



IDAHO
DEPARTMENT OF FINANCE

C.L. "BUTCH" OTTER
Governor

GAVIN M. GEE
Director

September 2, 2016

Re: Electronic Filing System (EFD) No Action Request

Dear _____:

We have reviewed and discussed your letter of August 26, 2016 that requests that the Department of Finance take a no enforcement action position as to the licensing provisions of the Idaho Money Transmitters Act relative to the EFD that is operated by the North American Securities Administrators Association (NASAA). In connection with your request, we provide the following.

The Department's past application of the Idaho Money Transmitters Act (IMTA) has generally taken a view contrary to your assertion that the EFD is "not in the business" of transmitting money. However, the Department, in appropriate instances, has previously granted no action relief as to the licensing provisions of the IMTA.

In the present instance, the Idaho Department of Finance is the only Idaho recipient of funds paid by electronic filers through the EFD system. Further, the EFD is operated and overseen by NASAA, a non-profit organization whose members are state and provincial securities regulators, including the State of Idaho.

Given the limited nature of the activity, the design of the system and the Department's ability to access or otherwise participate in oversight of the system, we find that licensure under the IMTA would serve no public policy purpose. Hence, based solely upon the facts presented in your communications, the Department has determined to take a no enforcement action position as it pertains to the licensing provisions of the Idaho Money Transmitters Act¹.

Please be advised, that should the facts of the identified business activities be different than characterized above, change at a later date, or the EFD's limited activities in or from Idaho change, then the Department's conclusion may well be different than stated herein.

¹ This decision is based solely on the EFD's unique circumstances and is not intended to serve as precedent for any other money transmitter or applicant. This letter should not be construed as a finding that licensure is not required in other jurisdictions where users of the EFD may reside.

SECURITIES BUREAU

Bureau Chief - James A. Burns

800 Park Blvd, Suite 200, Boise, ID 83712

Mail To: P.O. Box 83720, Boise ID 83720-0031

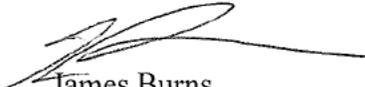
Phone: (208) 332-8004 Fax: (208) 332-8099

<http://finance.idaho.gov>

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Should you have any questions or need additional clarification, please feel free to contact the undersigned at (208) 332-8080.

Regards,



James Burns

SECURITIES BUREAU
Bureau Chief - James A. Burns
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AUG 29 2016

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DEPARTMENT OF FINANCE
STATE OF IDAHO

August 26, 2016

Via E-Mail and Federal Express

Department of Finance
Securities Bureau
Attn: James A. Burns
800 Park Blvd., Suite 200
Boise, ID 83712

Re: Request for No-Action Letter

Dear Chief Burns:

We are writing on behalf of our client, the North American Securities Administrators Association, Inc. ("NASAA") to request a no-action letter confirming that the Idaho Department of Finance, Bureau of Securities ("Department") will take no action under the Idaho Money Transmitters Act¹ ("Act") in relation to their services, as described herein. As you know, the Bureau of Securities is a user of the system and services described in this letter. We make this request pursuant to the Department's authority to indicate that it will not recommend enforcement action if our client undertakes the actions described herein. Please provide us with confirmation that the Department has received this letter.

This letter and the materials submitted today constitute sensitive and proprietary business information of NASAA and we respectfully request this submission be given confidential treatment from disclosure. Should the Department receive a request for disclosure of any portion of this letter or materials attached herein, we ask that the Department provide the undersigned with a prompt written notice of such request and opportunity to object to the disclosure.

