

DEPARTMENT OF FINANCIAL INSTITUTIONS

TEVEIA R. BARNES, Commissioner of Financial Institutions
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Opinion – “FBO Accounts - Do Not Qualify as Eligible Securities under the Money Transmission Act”

July 3, 2012

Re: ___ - Eligible Securities

Dear ___:

We have reviewed the memorandum, dated May 25, 2012, submitted to the California Department of Financial Institutions (Department). The memorandum raises the issue of whether bank deposits held for the benefit of a licensee’s customers (FBO accounts) can be considered an eligible security.

As you correctly point out, the applicable code sections governing the eligible security requirement are California Financial Code (FC) §§ 2081 and 2084. FC § 2081 requires that a licensee must “at all times own eligible securities” having a specified value. FC § 2084(a) defines ownership as follows: “A licensee shall be deemed to own an eligible security only if the following apply: (1) The licensee owns the eligible security solely and exclusively in its own right, both of record and beneficially.”

FBO accounts, by their very nature, cannot be “owned” by a licensee as required by FC § 2084(a). FBO accounts are deposits held for the benefit of a licensee’s customers, not the licensee. Thus, a licensee cannot own the FBO account “both of record and beneficially.”

FC § 2081(c) is not inconsistent with this interpretation. Section 2081 merely provides an implied exception to the general rule of ownership set forth in § 2084. Section 2081 imposes a statutory trust for the benefit of a licensee’s customers only in the limited circumstances of bankruptcy or receivership of the licensee or an action by a creditor against the licensee. Absent those explicitly noted limited circumstances, all eligible securities are not held in trust for the benefit of a licensee’s customers.

Accordingly, the Department reaffirms its conclusion that FC § 2084(a) precludes a licensee from treating FBO accounts as eligible securities because FBO accounts cannot be owned by a licensee.

Sincerely,

/s/ Jennifer L.W. Rumberger

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cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco