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2018 FEB 14 AM 9:08

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

BY DEPARTMENT OF
BANKING AND SECURITIES

COMMONWEALTH OF PENNSYLVANIA :	:
DEPARTMENT OF BANKING AND :	:
SECURITIES, COMPLIANCE OFFICE :	:
	:
v. :	DOCKET No. 160052 (BNK-C&D)
	:
GIVELIFY LLC, :	:
TAYO ADEMUYIWA, M.D. an individual, :	:
And WALLE MAFOLASIRE, an individual, :	:
Jointly and Severally :	:
	:

NOTICE OF RIGHT TO APPEAL

You are hereby notified that you have the right to appeal the attached Final Report and Order (“Order”) issued by the Commonwealth of Pennsylvania Banking and Securities Commission.

If you wish to appeal the attached Order you may file a petition for review with the Prothonotary of the Commonwealth Court of Pennsylvania that complies with the format and timing requirements of the applicable Pennsylvania Rules of Appellate Procedure. Pa. R.A.P. 1511-1561. Failure to file a petition for review within 30 days of the mailing date of this Order will result in the attached Order becoming final and unappealable. You may reach the Commonwealth Court at 717-255-1650.

Please be advised that this Notice of Right to Appeal is not intended to and does not constitute legal advice. You should consult an attorney regarding your legal rights including your right to appeal the attached Order or your right to file an application for rehearing or reconsideration under the General Rules of Administrative Practice and Procedure. 1 Pa. Code § 35.241.

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COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF BANKING AND :
SECURITIES, BUREAU OF SECURITIES :
COMPLIANCE OFFICE :
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v. : **Docket No.: 160052 (BNK-C&D)**
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Givelify, LLC, Tayo Ademuyiwa, M.D. :
Individually and Walle Mafolasire, :
Individually And Jointly and Severally :
:

ORDER

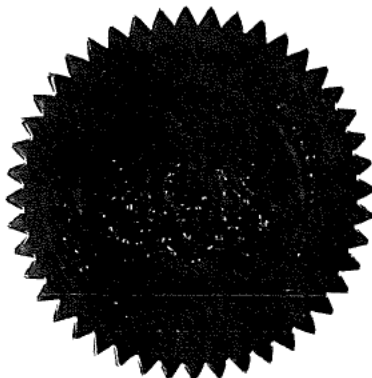
NOW, this 7th day of February, 2018, upon review of the record, the attached Proposed Report and the exceptions filed by the above parties to the litigation, the Banking and Securities Commission of the Commonwealth of Pennsylvania ("Commission") pursuant to the final adjudication authority granted to the Commission under Section 1122-A of the Department of Banking and Securities Code, 71 P.S. § 733-1122-A hereby **APPROVES** the Proposed Order that the Department's September 19, 2016 Order to Cease and Desist and Pay a Fine is Affirmed and accepts the Proposed Report **AS MODIFIED** by the attached discussion to clarify the analysis regarding agency and the agent exceptions under the Money Transmitter Act, 7 P.S. §§ 6101-6118.

BY ORDER OF THE COMMISSION:

Redacted

James R. Biery
Chair
Department of Banking and Securities Commission

ORDERED this 14th day of February, 2018



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

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PA DEPARTMENT OF
BANKING AND SECURITIES

COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF BANKING AND :
SECURITIES, BUREAU OF SECURITIES :
COMPLIANCE OFFICE :

v. :

Docket No.: 160052 (BNK-C&D)

Givelify, LLC, Tayo Ademuyiwa, M.D. :
Individually and Walle Mafolasire, :
Individually and Jointly and Severally :

The Department of Banking and Securities Commission (Commission) adopts the proposed report of the hearing officer and agrees with affirming the Department’s September 19, 2016 Order to Cease and Desist and payment of the proposed fine but issues the following clarification regarding applicability of the agency exceptions under the exemption found in Section 3 of the January 2017 amendments to the Money Transmitter Act (MTA), 7 P.S. §6103(4).

Findings of Fact and Conclusions of Law

The Commission reiterates the hearing officer’s findings of fact and conclusions of law that Givelify does not qualify as an “agent” under the MTA as amended in January 2017 is the correct conclusion of law.

See, Conclusions of Law No 2, Page 11.

“2 . Givelify does not qualify as an “agent” under the MTA, as amended.
(Finding of fact, Nos. 5-29).”

However, the Commission also notes that the actions and activities covered by the Department’s September 19, 2016 Cease and Desist Order were based upon unlicensed activity

and conduct that occurred entirely prior to the enactment of the changes to the MTA on November 3, 2016 when Governor Wolf signed into law the legislation as Act 129 of 2016. Thus, none of the matters associated with this proceeding cover the period after the MTA changes became effective on January 2, 2017 and all discussions concerning the 2017 exceptions are dicta¹ and not relevant for the disposition of this matter since the actions and activities in question occurred prior to the change in the law when there was no agency exception except for agents of persons licensed under the MTA.

Discussion

While the hearing officer's conclusion of law is clear and unambiguous regarding the agency relationship of Givelify in relation to those persons for whom it was performing money transmission services, the subsequent discussion regarding agency was not as clear and unambiguous as it should have been. The Commission believes further clarification is warranted as part of its adoption of the proposed report and affirmation of the Department's September 19, 2016 Order to Cease and Desist and payment of the proposed fine to avoid confusion in the proper application and coverage of the MTA.

First and foremost, an arrangement or relationship that is basically a money transmission relationship is never sufficient to establish an agency relationship between the money transmitter and those persons for whom it is performing money transmission services for purposes of the exceptions in Section 3 of the MTA². A money transmitter is not an "agent" solely based upon

¹ The discussion on prospective application of the MTA is dicta in current instance for purposes of the fine imposed in this matter and regarding the Cease and Desist based upon the assertions of respondents that they had cease operations in Pennsylvania. If such assertions are not truthful, the discussion clarifies why Givelify cannot claim an exemption from the MTA.

² **Section 3. Exemptions.**

No license shall be required for any of the following:

the mere fact it is engaging in money transmitter services. If such was the case, then the exceptions in Section 3 of the MTA would subsume the entire statute and nullify the legislature's intent for having money transmitter licensure in the Commonwealth. A reading of the MTA that construed the exception in a manner that made it applicable to almost all money transmission transactions would create the absurd result of invalidating the legislature's entire regulatory and licensure scheme established by the MTA. Section 1922 of the Statutory Construction Act,³ 1 Pa.C.S § 1922, specifies that the General Assembly does not intend a result that is absurd and intends the entire statute to be effective. A reading of the statute that would apply the agency exception to basically all money transmitter relationships by the mere assertion of an agency relationship would violate concepts of statutory construction and functionally invalidate the entire MTA statute.

-
- (1) Banks, bank and trust companies, credit unions, savings banks and private banks organized under the laws of this Commonwealth; similar banking institutions organized under the laws of the United States or of any other state which are insured by the Federal Deposit Insurance Corporation; similar credit unions organized under the laws of the United States or another state, and insured by the National Credit Union Share Insurance Fund; and savings and loan associations and building and loan associations organized under the laws of another state or of the United States; or their agents.
 - (2) Agents of a person licensed under this act.
 - (3) Agents of a Federal, State or local government agency, to the extent that such agents are disbursing government benefits.
 - (4) Agents that receive payments from individuals on behalf of persons that are creditors, public utilities or providers of goods or services

³ 2 Pa C S. § 1922. Presumptions in ascertaining legislative intent.

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

- (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
- (2) That the General Assembly intends the entire statute to be effective and certain.
- (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.
- (4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language
- (5) That the General Assembly intends to favor the public interest as against any private interest.

