

GUIDANCE

Please note that subsequent legal cases and legislation can affect the validity of past guidance documents. Guidance documents are valid at the time they are published, based on the law and facts at that given time. In 2020, the following guidance documents remain valid.

Current Guidance – General

CML 2019-1.....Advertising

CML 2019-2.....Use of Fictitious Names

CML 2020-1.....Historical Usury Rates for First Mortgage Loans

Current Guidance – Money Transmitter

MT 2014-1Virtual Currency

MT 2016-1Agent-of-the-Payee

Instructions for Submitting a Request for an Agent-of-the-Payee
Exemption

MT 2019-1Cash-In-Transit



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David L. Herndon, Acting Bank Commissioner

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CML Guidance 2019-1 Advertising August 23, 2019

Information Required in Advertising

KMBA. Licensees and registrants soliciting or advertising mortgage business directed at Kansas residents must include the name and license number/unique identifier of the licensee on record with the OSBC per K.S.A. 9-2208 (c) and (e).

CSO. Similarly, credit service organizations must include the name and license number used on record with the OSBC for solicitations and advertisements per K.S.A. 50-1120 (d) and (f).

U3C. A licensee subject to the Uniform Consumer Credit Code may only conduct business under the name given in the license per K.S.A. 16a-2-302(7).

KMTA. Kansas law does not prescribe requirements for money transmitter names.

Limits on Name Under the Banking Code. A provision of the Kansas banking code, K.S.A. 9-2011, states:

It shall be unlawful for any individual, firm or corporation to advertise, publish or otherwise promulgate that the individual, firm or corporation is engaged in the **banking business or trust business** without first having obtained authority from the commissioner. Any such individual or member of any such firm or officer of any such corporation violating this section, upon conviction shall be guilty of a class A, nonperson misdemeanor.

Use of the words “trust company” or “bank” (or any derivative such as banc, banque) may constitute advertising to the general public that such person is engaged in the banking business. Such advertising makes it appear that the person has obtained authority from the OSBC and it is in fact a bank/trust company subject to banking law and supervision. Such an assertion is deceptive and confusing to the public.¹

The OSBC must review names on a case-by-case basis to determine whether the particular use of the words in the name could be construed to mean the entity is lawfully engaged in the

¹ Exception are businesses that are clearly not financial institutions such as “Blood Bank.”

business of banking. Factors to be considered in deciding whether the use of the words “bank,” “trust,” or “trust company” are appropriate: 1. type of service provided, 2. level of sophistication of the parties interacted with, and 3. the amount of contact the business has with the public.

Retention of Advertising Records

KMBA. Licensees shall maintain a record of all solicitations or advertisements for a period of 36 months in accordance with K.S.A. 9-2208(c). Such advertising does not include business cards or promotional items.

CSO. Each licensee must maintain a record of all solicitations or advertisements for a period of 36 months, not including business cards or promotional items per K.S.A. 50-1120(d).

U3C. K.S.A. 16a-2-304 outlines the requirements for record retention under the U3C. Generally, records must be maintained in order for the administrator to determine compliance with the law. Under K.A.R. 75-6-38—a regulation implementing the U3C’s record retention—each licensee or person filing notification shall retain copies of advertisements or solicitations whether printed or internet/electronic.

KMTA. The commissioner has discretion to require any person under the Act to maintain such documents and records as necessary to verify compliance with law. The commissioner may deny, suspend, revoke or refuse to renew or approve a license for any person who fails to keep and maintain sufficient records to permit an audit or to show compliance with the law per K.S.A. 9-513a.

False and Misleading Advertisement

KMBA. An individual engaging solely in loan processing or underwriting cannot represent to the public that such individual can or will perform any activities of a loan originator. This prohibition includes advertising, communicating, or using business cards, stationery, brochures, signs, rate lists or other promotional items per K.S.A.9-2201(i)(2). No KMBA solicitation or advertisement can contain false, misleading or deceptive information, or indicate or imply that the interest rates or charges stated are "recommended," "approved," "set" or "established" by the state of Kansas, per K.S.A. 9-2208(d). No person who is required to be licensed or registered under the KMBA can solicit, advertise or enter into a contract for specific interest rates, points or other financing terms unless the terms are actually available at the time of soliciting, advertising or contracting per K.S.A. 9-2212(m).

CSO. No CSO solicitation or advertisement shall contain false, misleading or deceptive information per K.S.A. 50-1120(e).

