

**BEFORE THE
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF CONSUMER SERVICES**

In the Matter of)
) **PETITION**
Petition of the Electronic Transactions)
Association for a Declaratory Order)

PETITION FOR DECLARATORY ORDER

The Electronic Transactions Association (“ETA”), pursuant to the Washington Administrative Procedure Act chapter 34.05.240 RCW,¹ hereby requests that the Department of Financial Institutions issue a Declaratory Order clarifying the scope and applicability of the Division of Consumer Services’ December 7, 2015 Interpretive Statement addressed to “Financial Services Companies Operating or Wishing to Operate in Washington State as a Payment Processor” (the “Interpretive Statement”).² ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA’s members include financial institutions and payment processors

¹ Chapter 34.05.240 RCW provides that any person may petition an agency for a declaratory order with respect to the applicability of a rule, order or statute enforceable by the agency. ETA requests a declaratory order that the payment processor exclusion of Washington’s Uniform Money Services Act, chapter 19.230.020(9) RCW, applies to payment processors that act on behalf of merchants, rather than consumers, to facilitate the merchant’s acceptance of credit and debit cards and that such payment processors are not subject to the Act.

² See Uniform Money Services Act Interpretive Statement 2016-1: Payment Processors issued by the Department of Financial Institutions, Division of Consumer Services, and dated December 7, 2015. Chapter 34.05.230 RCW provides that whenever an agency issues an interpretive statement, the agency shall submit to the code reviser for publication in the Washington State Register a statement describing the subject matter and listing the person at the agency from whom a copy of the interpretive statement may be obtained. ETA has not seen any reference to the Division’s December 7, 2015 Interpretive Statement in the Washington State Register.

that are adversely impacted by the uncertainty created by the Division’s unqualified interpretation that all “payment processing is money transmission as defined in the” Washington Uniform Money Services Act (“Act”).³ A declaratory order clarifying that the Interpretive Statement only applies to payment processors that have consumer/debtor-facing relationships and actually receive consumer/debtor payments for transmission to another is necessary to remove the uncertainty. Without such a clarification, the Interpretive Statement may create a barrier to the provision of payment processing services by entities acting on behalf of merchants to facilitate credit and debit card transactions.

1. The Act defines “money transmission” as “receiving money or its equivalent value to transmit, deliver, or instruct to be delivered the money or its equivalent value to another location inside or outside the United States, by any means including but not limited to by wire, facsimile, or electronic transfer.”⁴ Explicitly excluded from the coverage of the Act is

an operator of a payment system only to the extent that it provides processing, clearing, or settlement services, between or among persons who are all excluded by this section, in connection with wire transfers, credit card transactions, debit card transactions, stored-value transactions, automated clearinghouse transfers, or similar funds transfers.⁵

2. The Division asserts that the payment processor exclusion does not apply to most payment processors because they provide services between merchants/creditors and consumers/debtors and “merchants/creditors and consumers/debtors are not typically persons all excluded from the Act.”⁶ The Division further contends that “[p]ayment processors receive

³ *Id.*; chapter 19.230 RCW.

⁴ Chapter 19.230.010(18) RCW.

⁵ Chapter 19.230.020(9) RCW.

⁶ Interpretive Statement at 3.

payments from consumers, settle payment transactions with or without financial institutions, and transmit payments to merchants' or creditors' accounts."⁷

3. While in some unique instances or business models a payment processor may receive payments directly from consumers, many do not. The business model used by many payment processors consists of a relationship between a merchant and an acquiring financial institution whereby the acquiring institution, through a payment processor, facilitates the merchant's acceptance of credit and debit cards. By accepting credit or debit cards in payment for goods and services, a merchant constructively agrees to accept payment from the consumer's card issuing bank and the consumer's obligation to the merchant is extinguished once the transaction is authorized. Thereafter, the payment is transmitted from the card issuing bank to the acquiring bank for further settlement to the merchant's bank account. The risk to the consumer in such credit and debit card transactions is minimal to non-existent.

