

UNITED STATES OF AMERICA Federal Trade Commission Washington, D.C. 20580

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Ezra C. Levine, Esq. Morrison & Foerster LLP 2000 Pennsylvania Avenue, NW Washington, D.C. 20006

Dear Mr. Levine,

This letter responds to your request on behalf of The Money Services Round Table ("TMSRT") for an advisory opinion concerning TMSRT's proposal to collect and disseminate certain information regarding terminated United States money transmitter agents. TMSRT wishes to know whether Federal Trade Commission ("FTC" or "Commission") staff is likely to recommend an enforcement action, challenging the information exchange as an anticompetitive restraint of trade.

Based on the information you provided,¹ FTC staff has no present intention of recommending law enforcement action. As discussed below, the stated purpose of the proposed information exchange is to improve money transmitters' ability to evaluate prospective United States agents and to comply with federal and state money laundering and other laws, and there appears to be little or no potential for competitive harm associated with the information exchange. Our conclusions, however, are entirely dependent on the completeness and accuracy of the information you provided to us, and on our understanding of the pertinent facts, as described below. Should there be information, or should the proposed information exchange materially change in the future, we may change our law enforcement recommendations accordingly.

¹ Our analysis and conclusions rely on your representations to staff, including those made in correspondence you provided to us on July 25, 2013 (which superseded an earlier June 14, 2013 letter), as well as those made during our telephone conversations with you and your colleague, Sean Ruff. We have not conducted an independent investigation or otherwise verified the information that you provided.

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Statement of the Pertinent Facts

TMSRT is a trade association comprised of six licensed national money transmitters (hereinafter "TMSRT Participants").² Money transmitters are non-bank entities that transfer funds from one individual or institution to another by wire, check, computer network, or other means. TMSRT Participants are the largest money transmitters in the United States by volume and revenue, and offer money transfer services to consumers through a network of agents located in cities across the United States and abroad.

Under the money transmitter agent model, money transmitters enter into agent service agreements with commercial entities, such as neighborhood grocery stores, convenience stores, liquor stores, and check casher services, which seek to add money transmission services to their existing inventory of consumer products and services.³ Agents serve as the point of contact for the money transmitter with the public, and act pursuant to express contractual authority and the pertinent state's money transmitter law.⁴ Money transmitters pay their agents a commission based on a percentage of their revenue – that is, the transaction fees charged to consumers to transfer funds. The commission may be split between the sending agent (*i.e.*, the agent that initiated the transaction) and the receiving agent (the agent that paid the transaction). Agents frequently migrate among money transmitters to obtain higher commissions and other benefits.⁵

A typical money transmission requires four parties: the sender, the money transmitter's sending agent, the money transmitter's receiving agent, and the recipient.⁶ A sender walks in to one of the money transmitter's agent locations and provides the agent the funds and instructions for delivery to the recipient, as well as the fee established by the money transmitter for the transmission service.⁷ The sending agent takes the funds and instructions, and enters the transaction information into a computer terminal owned by the money transmitter.⁸ Upon receiving the instructions, the money transmitter contacts the appropriate receiving agent for payment to the recipient.

Recipients may receive payment within several minutes or several days, depending on the sender's instructions, the money transmitter's policies, and the

² TMSRT members include Western Union Financial Services, Inc.; MoneyGram Payment Systems, Inc.; American Express Travel Related Services Co., Inc.; RIA Financial Services; Sigue Corporation; and Integrated Payment Systems, Inc. Letter from Ezra C. Levine, Morrison & Foerster LLP, to Donald S. Clark, Secretary, Fed. Trade Comm'n (July 25, 2013) ("July 25 Letter") at 1.

³ July 25 Letter at 2.

 ⁴ Id. Nearly every state regulates money transmission services through licensing requirements.
⁵ Id

⁶ *Id.* at 2-3. All United States money transmitter agents are contractually obligated to send and receive transmissions.

^{&#}x27; Id. at 3.

⁸ *Id.* Transmissions also may occur by telephone, facsimile or other means.

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receiving agent's location and availability. In certain instances, the money transmitter may remit payment to the recipient before receiving the funds from the sending agent.⁹ For example, the sending agent may not have transferred (deposited) the funds before the appointed transmission time. Alternatively, the sending agent may have fraudulently withheld the funds from the money transmitter.¹⁰

Both agent fraud and reliability concerns have prompted many money transmitters to vet prospective agents by conducting background checks.¹¹ In addition, money transmitters are obligated to perform due diligence on prospective agents under various federal and state laws designed to prevent money laundering, terrorist financing, and other criminal behavior.¹²

1. Federal Regulation

The Currency and Foreign Transactions Reporting Act (commonly referred to as the "Bank Secrecy Act" or "BSA")¹³ requires money transmitters, banks, and other financial institutions to maintain certain records and to file certain reports, which are used by law enforcement agencies to prevent and detect money laundering, terrorist financing, and other crimes.¹⁴ In addition, the BSA requires money transmitters to develop and implement an "effective anti-money laundering program reasonably designed to prevent [the money transmitter] from being used to facilitate money laundering and the financing of terrorist activities."¹⁵ An effective anti-money laundering program includes "evaluat[ing] the suitability of prospective agents," which means that money transmitters that contract with agents must conduct "reasonable, risk-based due diligence * * * to help ensure that such agents themselves are not complicit in illegal activity."¹⁶

2. State Regulation

Nearly every state regulates money transmitters through licensing laws. In addition, several states have enacted statutes or implemented regulations that make violations of the BSA a state violation.¹⁷ Certain states also require money transmitters to

¹² Id.

¹⁶ Id. at 4 (citing Financial Crimes Enforcement Network ("FinCEN") Interpretive Release 2004-1, Anti-Money Laundering Program Requirements for Money Services Businesses With Respect to Foreign Agents or Foreign Counterparties, 69 Fed. Reg. 74,439, 74,440 (Dec. 14, 2004)). FinCEN, a bureau of the United States Department of Treasury, is authorized to implement and administer the regulations under the BSA.

¹⁷ Id. at 5 (citing, as an example, Wash. Rev. Code § 19.230.180, which requires "every licensee and its delegates [to] file all reports required by federal currency reporting, recordkeeping, and suspicious transaction reporting requirements * * * and other federal and state laws pertaining to money laundering").

⁹ *Id.* at 3.

¹⁰ See id. ¹¹ Id.

¹³ Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311-5314, 5316-5322 (2013).

¹⁴ July 25 Letter at 3.

¹⁵ Id. (citing Rules for Money Services Businesses, 31 C.F.R. § 1022.210(a) (2013)).

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conduct "risk-based background investigations" of prospective agents to determine whether such agents have "complied with applicable state and federal law, including laws dealing with fraud and other criminal activities harmful to consumers."¹⁸

3. The Proposed Information Exchange

Spurred, in part, by these federal and state requirements, TMSRT proposes an information exchange that will consist of a database developed, maintained, and secured by an independent third-party vendor.¹⁹ The database will contain information regarding former United States sending and receiving agents whose contractual relationships were terminated due to failure to comply with federal and/or state law, or money transmitter contract terms or policies.²⁰ Exchange membership will be open to all licensed non-bank money transmitters, and will include TMSRT Participants.²¹ Participation in the information exchange will be voluntary,²² and each member of the information exchange ("Exchange Member") will retain the right to decide unilaterally whether to appoint an agent that has been terminated by another Exchange Member (and thus included in the database).23

Per your correspondence and conversations with staff, the following information will be collected and made available in the Exchange Member database:

- the name of the Exchange Member that supplied the terminated agent information;
- the agent's name(s), address, telephone number, and business tax identification number (including any name under which the agent is doing business);
- the name, address, telephone number, and individual or business tax identification number of any individual or entity that owns more than ten percent of the agent;
- the name, addresses, telephone number, and tax identification number or social security number of any other principal, including executive officers, directors, and managers;
- the date of termination; and
- the reason(s) for termination. •

Once an agent has been added to the database, the third-party vendor will notify the agent in writing and provide the agent, upon the agent's request, a copy of its database record.²⁴ Exchange Members will be under a continuing obligation to update any information submitted to the exchange and to correct any errors.²

¹⁸ Id. (citing, as examples, Tex. Fin. Code § 151.402(b) and Fla. Stat. § 560.1235).

¹⁹ *Id.* at 6, 8. ²⁰ *Id.* at 6-7.

²¹ Id. at 1.

²² *Id.* at 8.

²³ *Id.* at 6, 8. ²⁴ Id. at 7.