U3C. Under K.S.A. 16a-2-310, no person shall solicit, advertise or enter into a contract for specific interest rates, points or other financing terms unless the terms are actually available at the time of soliciting, advertising or contracting. Under K.S.A.16a-3-208, a supervised lender

shall not, directly or indirectly, make a false, misleading or deceptive advertisement regarding loans or the availability of loans.

A supervised lender cannot advertise any size of loan, security required for a loan, rate of charge or other conditions of lending except with the full intent of making loans at those rates—or lower rates—and under those conditions—or conditions more favorable to the consumer—to loan applicants who meet the standards or qualifications prescribed by the supervised lender.

KMTA. The commissioner may deny, suspend, revoke or refuse to renew or approve a license for any person who: engages in any transaction, practice or business conduct that is fraudulent or deceptive in connection with the business of money transmission or; advertises, displays, distributes, broadcasts or televises any false, misleading or deceptive statement or representation with regard to rates, terms or conditions for the transmission of money per K.S.A. 9-513a(j), (k).

Regulation Z

In addition to state law restrictions on advertising solicitations, Regulation Z, 12 C.F.R. 1026, requires that certain disclosures be provided in advertisements. Licensees should refer to Regulation Z for specific advertising requirements applicable to the loan products they offer. Features common to many of the advertisements we have reviewed include statements regarding terms of repayment or specifying the amount of a payment. Such statements trigger additional disclosures that must be made pursuant to Regulation Z. The OSBC expects all licensees to familiarize themselves with Regulation Z's advertising provisions and to seek legal counsel when necessary to ensure compliance. Licensees should not rely on marketing companies offering form solicitations for compliance with either state or federal law.

Internet Communications and Social Media

Any website or internet post, as well as social media, e.g., Facebook, Twitter, Instagram, and any form of electronic promotion is considered advertising subject to this Regulatory Mailing.



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CML Guidance 2019-2 Use of Fictitious Names October 24, 2019

The purpose of this memorandum is to clarify the opinion of this office regarding a licensee's use of fictitious names, also referred to as trade names, or dba (doing business as) names in loan contracts and other documents. Our office routinely receives questions from regulated entities as to the proper use of these names.

While a document that references only the fictitious name of a licensee may be valid and enforceable by either party to the transaction, the use of an alternative name could lead to confusion for consumers. It is recommended that licensees use their full legal name in all documents prepared or used by a licensee when entering into transactions with Kansas consumers. It is acceptable to add a fictitious name that is properly noted on the entity's license in legal documents when the legal name is also used. A licensee may use just the fictitious name that is listed on the license without the official legal name so long as the use is not intended to cause confusion or deceit to the public.

Assume the legal name of a licensee is "XYZ Financial Group" but with a dba of "XYZ Mortgage." The company has properly noted both names on the license. The best practice is for all loan documents to include the official legal name "XYZ Financial Group." The company may also include the company's dba "XYZ Mortgage" with the legal name, or alone if the dba does not cause confusion or deception to the public.

Should you have any questions or concerns please contact the Office of the State Bank Commissioner, Consumer and Mortgage Lending Division, at 785-296-2266.



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CML Guidance 2020-1 Historical Usury Rates for First Mortgage Loans March 18, 2020

Usury Rate for First Mortgage Loans Prior to July 1, 2013

Prior to July 1, 2013, Kansas law defined a floating usury cap in K.S.A. 16-207(b) for interest rates on first mortgage loans.¹ This subsection also required the Secretary of State to periodically publish notice of this maximum interest rate. Effective July 1, 2013, that subsection was repealed. The floating cap was removed, and the secretary of state was no longer required to publish notice of the maximum interest rate. On and after July 1, 2013, all first mortgage loans are subject to K.S.A. 16-207(a), which continues to provide a general usury cap of 15% per annum, unless otherwise specifically authorized by other provisions of law.

This guidance document contains the historical text of 16-207(b) prior to July 1, 2013, and the relevant historical rates as published by the Secretary of State from January 1993 up to June 2013. This historical data remains relevant for first mortgage loans entered into prior to July 1, 2013.

