

March 30, 2018

Cindy Fazio  
Chief of Regulatory Affairs – Consumer Services  
Washington Department of Financial Institutions  
P.O. Box 41200  
Olympia, WA 98504-1200

**RE: Amending Wash. Admin. Code 208-690 WAC**

Dear Ms. Fazio:

On behalf of the Electronic Transactions Association (“ETA”), we appreciate the opportunity to share our comments with the Washington Department of Financial Institutions (“WA DFI”) on your proposal to amend the regulations implementing the Uniform Money Services Act and Regulation of Money Services Providers (Wash. Admin. Code 208-690 WAC) and harmonize it with the statutory changes from SSB 5031 (chapter 30, Laws of 2017) as well as provide any other necessary clarification.

As background, 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 all parts of the electronic payments ecosystem including financial institutions, acquiring banks, merchant service providers and processors, and payment card networks. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient, secure, and rewarding payment solutions.

**Specific Comments:**

***WAC 208-690-010 Definition – Closed Loop Prepaid Access***

The proposal changes the definition of Closed Loop Prepaid Access.

Comments: The proposed change unnecessarily limits the definition of closed loop beyond that which currently exists under Washington law and that which is provided by federal law.

Recommendation: We prefer use of the federal definition of closed loop prepaid access to ensure consistency for businesses operating in numerous jurisdictions. *See [31 CFR 1010.100\(kkk\)](#)*. In the alternative, you should revert to the existing definition but incorporate your new ideas to include intangibles if you are concerned that they are not adequately covered already.

Proposed amended language: “means prepaid access that can primarily be redeemed for a limited universe of goods, intangibles, services, or other items.”

***WAC 208-690-010 Definitions – Money Transmission***

The proposal changes the definition of Money Transmission

Comments: The proposed changes are too broad.

Recommendations: The definition of “Money Transmission” should expressly exclude anything covered by the term “Virtual Currency” so there is clarity in which requirements apply to each type of activity and so it does not appear that two different sets of requirements could apply to a single activity.

Additionally, the exclusion of units of value that have no market or application outside of an online platform should not be limited to solely *gaming* platforms. The exclusion should allow for units of value within *any* online platform that has no market or application outside of that platform to be excluded from the definition because the functionality of an online platform as a gaming, social media, or other type should be irrelevant in the determination of whether money transmission has occurred. The important factor should be the functionality of the unit of value to provide goods or services off the platform and the actual use within an online-only application. If there is no off-platform benefit, then the exclusion should apply without respect to whether the online platform is considered a gaming platform.

Proposed amended language: “means receiving money or its equivalent value (equivalent value does not include virtual currency, closed loop prepaid access or software or protocols governing the transfer of the digital representation of value or other uses of virtual distributed ledger systems to verify ownership or authenticity in a digital capacity when the virtual currency is not used as a medium of exchange) to transmit, deliver, or instruct to be delivered to another location, inside or outside the United States, by any means including, but not limited to, by wire, facsimile, or electronic transfer. Money transmission includes selling, issuing, or acting as an intermediary for open-loop prepaid access and payment instruments, but not closed-loop prepaid access. Money transmission does not include: The provision solely of connection services to the internet, telecommunications services, or network access; units of value that are issued in affinity or rewards programs that cannot be redeemed for either money or virtual currencies; and units of value that are used solely within online platforms that have no market or application outside of the platforms.”

#### ***WAC 208-690-010 Definitions – Virtual Currency***

The proposal changes/adds the definition of Virtual Currency

Comments: The definition of Virtual Currency should exclude all activity covered under the definition of money transmission to ensure that the same activity is not covered twice. As written, the use of the wording “store of value” may be seen as including electronic versions of closed loop stored value that is not intended to be regulated. Moreover, the definition does not make clear that the key factor of virtual currency (and presumably the reason for its regulation) is that it is ultimately exchangeable for fiat currency/cash outside of the virtual system.

Proposed amended language: “means a digital representation of value used as either a medium of exchange or a unit of account that is intended to be redeemable or exchangeable for legal tender or fiat currency, but which does not itself have legal tender status as recognized by the United States government. Virtual currency does not include open loop prepaid access, closed loop prepaid access, or the software or protocols governing the transfer of the digital representation of value or other uses of virtual distributed ledger systems to verify ownership or authenticity in a digital capacity when the virtual currency is not used as a medium of exchange. Neither does the term include an affinity or rewards program tied to a credit, debit or prepaid card that awards points or units of value for purchases and other transactions, which points or units of value can be redeemed for dollar-denominated credit to a checking, credit card, or prepaid card account, or for a gift card, goods, travel or services.”

***WAC 208-690-015(4)(c)***

This section includes a proposed list of exemptions that do not require a Money Transmitter license as well as a list of activities that do not qualify for the exemptions. One of the items that does not qualify for an exemption includes the payment processing by a person meeting the requirements in RCW 19.230.020(9), but not a person engaged in payment processing activities if “holding funds longer than the time period needed to complete a transaction.”

