



COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF BANKS

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March 26, 2021

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Dear Mr. Carbide:

This letter is in response to your correspondence of January 19, 2021 to the Division of Banks (Division) requesting an opinion as to whether your client, TandP, LLC d/b/a Track-n- Pay (TandP) requires a foreign transmittal license based upon the activities described in your correspondence.

TandP offers services to merchants of goods and services enabling them to accept customer payments on credit, debit, prepaid, or gift cards of the major card networks, as well as payments through the Automated Clearing House (ACH) network. Your correspondence states that TandP plans to facilitate the sale of goods or services by merchants in two different capacities: data processor and payment processor. With respect to TandP's services, TandP and its merchant clients enter into a written agreement (Merchant Agreement) outlining the rights and obligations of the parties.¹ According to your correspondence, customers will be both Massachusetts residents and non-residents.²

As previously noted, TandP will offer two types of services. First, it may act as a data processor for merchants. Your correspondence describes two different methods by which TandP's data processing services are utilized for transactions; the ACH Model and the Credit/Debit Card Model. In providing its data processing service through these services, TandP creates daily transaction files and instructions which it then submits to a federal or state chartered financial institution. In both cases, the financial institution uses the transaction files and instructions to direct the debiting and crediting of accounts as necessary to settle payments owed by purchasers of goods to merchant retailers. In the data processing service, each merchant maintains its own account at its financial institution. Likewise, purchasers of goods or services from merchants will also maintain their own individual accounts at financial institutions from which their payments will be debited.

¹ Your correspondence includes a copy of the Merchant Agreement.

² While not specifically stated, the Division interprets TandP's description of customers to include residents of foreign countries, as the Massachusetts foreign transmittal licensing requirement currently applies only to foreign money transmission. See M.G.L. c. 169. Please note, however, that legislation has been filed in the Massachusetts House of Representatives that would extend the licensure requirement to include those engaged in domestic money transmissions, as well. See House Docket 3106, *An Act Relative to the Regulation of the Business of Domestic and Foreign Money Transmission by the Division of Banks*.

More specifically, your correspondence provides an example of a TandP data processing transaction involving an ACH transfer. In this situation, TandP provides payment files and instructions to a merchant's financial institution. This financial institution would then send the National Automated Clearing House Association (NACHA) instructions to the retail customer's financial institution directing such institution to send funds to the appropriate merchant account at the merchant's financial institution. As noted in your correspondence, funds do not flow through TandP's accounts in a data processing transaction and likewise do not appear on TandP's balance sheet. Rather, TandP is acting solely as a data processor.

As noted, TandP also offers a payment processing service. Merchants engaging TandP for its payment processing services are able to accept payments from customers on credit, debit, prepaid or gift cards on the various card networks, as well as through the ACH network. In providing its payment processing services pursuant to the Merchant Agreement, all of TandP's payment processing functions are performed as an agent of the merchant. More specifically, as noted in your correspondence, TandP accepts payments from customers on behalf of the merchant and processes those payments on behalf of the merchant. In order to provide its payment processing services, TandP generates files and instructions for the settlement of payments and then transmits this information and instructions to a federal or state-chartered financial institution.³ The financial institution then effects the payment through an ACH transaction or a credit or debit card processed with the card processor/acquirer bank. These funds are then settled through an omnibus account (FBO Account) maintained by TandP at its financial institution. Pursuant to the Merchant Agreement, TandP's merchant clients must maintain accounts at the same financial institution as TandP, thereby allowing TandP to direct payments within the same FBO Account. TandP also processes customer refunds for such purchase transactions, as set forth in the Merchant Agreement.

In its payment processing services, TandP's receipt of a consumer's funds is treated as tantamount to the receipt of funds by the merchant itself. Specifically, the Merchant Agreement expressly provides that upon TandP's receipt of full payment by the customer, the customer's obligation to the merchant is extinguished. In providing a receipt to consumers, TandP provides consumers with customer service information, allowing the payee to represent to consumers that TandP accepts payment on the payee's behalf. In addition, as noted in your correspondence, if TandP fails to provide the funds to the merchant, the merchant's only recourse is against TandP – *not* the customer. Moreover, the merchant is not permitted to withhold the consumer's goods or services or penalize the customer in any way. In other words, even if TandP fails to remit a resident's funds to the merchant, the customer suffers no risk of loss, and the risk of loss stays with the merchant.

Pursuant to M.G.L. c 169, section 1, persons who engage or are financially interested in the business of receiving deposits of money for the purpose of transmitting such deposits to foreign countries must be licensed by the Division. With respect to the data processing services as described, your correspondence clearly notes that at no point does TandP take possession of funds as part of this service and the funds never appear on TandP's balance sheet. Rather, in providing its data processing services, TandP is acting solely as a third party directing the flow of funds between other accounts. The mere transmission of payment information by itself does not constitute money transmission under M.G.L. c. 169. Accordingly, it is the position of the Division that TandP's data processing services do not trigger the requirement of foreign transmittal licensing.

³ Your correspondence identifies a specific Colorado-chartered credit union that has entered into an agreement with TandP to process ACH, debit, and credit card payments as part of TandP's payment processing services.

With respect to TandP's proposed payment processing services, regulations promulgated by the Division pursuant to its authority under M.G.L. c. 169 are helpful for your inquiry. The pertinent regulation, 209 CMR 45.00 *et seq.*, expressly addresses TandP's payment processing activities. Specifically, 209 CMR 45.02 provides a definition of "foreign transmittal agency" which excludes entities engaged in so-called agent-of-the-payee transactions. In pertinent part, 209 CMR 45.02 provides:

Foreign Transmittal Agency means a person who engages or is financially interested in the business of receiving deposits of money for the purpose of transmitting the same or equivalents thereof to foreign countries; provided, however, that the following activities shall not constitute activities requiring licensure by the Division as a Foreign Transmittal Agency:

- (1) The transmission of money or its equivalents that is not primarily for personal, family, or household purposes; or
- (2) A transaction in which the recipient of the money or other monetary value is an agent of the payee pursuant to a written contract and delivery of the money or other monetary value to the agent satisfies the payor's obligation to the payee.
 - a. For purposes of this regulation, "payee" means the provider of goods or services who is owed payment of money or other monetary value from the payor for the goods or services.
 - b. For purposes of this regulation, "payor" means the recipient of goods or services, who owes payment of money or monetary value to the payee for the goods or services.

The merchants who enter into the Merchant Agreement with TandP will be providing goods or services to the purchasing customer. As confirmed in your submission, the Merchant Agreement expressly provides that upon TandP's receipt of full payment by the customer, the customer's obligation to the merchant is extinguished. If TandP fails to provide the funds to the merchant, the merchant's only recourse is against TandP and not the customer. Moreover, the merchant is not permitted to withhold the customer's goods or services or otherwise penalize the customer. TandP's provision of customer refunds for such purchases, as described in its Merchant Agreement, would also fall within the scope of an agent-of-the-payee transaction. Accordingly, it is the position of the Division that the proposed payment processing services of TandP, as described, fall within the agent-of-the-payee exemption set forth in 209 CMR 45.02, and TandP is not required to obtain a foreign transmittal license pursuant to M. G. L. c. 169.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,

/s/ Barbara Keefe
Deputy Commissioner of Banks
and General Counsel

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