²⁵ Id.

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Analysis of the Proposed Information Exchange

TMSRT's proposal contemplates a type of information exchange among competitors.²⁶ Both the United States Department of Justice and the Commission have recognized that information exchanges among competitors may be competitively neutral or even procompetitive.²⁷ However, certain information exchanges among competitors may violate Section 1 of the Sherman Act, which prohibits a "contract, combination * * * or conspiracy" that unreasonably restrains trade.²⁸ The antitrust concern is that the information exchange may facilitate anticompetitive harm by advancing competitors' ability to collude or tacitly coordinate in a manner that lessens competition.

Under the antitrust laws, information exchanges among competitors generally are examined under the "rule of reason."²⁹ The "rule of reason" is a method of antitrust analysis that distinguishes legitimate information exchanges from illegal ones by balancing the information exchange's anticompetitive effects with its efficiencies and other procompetitive benefits. Various criteria are considered in assessing the legality of an information exchange, including the nature and quantity of the information shared, the parties' intent in sharing the information, and how the information exchange is structured and controlled.³⁰

Based on the information you provided, TMSRT's proposed exchange does not appear likely to facilitate collusion or anticompetitive refusals to deal, or to otherwise restrict competition. To the contrary, the information exchange has the potential to generate efficiencies that benefit consumers. Our assessment is based on a number of factors.

First, the goals of the information exchange do not appear to be either directly or indirectly anticompetitive, or designed to further coordination among United States money transmitters with regard to any significant competitive factor, such as the commission rates paid to agents for completing money transfer services. Given that the information sharing is unlikely to facilitate coordination on a significant competitive

²⁶ Without performing a formal market definition exercise, it is not possible to know whether or to what extent Exchange Members are actual competitors. Nonetheless, for purposes of this analysis, we assume that Exchange Members are competitors, at least with respect to one or more relevant United States markets.

²⁷ U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (hereinafter the "Collaboration Guidelines"). The Collaboration Guidelines provides a general outline of the analytical framework for evaluating collaborations among competitors.

²⁸ 15 U.S.C. § 1.

²⁹ United States v. United States Gypsum Co., 438 U.S. 422, 441, n. 16 (1978) (information exchanges among competitors may be procompetitive, and thus such exchanges – when not evidence of actual agreements to limit competition – should be subject to the rule of reason).

³⁰ *Id. See also United States v. Container Corp. of America*, 393 U.S. 333, 335-38 (1969) (finding a direct exchange of pricing information among competitors unlawful, despite finding no agreement on price, largely because of the nature of the information exchanged, the structure of the market, and the absence of a benign justification for the exchange).

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factor, such as price, cost, or output, efforts by Exchange Members to identify and share terminated agent information is not likely to create a substantial risk of competitive harm.

Second, the proposed information exchange appears to contain several safeguards that further lessen the risk of competitive harm. For example, the database will be maintained and secured by a third-party vendor; participation in the exchange will be voluntary; and each Exchange Member will conduct its own risk assessment and render its own judgment regarding whether to appoint a terminated agent.

Finally, the proposed information exchange could generate efficiencies for Exchange Members and enhance consumer welfare. For example, to the extent that the sharing of terminated agent information improves Exchange Members' ability to conduct thorough background checks on prospective agents, the information exchange could prevent the appointment of problematic agents, including agents who may be money launderers or other criminal offenders, and thus benefit consumers.

Conclusion

For the reasons stated above, FTC staff believes that TMSRT's proposed information exchange is unlikely to constitute an unreasonable restraint of trade. Accordingly, we have no present intention to recommend a challenge to the program.

This letter sets out the views of the staff of the Bureau of Competition, as authorized by Rule 1.1(b) of the Commission's Rules of Practice, 16 C.F.R. § 1.1(b). Under Commission Rule 1.3(c), 16 C.F.R. § 1.3(c), the Commission is not bound by this staff advisory opinion and reserves the right to rescind it at a later time. In addition, FTC staff retains the right to reconsider this opinion, and, with notice to the requesting party, to rescind or revoke it if implementation of the proposed information exchange appears to result in significant anticompetitive effects, if the exchange is used for improper purposes, if pertinent facts (or our understanding thereof) change significantly, or if it would be in the public interest to do so.

Sincerely,

Michael J. Bloom Assistant Director Office of Policy & Coordination