An agency relationship does not exist based upon the mere provision of services. For an agency relationship to exist and for a person to be considered an agent, there must be a much greater relationship than merely providing services such as money transmission. An agency relationship is a significant arrangement between parties and exceeds merely ensuring funds are transferred from “Person A” to “Person B.”

An agency relationship “is the **fiduciary relationship**⁴ (emphasis added) that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.” Para 1.01, The Restatement of the Law of Agency, (3rd ed. 2006).

Thus, agency which constitutes the creation of a fiduciary relationship between parties is a significant relationship with duties, obligations, and consequences that far exceed the relationship of an entity providing money transmission services in the commercial marketplace. The mere assertion that one is an agent without the commensurate obligations, duties and authorities is not sufficient to create the agency relationship.

The Department often receives assertions by persons that an agency relationship exists when they are serving as a money transmitter and the documents⁵ that these persons often submit as part of the regulatory process often assert or claim an agency relationship while the actual operations and execution of the arrangement amongst the parties clearly demonstrates that the activities and relationship do not constitute an agency arrangement. Asserting agency without

⁴ Being a fiduciary for another person is a significant relationship between the parties, “Fiduciary. The term is derived from Roman law, and means a person holding the character of a trustee, or a character analogous to that of a trustee ... to act primarily for another’s benefit in matters connected with such undertaking.” Black’s Law Dictionary (6th ed. 1990).

⁵ In that the exception requires the agency relationship to be in writing, the Department often receives documents that assert agency between the parties but then the terms and conditions under which the parties operate clearly demonstrate that an agency relationship does not exist and often specifically contradict the asserting of that the money transmitter is an “agent” in that they will state the “agent” has no authority to bind the principal or discretion in the execution of responsibilities and duties

commensurate obligations and duties that clearly demonstrate the existence of an agent relationship does not overcome the burden that a money transmitter must be licensed under the MTA.

Based upon the significance of an actual agency relationship with its commensurate duties and obligations exceeding the money transmission activities of Givelify, the assertions regarding agency made by the hearing officer on pages 25 through 27 of the proposed report are at odds with the law of agency as well as the hearing officer's own clear findings of fact and conclusions of law established by the testimony and evidence in the record as well as the correct understanding of a true agency relationship and are not incorporated or adopted by the Commission in its determination and affirmation of the Cease and desist and imposition of the fine by the Department.

In summation, the relationship established by merely engaging in the activity of money transmission is **not sufficient** to establish an agency relationship exception under Section 3 of the MTA. For an agency relationship to be considered for the exceptions under the MTA the actual duties, responsibilities engaged in by the parties and the liabilities of the purported agent must be commensurate with the level of those existing in a true agency relationship. Mere representations or solely transferring funds as a money transmitter are not sufficient to establish the exception under Section 3 of the MTA

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

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PA DEPARTMENT OF
BANKING AND SECURITIES

Commonwealth of Pennsylvania, :
Department of Banking and Securities, :
Compliance Office :

Docket No. 160052 (BNK- C&D)

v. :

Givelify, LLC, Tayo Ademuyiwa, M.D., :
Individually and Walle Mafolasire, Individually :
And Jointly and Severally, :
Respondents :

PROPOSED REPORT

Marc A. Moyer, Esquire
Hearing Officer

Commonwealth of Pennsylvania
Governor's Office of General Counsel
Department of State
P.O. Box 2649
Harrisburg, PA 17105-2649

PROCEDURAL HISTORY

In or about January 2015, the Pennsylvania Department of Banking and Securities, Compliance Office (the "Department") initiated an investigation into the activities of Givelify, LLC ("Givelify") for the purpose of determining whether it was engaged in unlicensed money transmissions in violation of Pennsylvania's Money Transmitter Act, 7 P S §6101-6118 ("MTA" / "Act") By letter dated March 20, 2015, Givelify, through Respondent Walle Mafolasire, informed the Department that Givelify would cease doing business in Pennsylvania until it was licensed as a money transmitter Givelify had previously begun the licensing application process, but its application was returned for being deficient On May 11, 2015, Givelify's legal counsel informed the Department that it would continue to voluntarily cease doing business in Pennsylvania, and that it was withdrawing its previous application materials Soon thereafter, Givelify's legal counsel provided the Department with a packet of materials pertaining to Givelify's business operations

The Department conducted a follow-up investigation of Respondents' business activities through which it discovered that Pennsylvania churches were continuing to utilize Givelify's services. On September 19, 2016, the Department's Director issued an *Order to Cease and Desist and Pay a Fine* ("Cease and Desist Order") in the amount of \$176,000.00 against Givelify, Walle Mafolasire and Tayo Ademuyiwa, M.D., individually, jointly and severally¹ The Department's Order alleged that Givelify had violated the MTA by engaging in the business of transmitting money or credit in Pennsylvania without a license. By letter dated September 29, 2016, Vantiv, the payment processor with which Givelify associated in conjunction with Fifth

¹Givelify, Walle Mafolasire and Tayo Ademuyiwa, M.D. will collectively be referred to as "Respondents" unless the context indicates otherwise

Third Bank, notified Givelify that it had stopped processing Givelify's Pennsylvania transactions upon learning of the Department's Order

Respondents filed a timely appeal from the Department's September 29, 2016 Order and, on October 19, 2016 filed an Answer with New Matter with the Department. The Department filed an Answer to Respondents' New Matter on October 24, 2016. By letter dated December 7, 2016, Department Secretary, Robin L. Wiessmann, delegated this matter to the undersigned Hearing Officer.

On January 3, 2017, amendments to the current version of the MTA took effect. By Orders issued on January 17, 2017, the Hearing Officer directed the parties to file pre-hearing statements no later than April 10, 2017, scheduled a telephonic pre-hearing conference for April 17, 2017, and scheduled the formal administrative hearing for April 24, 2017. By letter dated February 7, 2017, Respondents requested a continuance of the hearing based upon their unavailability. The Department filed an Answer to Respondents' request for the continuance on February 15, 2017, to which Respondents filed a reply on February 22, 2017. By Order dated February 22, 2017, the Hearing Officer issued an Order which scheduled a telephonic pre-hearing conference for March 3, 2017 to address Respondents' continuance request. Respondents withdrew their motion for a continuance by letter dated March 17, 2017, following the telephonic pre-hearing conference.

Respondents and the Department filed their pre-hearing statements on April 11, 2017. The Department simultaneously filed a Motion To Move Location of Hearing. A telephonic pre-hearing conference was held, as scheduled, on April 17, 2017. On April 20, 2017, the Hearing Officer granted the Department's Motion to transfer the location of the hearing which was

unopposed by Respondents. The Hearing Officer also issued an Order that same date which granted Respondents' request to present two fact witnesses by telephone at the hearing.

On April 21, 2017, Respondents filed a Motion to Preclude an affidavit which the Department identified as a possible exhibit for introduction at the hearing. The Department filed an Answer to Respondents' Motion to Preclude on or about that same date. The Hearing Officer deferred ruling on Respondents' Motion. The formal administrative hearing convened, as scheduled, on April 24, 2017 before Hearing Officer Marc A. Moyer, Esquire. Respondents' outstanding Motion became moot at the hearing and, therefore, was not ruled upon.

