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Ms. Cindy Fazio
Chief of Regulatory Affairs – Consumer Services
Washington Department of Financial Institutions
150 Israel Rd SW
Tumwater, WA 98501

Re: Proposed Amendments to WAC 208-690 implementing the Washington Uniform Money Services Act

Dear Ms. Fazio:

On behalf of The Money Services Round Table ("TMSRT")[1], I write regarding the draft proposed amendments to the Washington Administrative Code ("WAC") prepared by the Department of Financial Institutions ("DFI") (the "Proposed Rulemaking"). TMSRT appreciates the opportunity to offer these comments on the Proposed Rulemaking and, generally, on the provisions at WAC 208-690 that implement the Uniform Money Services Act, Rev. Code Wash. Ch. 19.230 (the "Act").

Scope of the Regulations

As the DFI considers updates to its rules relating to money transmission licensees in light of the most recent amendments to the Act,[2] we wish to note, as a general matter, that the scope and breadth of these rules—including their repetition of provisions in the Act—can pose a significant compliance challenge and burden for licensees such as TMSRT members. In

[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 Washington, and is treated as a "Money Services Business" under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, and its implementing regulations, 31 CFR Chapter X.

[2] *See generally*, SSB 5031 (2017).

particular, many of the rules either repeat verbatim provisions of the Act or cover the same ground as the Act albeit in slightly different form.

Thus licensees (and applicants) must reference two separate sources of authority, both of significant length, in order to seek to understand their obligations as Washington licensees. And, where there are slight differences in language between the statute and the rules, licensees must ascertain whether these differences were intended to translate into substantive legal differences. If the intent is to merely repeat existing statutory language, a specific reference to the statute would seem to suffice. If substantive differences are intended, then these substantive differences should be separately highlighted so that licensees can understand the intent.

Accordingly, we respectfully suggest that the DFI consider significantly streamlining its rules such that they address only provisions not already covered by the Act or provisions necessary to implement specific provisions of the Act. For example, such a streamlining might consider the following aspects of the rules.

- **WAC 208-690-010 (definitions)**. Many of these definitions are also found in the Act using identical or virtually identical language. This repetition requires licensees and applicants to nevertheless cross-reference two sources to ascertain the operative definitions for Washington's money transmission laws.

- **WAC 208-690-030 (license application)**. This regulation appears to largely repeat the statutory requirements for license applications in Wash. Rev. Code § 19.230.040. Moreover, because these provisions appear to be designed to provide applications with a checklist of materials that must be submitted, DFI might wish to consider relying on the NMLS Washington Money Transmitter New Application Checklist (the "NMLS Checklist") to disseminate these requirements instead of a regulation. This approach would be more accessible for new applicants.

  In addition, TMSRT would note that DFI also has on its website, a "Summary of Money Transmitter Regulations," information regarding "General Licensure Requirements for Money Transmitter Applicants," and a "Summary of Costs for Money Transmitter Applicants." TMSRT suggests that DFI consider eliminating these materials to the extent that they are duplicative. These varying sources of information can create confusion and an unnecessary compliance burden for applicants, as well as licensees (who must report material changes to their applications). To the extent that there may be differences in language between these sources, applicants may become confused regarding the requirements. In addition, DFI will have the burden of trying to update multiple documents whenever changes in its procedures occur.

- **WAC 208-690-015 (exemptions).** Section 19.230.020 of the Act enumerates express exclusions from the Act for, for example, the U.S. post office, banks, certain payment processing activities, and registered securities broker-dealers. WAC 208-690-015, however, identifies "some of the activities that are exempt from the [A]ct." The operative legal effect of this rule is unclear, as it appears to just provide examples of exempt activity, some of which are consistent with the Act and others that are not. (Furthermore, as discussed below, the revisions to this rule in the Proposed Rulemaking would actually operate to *limit* the scope of exemptions from the Act and not to describe "activities that are exempt from the Act.") We thus respectfully believe that this rule should be eliminated with respect to its repetition of exclusions in the Act. A separate rule should be drafted, and subject to comment, to the extent that the DFI seeks to *limit* or otherwise elaborate on the scope of any statutory exclusion as established in the Act.

- **WAC 208-690-035 (authorized delegates).** This rule provides for a number of limitations and requirements in connection with the relationship between a licensee and an authorized delegate. These provisions go well beyond, but also incorporate, the requirements under the Act with respect to, among other things, the contract between a licensee and an authorized delegate and the limitation on sub-delegates. *See* Rev. Code Wash. §§ 19.230.120(2), (3). We thus respectfully suggest that the rule be streamlined to clearly articulate only additional provisions that apply to the authorized delegate/licensee relationship and not also blend in the requirements clearly established by the Act.