4. The statutory payment processor exclusion in the Act should be read to encompass those payment processors that act on behalf of the merchant rather than on behalf of the consumer. Where such a payment processor provides processing, clearing or settlement services in connection with credit card, debit card or stored value transactions, those services are provided (and the funds are transferred) between the card issuing bank, the merchant acquiring bank and the bank holding the merchant's depository (or settlement) account. Because financial institutions are also excluded from coverage under the Act,⁸ the payment processor exclusion must apply to payment processors acting on behalf of merchants to facilitate the merchant's

⁷ *Id.* at 2-3.

⁸ Chapter 19.230.020(4) RCW.

acceptance of credit and debit cards.⁹ Such a reading of the payment processor exclusion would be consistent with the intent of the drafters of the Uniform Money Services Act, the National Conference of Commissioners on Uniform State Laws (“National Conference”). Washington’s payment processor exclusion is virtually identical to the one drafted by the National Conference.¹⁰ In its explanatory comments to the exclusion, the National Conference explained that “Clearing and settlement often involves the transfer of funds from one participating financial institution’s bank account to another (*e.g.*, the debiting and crediting of accounts of various participants in a . . . credit card consortium).”¹¹

5. Narrowing the Division’s interpretation of “money transmitter” to exclude payment processors that act on behalf of merchants would also be consistent with federal law.¹² The Bank Secrecy Act rules expressly provide that payment processors that facilitate the purchase of, or payment for, a good or service as an agent of the merchant are not money transmitters:

the term “money transmitter” shall not include a person that only: . . . (B) acts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller; (C) operates a clearance and settlement system or otherwise acts an intermediary solely

⁹ If the exclusion is not so read, it is hard to imagine any circumstance in which the exclusion would apply to payment processors providing processing, clearing or settlement services in connection with credit card, debit card and stored-value transactions.

¹⁰ The payment processor exclusion in the Uniform Money Services Act applies to “an operator of a payment system to the extent that it provides processing, clearing or settlement services, between or among persons excluded by this section, in connection with wire transfers, credit card transactions, debit card transactions, stored-value transactions, automated clearing house transfers or similar funds transfers.” See National Conference of Commissioners on Uniform State Laws, Uniform Money Services Act, Section 103(9) (July 6, 2001), available at <http://ssl.csg.org/terrorism/umsa2001final.pdf>.

¹¹ *Id.* at 11.

¹² ETA disagrees with the Division’s assertion that its interpretation is consistent with federal law. Interpretive Statement at 3.

between BSA-regulated institutions. . . ; or (F) accepts and transmits funds only integral to the sales of goods or provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.¹³

The Financial Crimes Enforcement Network (“FinCEN”) has also determined that a “merchant payment processor, processing payments from consumers as an agent of the merchant to whom consumers owe money – rather than on behalf of consumers themselves – is not a money transmitter by virtue of such activities.”¹⁴

6. Other provisions of the Act also indicate that it is not meant to apply to payment processors that act on behalf of merchants. For example, the Act requires money transmitters to provide a receipt to the customer that clearly states the amount of money presented for transmission and the total of any fees charged by the licensee.¹⁵ Where payment processors process payments from consumers on behalf of merchants, rather than on behalf of consumers themselves, they have no contact with the consumer (and charge no fees to the consumer). As a result, it would be extremely difficult, if not impossible, for such payment processors to issue a receipt to the consumer for the consumer’s payment to the merchant.¹⁶ The Act also provides that licensed money transmitters must provide refunds to customers upon receipt of a written request.¹⁷ To the extent that the consumer has an issue with the merchant with respect to the

¹² 31 C.F.R. § 1010.100(ff)(5)(ii).

¹⁴ See FinCEN-2008-R006 (Whether an Authorized Agent for the Receipt of Utility Payments is a Money Transmitter) (May 21, 2008); see also, FinCEN-2003-8 (Definition of Money Transmitter (Merchant Payment Processing)) (Nov. 19, 2003).

¹⁵ Chapter 19.230.330(2) RCW.

¹⁶ Washington Administrative Code Section 208-690-200 requires a money transmitter receipt to contain the licensee’s name, address and telephone number. Where payment is made to the merchant, it is the merchant, not the payment processor, that issues the receipt to the consumer.

¹⁷ Chapter 19.230.330(3) RCW.

goods or services purchased or seeks a refund for any other reason, his/her remedy is with the merchant or the card issuer, not with the payment processor.