The Department was represented at the hearing by Linda Carroll, Esquire and Thomas S. Lee, Esquire. Respondents were represented by Wayne C. Stansfield, Esquire and Tavis P. Nelson, Esquire. The Department presented its case through the testimony of Department Compliance Office Chief, James Keiser, and Non-depository Financial Institution Examiner II, Theresa Jones. The Department additionally moved into evidence the following eleven (11) Exhibits: Bank Card Merchant Agreement and Large Merchant Price Schedule to the Bank Card Merchant Agreement (collectively, DoBS-1), Special Amendment to the Bank Card Merchant Agreement (DoBS-2), Terms of Use (DoBS-3); Givelify Frequently Asked Questions (DoBS-4); March 20, 2015 correspondence of Walle Mafolasire (DoBS-5); May 11, 2015 correspondence of Adam Atlas, Esquire (DoBS-6); September 29, 2015 Department Policy Statement (DoBS-7), Givelify partial website (DoBS-8); Schedule A spreadsheet (DoBS-9), Givelify smartphone screen shots (DoBS-10); and Givelify's current website, p. 108 (DoBS-11). The Department's Exhibits were admitted into evidence without objection.

Respondents presented their case through the testimony of Givelify founder and Chief Executive Officer, Walle Mafolasire, Reverend Damone Jones and Pastor Chandra Williams.

Respondents additionally moved into evidence the following five (5) Exhibits: 1) February 18, 2016 correspondence of Theresa L. Jones (Exhibit 1); 2) September 29, 2015 Department Policy Statement (Exhibit -2), 3) Bank Card Merchant Agreement, Large Merchant Price Schedule to the Bank Card Merchant Agreement, Special Amendment to the Bank Card Merchant Agreement, and Exhibit A to the Special Amendment Underwriting Guidelines (collectively, Exhibit 3), 4) Vanco Integration Agreement (Exhibit 4), and 5) September 29, 2016 correspondence from Vantriv, LLC (Exhibit 5). Respondents' Exhibits were admitted into evidence without objection.

The parties entered into a Joint Stipulation of Facts (Exhibit J-1) on April 24, 2017.

The hearing transcript ("N T") was filed on May 25, 2017. By Order dated May 26, 2017, the Department was directed to file its post-hearing brief no later than June 29, 2017. Respondents were directed to file their post-hearing brief no later than July 31, 2017. The Department was directed to file its reply brief, if any, no later than August 15, 2017. On June 20, 2017, the Department filed a Motion to Correct the Hearing Transcript. The Department's Motion was granted by Order dated July 3, 2017. The parties filed timely post-hearing briefs.

PROPOSED FINDINGS OF FACT

- 1 Givelify, LLC is an Indiana corporation which has its principal office at 47 S Pennsylvania Street, Suite 702, Indianapolis, IN 46204 (Official Notice-Department records², DoBS-1)
- 2 Walle Mafolasire is the founder and Chief Executive Officer of Givelify (N T 286)
- 3 Tayo Ademuyiwa, M D is an owner and co-founder of Givelify. (Official Notice-Department records)
- 4 Givelify began operating in 2013, and currently operates in every state except Pennsylvania (N T. 305-306)
- 5 Givelify solicits donations for not-for-profit organizations and religious organizations. (DoBS-8; DoBS-10; N T 289-321).
- 6 Givelify charges a transaction fee of 2.9% and 30¢ per donation for its services (DoBS-8, p 26; DoBS-10, p 99, N T 95, 154, 300, 303)
7. Givelify makes a software application available over the internet at givelify.com which facilitates the donation of money from individuals and religious organizations to not-for-profit organizations and religious organizations (J-1, ¶1; DoBS-8, DoBS-10, N.T. 99, 110-156, 286, 288-289).
- 8 Givelify's service requires donors to establish an account through its software application which captures electronic identifying information, including a donor's name, tax

²Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa Code §35 173, which provides, in pertinent part, as follows

§35 173 Official notice of facts
Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert

1 Pa Code §35 173 In *Falasco v Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A 2d 991 (Pa Cmwlth 1987), the Pennsylvania Commonwealth Court explained

“Official notice” is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

521 A 2d at 994 n 6

identification number, bank/checking account number, credit or debit card number, credit or debit card security code, e-mail address, and the amount to be donated. (Exhibit J-1; DoBS-10; N T. 289-90, 294, 345, 354)

9. Givelify's service also requires the religious organization and/or non-profit receiving a donation to register with Givelify through its software application during which Givelify captures the donation recipient's electronic identifying information, including its name, address, Tax Identification number/ EIN, name of its authorized person and bank/checking account information (Exhibit J-1; DoBS-8; DoBS-10, N T 93-95, 354)
- 10 Givelify encrypts a donor's electronic identifying information, then sends the encrypted information to Vantiv (Exhibit J-1, N T 294, 324-26)
- 11 Vantiv transmits a "token" to Givelify within seconds of receiving the donor's electronic identifying information. The token does not contain any personal identifying information but, instead, contains only a unique identifier issued by Vantiv that identifies the donor to Vantiv and allows Vantiv to match the unique identifier to the donor's information on Vantiv's server (Exhibit J-1, N T 103-05, 213-14, 294, 324-25)
- 12 Givelify deletes the donor's electronic identifying information from its servers upon its receipt of the token from Vantiv. (N.T 324-325)
- 13 Givelify also transmits the electronic identifying information of the donation recipient to Vantiv who then generates a Merchant Identification Number ("MID") to identify the donation recipient (Exhibit J-1, N T 221, 290).
- 14 A donor can use the Givelify software application to identify a donation amount and a recipient of the donation on either a one-time or recurring basis. Thereafter, Givelify simultaneously transmits the donor's token the MID and the donation amount to Vantiv. (Exhibit J-1; DoBS-10, N T 125, 297).
15. Vantiv, thereafter, contacts the donor's bank/credit card to confirm the existence of sufficient funds to pay for the donation (Exhibit J-1, N T 298, 347)
- 16 The donor's bank/credit card provides Vantiv with an approval code for the transfer of funds if sufficient funds exist. (Exhibit J-1; N.T 298, 347)
17. Vantiv notifies Givelify when it receives approval for the transaction from the donor's bank/credit card. Exhibit J-1; N T 298)
- 18 Givelify then notifies the donor that the transaction has been completed, and notifies the donation recipient of the donation (N.T. 298-99, 333-34, 341).
19. Vantiv instructs the donor's credit card/bank to release the donated funds upon its receipt of the approval from the credit card/bank. (Exhibit J-1, N.T 300)

- 20 The donor's credit card/bank thereafter releases the funds which are deposited into a Vantiv account at Fifth Third Bank. (N T 291-292, 299-300).
21. Fifth Third Bank then transfers the donated amount directly into the donation recipient's bank account after first subtracting the remittance amount it pays to Givelify (Exhibit J-1, N T. 96, 299-300, 302-303, 348)
22. The remittance tendered to Givelify is 2.9%, plus 30¢ per transaction (Exhibit J-1; DoBS-10; N T 300, 303)
- 23 Vantiv submitted Givelify a monthly invoice for the services it provided to Givelify (Exhibit J-1, N T 334)
- 24 Vantiv was identified in a Bank Card Merchant Agreement as a payment Processor and was collectively identified with Fifth Third Bank as a "Bank" in the Agreement (DoBS-1, N T 102, 104, 294)
25. Givelify utilized the services on Vantiv as a payment processor to assist with the electronic transfer of funds from donors to donation recipients, including not-for-profit organizations and religious organizations (DoBS-1, DOBS-10, J-1, N T 294, 324-25).
- 26 The MTA does not define the term "transmitting money" (7 P S. §6101 *et seq* , N T 40)
- 27 As of September 19, 2016, "Transmittal instrument" was defined under the MTA as "any check, draft, money order, personal money order or method for the payment of money or transmittal of credit, other than merchandise gift certificate sold in the regular course of business by a vendor or personal property or services " 7 P S §6101(2)
28. Effective February 3, 2017, "Transmittal instrument" is defined under the MTA as a "check, draft, money order, personal money order, debit card, stored value card, electronic transfer or other method for the payment of money or transmittal of credit, other than a merchandise gift certificate or instrument with a similar purpose sold in the regular course of business by a vendor of personal property or services in a closed loop system or hybrid closed loop system " 7 P S §6101.
- 29 Transmitting money under the MTA includes, but is not limited to, the collection, formatting, compilation and transmission of Internal Revenue Service issued EIN numbers, tax identification numbers, and bank account numbers for the purpose of facilitating the movement of money from donors to donation recipients. (N T. 100, 169, 182)
30. Vantiv is not a licensed money transmitter. (N T. 244-245).
- 31 Givelify is not, nor has it ever been licensed by the Department as a money transmitter. (Official Notice-Department records).

