National Conference of Commissioners on Uniform State Laws

Drafting Committee for Proposed Non Depository Providers of Financial Services Act

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Introduction

CyberCash, Inc., provides software and services to enable secure financial transactions on the Internet. Its services are used by merchants and financial institutions both in the United States and abroad. CyberCash's strategy is to provide on the Internet a full range of the payment services that are available in the physical world. Its current services include a secure credit card payment service; CyberCoin®, which enables small cash-like payments; and PayNow™, which enables payments from consumer checking accounts. Because some of CyberCash's services involve the transfer of funds, it has an interest in state laws related to money transmission services.

During the time I have served as CyberCash's General Counsel, I have had the opportunity to study state regulation of money transmitters as it applies to the new world of electronic funds transfer over the Internet. I have also become familiar with federal law and policy related to money laundering. It is clear to me that current state laws, all of which were drafted before the Internet and electronic commerce had even been conceived, are ill-adapted to deal with the questions raised by this new phenomenon. The same is generally true of federal law relating to money laundering. I am pleased, therefore, to have the opportunity to act as an observer to the work of the Committee and to assist in the shaping of model legislation that will address the important policy issues with which both conventional money transmitter regulation and federal money laundering laws are concerned.

I would like to address, at this first substantive meeting of the Committee, four topics, one relatively trivial, and the other three quite important.

First Things

Let me address the trivial concern first. It is the name of the proposed uniform law. I urge that the Committee find some name other than "Non Depository Providers." The class of institution in question already has more names than it can profitably use. One would have thought that "money transmitters," a denomination that has served adequately for many years, would have been sufficient. In the Money Laundering Suppression Act, Congress created two new appellations. And FinCEN, not satisfied, has created two more terms. (None of them, of course, are "non depository providers.")

One can agree that "money transmitter" is less than an entirely satisfactory term and still be of the opinion that it is not necessary to make up new ones. At a minimum, "non depository provider" fails to give any suggestion of what is being "provided," which should, one would think, be a critical element of a satisfactory name.

Policy

Now let me turn to more significant issues. As this Committee is fully aware, it owes its existence to the Money Laundering Suppression Act, a federal statute that embodies federal policy concerns. And yet it is charged with drafting a uniform state law. And money laundering is not a policy with which the

states have traditionally been concerned. Instead, they have been concerned about consumer protection, in particular the safety and soundness of the providers of money transmission services.

That puts the Committee in an unusual, perhaps unprecedented, situation. The Committee will be successful only if the statute it drafts is widely adopted by the states. This will only be possible if the Committee clearly articulates the policies underlying its work, and if those are policies that will find wide acceptance among the states.

There are at least two, and perhaps three, policies that could support a model act. The first is the conventional one: assuring that institutions that accept money from consumers and agree to transfer it elsewhere are safe and sound, and are always able to carry out their end of the bargain.

A second policy is the prevention of fraud. It is so closely related to safety and soundness as to be essentially the same thing. Like safety and soundness, it grows out of a concern for consumer protection, and is part of the traditional role of state money transmitter laws.

Finally, there is money laundering. As the Committee is aware, this has not traditionally been a policy of great concern to state governments.

It may be that the Committee can prepare a statute that addresses all of these issues. But it will only succeed if it articulates the policies it is seeking to implement in the clearest terms possible.

Application to Electronic Payment Systems

Electronic payment systems that call into issue any of the policy concerns discussed above are, of course, quite a new phenomenon. Because these systems are in their infancy, it is difficult to determine whether, how, and to what extent they implicate any of these policies. Moreover, electronic payment systems differ widely in their attributes and architectures; and these differences have significant impacts on the interaction of a particular system with relevant legal and policy considerations.

Electronic payment systems will be an important feature of electronic commerce, and of the money transmission industry of the future. It is important that the Committee understand them. It is equally important that the draft statute not be worded in a way that inadvertently hinders the development of this infant medium.

Jurisdiction

Much of the electronic payments industry will operate on the Internet. One of the most puzzling aspects of this new medium from a legal perspective, is how to draw sensible jurisdictional lines. The jurisdiction with which the Committee must be most concerned is proscriptive jurisdiction, or the jurisdiction to regulate, which is not necessarily coextensive with jurisdiction over the person.

A provider of electronic payment services over the Internet can, in theory, provide services to anyone on the planet. Indeed, it is one of the great virtues of the Internet that it is possible to do so. It does not necessarily follow from that, however, that a provider of such services should be subject to the proscriptive jurisdiction of every lawmaking body on the planet. There are today some 200 countries – and who knows how many states, provinces, cantons, oblasts, and other sub-national jurisdictions – with lawmaking authority. If every one of these jurisdictions felt empowered (perhaps even obligated) to assert regulatory authority over service providers offering payment services on the Internet, the result would be intolerably burdensome and conflicting regulation. In such a world, electronic commerce would quickly come to a halt.

Conclusion

In conclusion, I urge the Committee to consider the following suggestions:

First, please try to find a name that is at least more descriptive than “non depository providers.”

Second, it is essential that the Committee clearly articulate the policy considerations that will serve as the foundation for its work.

Third, the Committee should pay particular attention to the ways in which the model act will apply to the electronic payment systems that will play an increasingly important role in the economy. To do so, it will be essential for the Committee to develop an understanding of the technologies used in various embodiments of these systems.

Fourth, the Committee must identify and articulate a basis of proscriptive jurisdiction that strikes an appropriate balance between the need to regulate some forms of electronic payment system and the intolerable burdens of conflicting and overlapping regulation that will result without limits on jurisdiction.