Historical Text of K.S.A. 16-207(b)

Prior to July 1, 2013, K.S.A. 16-207(b) stated:

The interest rate limitation set forth in this subsection applies to all first mortgage loans and contracts for deed to real estate, unless the parties agree in writing to make the transaction subject to the uniform consumer credit code, K.S.A. 16a-1-101 to 16a-9-102, and amendments thereto. The interest rate limitation set forth in this subsection does not apply to a second mortgage loan governed by the uniform consumer credit code, K.S.A. 16a-1-101 to 16a-9-102, and amendments thereto, unless the lender and the borrower agree in writing that the interest rate for the loan is to be governed by this subsection. The maximum rate of interest per annum for notes secured by real estate mortgages and contracts for deed to real estate governed by this subsection shall be at an amount equal to 1 ½ percentage points above the yield of thirty-year fixed rate conventional home

¹ In this guidance document, “first mortgage loans” refers to consumer, first-lien, fixed-rate, real-estate mortgage loans and contracts for deed to real estate.

mortgages committed for delivery within 61 to 90 days accepted under the federal home loan mortgage corporation's daily offerings for sale on the last day on which commitments for such mortgages were received in the preceding month unless otherwise specifically authorized by law. Such interest rate shall be computed for each calendar month and be effective on the first day thereof. The secretary of state shall publish notice of such maximum interest rate not later than the second issue of the Kansas register published each month.

Chart of Historical Usury Rates for First Mortgage Loans

See the following page for a chart of maximum interest rates for first mortgage loans as published by the Secretary of State from January 1993 through June 2013.

Historical Kansas Usury Rates for First Mortgage Loans from January 1993 to June 2013

| | 2013 | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 | 2006 | 2005 | 2004 | 2003 |
|-----------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| January | 4.42% | 5.02% | 6.11% | 6.47% | 6.30% | 7.41% | 7.57% | 7.56% | 7.13% | 7.20% | 7.07% |
| February | 4.60% | 4.93% | 6.09% | 6.33% | 6.51% | 7.04% | 7.72% | 7.57% | 6.97% | 7.15% | 7.16% |
| March | 4.59% | 4.96% | 6.16% | 6.25% | 6.53% | 7.36% | 7.48% | 7.58% | 7.07% | 6.95% | 6.98% |
| April | 4.60% | 5.11% | 6.16% | 6.37% | 5.92% | 7.16% | 7.55% | 7.82% | 7.42% | 6.91% | 7.02% |
| May | 4.43% | 4.90% | 6.01% | 6.36% | 6.09% | 7.42% | 7.58% | 7.96% | 7.13% | 7.50% | 6.94% |
| June | 4.93% | 4.74% | 5.85% | 6.12% | 6.53% | 7.59% | 7.79% | 8.05% | 7.01% | 7.72% | 6.38% |
| July | NA | 4.49% | 5.87% | 5.74% | 6.58% | 7.72% | 8.07% | 8.22% | 6.99% | 7.61% | 6.62% |
| August | NA | 4.30% | 5.77% | 5.58% | 6.57% | 7.82% | 8.06% | 7.97% | 7.16% | 7.46% | 7.48% |
| September | NA | 4.32% | 5.30% | 5.37% | 6.47% | 7.68% | 7.83% | 7.78% | 7.12% | 7.13% | 7.58% |
| October | NA | 4.10% | 5.03% | 5.57% | 6.21% | 7.40% | 7.70% | 7.58% | 7.31% | 7.09% | 7.02% |
| November | NA | 4.34% | 5.18% | 5.46% | 6.33% | 7.93% | 7.59% | 7.63% | 7.63% | 7.02% | 7.33% |
| December | NA | 4.25% | 5.12% | 5.69% | 5.96% | 6.87% | 7.31% | 7.47% | 7.64% | 7.15% | 7.28% |

| | 2002 | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 | 1993 |
|-----------|-------|-------|--------|-------|-------|-------|--------|--------|--------|-------|
| January | 8.64% | 8.78% | 9.71% | 8.29% | 8.75% | 9.54% | 8.74% | 10.95% | 8.76% | 9.62% |
| February | 8.36% | 8.50% | 10.09% | 8.21% | 8.60% | 9.54% | 8.65% | 10.66% | 8.47% | 9.20% |
| March | 7.91% | 8.48% | 9.73% | 8.67% | 8.64% | 9.55% | 9.21% | 10.15% | 8.95% | 8.97% |
| April | 8.59% | 8.51% | 9.88% | 8.63% | 8.69% | 9.87% | 9.59% | 10.22% | 9.78% | 8.99% |
| May | 8.21% | 8.71% | 9.87% | 8.62% | 8.55% | 9.79% | 9.80% | 10.06% | 10.17% | 8.98% |
| June | 8.10% | 8.63% | 10.08% | 8.97% | 8.57% | 9.64% | 10.01% | 9.40% | 10.24% | 9.06% |
| July | 8.05% | 8.78% | 9.70% | 9.24% | 8.56% | 9.44% | 9.80% | 9.42% | 10.32% | 8.65% |
| August | 7.93% | 8.42% | 9.70% | 9.55% | 8.56% | 9.05% | 9.88% | 9.52% | 10.12% | 8.64% |
| September | 7.51% | 8.30% | 9.51% | 9.69% | 8.31% | 9.21% | 9.94% | 9.38% | 10.17% | 8.31% |
| October | 7.24% | 8.02% | 9.34% | 9.44% | 8.01% | 9.03% | 9.78% | 9.39% | 10.50% | 8.38% |
| November | 7.24% | 7.62% | 9.35% | 9.43% | 8.09% | 8.94% | 9.44% | 9.18% | 10.68% | 8.34% |
| December | 7.43% | 8.23% | 9.06% | 9.56% | 8.24% | 8.91% | 9.22% | 8.93% | 10.97% | 8.79% |



