints should not be required. These background checks create a separate burdensome process and should be replaced, in

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[19] Some states currently seek to impose, through NMLS checklists, advance notice requirements with respect to ordinary course changes to controlling individuals such as officers or directors that are not part of a change of ownership.

[20] For example, some state statutes do not expressly differentiate between a change of controlling individuals and a change of ownership, 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. In these states a change in an officer or director would be governed by the general notification requirement relating to any material changes to the licensee's application materials; such provisions generally require notice at the time the material event is known or within a specified number of days after the material event occurs.

[21] With the exception of state-specific background check authorization forms that would replace state background checks conducted using fingerprints, as discussed below.

[22] *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. Codified 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").

states that are unwilling to eliminate them entirely, with background checks that can be performed using public records searches.[23]

- Not require a credit report for controlling individuals of a licensee that is a publicly traded company or that is a subsidiary of a publicly traded company as this is an unduly burdensome and unnecessary requirement. The personal credit of these individuals is not be material to the safety and soundness of a licensed money transmitter.

- Expressly prohibit the requirement that personal financial statements be submitted, as follows: *No personal financial information shall be required to be provided by a controlling individual, unless such an individual owns more than 25% of the equity of the licensee.* We note that the Draft Model Language does not include a requirement for personal financial statements but we nonetheless believe that states should be restricted from subsequently requiring such information by rule or policy.

Acquisition of Control/Change of Control Persons

As a starting point, the Draft Model Language should set forth triggers for a change of control event requiring notice and approval. For example:

> If any person not currently a control person of the licensee seeks to acquire an interest in the licensee that would make such person a control person, the person shall not do without having provided notice to, and obtained approval from, the [superintendent] as set forth herein.

With respect to the process for providing notice and requesting approval, we do not believe that the form of application should be prescribed by the state banking department but rather that changes of control should be processed through an advance change notice submitted through NMLS (as affirmed in each state's money transmission law). As for the substance, we have the following comments on the proposed items:

- The information required relating to new controlling individuals (as discussed immediately above) should also be required of any new controlling individuals associated with a change in a control person (*e.g.,* new management in connection with an acquisition of a licensee).

[23] For example, Minnesota uses an "Authorization to Release Information" form to conduct background checks. *See*: https://mortgage.nationwidelicensingsystem.org/slr/StateForms/MN14-%20MT%20Authorization%20to%20Release%20Information.pdf. While we believe that a uniform model law should eliminate these types of state-specific requirements, during a transitional period submitting a single form that can be used for background checks to be run is preferable to the state-specific fingerprint-based background check process.

- The information required generally should be limited to any applicable updates to the NMLS MU1 form, as well as a narrative description of the changes and the proposed transaction. The acquiring entity should not, for example, be required to submit its own business plan, certificates of good standing in each state, etc.[24]

- We appreciate the effort to ensure that applications for acquisition of control are timely processed by proposing required action within 180 days of an application being deemed complete. We respectfully believe, however, that 180 days is too long and that the proposed approach is in any event likely to be insufficient because there is no time restriction on when an application must be deemed complete. We therefore propose the following revisions to the Draft Model Language in item (D) of the Control Events section:

> (D) (1) The [superintendent] must within 30 days of submission of the application required by subsection (A) make a determination that such application is complete or request any additional information required in order to make the application complete (2) When an application for a change of control under this [article] is deemed complete in accordance with [(D)(1)], the [superintendent] shall notify the licensee of the date on which the application was determined to be complete
>
> (3) if no new controlling person would hold 50% or more of the total voting power or hold more than 50% economic ownership of the licensee, application shall be approved or denied within 45 days after the date on which the application was determined to be complete; and (B) otherwise, said application shall be approved or denied within 90 days after the date on which the application was determined to be complete.

As we stated in our comments on the RFI, firm deadlines will ensure that transactions involving licensees can be timely and predictably consummated. These changes will help enable licensees to timely secure funding and investment in their businesses and will increase the overall value of the industry by providing greater certainty to potential investors in, and acquirers of, money transmission companies. In addition, these types of provisions will not have a material impact on the safety and soundness of licensees nor risk undue harm to consumers because the licensees themselves will still be subject to the same degree of regulation and oversight on a continuing basis.

Finally, we believe that the proposed "public interest" exclusion from these change of control process requirements is too indeterminate and will result in inconsistent application across

[24] Consistent with existing money transmission laws, a money transmission license should not be transferable. This means that the licensee continues to operate under its own name and continues to provide the same or substantially the same money transmission services in connection with any acquisition of a controlling interest. Because the licensee is providing the services, operational information about the new controlling owner should be relevant only to the extent that the same type of information is required about any controlling owner of a *de novo* applicant.

states. It would be more appropriate to expressly exclude from the approval process: (1) acquisitions by a licensed money transmitter in good standing in each of the states in which the licensee to be acquired is located; and (2) purchases of the publicly traded shares of a licensee that do not occur in the context of an agreement between the licensee and the purchasing entity (*i.e.,* open market purchases of the licensee's shares).