I. Background.

NASAA is a non-profit organization subject to the District of Columbia Nonprofit Corporation Act and section 501(c)(3) of the Internal Revenue Code. Organized in 1919, NASAA is the oldest international organization devoted to investor protection. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is committed to educating investors, protecting investors from fraud and abuse, supporting responsible capital formation, and helping to ensure the integrity and efficiency of financial markets. NASAA represents and serves its members through advocacy, education, subject matter expertise, communication and

¹ Idaho Code §§ 26-2901 *et seq.*

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coordination. NASAA provides these services and resources to all of its members, including the U.S. state securities regulators.²

NASAA, under the leadership and supervision of its state securities regulator members, operates the Electronic Filing Depository (“EFD”). The EFD system benefits from the oversight of the NASAA Board of Directors and subject matter expertise from the EFD Steering Committee. EFD is an internet accessible database that allows issuers of securities to submit regulatory filings, currently, Form D for Regulation D, Rule 506 offerings and pay related fees to state securities regulators. EFD also provides a public-facing website allowing members of the public to search and view, free of charge, Form D and additional form filings made with state securities regulators.³ On a day-to-day basis, an outside vendor, with whom NASAA has entered into a contractual relationship, operates the system. NASAA office staff oversee the work of the outside vendor with input from the EFD Steering Committee, particularly with regard to system enhancements and changes to better serve regulatory users of the system, the state regulatory agencies.

The EFD system allows filers and state regulatory agencies to transition from a paper based filing system to an electronic system. The U.S. Securities and Exchange Commission (“SEC”) mandates electronic filing for Form D through the agency’s EDGAR system. EFD provides state regulators with the tools necessary to receive and manage Form D filings in their respective states – giving states a portal with which to manage their workflows regarding Form D filings. Furthermore, there are communication capabilities allowing communication between regulators with filers. By fostering uniformity in state securities regulatory filings and simplifying the communication between filer and regulator, EFD helps to provide regulators with a more efficient and effective means of receiving and monitoring securities filings, as well as better aligning the state filing process with the federal filing process.

The EFD system provides filers a complete management tool for their Form D filings, allowing filers to generate reports on filing activities including filing history. Filers benefit from the EFD system as a centralized place to file with many state securities regulators at once, rather than piecemeal like in the paper based filing system. In addition, filers are able to manage these filings and any subsequent notices such as amendments or renewals through EFD. Filers include issuers of Form D’s and the service providers to these issuers, such as law firms.

² The U.S. component of the membership also includes the regulators of the District of Columbia, Puerto Rico and the U.S. Virgin Islands.

³ In the future, it is likely that EFD will be used by state securities regulators to collect forms other than Form D.

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As you may know, Rule 506 of Regulation D is a “safe harbor” for the private offering exemption of Section 4(a)(2) of the Securities Act. Issuers relying on the Rule 506 exemption do not have to register their offering of securities with the SEC or state securities regulators, but they must file what is known as a “Form D” with the SEC and state securities regulators after they first sell their securities. Form D contains limited information about the securities being offered and the issuer offering those securities.⁴

EFD requires filers and state regulators to establish system accounts containing relevant identifying information. Ancillary to EFD’s functionality as a regulatory filing and data management tool, state regulatory agencies receive required filing fees using Automated Clearing House transactions (“ACH”) or other payment methods that may be supported by EFD. For example, filers may enter their payment information into EFD. Upon receiving a Form D filing and state mandated filing fees, EFD will write that information to a NACHA file with its bank to withdraw funds from the filer’s bank account. Using the FedLine Advantage ACH system, these funds are then deposited into a bank account established, maintained and held by NASAA exclusively for such purpose (the “Clearinghouse Account”). The funds are subsequently distributed by ACH to accounts designated by the states.⁵ Each state securities regulator sets its own filing fees according to applicable law, and no other payments to the states may be made by EFD users.

NASAA treats all filing fees paid through EFD as if the fees were a check paid through the paper filing system. Accordingly, NASAA considers the filing fees paid through EFD to be the property of the state regulators, and NASAA is not in the position of acting as agent for the filer or the securities regulator. As in paper filing, if there is a deficiency in a payment made to a securities regulator, the issue is handled through notice to the filer from the regulator. If a deficiency is not cured, both the filer and the regulator become aware of this through the EFD management tools. Furthermore, when the filer submits the Form D and accompanying payment, the EFD system generates a receipt noting that the Form D has been filed.