Office of the State Bank Commissioner Guidance Document MT 2014-01

Date: June 6, 2014

Regulatory Treatment of Virtual Currencies Under the Kansas Money Transmitter Act

Purpose

The purpose of this guidance document is to clarify the applicability of the Kansas Money Transmitter Act (KMTA)¹ to persons or entities engaging in the use and/or transmission of virtual currencies.² This guidance document provides the policy of the Office of the State Bank Commissioner (OSBC) regarding the regulatory treatment of virtual currencies pursuant to the statutory definitions of the KMTA.

Types of Virtual Currency

In broad terms, a virtual currency is an electronic medium of exchange typically used to purchase goods and services from certain merchants or to exchange for other currencies, either virtual or sovereign.³ As of the date of this memorandum, the OSBC is not aware of any virtual currency that has legal tender status in any jurisdiction, nor of any virtual currency issued by a governmental central bank. As such, virtual currencies exist outside established financial institution systems. There are many different virtual currency schemes, and it is not easy to classify all of them, but for purposes of this document, they can generally be divided into two basic types: centralized and decentralized.

Centralized virtual currencies are created and issued by a specified source. They rely on an entity with some form of authority or control over the currency. Typically, the authority behind a centralized virtual currency is also the creator. Centralized virtual currencies can be further divided into subclassifications that quickly become too complex to apply a universal policy. Some can be purchased with sovereign currency, but cannot be exchanged back to sovereign currency; some can be converted back to sovereign currency; some are used only for purchase of goods and services from a closed universe of merchants, while others may have a

¹ Kansas Statutes Annotated 9-508 *et seq.*

² Much of this document is modeled after guidance issued by the Texas Department of Banking in Supervisory Memorandum 1037 and we thank them for allowing the OSBC to adapt it for use in Kansas.

³ As used in this document, sovereign currency refers to government-issued currency with legal tender status in the country of issuance, such as U.S. Dollars or Euros. This includes both government-issued fiat currency and commodity-backed currency that is designated as legal tender.

theoretically open universe of merchants. Some centralized currencies are backed by the issuer with sovereign currency or precious metals, and therefore derive intrinsic value.

In contrast, decentralized virtual currencies are not created or issued by a particular person or entity, have no administrator, and have no central repository. Thus far, decentralized currencies are all cryptocurrencies such as Bitcoin, Litecoin, Peercoin, and Namecoin. A cryptocurrency is based on a cryptographic protocol that manages the creation of new units of the currency through a peer-to-peer network. The creation of cryptocurrency happens through a process called mining that basically involves running an application on a computer that performs proof-of-work calculations. When the computer performs a sufficient amount of these calculations, the cryptocurrency's underlying protocol essentially generates a new unit of the currency that can be delivered to the miner's wallet. Because users' wallets act as the connection points of the cryptocurrency's peer-to-peer network, transfers of cryptocurrency are made directly from wallet to wallet, without any intermediary, whereas transmissions of sovereign currencies must be made through one or more intermediaries such as a financial institution or money transmitter.

One important characteristic of cryptocurrency is its lack of intrinsic value. A unit of cryptocurrency does not represent a claim on a commodity, and is not convertible by law. And unlike fiat currencies,⁴ there is no governmental authority or central bank establishing its value through law or regulation. Its value is only what a buyer is willing to pay for it. Most cryptocurrencies are traded on third party exchange sites, where the exchange rates with sovereign currencies are determined by averaging the transactions that occur. Some experts consider cryptocurrency to be a new asset class that is neither currency nor commodity, but possessing characteristics of both, as well as characteristics of neither.