Financial Condition

The proposals relating to prudential regulation of money transmitters still appear to be in development and we believe that additional dialogue is necessary before any final framework, let alone model language, is established. To facilitate this discussion, herein we provide initial comments and reactions to the ideas put forward regarding net worth, surety bonds, permissible investments, and the notes relating to a possible "suspension bridge" type of approach.

Net Worth

TMSRT supports in concept the proposed Draft Model Language approach of setting minimum net worth requirements based on volume as opposed to locations. However, the net worth requirement, as initially explained in the Uniform Act, is *not* the primary mechanism of ensuring that the licensee can meet its outstanding obligations; that is the permissible investments requirement.[25] Instead, the purpose of the net worth requirement is, like the surety bond requirement, to serve as a "barrier to entry" to prevent applicants who are unable to meet baseline requirements or that have questionable business models from entering and remaining in the industry.

Thus, the Uniform Act suggests only a "minimal" net worth requirement. However, the Draft Model Language contemplates what could potentially be a very high tangible net worth requirement based on 3% of total assets. For some of the largest licensees, including many TMSRT members, an uncapped 3% tangible net worth requirement would be an extreme increase over the current minimum net worth requirements. Because the net worth requirement should be used as a barrier to entry and a minimum baseline measure of safety and soundness—not a guaranty of it—we believe that a $10 million ceiling on the minimum

[25] UMSA commentary states that "[m]oney transmitters are required to maintain a certain level of investments that are equal to the value of their outstanding obligations as a means of protecting individual consumers." The CSBS Executive Summary also notes that, particularly for large licensees, "permissible investments are the single most important aspect of protecting consumer funds."

net worth requirement should be established by statute in conjunction with any transition to the new net worth requirements structure under the "three-legged stool" approach.[26]

We also believe that the discretion for the state regulatory authority to increase the required amount of tangible net worth should be grounded in specific statutory criteria and not criteria that can be established by rule on a state-by-state basis. Because net worth is a supplemental requirement in the first place, the criteria should be related to its value as a supplemental assurance of the ability of the licensee to meet baseline requirements. For example, if a licensee fails to at all times meet its permissible investments requirements or otherwise engages in activity that raises questions about its fundamental stability, increasing the net worth requirement can provide reassurances that the licensee is still fundamentally sound (assuming the licensee is able to meet the enhanced requirement). The discretion to increase the required amount of tangible net worth should also be limited by the $10 million ceiling because any amount in excess of that appears unlikely to be necessary for the net worth requirement to serve the purposes discussed herein.

Surety Bond

As with the net worth approach, TMSRT appreciates the proposed approach of moving toward a uniform surety bond calculation requirement based on volume. However the relevant volume should be revised to clarify that it is "the dollar amount of all licensed money transmission activity **originating** in this state" to affirm that payouts in a state do not count. We are also concerned that blanket discretion to increase the bond amount to $7 million could result in aggregate bond amounts for licensees of $350 million. Again, a focus on the underlying purpose of the surety bond requirement—as a baseline measure of soundness—strongly suggests that surety bond requirements of this size are not appropriate. Bond requirements of this size will increase costs to industry, and therefore to customers, that are far out of proportion to any safety and soundness benefit. Nevertheless, if state regulators perceive surety bonds as helping to ensure coverage of outstanding obligations in addition to (and duplicative of) permissible investments, then consideration should be given to calculating required surety bond amounts beyond a baseline minimum requirement based on *outstanding* liabilities as opposed to volume of money transmission activity.

Permissible Investments

The Draft Model Language includes proposed language regarding the *maintenance* of permissible investments as follows:

[26] Possible approaches to net worth requirements under a "suspension bridge" approach are a separate matter and we reserve comment on net worth requirements in that context.

> A licensee shall maintain at all times permissible investments that have a market value computed in accordance with generally accepted accounting principles of not less than the aggregate amount of all of its outstanding payment instruments and prepaid access [or stored value] obligations issued or sold in all states and money transmitted from all states by the licensee.

TMSRT agrees that permissible investments should be calculated in accordance with US GAAP. But to create uniform requirements relating to maintenance of permissible investments it is necessary to have uniform definitions of outstanding obligations, which also should be calculated in accordance with US GAAP. As an initial matter, the language regarding permissible investments maintenance should clarify that the requirement is not based on "money transmitted" but rather "outstanding money transmission obligations." This issue can be addressed as CSBS develops a comprehensive updated model law building on the Draft Model Language. As this project moves forward we would be happy to engage in dialogue with CSBS that includes a uniform approach to defining and addressing outstanding obligations.