32. Grivelify has not directly transferred money from donors to donation recipients. Instead, Grivelify facilitated the transfer of the money through its affiliation with Vantiv based upon identifying information of donors and donation recipients it captured through its software application (N T 169, 197).
33. Donated funds transferred through the use of Grivelify's software application have never been deposited into an account directly owned or controlled by Grivelify (N.T. 300-301).
34. James Keiser is employed by the Pennsylvania Department of Banking and Securities (the "Department") as its Chief of the Compliance Office (the "Compliance Office") (N T 23)
35. Theresa Jones ("Ms Jones") is a Non-depository Financial Institution Examiner II with the Department. (N T 62).
36. Ms. Jones investigated Respondents' business activities related to this matter, beginning January 2015 (N T 62, 165)
37. In or about January/February 2015, Ms. Jones informed Respondent Walle Mafolasire that the MTA required Grivelify to be licensed in order to conduct its operations in Pennsylvania. (N T 65-67)
38. By letter dated March 20, 2015, Respondent Walle Mafolasire informed Ms Jones that Grivelify agreed to voluntarily cease doing business in the Commonwealth of Pennsylvania (DoBS-5, N.T 71-72)
39. By letter dated May 11, 2015, Respondents' legal counsel, Adam Atlas, Esquire, informed the Department that it would continue to voluntarily cease doing business in the Commonwealth of Pennsylvania, and that it had withdrawn any previous application materials it had submitted for licensure in the Commonwealth (DoBS-6; N.T 72-73)
40. Several days after having sent the Department his May 11, 2015 correspondence, Attorney Atlas provided the Department with a packet of materials, including a Bank Card Merchant Agreement between Vantiv, LLC, Fifth Third Bank and Grivelify, LLC. The packet also included a Special Amendment To The Bank Card Merchant Agreement and "Terms of Use" document for the use of the Grivelify website and mobile applications (DoBS-1, DoBS-2, DoBS-3, N T. 73-75, 166).
41. Ms. Jones continued to investigate Respondents' business activities, during which she learned from Grivelify's website and/or social media in November 2016 that Pennsylvania churches were continuing to utilize Grivelify's services after the Department had been informed that Grivelify had stopped doing business in the Commonwealth of Pennsylvania. (DoBS-8, pp 32-33; DoBS-9, N.T. 76-83, 85-86, 166)

42. On September 19, 2016, the Department issued an *Order to Cease and Desist and Pay a Fine* (“Cease and Desist Order”) in the amount of \$176,000 00 against Respondents, individually, jointly and severally (Official Notice-Department records, N T 170, 209, 211, 230, 234).
- 43 The Department’s fine of \$176,000 00 against Respondents was calculated by assessing Respondents \$2,000 00 per violation of the MTA based upon Respondents having operated on 88 Sundays between the date upon which Givelify was placed on notice by the Department of its determination that it required a money transmitter license and the date the Department issued its Cease and Desist Order (Exhibit J-1, Schedule A, N.T 157-159)
44. By letter dated September 29, 2016, Vantiv notified Givelify that it had stopped processing Givelify’s Pennsylvania transactions upon learning of the Department’s September 19, 2016 Order (Exhibit R-5, N.T. 309, 358-359)
- 45 DoBS-8 is comprised of a “screen shot” from Givelify’s website at Givelify.com (N T 90).
- 46 DoBS-10, with the exception of pages 43,44 and 45, primarily consists of “screen shots” from Givelify’s mobile application which Ms. Jones captured on her smart-phone in 2015 (DoBS-10; N T 110-115, 131-132, 173-177, 179).
- 47 By letter dated February 18, 2016, Ms. Jones provided Vanco Payment Solutions, LLC with a written explanation of the applicability of the MTA to activities involving third-party companies which, for a fee, solicit religious, political or charitable organizations and their donors to use their services (Exhibit 1, N T 227-230)
- 48 Vantiv provided the Department with information which identified the financial partners/churches that had utilized Givelify’s services from November 2015 through October 2016. (DoBS-9, N T 84)
- 49 The Compliance Office regulates Pennsylvania’s Money Transmitter Act, 7 P S §6101 *et seq* (the “MTA”) (N.T 25)
50. The MTA is a consumer protection statute. (N T. 25-26, 33)
- 51 The current version of the MTA became effective January 3, 2017 (7 P S §6101 *et seq* , N T. 48-49)
- 52 The exemptions from licensing by the Department set forth under the current MTA did not exist prior to the effective date of the present version of the Act, January 3, 2017
53. On or about September 29, 2015, the Pennsylvania Secretary of Banking and Security promulgated correspondence which indicated, *inter alia*, that entities engaged in money transmission by selling services to persons, including non-profit organizations, religious

organizations, charities and political campaigns for the movement of money from a donor's bank account or credit card to a third-party recipient are required to be licensed under the MTA (DoBS 7, N T 32)

54. The Secretary's September 29, 2015 correspondence was not the product of the legislative rule-making or comment processes (N T 39)
- 55 The Secretary's correspondence constitutes guidance to the Compliance Office (N T 32, 40)
- 56 Damone Boykin Jones, Sr is the minister for Bible Way Baptist Church ("Bible Way Church") in Philadelphia, Pennsylvania, 19131. (N T. 263)
- 57 Bible Way Church is not a 501(c)(3) corporation and it pays federal income tax (N T 267-68)
- 58 Bible Way Church is registered with Givelify. (N.T 271)
- 59 Bible Way Church conducts worship services on Sundays. (N T. 264-65)
- 60 Bible Way Church conducts weddings, communion and baptism services pursuant to a fee schedule for non-members of the church It also performs baby dedications, funerals and holiday services in accordance with a non-member fee schedule (N T. 265-66, 269-70)
- 61 Bible Way Church has a prison ministry and a community outreach ministry It also provides underwear, deodorant and snacks to the Philadelphia prison system juvenile unit and school supplies to local schools (N.T 266)
- 62 Bible Way Church holds an annual community outreach during which it feeds the neighborhood and provides a hot meal and free clothing to people in need (N T 266).
- 63 Bible Way Church is totally funded by donations. (N T 266).
- 64 Absent donations, Bible Way Church would not be able to operate in the manner by which it currently operates. (N T 267).
65. Reverend Chandra I. Williams is the Pastor at United Missionary Baptist Church ("United Missionary") (N.T 274)
66. United Missionary conducts Sunday worship services and Sunday School (N T 277).
67. United Missionary conducts baby naming and funeral services, weddings, performs mission work with local schools, provides meals for students and homeless citizens and it provides shelter for the homeless free of charge (N.T 278, 280).

- 68 United Missionary is totally funded by donations (N T 279-80)
- 69 United Missionary is not a 501(c)(3) corporation, but it does not pay federal income tax as a non-profit organization (N T 281-82)
- 70 United Missionary registered with Givelify through its website. (N T. 282-83).
- 71 Respondents were served with all pleadings, notices and orders filed in this matter, and they attended the formal administrative hearing with the assistance of legal counsel on April 24, 2017 (Official Notice-Board records, N T 8-362)

CONCLUSIONS OF LAW

- 1 The Givelify software/business model constitutes a “transmittal instrument” under the former version of the MTA, and as amended (Finding of Fact, Nos 5-29)
- 2 Givelify does not qualify as an “agent” under the MTA, as amended. (Finding of Fact, Nos. 5-29)
- 3 Givelify engaged in the unlicensed business of transmitting money by means of a transmittal instrument for a fee or other consideration, without having qualified for an exemption, in violation of the MTA at 7 P S §6102 (Finding of Fact, Nos 5-31)
- 4 The Department’s imposition of a \$176,000 00 fine upon Respondents, individually, jointly and severally did not constitute an abuse of the Department’s discretion and was supported by the preponderance of the evidence. (Finding of Fact, Nos. 42-43).
- 5 Givelify’s continuing operations through its existing software/business model would constitute engaging in the unlicensed business of transmitting money by means of a transmittal instrument for a fee or other consideration, without an exemption, in violation of the MTA at 7 P S. §6102(a). (Finding of Fact, Nos. 5-31)

DISCUSSION

This matter involves an appeal by Respondents from an *Order to Cease and Desist and Pay a Fine* (“Cease and Desist Order”) issued against them by the Department on September 19, 2016. The Cease and Desist Order alleged, *inter alia*, that Givelify was “engaged in the business of creating transmittal documents for the movement of money from the bank accounts of individuals to the bank accounts of a non-profit entities for which it received the payment of a fee.” The Department determined that Givelify was in violation of Section 2 of the MTA by engaging in the business of money transmission while not licensed by the Department, and while not being an agent of a person licensed or exempted from licensure under the Act. In addition to ordering Respondents to immediately cease and desist from engaging in money transmissions in Pennsylvania, the Order also imposed a fine against Respondents in the amount of \$176,000.00, individually, jointly and severally.

The degree of proof applicable to this matter is a preponderance of the evidence. *Lansberry v Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). A preponderance of the evidence is generally understood to mean that the evidence demonstrating a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of a party’s case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery, Inc v Margulies*, 70 A.2d 854, 856 (Pa. 1950). To satisfy the burden of proof, evidence is required to be substantial and legally credible, not mere “suspicion” or a “scintilla” of evidence. *Lansberry*, 578 A.2d at 602.

The Givelify Business Model

Givelify solicits donations for not-for-profit organizations and religious organizations, and does so through its internet software application at givelify.com. The software application

facilitates the transmission of money from individuals and organizations to recipient not-for-profit organizations and/or religious organizations. Givelify's service requires donors to establish an account through its software application. The application captures electronic identifying information which includes the donor's name, tax identification number, bank/checking account number, credit or debit card number, credit or debit card security code, e-mail address, and the amount to be donated. Givelify's service also requires donation recipients to register with Givelify through its software application during which Givelify similarly captures a recipient's electronic identifying information, including its name, tax identification number/ EIN, name of its authorized person and bank/checking account information.

Givelify encrypts a donor's electronic identifying information upon its receipt thereof, then transmits the encrypted information to Vantiv. Givelify utilized the services of Vantiv as a payment processor to assist it with the electronic transfer of funds from donors to the donation recipients.³ Vantiv is not a licensed money transmitter.

Vantiv transmitted a "token" to Givelify within seconds of having received the donor's electronic identifying information. The token did not contain any personal identifiable information but, instead, contained only a unique identifier issued by Vantiv to identify the donor to Vantiv which, in turn, enabled Vantiv to match the unique identifier to the donor's information on Vantiv's server. Givelify deleted the donor's electronic identifying information from its servers upon its receipt of the token from Vantiv. Givelify also transmitted the electronic identifying information of the donation recipient to Vantiv who then generated a

³On September 29, 2016, Vantiv notified Givelify that it had stopped processing Givelify's Pennsylvania transactions upon learning of the Department's September 19, 2016 Cease and Desist Order. The record does not establish whether Vantiv has reinstated its processing of donations on Givelify's behalf. Accordingly, specific references to Vantiv's involvement in the Givelify business model as the payment processor shall be referred to in past tense.

Merchant Identification Number (“MID”) associated with the donation recipient. A donor can use the Givelify software application to identify a donation amount and a recipient of the donation on either a one-time or recurring basis. Thereafter, Givelify simultaneously transmitted the donor’s token, the MID and the donation amount to Vantiv. Vantiv, thereafter, contacted the donor’s bank/credit card to confirm the existence of sufficient funds to pay for the donation. The donor’s bank/credit card provided Vantiv with an approval code for the transfer of funds if sufficient funds existed. Vantiv then notified Givelify when it received approval for the transaction from the donor’s bank/credit card (Exhibit J-1; N T 298).

Givelify subsequently notified the donor that the transaction had been completed and notified the donation recipient of the donation. Vantiv instructed the donor’s credit card/bank to release the donated funds upon its receipt of the approval from the credit card/bank. The donor’s credit card/bank thereafter released the funds which were then deposited into a Vantiv account at Fifth Third Bank. Fifth Third Bank then transferred the donated amount directly into the donation recipient’s bank account after it first subtracted a remittance payment to Givelify. Vantiv submitted a monthly invoice to Givelify for its services.

Statutory Prohibition

The version of MTA in effect at the time the Department issued its September 19, 2016 Cease and Desist Order provided, in pertinent part, as follows:

No person shall engage **in the business** of transmitting money by means of a **transmittal instrument** for a fee or other consideration without first having obtained a license from the Department of Banking nor shall any person engage in such business as an agent except as an agent of a person licensed or exempted under this act.

7 P S §6102 (emphasis added) The MTA was amended, effective January 3, 2017. The statute at 7 P S. §6102(a) currently provides as follows:

§6102. License required

- (a) No person shall **engage in the business** of transmitting money by means of a **transmittal instrument** for a fee or other consideration with or on behalf of an individual without first having obtained a license from the department

7 P S §6102(a) (emphasis added) Accordingly, the revised statute now limits the applicability of the statute's prohibition to money transmission performed "on behalf of an individual" The current version of the MTA does not define the term "individual" Neither the preceding version of the MTA, nor the current version of the statute define the term "transmitting money"

Analysis

The salient issues raised by Respondents' appeal from the Department's September 19, 2016 Cease and Desist Order involve whether Respondents were engaged in the unlicensed business of money transmission, without exemption, under the preceding version of the Act and, if so, whether the imposition of the civil penalty by the Department was supported by the preponderance of the evidence The timing of Respondents' appeal following the effective date of the amended MTA also raises the issue of whether Givelify is exempt from the statute's current licensing requirements for the purpose of determining whether it remains subject to the Department's Cease and Desist Order

Respondents do not contest, and the record clearly demonstrates that Givelify received a fee for its services in the form of a remittance from Vantriv. That fee consisted of 2.9%, plus 30¢ per donation. Thus, the determination of whether Respondents were properly the subject of the Department's Cease and Desist Order and the imposition of a civil penalty under the preceding version of the Act necessarily turns upon the following two determinations. 1) Whether Givelify was in the business of transmitting money and, if so; 2) Whether it did so by means of a transmittal instrument.

Transmitting Money

The Department asserts that the Givelify engaged in the business of transmitting money as contemplated by the MTA even though that term is not expressly defined by the Act See, Department Post-Hearing Brief, pp 15, 17 To that end, the Department argues that Givelify is an indispensable part of a chain of events through which money is transferred from donors to the recipients of the donations. Accordingly, the Department argues that Givelify is engaged in **the business** of transmitting money by being inextricably intertwined with a system, through its software application, which, in turn, results in the transmission of money, even if Givelify is not the entity which actually receives, possesses or deposits the donated funds *Id* The Department similarly argues that Givelify’s business model of collecting and transmitting payment information, and its receipt and issuance of instructions for what to do with donations through its mobile application is a “method for the payment of money or transmittal of credit” and, therefore, is a transmittal instrument under the MTA See, N.T. 193-195, 197-198.

By contrast, Respondents argue that Givelify is not engaged in the business of transmitting money, or that its software application constitutes a transmittal instrument under the MTA Respondents instead assert that the Givelify software simply connects donors and churches, and that any transmission of money is “outsourced” to a third party See, N T. 286, 304. More particularly, Respondents argue that the statutory language and construction of the MTA shows that the Pennsylvania Legislature intended for a transmitter of money to actually possess or take custody of the money being transmitted in order to be subject to the Act’s licensing requirement See, Respondents’ Post-Hearing Brief, p. 9-10. Because Givelify never received or deposited donations, and because donated funds were never placed in any Givelify accounts, Respondents assert that Givelify cannot be considered to have transmitted money

under the “peculiar and appropriate” use of the term “transmitting money”, as intended under the MTA

Respondents similarly argue that Givelify’s business model and/or its software application is not a transmittal instrument under the MTA because Givelify did not create the token or MID used within Givelify’s business model, and because the software is not the equivalent of a negotiable instrument. Respondents further assert that the Department’s interpretation of the MTA makes it an outlier to nation’s general approach towards transmitting money as reflected by legislation similar to the MTA. See, Respondents’ Post-Hearing Brief, p 11-24

Notwithstanding Respondents’ arguments, this Hearing Examiner finds that Respondents’ interpretation of what constitutes the business of transmitting money under the MTA is too narrow. It is well established that “[e]very statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa.C.S. § 1921(a). For that reason, it is to be presumed “[t]hat the General Assembly intends the entire statute to be effective and certain.” 1 Pa.C.S. § 1922(2). Thus, no provision of a statute shall be “reduced to mere surplusage.” *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004). In determining the General Assembly’s intent, we are to presume that the legislators have not intended an absurd or unreasonable result, and that they intend to favor the public interest as against any private interest. 1 Pa.C.S. § 1922(1) and (5). See also, *Whalen v. Commonwealth of Pennsylvania, Department of Transportation*, 32 A.3d 677, 679 (Pa. 2011).

As set forth by the plain language of the MTA at 7 P.S. §6102/6102(a), the prohibition against the unlicensed transmittal of money is not limited to the person/entity who performs the actual act of transmitting money. Instead, the language of the MTA is broader, and includes those who are “engage[d] in the business” of transmitting money. To adopt a reading of the

MTA in the manner proffered by Respondents would be tantamount to reading that provision out of the statute

At its most fundamental level, the purpose of Givelify's software and its business model is to facilitate the movement of money from donors to donation recipients. If Givelify's software merely worked to connect donors and donation recipients as Respondents suggest, its business model would cease to involve Givelify once that connection has been established. Instead, Givelify remains inextricably intertwined with the donation process by conducting background checks on donors and donation recipients, by encrypting and transmitting identifying information to a third party, and by receiving, storing and linking donations to MID's and tokens used to identify donors and their intended beneficiaries. The necessity and applicability of the MID's and tokens to Givelify's business model remain the same regardless of who actually creates those features. Importantly, the record also shows that Givelify receives a fee/remittance for each transaction completed through its software, rather than charging a one-time fee. Based upon the totality of Givelify's involvement in donation process, including its charging of the fees it earns based precisely upon that continuing involvement, the record shows that Givelify engages in the business of transmitting money under the MTA, even if it is not the party who actually transfers the donated funds to the donation recipients.⁴

Respondents additionally assert that the January 3, 2017 amendment to the MTA at 7 P.S. §6106(b 1) signaled the Pennsylvania Legislature's intention to require that a money transmitter actually possess or control the money being transmitted in order to be subject to the MTA's

⁴Respondents also contend that the Department has improperly interpreted the term "transmitting money" as including the language "or cause another to transmit" because that language is not contained within the Act. See, Respondents' Post-Hearing Brief, p. 16. While such language would have certainly been applicable, and may have even provided additional clarity in the context of the present matter, its omission from the MTA does not negate the plain language of the statute which broadly prohibits the unlicensed "business of transmitting money"

licensing requirement ⁵ See, Respondents' Post-Hearing Brief, pp 9-11 The MTA at 7 P S

§6106(b.1) provides as follows:

§6106. Fee, financial statement and security

(b 1) If the department, in its discretion, shall determine the bond or deposit of securities provided for in clause (3) of subsection (a) is not adequate, the department may, after an examination and a consent agreement or order, require an additional bond in an amount up to the average daily outstanding balance of **money received for transmission** in this Commonwealth during the thirty days preceding the department's requirement plus an additional ten percent of the amount of the average daily outstanding balance subject to the same conditions and the same right of execution provided for in clause (3) of subsection (a)

7 P S §6106(b 1) (emphasis added) Respondents assert that the phrase "money received for transmission" "unquestionably reflects the General Assembly's understanding that the business of transmitting money requires the transmitter to actually 'receive' money for subsequent transmission." See, Respondents' Post-Hearing Brief, p 10 This Hearing Examiner does not find that the Legislature's inclusion of the additional language cited by Respondents necessarily carries the import they suggest

On its face, the statutory language upon which Respondents rely does not require the Department to increase the bond requirement under the MTA but, instead, merely provides the Department discretion to do so if it determines an increase is necessary under appropriate circumstances. The additional language of 7 P S §6106(b 1) therefore represents a recognition by the Legislature of the rapidly changing financial marketplace which may include, but not necessarily be limited to monetary transactions and/or transmittal instruments which involve the actual possession of money received for transmission. Under such circumstances, the MTA provides the Department with a metric to be used should it determine a higher bond amount is

⁵Respondents' argument is inapplicable to the enforceability of the Department's Cease and Desist Order and its imposition of a fine prior to January 3, 2017 to the extent the language upon which Respondents rely was not yet in effect at the time of Respondents' activities

warranted under those circumstances. The recently added language of 7 P.S. §6106(b.1) does not in any way negate the existing bond requirement of 7 P.S. §6106(a)(3) or require the Department to incrementally increase that amount under every circumstance, such as one where a party does not actually receive money for transmission. For that reason, the inclusion of the discretionary language of 7 P.S. §6106(b.1) does not necessarily signal an intention by the Legislature that a money transmitter must actually possess the money being transmitted in order to be subject to the MTA's bond requirements, or to the licensing requirements under the statute.

Respondents additionally argue that the Department's interpretation of "transmitting money" disregards the "peculiar and appropriate" meaning of the term as it has been purportedly applied by statutes similar to the MTA throughout the United States such that the term "transmitting money" requires a person to actually receive money in order to be a money transmitter under the MTA. See, Respondents' Post-Hearing Brief, pp. 11-16. Respondents contend that the MTA "is consistent with the generally accepted understanding of the term ['transmitting money'] as is reflected in its federal counterpart" at 31 C.F.R. §1010.100 *et. seq.* and statutes promulgated by 44 other states throughout the United States. More specifically, Respondents cite to definitions of the terms "transmitting money" and/or "money transmission" used within those statutes.

Admittedly, Pennsylvania's Statutory Construction Act provides that "Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." 1 Pa.C.S. §1927. Although the definitions cited by Respondents do, in fact, include the receipt of money as a component part of the definition of transmitting money, Respondents have not established that each of the statutes are uniform in their overall statutory approach and application towards the transmission of

money outside the context of the definitions themselves. On the contrary, the MTA is a money transmission statute wholly separate and distinct from a uniform statute such as the model Uniform Money Services Act. Accordingly, the fact that several states similarly define the term money transmission, the record fails to reflect a sufficiently uniform application of that term within their respective statutes so as to specifically ascribe a “particular and appropriate meaning” to the term under the MTA pursuant to Pennsylvania’s Statutory Construction Act at 1 Pa C.S. §1927.

Transmittal Instrument

Having concluded that Givehfy is engaged in the business of transmitting money under the MTA, the issue becomes whether it did so through its use of a transmittal instrument. The version of the MTA in effect at the time the Department issued its Cease and Desist Order defined a “Transmittal instrument” as “any check, draft, money order, personal money order or **method for the payment of money or transmittal of credit**, other than merchandise gift certificate sold in the regular course of business by a vendor or personal property or services” 7 P.S. §6101(2) (emphasis added). The current version of the Act expanded the definition of “transmittal instrument” by adding several specific examples of transmittal instruments. In that regard, the term “Transmittal instrument” is presently defined as “any check, draft, money order, personal money order, debit card, stored value card, electronic transfer or **other method for the payment of money or transmittal of credit**, other than a merchandise gift certificate or instrument with a similar purpose sold in the regular course of business by a vendor of personal property or services in a closed loop system or hybrid closed loop system.” 7 P.S. §6101 (emphasis added).

The Department contends that the broad language “other method for the payment of money or transmittal of credit” within the definition of “transmittal instrument” at 7 P S §6101 necessarily included electronic methods for the payment of money or the transmission of credit because the “other methods” covered under the Act ultimately served the same function as the checks, drafts, money orders, personal money orders, debit cards, stored value cards, and electronic transfers set forth within the current definition. By way of analogy to other cases involving the judicial interpretation of internet-related transactional issues, the Department asserts that the definition reflected the Legislature’s recognition that the statute needed to encompass methods of money transmission other than those which were conventionally used at the time in order to provide the Department with the flexibility it required to oversee the rapidly changing landscape of the banking and financial industries

Givelify, on the other hand, asserts that its business model and software have never constituted a transmittal instrument because Givelify did not create the token, donation amount or MID used within its business model. Instead, those aspects of the Givelify business model are generated solely by a third party. Givelify additionally contends that its software is not a transmittal instrument under the present version of the Act because it is not the functional equivalent of money consistent with the types of negotiable instruments specifically identified within the current definition.

Givelify’s reliance upon a third party to create a token and MID, rather than creating those features on its own, is a distinction without a difference for the purpose of determining whether the Givelify software/business model constitutes a method for the payment of money or transmittal of credit under the MTA. The record shows that the Givelify software is used to obtain identifying information from donors and donation recipients, and that it uses the token and

MID to identify and pair donors to donation recipients. Although Givelify does not create the token and/or MID as component parts of the Givelify business model, the software unquestionably gathers and organizes the substantive information transmitted to the third-party payment processor which created those features. The Givelify software/business model similarly establishes the vehicle and procedural mechanism by which donations are transmitted to their recipients. Accordingly, all of the component parts of the Givelify business model, including those comprising of Givelify's gathering of substantive information, and the instructions it provides to the payment processor to use the tokens and MID's, constitutes a method used to facilitate the transfer of money. Indeed, the integrated use of the component parts of the process incorporated into Givelify's software is not only a method for the transmission of money, it is **the** method of transmission under the Givelify business model.

This Hearing Examiner similarly disagrees with Givelify's contention that the Legislature's addition of the word "other" in conjunction with "debit card, stored value card, electronic transfer" within the definition of transmittal instrument "strongly suggests" that the Legislature intended that the "other method[s]" for the payment of money reflect methods similar to those specifically identified within the definition. Givelify provides no reason for applying such a narrow interpretation to the current definition of "transmission of money" other than to assert that the tokens, MID's and donation amounts used within the Givelify business model cannot be used independently to transfer funds, as can be done by the other methods identified within the definition. Instead, as previously noted, the component parts of the Givelify business model were not used in isolation to transfer money but, instead, were integrated into the overall Givelify business model through its software which, in turn, was used in the aggregate to effectuate the transmission of donated funds. For the foregoing reasons, this Hearing Examiner

finds that the Givelify business model/software constituted a transmittal instrument as an “other method for the payment of money or transmittal of credit” under the MTA

Givelify as the Agent of Donation Recipients

Respondents assert that they are agents of donation recipients and, therefore, are subject to the exemption for licensing set forth by the January 3, 2017 amendment to the MTA at 7 P S §6103(4). More particularly, Respondents contend that because the religious charitable organizations that receive the donations provide services to their communities and use the Givelify software as a method to receive donations, Givelify is an agent of the organizations and, therefore, is exempt from licensing under the MTA. Although the claimed exemption is inapplicable to the Department’s Cease and Desist Order due to the effective date of the amended statute, the exemption would be relevant to Givelify’s business activities subsequent to January 3, 2017, if the exemption is found to be applicable under Givelify’s business model

The Department raises several arguments for why it believes Givelify is not subject to an exemption from licensure under 7 P S §6103(4). Specifically, the Department asserts “1) Givelify is the only provider of services in the transaction, 2) church donee[s] are not providers of goods or services, 3) the funds received are not “payments” for purposes of the money at issue; 4) church donees are not in control of Givelify⁶, and 5) Givelify’s interpretation of the statute yields an absurd result. ”. See, Department Post-Hearing Brief, p. 19.

The exemption claimed by Respondents provides, in pertinent part, that “No license shall be required for any of the following: Agents that receive payments from individuals on behalf of

⁶Although the Department does not expressly identify the basis for this contention, it is presumed the Department is referring to the statutory requirements applicable to agents under the MTA at 7 P S §6112(3). Because neither party has addressed this issue in their post-hearing briefs, and because Section 6112(3) addresses requirements applicable to agents, rather than whether an entity qualifies as an agent or is exempt from the licensure requirements of the statute pursuant to 7 P S. §§6101, 6103(4), this issue need not be addressed in this Proposed Report

persons that are providers of services.” 7 P S §6103(4). In turn, the term “agent” is defined under the MTA as “any person that provides money transmission services on behalf of another person.” 7 P.S §6101. Within the definition of the term “agent”, the MTA further defines “services” as “work, labor and services for other than a commercial or business use ” *Id* When incorporating the definition of “services” into the definition of “agent”, the definition of “agent” ultimately reads as “any person that provides money transmission work, labor and services, for **other than a commercial or business use**, on behalf of another person.” In this case, the record clearly indicates that Givelify receives monetary payments for its services and, therefore, uses its software/business model for commercial or business use rather than for charitable purposes. Thus, on the face of the statute, Givelify does not qualify as an “agent” under the statutory definition of the term for the purpose of invoking the exemption set forth by 7 P S §6103(4)

Assuming, *arguendo*, Givelify is found to satisfy the statutory definition of an “agent” however, this Hearing Officer rejects the Department’s contention that Givelify does not qualify as an “agent” under the MTA because money received by Givelify does not constitute “payment” under 7 P S. §6103(4). The term “payment” is not specifically defined by the MTA. However, the term has been defined by other sources as “the performance of a duty, promise, or obligation, or discharge of a debt or liability, by the delivery of money or other value by a debtor or a creditor, where the money or other valuable thing is tendered and accepted as extinguishing debt or obligation in whole or in part ” *Black’s Law Dictionary*, Sixth Edition. West Group 1990