- **WAC 208-690-200 (receipts).** The general receipt provisions repeat, albeit in different form, the requirements established by § 19.230.330(2)(a) of the Act. Accordingly, these provisions can create confusion about what is required and to which source of authority licensees should turn to understand their obligations. We therefore respectfully suggest that the DFI consider revising this rule so that it does not repeat the requirements of the Act but rather cross-references them and elaborates only as necessary.[3]

Lengthy, complex and repetitive rules can create compliance challenges and costs for licensees. We thus hope that the above examples may prove beneficial to DFI as it seeks to make the money transmission application and licensing process more efficient while still ensuring that appropriate consumer protections are in place.

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[3] We also note that, in the event that this rule is not substantially revised, it may at least in the short-term be beneficial to licensees to update the reference to "RCW 19.230.330(2)" to "RCW 19.230.330(2)**(a)** in light of the 2017 updates to the Act.

We also offer the below comments on specific provisions contemplated by the Proposed Rulemaking.

Surety Bond Provisions

Under proposed WAC 208-690-040(5), "the director may provide an alternative to a bond under certain circumstances." TMSRT believes that this provision should be struck for the following reasons:

- SSB 5031 amended the Act to *remove* the provision that enabled licensees to maintain, instead of a surety bond, some "other similar security acceptable to the director."[4] Accordingly, it would appear that providing such an alternative to a surety bond by rulemaking, after the legislature has expressly eliminated the possibility of an alternative, could be beyond the bounds of the director's authority under the statute.

- Additionally, we note that as drafted this provision is vague and ambiguous and does not provide any parameters with respect to *what* such an alternative may be, nor in what circumstances such an alternative may be permissible.

TMSRT believes that flexible approaches to ensuring the safety and soundness of licensees, including approaches that address the redundancy caused by independent net worth, bonding, and permissible investments requirements, should be explored by regulators. Nevertheless, because these provisions appear to conflict with SSB 5031, promulgation of the regulation will create confusion for licensees.

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Similarly, new WAC 208-690-140(3) of the Proposed Regulations would provide that, "if thirty days after the due date the annual assessment or any late fee for failure to report or pay the annual assessment is not paid, ***the department may make a claim against the surety bond.***" (Emphasis added.) TMSRT respectfully requests that the DFI not make this change. The Act clearly establishes that the purpose of the surety bond is to "run to the benefit of the state and any person or persons *who suffer loss* by reason of a licensee's or licensee's authorized delegate's violation of this chapter or the rules adopted under this chapter. Wash. Rev. Code § 19.230.050(2) (emphasis added). That is, the purpose of a surety bond is to ensure that licensees keep their promises *to their customers*—the promise to deliver funds to the intended beneficiary. Indeed, as the commentary to the Uniform Act states, the bond requirement is a "safety and soundness measure[e] designed to protect the public. . ."

[4] *See* SSB 5031 Section 5 (amending Rev. Code Wash. 19.230.050(1)).

We do not believe it is appropriate for a surety bond to be used for the payment of any administrative licensing obligation of a licensee, such as fees for the annual assessment. Any such payments should be made by the licensee directly, from funds it holds on its own account. We also note that we are not aware of any other state that that provides for an action on a bond of this nature, and are not aware of any precedents that would suggest the need for the DFI (or another Washington government entity) to be paid directly on the bond in connection with the matter of ordinary payment of licensing fees by a money transmitter licensee.

Promulgation of this regulation could complicate bond underwriting for all licensees. The DFI already has adequate remedies to ensure payment of license fees, such as suspension of licensees for failure to timely pay. If the DFI has specific concerns relating to the actions of money transmitters that have precipitated this proposed modification, we would be happy to discuss them with you.

Annual Reporting and Required Certifications

The Proposed Regulation would amend WAC 208-690-090(2) and (4) to require licensees to include, with their annual audited reports, additional certifications[5] that "authorized delegate information in the NMLS is current" and that "material changes . . . have been reported through the NMLS and are current." While TMSRT appreciates the importance of accurate authorized delegate reporting and the need to report material changes, TMSRT strongly opposes these proposed changes.

With respect to authorized delegates, Washington has transitioned to the use of the Uniform Authorized Agent Reporting ("UAAR") functionality through NMLS.[6] Thus, there is a set process for reporting new authorized delegates and changes to authorized delegates. This information must be updated in NMLS in accordance with the NMLS-established UAAR process, and each required submission through NMLS *must be attested to* by the licensee. A separate requirement to certify that the authorized delegate information is current is therefore redundant.

In addition, any such separate certification could not be effectuated through NMLS, which does not have this functionality (other than through the UAAR submission and attestation process). Thus DFI would, it appears, be creating a new "paper" requirement. This requirement is inconsistent with the goal of greater streamlining and efficiency of the licensing and oversight process through NMLS. Finally, we note that it is not clear what is

[5] Licensees are currently required to make a certification with respect to permissible investments, though this certification would be modified to require licensees to certify that they meet permissible investments requirements under the Act.

[6] *See* https://mortgage.nationwidelicensingsystem.org/slr/Documents/UAAR%20Adopting%20states.pdf.

meant by "current" in proposed WAC 208-690-090(2). The UAAR reporting submission must be conducted on a quarterly basis, and licensees are, accordingly, able to update their authorized delegate information at such time. A licensee's authorized delegate information would therefore be "current" as of the last UAAR submission through NMLS, though it is not clear from the Proposed Regulation how the timing of the UAAR submission would be reconciled with the timing of the separate certification that would be required by WAC 208-690-090(2).

TMSRT also believes that a separate certification of no material changes, as would be required by WAC 208-690-090(4), is unnecessary. First, licensees are already required to attest every time information is submitted through NMLS. Second, as discussed further below, the provisions in the WAC relating to material changes are very broad and ambiguous. Thus, what may constitute a "material" change could be subjective. Licensees should not be required to provide an additional certification specifically with respect to whether a material change has occurred because of the vagueness of WAC 208-690-110. Rather, consistent with Wash. Rev. Code § 19.230.150(1), licensees should be (and are) required to maintain the application materials submitted through NMLS up-to-date and accurate, and to attest to any such changes made to those application materials.

In light of the foregoing, TMSRT respectfully suggests that the proposed changes to WAC 208-690-090(2) and (4) should not be made.

Audited Financial Statement

The Proposed Regulation would amend WAC 208-690-080(1) to provide that the requirements for a licensee to "have an audited financial statement prepared annually" may be waived for "licensees with minimal or no business activity conducted under their license." TMSRT respectfully believes that this change should not be made for the following reasons:

- The statute appears to clearly require that licensees "shall submit an accurate annual report" that contains, among other things, "a copy of the licensee's most recent audited annual financial statement." Wash. Rev. Code § 19.230.110(2)(a). Therefore, there does not appear to be a clear basis for waiving this requirement.

- The mechanism by which this waiver would be effectuated, and the criteria on which the DFI would waive the requirement, is not clearly established. Thus there appears to be a risk that waivers could be granted on an inconsistent basis.

- A licensee's financial condition can change, materially, even if the licensee does not conduct any activity subject to regulation as money transmission in Washington. Accordingly, the financial statement may still serve as an important mechanism to assess the safety and soundness of a licensee.

- Virtually all other states that license money transmitters require audited annual financial statements and, as a result, it is highly likely that this modification would result in the DFI not receiving information that the licensee nevertheless has available and has provided to other states.

For the foregoing reasons, TMSRT believes that all licensed money transmitters should be required to meet applicable statutory requirements regarding, among other things, financial reporting to the DFI.

Material Change Reporting Provisions

Pursuant to Wash. Rev. Code § 19.230.150(1), licensees are required to file within thirty days "any material changes in information provided in a licensee's application as prescribed in rule by the director." WAC 208-690-110 appears intended to implement this statutory requirement but, as *currently* implemented, includes provisions that do not pertain to information in a licensee's application. In particular, the NMLS Checklist does not require: (1) that applications report "the obtaining, revocation or surrender of a money services license in any other jurisdiction," *id.* at 208-690-110(5); or (2) notice of or information regarding data breaches, as apparently required, *id.* at 208-690-110(12). Accordingly, TMSRT believes that these provisions should be struck from 208-690-110.

TMSRT also believes that current 208-690-110(10) (as renumbered by the Proposed Regulation) should be struck. This provision, which states that a material change includes "[o]ther similar activities or events affecting the business or executive offices or other persons in control" is vague and confusing and, to the extent that it would pertain to information beyond what is included in the application, beyond the scope of the underlying statutory provision. If it is not intended to extend beyond the scope of the underlying statutory provision, it is not clear what type of information it is intended to capture that would not otherwise be addressed by the enumerated requirements. As discussed above with respect to the proposed new annual reporting certifications, licensees should not be required to certify to compliance with vague and undefined requirements.