Currently, the filing fee remains for the life of the filing, covering any amendments or additional state filings made by the filer. Each new filing accrues the EFD system fee. All other filing fees submitted by the filer belong to the state regulator. With respect to the EFD service,

⁴ To learn more about Regulation D and Rule 506 please visit the SEC’s website:
<http://www.sec.gov/answers/rule506.htm>.

⁵ See FinCEN Ruling, FIN-2008-R006 (May 21, 2008) (ruling that processing payments from consumers to a utility is not money transmission as long as the company processing the payment “limits itself to accepting payments only on behalf of the utilities with whom it has contracted...and declines to accept and transmit funds for any other purpose” because these “activities are sufficiently similar to the services provided to merchants by merchant payment processors”).

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NASAA is exclusively compensated by the system fee paid by a filer when a new Form D is filed.

II. Legal Analysis and Request for No-Action Letter.

NASAA is seeking guidance and a formal response from the Department regarding whether or not it is required to be licensed as a money transmitter for the purpose of conducting the above activities on behalf of its state regulator members. Both the Idaho Money Transmitters Act and guidance from the Financial Crimes Enforcement Network (“FinCEN”) counsels that NASAA should not be required to be licensed as a money transmitter. The spirit as well as the letter of the Act permits the Department to take no-action and grant NASAA an exclusion from licensure. Likewise, FinCEN guidance provides that companies that transmit money only incident and ancillary to the company’s main service should not be licensed as money transmitters.

In Idaho, “money transmission” means “the sale or issuance of payment instruments or engaging in the business of receiving money for transmission or the business of transmitting money.”⁶ NASAA is not in the business of money transmission, and does so only incident to its provision of the EFD system. Accordingly, and as described below, NASAA believes the EFD system falls outside the scope of the Act or should otherwise be recognized as exempt from being required to be licensed as a money transmitter.

Further, the Department should consider NASAA exempt from licensure due to there being no public policy reason or other benefit under the statutory scheme to license its actions.⁷ The Department has taken this position in another instance in its Opinion of August 14, 2013. In that Opinion, the Department granted no-action relief to a company that functioned as a “limited purpose entity that only accepts and forwards licensing fees to participating regulatory agencies from individuals or entities that seek to become licensed in various capacities with these regulatory agencies.”⁸ NASAA’s EFD system functions in the exact same way, and should therefore be granted no-action relief as well.

⁶ Idaho Code § 26-2902(11) (emphasis added).

⁷ The Texas Department of Banking chose not to require NASAA to be licensed as a money transmitter because licensure was unnecessary to achieve the purpose of Texas Money Services Act. Texas Department of Banking, No-Action Letter (Aug. 8, 2016).

⁸ NASAA understands that the Department’s Opinion granting no-action relief was provided in response to a request from the Nationwide Multistate Licensing System (NMLS). As described in this letter, NASAA’s EFD system operates in the same manner as NMLS.

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In connection with the services NASAA provides, EFD facilitates the filing of forms to state securities regulators on a non-commercial basis for the benefit of its state regulator members. NASAA developed the EFD system to further its broader mission of investor protection and promoting uniform policies for NASAA members. EFD only accepts funds from filers and transfers those funds to, and under an agreement with, the state regulator. The EFD, and any funds that are collected by states through the service, are exclusively to transfer payments due from filers in satisfaction of filing fees owed to state securities regulators. The funds are the state regulator's funds upon their payment through the EFD system.⁹

Numerous states have granted no-action relief to NASAA partly on the grounds that the fees paid through the EFD system are transferred to the state regulators directly so that NASAA functions as an agent of the state. The Colorado Department of Banking recently agreed with this analysis, and granted NASAA an exemption from licensure under its money transmission law. Colorado stated that its statute explicitly exempts state governments, and the exemption also covers agents of state governments. Specifically, Colorado stated that NASAA was "exempt from the Act due to its clearly defined agent relationship with the securities administrators in the 50 states." Similarly, Washington exempted NASAA from licensure as a state instrumentality. Although Washington does not have the "agent of the payee" exemption, its letter agrees that "EFD only accepts funds from filers and transfers those funds to, and under an agreement with, the state regulator. The funds are the state regulator's funds upon their payment through the EFD system."