7. ETA has been unable to find any prior Division or Department ruling or finding that would have put payment processors that act on behalf of merchants on notice that the Division considers them to be money transmitters under the Act. The Interpretive Statement has created a great deal of uncertainty and confusion among payment processors that have been operating and processing credit and debit card transactions for merchants in the state of Washington for years without being licensed as money transmitters. The Interpretive Statement provides that unlicensed companies must either obtain a license or a waiver of the licensing requirements of the Act (but not of the money transmitter designation) “*before* conducting activity in the state or risk an action by the department for unlicensed activity.”¹⁸ Requiring all payment processors to go through such a licensing exercise regardless of whether they have any contact with, or receive payment directly from, consumers is inconsistent with the language of the Act. While the Division has the authority and discretion to interpret the Act to fulfill the intent of the legislature,¹⁹ the Interpretive Statement does not explain how the designation and licensing of payment processors that act on behalf of merchants, rather than consumers, as money transmitters is needed to fulfill the intent of the legislature as expressed in Chapter 19.230.005 RCW.²⁰

¹⁸ Interpretive Statement at 4 (emphasis added).

¹⁹ Chapter 19.230.310.

²⁰ Chapter 19.230.005 RCW provides that “[i]t is the intent of the legislature to establish a state system of licensure and regulation to ensure the safe and sound operation of money transmission and currency exchange businesses, to ensure that these businesses are not used for criminal purposes, to promote confidence in the state’s financial system, and to protect the public interest.”

8. The Interpretive Statement’s warning that payment processors that do not obtain a money transmitter license or waiver *before* conducting activity in the state creates a very real controversy with respect to the status of those payment processors that have been lawfully doing business in Washington for years on an unlicensed basis – a status that the Statement does not address.²¹ The Interpretive Statement’s failure to indicate whether existing market participants are also at risk of an enforcement action for unlicensed activity, whether their existing unlicensed activities are grandfathered, whether the Division expects them to exit the market pending the grant of a license or waiver or exactly what the Division’s expectations are for existing market participants generates an additional level of uncertainty that must be resolved.

9. A clarification that payment processors acting on behalf of merchants, rather than consumers, to process, clear and settle credit and debit card and stored value transactions are excluded from the definition of “money transmitter” under the Act and are not required to apply for a money transmitter license or a waiver from the licensing provisions is necessary to resolve the uncertainty created by the Interpretive Statement and thereby avoid extreme hardship to the many Washington merchants who rely on payment processors to operate their businesses, the many Washington consumers who rely on credit and debit cards to conduct their business every

²¹ The Interpretive Statement is addressed to “Financial Services Companies *Operating or Wishing to Operate* in Washington State as a Payment Processor,” but the implementation section only provides instructions for *unlicensed* companies to request an analysis by the Department of their eligibility for a waiver *before* conducting activity in the state. Although the Interpretive Statement also provides instructions for currently licensed companies to request an analysis by the Department of their eligibility for a waiver of the licensing requirement, what is missing is any implementation discussion for unlicensed payment processors acting on behalf of merchants to process, clear and settle credit and debit card and stored value transactions that have been operating in Washington since before January 1, 2016, the effective date of the Interpretive Statement. Interpretive Statement at 1, 4 (emphasis added).

day and the payment processors themselves. Such a clarification will benefit both the Washington economy and the public interest generally and will not cause any adverse effects.

Conclusion

For the foregoing reasons, ETA respectfully requests that the Department issue a Declaratory Order narrowing the scope and applicability of the Division of Consumer Services' December 7, 2015 Interpretive Statement as discussed herein.

Respectfully submitted,

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March 2, 2016

VERIFICATION

I, Mary C. Albert, am a member of the Bar of the District of Columbia and serve as the Director of Regulatory Affairs for the Electronic Transactions Association. Pursuant to chapter 10-08-250(2) WAC, I hereby verify that the facts set forth in the foregoing Petition for Declaratory Order are true and correct to the best of my knowledge and belief.

Mary C. Albert

Subscribed and sworn to before me this ____ day of March 2016 by Mary C. Albert. In witness hereof, I hereunto set my hand and official seal.

Scott Talbott
Notary Public, Montgomery County, Maryland

My Commission expires:_____