Finally, TMSRT does not believe that the new proposed additions and changes to 208-690-110 should be made. First, WAC 208-690-110(6) would require licensees to report, as material changes, "[t]he 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.*" As an initial matter, TMSRT believes that this provision is not necessary because a licensee is already required to provide notice of any change to information provided on the license application that is "not trivial" and would "cause an investigation or examination to be misled or delayed." WAC 208-690-110. In that regard, many companies that are DFI licensees operate globally and actions in other jurisdictions, especially outside of the United States, may not be germane to the licensee's

Washington activity and thus would *not* be likely to "cause an investigation or examination to be misled or delayed." Furthermore, the notion of an "administrative action" does not necessarily translate to the legal and regulatory regimes of other countries. Accordingly, we respectfully suggest that this provision, if it is not struck in its entirety, be amended as follows:

> 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 **pertaining to money services business activity in the United States~~, in any jurisdiction~~**.

Second, as noted above, TMSRT believes that the "material change" section is not the appropriate location for a notification requirement relating to a "data breach." Additionally, TMRST wishes to reiterate the comments we made when this provision was added to the WAC in the DFI's 2016 rulemaking: to avoid creating confusion for licensees with respect to what qualifies as a reportable incident under this provision and when such an obligation would be triggered (as "data breach" does not appear to be defined), licensees should only be required to provide notice to the DFI in the event that notice is provided by a licensee to the Attorney General's office pursuant to the Washington breach notification statute, Rev. Code Wash. § 19.255.

In the event, however, that DFI does not modify this provision to address these concerns, we respectfully suggest that, at the least, the DFI not change the timing of the reporting requirement to ten days from forty-five days. This contemplated timeframe is not sufficient for licensees to determine whether a noticeable incident has occurred (especially when there is no definition provided of what may constitute a noticeable incident). It is also inconsistent with the timing of notice obligations under breach notification statutes and thus runs the risk of creating asymmetry of information and confusing regulators, licensees, and consumers. Finally, we note that the inclusion of a timing requirement in 208-690-110(12) is inherently confusing because, as discussed above, Rule 208-690-110 generally pertains to material changes to a licensee's application *and requires notice of such changes be provided "through the NMLS within thirty business days of the occurrence of the change."*

Payment Processor Exemption

Proposed new WAC 208-690-015(4)(c) would attempt to restrict the statutory payment processor exemption, Rev. Code Wash. § 19.230.020(9)(c), to instances in which a person does not "hol[d] funds longer than the time period needed to complete a transaction." This provision as drafted is vague and does not articulate what is meant by "complete a transaction." For instance, a transaction at the point-of-sale between a customer and a merchant can be completed in seconds, though of course it may take days for the funds to

ultimately settle to the merchant. Additionally, payment intermediaries are generally obligated to ensure that transactions are not, among other things, fraudulent and thus may require time to appropriately investigate transactions. A rule that would effectively force such intermediaries to settle funds on an arbitrary (albeit wholly unclear) timeframe or else be subject to licensure as money transmitters does not appear to have any benefit from the perspective of consumer protection or the prevention and detection of money laundering.

Finally, the holding of funds does not appear to change the underlying nature of the exempt transaction, as provided for in the statute, in that such transactions would still: (1) involve the person "*facilitate[ing]* payment for goods or services…") (emphasis added); and (2) occur "pursuant to a written contract with the payee and either payment to the person facilitating the payment processing satisfies the payor's obligation to the payee or that obligation is otherwise extinguished." Rev. Code Wash. § 19.230.020(9)(c). Accordingly, TMSRT respectfully believes that this additional criterion called for by proposed new WAC 208-690-015(4)(c) should not be added.

Business Resumption Plan

Proposed revisions to WAC 208-690-280 would appear to require that a licensee's response and recovery plan "detai[l] the company's response and recovery to . . . a data breach." Typically, a company's policies and procedures relating to data breach incident response, including recovery, would be addressed by the company's written information security program and/or its separate written incident response plan. This excessively prescriptive requirement would likely result in licensees being required to modify their current data breach incident response policies and procedures or maintaining the same policies and procedures in multiple forms, which can create inefficiencies and confusion. Accordingly, we believe that the proposed revision to WAC 208-690-280 should not be made.

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On behalf of TMSRT, I thank you for your time and willingness to consider the comments provided herein. We would be happy to continue to discuss any of these issues with you at your convenience.

Sincerely,

Bradley S. Lui
Counsel to The Money Services Round Table