FinCEN rulings also offer guidance that EFD should not be considered a money transmitter. FinCEN exempts from regulation money transmitters whose money transmission activities are "integral" to the provision of the company's service. As such, FinCEN considers money transmission to be "integral" when the "acceptance and transmission of funds do not constitute a separate and discrete service provided in addition to the underlying service" provided by the company.¹⁰ As described above, EFD's purpose is to facilitate the filing of Form Ds with state regulators. The payment of funds to state regulators through EFD is integral to the filing of Form D.

⁹ Fees collected through the EFD System are disbursed to the jurisdiction, and NASAA has no obligation to seek payment of any amount due to the jurisdiction in the event of an underpayment, nor does NASAA have an obligation to refund the filer any overpayment. Such responsibilities fall to the jurisdiction, and in the event that NASAA or the EFD agent becomes aware of an over or underpayment, notice will be given to the jurisdiction.

¹⁰ FIN-2014-R005 (April 29, 2014).

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In addition, any money transmittal services in connection with EFD are ancillary and incidental to the larger regulatory purpose of the system.¹¹ As previously stated, filers will be able to submit their Form D filings through the EFD system. The goal of the EFD system is to simplify the Form D filing process, as filers will be able to make all of their Form D filings and payments in one place, rather than undertaking the time and expense of making separate filings with multiple states. The state related fees are merely incidental to these larger services provided by EFD and NASAA. We also note that NASAA believes its activities, as described herein, do not cause it to be a money transmitter because its services are pursuant to an agreement with each participating state regulator that uses the filing service.¹²

Further, regulatory filings (and fees) submitted through EFD are regulated under individual state law. The goal of the EFD system is to simplify the filing process, however, each filing is subject to the requirements of individual state law and regulations, including the payments made in relation to the filing. Choosing to regulate EFD as a money transmission activity potentially limits EFD's adoption and will not provide any additional protection to filers that would use the platform.

Finally, other state regulators have already granted NASAA's no-action request and provided letters either stating that the regulator will not take any enforcement action, or that NASAA is exempt from state licensure requirements. Please find enclosed a copy of the October 14, 2014 no-action letter from the Arkansas Securities Department to NASAA as Attachment A; a copy of the November 10, 2014 no-action letter from the Minnesota Department of Commerce as Attachment B; a copy of the May 6, 2016 no-action letter from the Nebraska Department of Banking and Finance as Attachment C; a copy of the May 12, 2016 no-action letter from the Washington Department of Financial Institutions as Attachment D; a copy of the July 11, 2016 no-action letter from the Colorado Department of Banking as Attachment E; and a copy of the August 8, 2016 no-action Order from the Texas Department of Banking.

* * * * *

¹¹ FinCEN Ruling 2004-4 (Nov. 24, 2004) (a debt management plan's money transmission was "ancillary" to the service and "incidental to a debtor's primary purpose in using the service," making the debt management plan not a money services business pursuant to federal law).

¹² See e.g., 31 C.F.R. § 1010.100(ff)(ii); FinCEN Ruling, FIN-2014-R009 (Aug 27, 2014) (affirming that an independent sales organization would meet the payment processing exemption to federal money services businesses law if it could show that (a) the entity providing the service facilitates the purchase or payment of goods or services (other than the money transmission itself); (b) the entity operates only through clearance and settlement systems that admit only BSA-regulated financial institutions; (c) the entity provides the service pursuant to a formal agreement; and (d) the entity's agreement must be at a minimum with the seller or creditor that provided the goods or services and receives the funds).

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For the foregoing reasons, we hereby request a no-action letter regarding the activities as described herein. Thank you for your assistance and cooperation. Please do not hesitate to contact me at

if you have any questions or desire additional information.

Sincerely,

Enclosures

cc: