

Money Transmitters with No Physical Presence in New York

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The Department has received an inquiry about the applicability of New York's money transmitter licensing law, Article XIII-B of the Banking Law, to a money transmitter with no office or agents in the State of New York. The Department has reviewed prior interpretations on this subject to determine whether "physical presence" is a valid prerequisite for licensing.

After review, the Department has concluded that there is no basis in law or policy for excluding from the licensing requirements of Article XIII-B money transmitters that do business with residents of New York or persons located in New York when the money transmitters themselves have no office or physical location in New York. The New York statute contains no "physical presence" requirement. In addition, the Department has reviewed prior staff interpretations regarding the requirement of "physical presence" and can find no articulated basis or legal reasoning for concluding that entities engaged in money transmission with persons resident in or located in New York fall outside the scope of Article XIII-B. In fact, most states license out-of-state money transmitters doing business with persons residing or located in-state, including states with statutes similar to Article XIII-B. See, e.g., Colorado (12 Col. Rev. Stat. § 52-104), Michigan (Mi. Comp. Laws Svc. § 487.1011) and Vermont (8 Vt. Statutes Ann. § 2502).

It appears that the "physical presence" requirement of our prior opinions is a vestige of a time when money transmission was handled by local businesses with a brick and mortar presence. However, with the prevalence of the Internet and the growth of a global economy, financial services businesses are no longer necessarily locally based. Today, there is no doubt that businesses located out-of-state are subject to the jurisdiction of the state in which they do business. *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F. Supp. 1119 (W.D. Pa. 1997). Likewise, it is clear that businesses located out-of-state that do business with residents and other persons located in state are properly subject to that state's laws and licensing requirements. See, e.g., *Quik Payday v. Stork*, 549 F.3d 1302 (10 Cir. 2008), cert denied, 129 S. Ct. 2062 (2009); *Aldens, Inc. v. La Follette*, 552 F.2d 745 (7th Cir. 1975), cert denied, 434 U.S. 880 (1977).

The Department believes that the Department's earlier interpretation of Article XIII-B can no longer be justified and that a change in interpretation of the law is warranted. Therefore, the Department will no longer follow pre-existing staff interpretations requiring money transmitters to be located in New York as a condition of licensing. Rather, we will require that (except as provided in Banking Law section 641(1)) any person (as defined in section 641) that engages in the business of selling or issuing checks or receiving money for transmission from persons residing or located in New York or transmitting money on behalf of persons residing or located in New York must be licensed by the Superintendent. We believe this interpretation

is consistent with the statutory language and intent to protect New York consumers of money transmission services and to ensure that persons that conduct financial business in New York do so fairly and honestly.

We also note that there is ample precedent for the Department to change its interpretation of the application of Article XIII-B. It is clear that state agencies, like courts, are entitled to change or modify prior erroneous interpretations of law. See, e.g., *In re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516 (1985); *Glick v. Summer*, 213 A.D.2d 403, 404 (2d Dep't 1995). We further note that the Pennsylvania Department of Banking, which had historically construed its licensed lending law as limited to lenders located in Pennsylvania, reconsidered its interpretation of Pennsylvania law to require the licensing of out-of-state Internet payday lenders that were doing business with Pennsylvania residents. The Pennsylvania Supreme Court upheld the Department's determination. *Cash Am. Net of Nevada v. Pennsylvania Dep't of Banking*, 8 A.3d 282 (2010).

We are aware that there are a number of persons who are engaged in the business of money transmission that do business with residents of New York or persons located in New York but who have no office or physical location in New York. Some of them received prior interpretations from the Department and others may have relied on the published interpretations. The Department will provide a transition period for such persons to obtain a license from the Superintendent. Such persons have until September 30, 2011 to submit a completed application for a license as a money transmitter to the Department. The forms for such an application are available on our website. Such persons may continue to operate without a license until six months from the date their application is deemed complete or until notified by the Department that their application has been denied, whichever occurs first, provided that the Superintendent may extend the period in which a company may operate without a license for just cause.

Questions with respect to the application process should be directed to the Deputy Superintendent of the Department's Licensed Financial Services Division at 212 709-5500.

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