Illinois Department of Financial and Professional Regulation

Division of Financial Institutions

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Governor

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Division of Financial Institutions

December 4, 2020

Non-Binding Statement Request 2020-13

Dear _____:

Thank you for your letter and supplemental responses. You requested a non-binding opinion pursuant Title 38, Section 200.310 of the Illinois Administrative Code addressing whether_____ ("_____"), is required to obtain a license under the Illinois Transmitters of Money Act ("TOMA"). _____ believes that it is not engaged in the business of selling or issuing payment instruments, transmitting money, or exchanging, for compensation, payment instruments or money as a result of offering its software product. You have requested confidential treatment.

Please be advised that consistent with governing law, the Illinois Department of Professional and Financial Regulation, Division of Financial Institutions ("Department" or "Division"), does not render formal legal opinions or interpretations, and non-binding statements do not have precedent value. In addition, facts or conditions different than those presented will require different conclusions, and persons other than those requesting the statement should not rely on this statement. In reaching its opinion, the Division has not independently verified any represented facts, and instead has relied upon the statements and representations contained in your correspondence.

FACTS

_____ specializes in developing interactive entertainment software games and intends to launch a new generation of interactive games, such as the _____ ("Game"). The Game and other interactive games will operate using distributed ledger technology ("DLT") developed by _____ and use specially developed computer programs ("Smart Contract[1]") which enable players ("Players") to acquire, own, transfer, and generate unique digital characters and other digital assets.

Interactive Game

There are two types of digital characters used to play the Game. The original, or first general characters ("Original _____") are created by _____ and can be purchased by Players. Players can also combine Original _____ or create new and unique characters ("Blended _____"), as well as

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[1] Smart contracts are typically used to track the digital assets. Per the _____Game Terms of Use, the smart contract will govern the functionality of the digital assets by containing the terms associated with purchases and sales of a the digital asset, including commissions payable to _____ on sales; fees payable to third-party platforms on which the Game is offered and played; secondary marketplaces; and any specific restrictions or prohibitions that may be imposed.

customize the digital characters with various assets, features, accessories, and/or attributes (the characters and customizations are collectively, "_____ Asset(s)").

Virtual Currencies

Players can purchase _____ Assets through _____'s in-game store or earn them by completing certain tasks or levels. To purchase _____ Assets, Players use virtual currencies created by _____ and solely for use in the interactive game. The first virtual currency, _____ ("Currency A"), can be purchased with US dollars or other fiat.[2] The second virtual currency, _____ ("Currency B"), is earned by completing certain tasks or levels. _____ represents that Players can only use Currency A and Currency B to buy digital assets from _____ and that they do not have any monetary value outside the game. _____ further represents that neither virtual currency is transferable to other Players or convertible (*i.e.* _____ will not redeem either currency for fiat or other virtual currency).

Transactions in the Secondary Marketplace

Players can interact directly with other Players to buy and sell _____ Assets using US dollars or another fiat in a secondary marketplace created by _____. _____'s role depends on whether the marketplace is hosted by _____ ("Hosted SM"), or a hosted by third-party (*e.g.* eBay) ("TPSM"). Regardless of the marketplace, a Player is required to open an account with Hyperwallet[3], a third-party licensed money transmitter, to receive and hold the proceeds of the sale.

<u>Hosted SM</u>

In the Hosted SM, _____ represents that it only provides the platform that facilitates the sale and transfer of ownership of the _____ Assets. A buyer can use a credit card, debit card, or PayPal funds for the transaction and J.P. Morgan Chase Bank, N.A. or Braintree[4] will process the transaction and transfers the funds directly to the seller's Hyperwallet account. _____ represents that it is not involved in the transfer of funds and does not otherwise touch the sales proceeds. The _____ Asset is transferred automatically from the seller to the buyer in accordance with the instructions contained in the Smart Contract, which also provides for the automatic transfer of fees/commissions on the sale to _____.

<u>TPSM</u>

In the TPSM, _____ represents that it acts on behalf of the seller as a reseller of the _____ Assets and as part of that, acts as the agent of the payee/seller in accepting payment from the TPSM. A buyer uses a payment method accepted in the TPSM and _____ represents that the TPSM's processor settles the funds from these transaction into a separate _____ PayPal account. PayPal then transfers the funds from the _____ PayPal account to a Hyperwallet account FBO _____ customers. Then, Hyperwallet (a service of PayPal) will send the funds to the seller's Hyperwallet sub-account, net of _____'s sales commission. Like a Hosted SM transaction, the _____ Asset itself is transferred automatically from the Seller to the Buyer based on the instructions contained in the Smart Contract. _____ further represents that it only works with licensed money transmitters and at all times it is

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[2] Currency A can be purchased through the use of credit cards, debit cards, or funds in PayPal accounts. A bank or Braintree (service of PayPal) is the payment processer for these transactions.
[3] Hyperwallet is a service of PayPal.
[4] Braintree is a service of PayPal and will be used as the back-up processor.

acting pursuant to a written agreement on behalf of the seller as part of the transaction to sell the _____ Asset, and the TPSM's payment to _____ satisfies the buyer's obligation to the seller.

Game's Terms of Use provides in part:

For transactions in web-hosted marketplaces, you agree that _____ may receive payments on your behalf. You also agree that any payments to _____ on your behalf will be treated by you as if payment was made directly to you and that you will have no recourse against a buyer of the _____ Asset, to the extent of the amount received by _____ on your behalf.

In either marketplace, once the seller receives the fiat payment, the seller has option to keep funds in the Hyperwallet, to buy additional Currency A, or alternatively request a disbursement of the funds from the Hyperwallet account.

LAW

Pursuant to Section 5 of the Transmitters of Money Act ("TOMA") a money transmitter is:

[A] person who is located in or doing business in this State and who directly or through authorized sellers does any of the following in this State:

(1) Sells or issues payment instruments.
(2) Engages in the business of receiving money for transmission or transmitting money.
(3) Engages in the business of exchanging, for compensation, money of the United States Government or a foreign government to or from money of another government.[5]

TOMA applies to the "transmission of money by any means, including transmissions to or from locations within the United States or to and from locations outside of the United States by payment instrument[6], facsimile or electronic transfer, or otherwise, and includes bill payment services."[7] TOMA defines money as "a medium of exchange that is authorized or adopted by a domestic or foreign government as a part of its currency and that is customarily used and accepted as a medium of exchange in the country of issuance."[8]

CONCLUSION

If all of the facts provided by _____ to the Division are true and correct, the Division would not recommend that enforcement action be initiated against _____ if it commenced the described activities without a TOMA license.

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[5] 205 ILCS 657/5

[6] *Id.* Payment instrument is defined as "a check, draft, money order, traveler's check, stored value card, or other instrument or memorandum, written order or written receipt for the transmission or payment of money sold or issued to one or more persons whether or not that instrument or order is negotiable. *Payment instrument does not include an instrument that is redeemable by the issuer in merchandise or service*, a credit card voucher, or a letter of credit…"

[7] *Id.*

[8] *Id.*

The Division expressly disclaims any obligation to advise you of any changes in the circumstances, laws or events that may occur after this date or otherwise update this response. This letter does not address the applicability of any law except TOMA.

Sincerely,

Francisco Menchaca
Director, Division of Financial Institutions

By,

s/ Helen Kim
Helen Kim
Associate General Counsel