Comments: Exempt payment processing activities should not prohibit a payment processor from holding funds longer than needed to complete the transaction when such time period has been agreed upon by the recipient and the payment processor and is nonetheless in conjunction with payment processing activity. Holding funds for pre-defined period outside of the literal time needed to complete the transaction is not dispositive of the role of a payment processor and does not make the activity money transmission. For example, it may be in the best interests of the buyer, seller, and payment processor for the payment processor to hold funds for certain periods to protect against chargebacks and fraud or more quickly facilitate refunds for buyers. This inclusion is in-line with the principle that parties should be free to enter into contract on terms of their choosing and presents no unanticipated risk to the recipient of funds.

The reason for disqualification from exemption does not have a clear definition. The department has not provided a definition of “holding funds longer than the time period needed to complete a transaction.” Current WA DFI Money Transmitter licensed activity requires transmission or issued instructions within ten business days of receiving the funds. However, the reason to deny the exemption does not indicate the timeframe used for the “holding funds longer than the time period needed to complete a transaction” determination.

Recommendation: Include proposed amended language and also consider clarity as to what the timeframe is be disqualified for an exemption due to processing timeframe.

Proposed amended language: “[...] (4) Payment processing by a person meeting the requirements in RCW 19.230.020(9), but not persons engaged in payment processing activities: [...] (c) Holding funds longer than the time period needed to complete a transaction or the time period otherwise reasonably agreed to between the parties pursuant to a payment processing contract.”

**WAC 208-690-030(4)**

The proposed amendment allows the WA DFI Director to require all fees to be paid through the Nationwide Multistate Licensing System (“NMLS”).

Comments: A third party, NMLS, is collecting the fees for the state agency. The majority of states are now utilizing NMLS for the same purpose. However, there is an internal state communication mechanism that needs to be developed between the licensing and examination staff to address the duplication of requests due to information received in the NMLS system not being internally communicated to both units.

Recommendation: The proposed amendment should include language to include the creation of an NMLS report that can be shared by the state licensee unit with the state examination unit limiting duplication of requests to the licensee.

Proposed amended language: (4) An application fee as prescribed by WAC 208-690- 130(1). The application fee is not refundable. The director may require all fees to be paid through the NMLS. The director will require the NMLS to provide a monthly written report to the state agency and licensee on the information collected, including fees and reports, per licensee, per item submitted, per date submitted and per date paid.

**WAC 208-690-030(8)**

The proposed amendment allows the WA DFI to deny a proposed license or trade name if the proposed name is similar to a currently existing licensee name, including trade names, or is otherwise unsuitable.

Comments: The WAC proposed amendment expands the WA DFI ability to deny a proposed name deemed unsuitable. The term unsuitable is not defined.

Recommendation: Define the term unsuitable.

**WAC 208-690-040**

The proposed amendment allows the Director to provide for an alternative to a surety bond under certain circumstances.

Comments: While providing for a required alternative (which would allow for smaller companies that might be declined by providers of surety bonds to comply with this requirement and bring important new technological advancements to the industry), the concern is that said alternative may become a way to decline properly issued surety bonds.

Recommendation: Include language within the proposed amendment that expands upon under which “certain circumstances” the Director can allow an alternative.

**WAC 208-690-080(1)**

The proposed amendment allows the Director to waive the audited annual financial statement requirements for a licensee with minimal or no business activity conducted under the license.

Comments: The proposed amendment does not take into account the fees charged for late submission of documents.

Recommendation: Include language that the Director will provide written waiver to the licensee and the third-party agency collecting fees for recordkeeping purposes.

#### ***WAC 208-690-090 (2-6)***

The proposed amendment expands the information required to be provided for the annual report and annual assessment. This includes:

1. Requires a licensee to provide a certification that the authorized delegate information on the NMLS is current,
2. Verification that an adequate surety bond and net worth are adequate,
3. A certification that material changes have been reported through the NMLS and are current, and
4. The annual report and assessment fee may be submitted through the NMLS

Comments: The proposed amendment expands the requirement placed on the licensee.

Recommendation: Delete the section as the licensee already provides confirmation when submitting the NMLS Call Report.

#### ***WAC 208-690-100***

The proposed amendment provides that the annual report and annual assessment fees are not considered submitted until both items have been submitted.

Comments: Licensees submit annual reports separate from assessment fees. Therefore, even if an annual report is submitted timely, a late fee can still be incurred if the assessment fee is not paid at the same time.

Recommendation: Eliminate the proposal.

#### ***WAC 208-690-105***

The proposed amendment implements a reporting requirement to submit a quarterly call report through the NMLS on the dates and in a form prescribed by the NMLS.

Comments: The RCW 19.230.152 requires a licensee to submit reports of condition through the NMLS, which must be in the form and must contain the information as the Director requires. This proposal places reporting requirements onto the licensees.

Recommendation: The Director communicates to the licensees that quarterly reporting is mandated through NMLS. If fees are to be assessed, this needs to be formerly communicated.

***WAC 208-690-110(6)***

The proposed amendment expands the definition of a material change to include the commencement of an administrative action against the licensee, an executive officer, responsible individual, board director, AML compliance officer, principal, or other person in control, in any jurisdiction.

Comments: The legislation passed changed the notification requirement from 30 business days to 30 days. The proposed language in the WAC does not make this change. The proposed WAC language expands what the definition a material change to include the commencement of an administrative action.

Recommendation: We request that the additional language added to material change be removed from the proposal. Additionally, the language around the due dates needs to be corrected to harmonize the statute and regulation. We highlight the important work currently being done by the CSBS Fintech Industry Advisory Panel, and this proposed amendment seems to contradict it.

***WAC 208-690-110 (12)***

The proposed amendment changes the notification requirement of a data breach due to the state from 45 days to 10 days.

Comments: This proposal does not provide for enough time for a licensee to review information that may indicate a data breach. This also not does not provide for consistency in reporting as other notification requirements for the state is at 30 days.

Recommendation: Do not change the notification requirement and make the 30-day notification requirements noted in WAC 208-690-110(6) uniform with the existing 45-day notification.

***WAC 208-690-140(3)***

The proposed amendment allows for the department to make a claim against the surety bond if the annual assessment or late fee for failure to report or pay the annual assessment is not paid 30 days after the due date.

Comments: The department has proposed a third party collecting all fees. If information is not communicated to the agency in a timely manner, the licensee could be subjected to fees and a claim against the surety bond.

Recommendation: There needs to be a written process in place with the third party that is provided to all licensees on how payments are communicated to the state agency.

***WAC 208-690-180(5)***

The proposed amendment allows the Director to participate in a joint or concurrent examination with other state or federal agencies.

Comments: This potentially reduces regulatory burden and duplicative examination. We support this proposed amendment and encourage the department look for additional ways to reduce regulatory burden.

***WAC 208-690-205***

The proposed amendment imposes disclosure and other customer experience requirements for virtual currencies.

Comments: Many of these disclosures ((b) and (c)) are either self-evident or apply to all money transmission products and therefore serve little value in re-informing consumers. The disclosure required as part of (e) is possibly false and misleading and there is not precedent for this type of disclosure in this market.

Under section (d), a notice regarding liability for unauthorized transfers is misleading and puts licensees in an unfair position. There is no general legal requirement that licensees engaged in traditional money transmission or virtual currency activities take on liability for unauthorized transaction. The EFTA/Reg E's unauthorized transfer protections do not generally apply to money transmission activities. And since these transactions are irreversible, there is no true error-resolution process that can be imposed without companies going out of pocket to make customers whole.

Recommendation: We recommend that sections (b), (c), (d), and (e) be removed.

***WAC 208-690-240***

The proposed amendment changes the requirement for a cyber security program to an information security program.

Comments: This is the first notification of a change to the Washington Administrative Code around Information Systems. This expands the regulatory expectation and examination scope.

Recommendation: A notification process similar to what New York provided to the licensees for the changes implemented for the New York cyber security requirements should have been given to the licensees for this proposed change. We recommend that the WA DFI offer this component as a separate notice and comment rulemaking so that interested parties can participate in that discussion.

***WAC 208-690-250(3)***

The proposed amendment deletes that compliance with GLBA and Regulation P is compliance with having an information security program.

Comments: This is the first notification of a change to the Washington Administrative Code around Information Systems. This expands the regulatory expectation and examination scope.

Recommendation: A notification process similar to what New York provided to the licensees for the changes implemented for the New York cyber security requirements should have been given to the licensees for this proposed change. We recommend that the WA DFI offer this component as a separate notice and comment rulemaking so that interested parties can participate in that discussion.

**WAC 208-690-280**

The proposed amendment expands the requirement to include in the business resumption plan a written plan that details the company's response and recovery to any event that results in damage to or destruction of books and records or a data breach.

Comments: This expands the regulatory expectation expands the requirement of the business resumption plan to include a written plan for a data breach event.

Recommendation: A notification process similar to what New York provided to the licensees for the changes implemented for the New York cyber security requirements should have been given to the licensees for this proposed change. We recommend that the WA DFI offer this component as a separate notice and comment rulemaking so that interested parties can participate in that discussion.

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Thank you for the opportunity to comment on this important issue. If you have any additional questions, you can contact me or ETA Senior Vice President, Scott Talbott at [stalbott@electran.org](mailto:stalbott@electran.org).

Sincerely,



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