Application of Kansas Money Transmitter Act to Virtual Currency

Currency Exchange

The act of two-party currency exchange by itself is not covered by the KMTA regardless of whether it is sovereign currency being exchanged or virtual currency. Further, it is not regulated by the OSBC. However, the presence of a third party involved in a currency exchange transaction, will likely subject the transaction to the KMTA as "money transmission" and is discussed further below.

Money Transmission

This guidance document does not address money transmission activities involving the various centralized virtual currencies in existence. Many of these types of virtual currency schemes are complicated and nuanced and general guidance cannot adequately cover all the possible types

⁴ Fiat currency is government-issued legal tender, such as the U.S. Dollar. It has no intrinsic value and does not represent a claim on a commodity; its value is established by law.

of these currencies. Thus, operators engaging in activities that may be considered money transmission involving a centralized virtual currency will have to seek an individual licensing determination from the OSBC.

This guidance is focused on money transmission activities involving decentralized cryptocurrencies, such as Bitcoin. Whether or not a Kansas money transmitter license is required for an entity to engage in the transmission of cryptocurrency turns on the question of whether cryptocurrency is considered “money” or “monetary value” under the KMTA. Money transmission is defined in statute and means “to engage in the business of receiving money or monetary value for transmission to a location within or outside the United States by...electronic means or any other means...”⁵ Money is not defined in statute, but Black’s Law Dictionary defines “money” as the “medium of exchange authorized or adopted by a government as part of its currency.” Since no cryptocurrency is currently authorized or adopted by any governmental entity as part of its currency, it is clear that cryptocurrency is not considered “money” for the purposes of the KMTA.

Monetary value, however, is defined in statute as “a medium of exchange, whether or not redeemable in money.”⁶ Medium of exchange is not defined by statute, but Black’s Law Dictionary defines “medium of exchange” as “anything generally accepted as payment in a transaction and recognized as a standard of value.” Cryptocurrencies are not generally accepted as payment in the current economy. While there may be a few retailers who are accepting Bitcoin or other cryptocurrencies, it is not generally accepted throughout the entire economy and does not even approach the extent to which U.S. Dollars (or other sovereign currencies) are accepted. Nor, does it have a recognized standard of value. There is no set value for a single unit of a cryptocurrency. As stated above, the value of a unit of cryptocurrency is only what a buyer is willing to pay for it and what a seller is willing to accept in order to part with it. There is no intrinsic or set value for a unit of cryptocurrency.

Therefore, because cryptocurrencies as currently in existence are not considered “money” or “monetary value” by the OSBC, they are not covered by the KMTA. Since the KMTA does not apply to transmission of decentralized cryptocurrencies, an entity engaged solely in the transmission of such currency would not be required to obtain a license in the State of Kansas. However, should the transmission of virtual currency include the involvement of sovereign currency in a transaction, it may be considered money transmission depending on how such transaction is organized.

To provide further guidance, the regulatory treatments of some common types of transactions involving cryptocurrency are as follows:

- Exchange of cryptocurrency for sovereign currency between two parties is not money transmission under the KMTA. This is essentially a sale of goods between two parties. The seller gives units of cryptocurrency to the buyer, who pays the seller directly with sovereign

⁵ K.S.A. 9-508(g).

⁶ K.S.A. 9-508(f).

currency. The seller does not receive the sovereign currency with the intent to transmit to another entity

- Exchange of one cryptocurrency for another cryptocurrency is not money transmission. Regardless of how many parties are involved, since cryptocurrency is not considered “money” under the KMTA, no money transmission occurs.
- Transfer of cryptocurrency by itself is not money transmission. Because cryptocurrency is not money or monetary value, the receipt of it with the intent to transmit it to another entity is not money transmission. This includes intermediaries who receive cryptocurrency for transfer to a third party, and entities that, akin to depositories, hold cryptocurrencies on behalf of customers.
- Exchange of cryptocurrency for sovereign currency through a third party exchanger is generally considered money transmission. For example, most Bitcoin exchange sites facilitate exchanges by acting as an escrow-like intermediary. In a typical transaction, the buyer of cryptocurrency sends sovereign currency to the exchanger who holds the funds until it determines that the terms of the sale have been satisfied before remitting the funds to the seller. Irrespective of its handling of the cryptocurrency, the exchanger conducts money transmission by receiving the buyer’s sovereign currency in exchange for a promise to make it available to the seller.
- Exchange of cryptocurrency for sovereign currency through an automated machine may or may not be money transmission depending on the facts and circumstances of its operation and the flow of funds between the operator of the automated machine and the customer. For example, several companies have begun selling automated machines commonly called “Bitcoin ATMs” that facilitate contemporaneous exchanges of bitcoins for sovereign currency. Most such machines currently available, when operating in their default mode, act as an intermediary between a buyer and a seller, typically connecting through one of the established exchange sites. When a customer buys or sells bitcoins through a machine configured in this way, the operator of the machine receives the buyer’s sovereign currency with the intent to transfer it to the seller. This would be considered money transmission under the KMTA and would require licensure. However, at least some Bitcoin ATMs can be configured to conduct transactions only between the customer and the operator or owner of the machine, with no third parties involved. If the machine never involves a third party, and only facilitates a sale or purchase of bitcoins by the machine’s operator directly with the customer, there is no money transmission because at no time is sovereign money received by the owner or operator of the machine with the intent to transfer it to another entity.