We also note that the Executive Summary includes a discussion of changing the types of investments that are permissible investments, and the financial condition template includes proposed model permissible investments language that is not included in the summary chart along with the Draft Model Language. TMSRT does not agree with the new proposal to restrict the following items to 30% of a licensee's total permissible investments:

> a) A short-term (up to six months) investment bearing a rating of one of the three highest grades as defined by a nationally recognized organization that rates securities; (b) Commercial paper; and (c) An interest-bearing bill, note, bond, or debenture of a person whose equity shares are traded on a national securities exchange or on a national over-the-counter market.

(We appreciate the proposal to remove the discount for authorized delegate receivables, as we believe this is a long-past-due update to reflect the nature of these funds today.) We also do not agree with the characterization of permissible investments requirements as designed to make consumers whole in the event of a loss or failure. To the contrary, the primary purpose of requiring permissible investments is to seek to ensure that a licensee does not fail in the first place—that it will always have sufficient funds to meet its customer obligations. To date, efforts to create a uniform regime for the maintenance of permissible investments have focused on seeking consensus on a uniform set of holdings that are deemed permissible investments. These new proposals appear to have deviated from prior work. We thus believe that further discussion is necessary on creating a uniform list of permissible

investments and related definitions of outstanding obligations with an ultimate goal of a single, nationwide calculation of permissible investments grounded in the laws of the states.

Alternative Suspension Bridge

Given the volume of information in the proposed Draft Model Language and related materials, TMSRT believes that there are a number of matters to address and work through based on the current structure of money transmission regulatory regimes before wholly new concepts can be explored. We thus respectfully believe that the suspension bridge concept should be tabled until more basic components of developing a uniform model law grounded in existing practice and precedent is completed.

Supervision and Parity

Consistent with our introductory comments, as long as money transmitters are to be licensed, regulated, and overseen on a state-by-state basis, then licensing, supervision and oversight must be conducted in a manner consistent with applicable state money transmission laws. Money transmitters are heavily regulated at the state and federal level, and are at risk of significant penalties for non-compliance with money transmission laws, including criminal penalties. TMSRT members are committed to complying with applicable money transmission laws, but—like other licensees—must know what the law is in order to seek to ensure compliance with it. Thus we are concerned that broad discretion granted to state banking departments to overrule current statues is not appropriate and risks exacerbating the lack of uniformity among states.[27]

As a result, we believe the following language is too broad and indeterminate and therefore has the potential to create significant uncertainty for licensees:

> In order to support uniformity between states, notwithstanding any other provision of law, if the commissioner finds that any provision of other state money services laws, regulations, guidance, interpretations, orders, processes, or policies applicable to licensees is substantively different from the provisions of this code, or would more clearly establish requirements within the commissioner's discretion, the commissioner may by regulation, guidance, interpretation, order, process, or policy make such a provision of another state's money services law, regulation, guidance, interpretation, order, process, or policy applicable to licensees.
>
> In order to support uniformity between states, notwithstanding any other provision of law, if the superintendent finds that any model regulations, guidance, interpretations, orders, processes, or policies established by the Conference of State Bank Supervisors, Money Transmitter Regulators Association, State Regulatory Registry, LLC, other association of state regulators, an instrumentality of the states established to promote consistency, or any other state

[27] We are also skeptical that legislatures would be willing to grant this power, as well as the viability of this type of approach under non-delegation doctrines and the principle of due process.

> or federal regulatory instrumentality, would clarify regulatory requirements, expectations, or drive consistency between states, the commissioner may by regulation, guidance, interpretation, order, process, or policy make such model regulations, guidance, interpretations, orders, processes, or policies applicable to licensees.
>
> In order to support uniformity between states . . . the commissioner has authority to adopt by regulation, guidance, interpretation, or order any requirement, standard, process, or other legal requisite needed to prevent federal preemption of money services in this state.

Conclusion

TMSRT appreciates the efforts that have been expended to date in seeking to develop language to update the current state-by-state money transmission regulatory regime. TMSRT believes, however, that the Draft Model Language should be enhanced with additional work to clarify its provisions and broaden the scope of regulatory issues it addresses. TMSRT stands ready to be a resource for CSBS and to support CSBS in any way we can in connection with the development of—and adoption by states of—a model payments law for money transmitters can.

TMSRT hopes that CSBS will continue to work with state authorities to ensure that the Draft Model Language is implemented through NMLS in a manner that is fully consistent with underlying state laws and regulations. Any further divergence between what is required through NMLS and what states require by statute and regulation will exacerbate the current regulatory challenges faced by industry by adding another layer of complexity and uncertainty—NMLS requirements, policies and standards in addition to existing statute and regulations. In that regard, TMSRT believes that CSBS's leadership in persuading states to adopt one uniform money transmission law will greatly benefit money transmission companies, their customers, and regulators as well.

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,

Bradley S. Lui
Counsel for The Money Services Round Table