Notably, the MTA’s exemption requires only that a person/entity receive payments from individuals on behalf of providers of goods and services. The record in this case shows that donation recipients who use the Givelify software are charged 2.9%, plus a .30¢ transaction fee which is then deducted from donated amounts. (Exhibit 10, p 99). Although the Department

correctly cites to the United States Supreme Court's decision in *Hernandez v Commissioner of Internal Revenue*, 490 U.S. 680 (1989) as recognizing the distinction between a payment and a donation, its reliance on *Hernandez* is misplaced in that it erroneously focuses on the money received by recipients in the form of donations, instead of focusing on the fees the donation recipients pay to Givelify in exchange for its services in facilitating the transmission of the donations. Accordingly, Givelify receives "payments" as part of its business model in exchange for its performance of a duty, promise, or obligation to facilitate a recipient's receipt of a donation

The Department additionally asserts that donation recipients who use the Givelify software do not provide services for the purpose of qualifying Givelify as an agent under the MTA. The Department alternatively argues that donations must have a direct nexus to the services provided by the donation recipients in order for Givelify to qualify as an agent under the MTA. Again, assuming Givelify satisfies the statutory definition of an "agent", this Hearing Officer disagrees with the Department's assertion that the organizations which received donations through the Givelify software do not provide services. On the contrary, the record is replete with credible testimony from Minister Jones and Reverend Williams which established that their churches provide numerous types of services, free of charge, to their respective communities. The remaining portion of the inquiry, therefore, turns upon whether the statutory exemption under the MTA requires that donations be made in exchange for an identifiable benefit in order for Givelify to qualify for the agent exemption under 7 P.S. §6103(4). See, Department's Post-Hearing Brief, p. 20.

The Department contends that in the absence of any nexus between a particular donation and the services provided by the donation recipient, the MTA would essentially permit a

licensing exemption to any person that receives payments for providing money transmission services on behalf of another whenever the donation recipient is a provider of services, regardless of the type of services they provide, or the existence of any connection between a donation and those services. See, Department Reply Brief, pp. 17-18. For that reason, the Department argues that Respondent's interpretation of the MTA as not requiring a correlation between donated funds and the services rendered by the donation recipient would yield an absurd and/or unreasonable result in contravention of 1 Pa C.S. §1922(1) See, Department Brief, p. 19.

This Hearing Officer agrees with the Department that a nexus must exist between the services provided by Givelify as a purported agent and the particular services provided by a donation recipient in order for the exemption to be consistent with the purpose and scope of the statute. However, this Hearing Officer finds that the Department has interpreted the exemption too narrowly in terms of essentially requiring a *quid pro quo* exchange of services for a donation in order to qualify for the exemption. It is well understood that donors may specifically designate the intended use for their donated funds. Conversely however, donations are frequently given without the donor knowing precisely how the funds will be used. Instead, donors frequently trust that the donation recipients will properly use the funds to promote programs and services consistent with the mission and purpose of the charity to which they donate.

In this case, the record shows that at least two churches registered with Givelify received donations from donors through their use of the Givelify software. The record equally shows that the churches provide a wide variety of services to their respective communities, in part, through those donations, and that the donations are used to provide the types of services religious organizations routinely provide. Although there is no evidence that the particular donors

benefitted from a *quid pro quo* exchange, it would be disingenuous to suggest that the donors did not contemplate that the donation recipients would use the money to provide the types of services described by Minister Jones and Reverend Williams. Thus, should Givelify be considered to be an agent as that term is defined under the MTA at 7 P S §6101, it would not be subject to the licensing requirements of the statute provided it can demonstrate that the charitable entities that receive donations utilizing its software provide services commensurate with their charitable purposes ⁷

Statutory Fine

The Department issued a fine against Respondents in the amount of \$176,000.00 through its September 19, 2016 Cease and Desist Order. The MTA in effect at the time permitted the Department to impose a fine in the amount of \$2,000.00 against “[a]ny person, whether licensed or not licensed under the provisions of this act, or any director, officer, employee or agent of any such person who shall violate the provisions of this act or shall direct or consent to such violations” for each violation of the Act 7 P.S. §6116. The record shows that Respondents were involved in 277 transactions between November 2015 and October 2016, inclusive, within the period Givelify informed the Department it had stopped operating in Pennsylvania and the date the Department issued its Cease and Desist Order. (DoBS-9; Exhibit J-1, Schedule A, N T. 157-159) Had the Department issued a fine in an amount equal to the statutory maximum permitted by the MTA, it could have imposed a fine against Respondents in the amount of \$554,000.00. Accordingly, the imposition of a fine in the lesser amount of \$176,000.00 constituted reasonable

⁷This Hearing Officer recognizes the practical difficulty faced by the Department when determining whether an entity falls within the exemption applicable to an agent of a “provider of services” based upon donations being consistent with a charity’s purpose. However, the Hearing Officer is constrained by the broad language of the statute in the absence of any duly promulgated regulations to the contrary.

discretion by the Department under the facts and circumstances of this case. For the foregoing reasons, the following Proposed Order shall issue:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

Commonwealth of Pennsylvania, :
Department of Banking and Securities, :
Compliance Office : Docket No. 160052 (BNK- C&D)
 :
v. :
 :
Givelify, LLC, Tayo Ademuyiwa, M.D., :
Individually and Walle Mafolasire, Individually :
And Jointly and Severally, :
Respondents :

PROPOSED ORDER

AND NOW, this 12th day of October, 2017, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, it is hereby ORDERED that the Department's September 19, 2016 Order to Cease and Desist and Pay A Fine is AFFIRMED

BY ORDER/

Redacted

Marc A. Moyer, Esquire
Hearing Officer

For Respondents:

Travis P Nelson, Esquire
Reed Smith, LLP
136 Main Street, Suite 250
Princeton, NJ 08540

Wayne C Stansfield, Esquire
Reed Smith, LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103

**For the Department of Banking
and Securities:**

Linda Carroll, Esquire
Deputy Chief Counsel
Commonwealth of Pennsylvania
Department of Banking and Securities
17 North Second Street, Suite 1300
Harrisburg, PA 17101

Date of Mailing: 10/19/17

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

FILED

2017 OCT 19 AM 9:24

COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF BANKING AND :
SECURITIES, COMPLIANCE OFFICE :
:
PETITIONER, :
v. :
:
GIVELIFY LLC, :
TAYO ADEMUYIWA, M.D. an individual :
And WALLE MAFOLASIRE, an individual :
jointly and severally :
:
RESPONDENT. :

PA DEPARTMENT OF
BANKING AND SECURITIES

Docket No. : 160052 (BNK-C&D)

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2017, I served a true and correct copy of the attached Letter and Proposed Report in accordance with the requirements of 1 Pa. Code § 33.31 (relating to service by agency), in the manner indicated below:

Via Hand Delivery:

Linda Carroll
Deputy Chief Counsel
PA Department of Banking and Securities
17 N. 2nd Street, Suite 1300
Harrisburg, PA 17101

By United States First Class Mail:

Travis P. Nelson, Esquire
Reed Smith, LLP
136 Main Street, Suite 250
Princeton, NJ 08540

Wayne C. Stansfield, Esquire
Reed Smith, LLP
Three Logan Square, Suite 3100
1717 Arch Street
Philadelphia, PA 19103

By:

Redacted

Linnea Freeberg, Docket Clerk
PA Department of Banking and Securities
17 North Second Street, Suite 1300
Harrisburg, Pennsylvania 17101