Additional Issues with Virtual Currency

- A cryptocurrency business that conducts money transmission, as outlined above, must comply with all applicable licensing, reporting, net worth and other relevant requirements of the Kansas Money Transmitter Act under K.S.A 9-508 *et seq.*
- Any entity engaged in money transmission must comply with the permissible investment requirements of K.S.A 9-513b and as defined in K.S.A. 9-508(j). For purposes of allowed permissible investments, no virtual currency has been approved for use under this section by the Commissioner. Therefore, if a licensed money transmitter is seeking to comply with the permissible investment requirement, it must have adequate U.S. currency or other approved investments to cover its outstanding payment instruments.
- For any entity intending to obtain licensing as a money transmitter, the OSBC will require any applicant who regularly handles virtual currencies in the course of its activities to submit a current third party security audit of all relevant computer and information systems. Because of the increased risk that Kansas consumers may face when using the services of a money transmitter involved with virtual currencies, it is incumbent upon any license applicant to demonstrate that all of a customer's sovereign and virtual currency are secure while controlled by the transmitter.

(*This guidance document is issued pursuant to K.S.A. 9-513 and K.S.A 77-438. This document is only intended as general guidance and any licensing determination made by the OSBC is based upon the specific facts presented for each unique case. The OSBC reserves the right to exercise its discretion in the application of this guidance document and it may edit, modify or retract its interpretation at any time. Issued June 6, 2014.)



Office of the State Bank Commissioner Guidance Document MT 2016-01

Date: 11/30/2016

Regulatory Treatment of an Agent-of-the-Payee

Purpose

The purpose of this guidance document is to clarify the Office of the State Bank Commissioner's (OSBC) policy regarding the Kansas Money Transmitter Act (KMTA)¹ licensure requirements of persons who enter into an agency relationship to accept and process payments on behalf of a principal acting as a payee in a money transmission transaction.

The KMTA also discusses agents of exempt entities and agents of licensees. This guidance document does not alter the licensing requirement for agents of exempt entities² or a licensee's requirement to gain prior approval from the commissioner prior to agent designation.³

An agent-of-the-payee relationship typically arises in situations where the payee provides goods or services to a consumer, and it is not cost effective or feasible for the payee to handle immediate credit payments directly. For instance, a consumer may wish to make a payment on a utility bill but does not find it convenient to drive to the utility bill's headquarters. The hypothetical payee utility company wishes to allow consumers to make payments at convenient locations and receive immediate credit, but it is not cost effective for the utility company to hire employees to be located throughout the city. The utility company finds it cost effective to pay a commission to a local grocery store to accept payment on the utility company's behalf and permit the agent to provide immediate credit on the consumer's account.

Interpretation

An agent-of-the-payee relationship is money transmission as defined by the KMTA. Money transmission is defined under the KMTA as "to engage in the business of the sale or issuance of payment instruments or of receiving money or monetary value for transmission to a location within or outside the United State by wire, facsimile, electronic means or any other means..."⁴ An agent-of-the-payee is considered to be engaged in money transmission because in exchange for money, an agent-of-the-payee is either appointed or agrees to collect and process payments from the consumer and forward payment to the payee.

¹ Kansas Statutes Annotated § 9-508 *et seq.*

² Kansas Statutes Annotated § 9-510(d)

³ Kansas Statutes Annotated § 9-510(b)

⁴ Kansas Statutes Annotated § 9-508(h).

Application under Kansas Common Law

While under the KMTA an agent-of-the-payee engages in money transmission, Kansas agency common law recognizes the customer's transaction is completed once the agent-of-the-payee receives payment in certain situations. Because the customer's transaction is completed upon the agent-of-the payee receiving payment, there is no money transmission.

Under Kansas agency common law, an agent's actions will impute⁵ to a principal if the principal intends the agent to act on the principal's behalf and the agent acts within the authority granted.⁶ In an agent-of-the-payee relationship, a payee would be the principal and the agent-of-the-payee is the agent. Kansas agency common law recognizes express and apparent agency authority⁷. A person is considered an agent if the person has express or apparent authority from a principal to do an act. Express authority is created if the principal has specifically delegated authority to the agent to do an act. Apparent authority is created based on the conduct of the principal and a consumer's reasonable reliance that an agent has authority to bind the principal. Apparent authority is a highly subjective test that often must be determined by a trier of fact. For this reason, the OSBC will only consider agent-of-the-payee relationships with written express authority when determining if licensure is required.

An agent-of-the-payee would not be subject to KMTA licensure based on common law express agency principles if the agent-of-the-payee can prove that:

1. There is a preexisting written agreement between the payee and the agent;
2. The payee expressly grants authority to the agent to accept payments on the payee's behalf in the preexisting written agreement;
3. Payment is treated as received by the payee upon receipt by the agent; and
4. Payment is for goods or services other than money transmission that has been provided or to be provided by the payee.

If an agent acts within its express authority to accept the funds on behalf of a payee, the law of Kansas deems the payee to have accepted and received the payment. The payee is considered liable to the consumer whether or not the agent actually transmits the funds to the payee. The legal responsibility of the payee to the consumer remains the same if the funds are in the hands of the agent or the payee. Thus, the agent receiving the money subject to the four steps above renders the transaction a two-party transaction between the customer and the payee.⁸ The agent-of-the-payee doesn't accept money from the customer with the promise to make it available at a different location, so there is no money transmission.⁹ The customer leaves the transaction with the benefit of the bargain and the payee has no recourse with the customer if the payee never receives the payment.

⁵Imputation is to ascribe or attribute; to regard as being done, caused, or possessed by. Black's Law Dictionary 14c (10th ed. 2014).

⁶ *Golden Rule Ins. Co. v. Tomlinson*; 300 Kan. 944, 958-59; 335 P.3d 1178, 1190 (2014).

⁷ *Id.*

⁸ Texas Department of Banking Opinion Number 14-01 issued May 9, 2014.

⁹ *Id.*

Predetermination Requirement

Current licensees may request a review by the OSBC to confirm that the services they currently offer qualify for the agent-of-the-payee exemption. Licensees must continue to report eligible activity until the OSBC determines their qualification. Once confirmed, the company may choose not to report the eligible activity during the annual assessment period. All other activity that requires licensure must be reported.

Unlicensed persons that believe they may have a business model eligible for exemption must request a review before conducting activity in the state. A person must request the confirmation from the OSBC by June 30, 2017 to avoid a potential enforcement action.

This guidance document is issued pursuant to K.S.A. 9-513 and K.S.A 77-438. This document is only intended as general guidance and any licensing determination made by the OSBC is based upon the specific facts presented for each unique case. The OSBC reserves the right to exercise its discretion in the application of this guidance document and it may edit, modify or retract its interpretation at any time. Issued 11/30/2016.

RELATED TO GUIDANCE DOCUMENT MT 2016-01

Instructions for Submitting a Request for an Agent-of-the-Payee Exemption

If you are seeking an exemption for Agent-of-the-Payee based on Guidance Document MT 2016-01, please submit the following items:

1. A letter that specifically requests a review for an Agent-of-the-Payee exemption on your company. Reference within the letter the contractual language that pertains to the criteria required by the Guidance Document.

Specifically:

- ✓ The payee expressly grants authority to the agent to accept payments on the payee's behalf in the preexisting written agreement.
 - ✓ Payment is treated as received by the payee upon receipt by the agent. If applicable, this shall include who is liable for lost payments.
 - ✓ Payment is for goods or services other than money transmission that has been provided or to be provided by the payee.
2. A copy of each preexisting written agreement(s) that pertains to this request between your company as the agent and the payee.

Your letter and all supporting documents must be received in order for this request to be considered “complete” and for our office to begin such review. Failure to provide all required information will result in a denial.

Complete requests may be submitted by mail or email to:

Bailey Burghart, Licensing Program Analyst
Office of the State Bank Commissioner
700 SW Jackson, Suite 300
Topeka, KS 66603

bailey.burghart@osbckansas.org



Office of the State Bank Commissioner Guidance Document MT 2019-01

Date: 11/01/2019

Regulatory Treatment of Cash-In-Transit

Purpose

The purpose of this guidance document is to clarify the Office of the State Bank Commissioner's (OSBC) policy regarding the treatment of cash-in-transit as a permissible investment under the Kansas Money Transmitter Act (KMTA).

Currently, the KMTA does not define "cash" to include cash-in-transit items nor "deposits" to include deposits-in-transit; however, it does direct licensees to calculate their permissible investments in accordance with United States Generally Accepted Accounting Principles (US GAAP) pursuant to K.S.A. 9-513b(a).

K.S.A. 9-513b(a) of the KMTA states "each licensee under this act shall at all times possess permissible investments having an aggregate market value, calculated in accordance with United States generally accepted accounting principles, of not less than the aggregate amount of the outstanding payment liability held by the licensee in the United States. This requirement may be waived by the commissioner if the dollar volume of a licensee's outstanding payment liability does not exceed the bond or other security devices posted by the licensee pursuant to K.S.A. 9-509, and amendments thereto."

Definition of Permissible Investments

Per K.S.A 9-508(k) of the KMTA, "permissible investments" means, in part:

- (1) Cash;
- (2) deposits in a demand or interest-bearing account with a domestic federally insured depository institution, including certificates of deposit.

US GAAP definition of Cash

Cash is defined by the Financial Accounting Standards Board (FASB) as follows:

"Consistent with common usage, cash includes not only currency on hand but demand deposits with banks or other financial institutions. Cash also includes other kinds of accounts that have the general characteristics of demand deposits in that the customer may deposit additional funds at any time, and they may also effectively withdraw funds at any time without prior notice or penalty. All charges and credits to those accounts are cash receipts or payments to both the entity owning the account and the bank holding it. For example, a bank's granting of a loan by crediting the proceeds to a customer's demand deposit account is a cash payment by the bank and a cash receipt of the customer when the entry is made.¹"

¹ FASB ASC Master Glossary, "Cash."

US GAAP Treatment of Cash-In-Transit

State regulators for money transmitters use the term cash-in-transit for the money services business call reports. Cash-in-transit does not appear to be a term used in the accounting industry but appears to have the same meaning as the industry term deposit-in-transit.

US GAAP permits a licensee to include deposits-in-transit in its calculation of cash.² Some deposits are received via automated clearing house (ACH) procedures. The question arose whether the KMTA permits cash-in-transit to be a permissible investment when an ACH-in-transit—a form of deposits-in-transit—is considered cash under US GAAP, and if the KMTA would permit cash-in-transit to be a permissible investment.

US GAAP states cash must include all cash within the payor's control, which includes cash in banks, cash on hand, and deposits-in-transit.³ In addition, the Securities and Exchange Commission criticizes entities that do not reduce cash when payments are issued and no longer within the entity's control.⁴ This cannot be considered an account payable.⁵ Once the customer remits the money to the licensee, the customer can no longer declare it as cash, even though the money has not cleared out of the bank account.⁶

Application of Cash-In-Transit under the KMTA

US GAAP requires deposits-in-transit to be included in cash even before the entity has the funds cleared into its bank account. There is also no requirement for an allowance for loss. Like issuing a check, when an entity submits an ACH payment, it must reduce its cash balance once the funds are no longer within its control. The applicable date here is the "launch date." This is the date the ACH originator debits the sender's account and begins crediting the recipient's account. The recipient of an ACH-in-transit is required under US GAAP to declare the ACH-in-transit as cash after the launch date.

The OSBC will allow licensees to declare 100% of all deposits-in-transit as a form of deposit in a demand or interest-bearing account because doing so is consistent with US GAAP. Therefore, an incoming ACH-in-transit after the "launch date" from customers or agents should be counted towards the applicable demand or interest-bearing account balance for permissible investment purposes pursuant to K.S.A. 9-513b. Additionally, a licensee may declare an outgoing ACH-in-transit as towards the demand or interest-bearing account balance until the "launch date." Licensees will need to provide additional permissible investments after the launch date until the outstanding liability is extinguished.

This guidance document is issued pursuant to K.S.A. 9-513 and K.S.A 77-438. This document is only intended as general guidance and any compliance determination made by the OSBC is based upon the specific facts of each unique case. The OSBC reserves the right to exercise its discretion in the application of this guidance document and it may edit, modify or retract its interpretation at any time.

² It is our position that US GAPP would permit a deposit-in-transit to be treated as cash as it is a credit towards a demand deposit account. FASB ASC Master Glossary, "Cash."

³ FASB ASC Master Glossary, "Cash."

⁴ GameStop Corp., Annual Report (Form 10-K) (February 1, 2014).

⁵ *Id.*

⁶ FASB ASC Master Glossary, "Cash."