First Data.

April 9, 2019

Department of Business Oversight
Legal Division
Attn: Mark Dyer, Regulations Coordinator
1515 K Street, Suite 200 Sacramento, California 95814-4052

FILE NO: PRO 07/17 INVITATION FOR COMMENTS ON PROPOSED RULEMAKING MONEY TRANSMITTER ACT: AGENT OF PAYEE (the "Invitation for Comments")

Dear Mr. Dyer,

We are responding to the Invitation for Comments referenced above.

As background, First Data is a global provider of technology solutions and services to merchants and financial institutions with clients in 118 countries. With our services, First Data enables 6 million merchants to accept electronic payments such as credit, debit, and prepaid cards, processing 2,800 transactions per second and handling $2.2 trillion in payments annually. We also perform a number of back-office services for over 4,000 financial institutions of all sizes and own the STAR debit network.

As a transaction processor for financial institutions and merchants, First Data is seeing the marketplace change significantly with the introduction of financial technology intermediaries and alternative payment networks. Money transmission laws such as California's Financial Code section 2030 play an important role in regulating these intermediaries by providing for consumer protection and overall systemic soundness. However, California and a number of other states have recognized that there is more than one way of providing for consumer protection in payment processing.

In particular, the California legislature, like others around the country, has recognized that once a payment in an ordinary commercial transaction is received by an agent acting on behalf of a payee, the payment is complete to the same extent as if the funds had been received by the payee directly. *See* Cal. Fin. Code §2010(l). Given that there are concerns in the marketplace that the California Department of Business Oversight (the "Department") has interpreted that exemption in an overly restrictive manner, we commend the Department for seeking public comment on this issue of significant public interest and strongly encourage the Department to take the opportunity to revisit those recent interpretations. The Department could take this opportunity to promulgate guidance that is more consistent with both the plain language of the statute and the legislative intent to enable payment processors to act as intermediaries on behalf of payees without unnecessary additional oversight, provided consumers are protected through the extinguishment of their payment obligations upon payment to the designated agent of a payee. In the alternative, we strongly encourage the Department to utilize its authority at section 2011 to adopt a regulatory exemption with the same effect.

A. The Agent of the Payee Exemption Applies Broadly Beyond Online Marketplace Platforms

The Department's invitation for comment indicates that, based on the legislative history of the agent of the payee exemption at Cal. Fin. Code §2010(l), the legislature, at minimum, wished to ensure that online marketplace transactions not be regulated as money transmission under the California Money

Transmission Act ("MTA"). Online marketplaces and e-commerce transactions were clearly a focus of the legislative debate, including in comments from the bill's sponsor. Accordingly, any implementing regulations should not disrupt application of Cal. Fin. Code §2010(l) to online marketplaces and other e-commerce transactions. These transactions represent an evolving and dynamic part of the California economy that the legislature clearly desired to nurture.

It is worth noting that the legislature in Cal. Fin. Code §2010(l) did not limit the agent of payee exemption exclusively to online marketplace platforms or to e-commerce in general.[1] The plain language of the statute clearly and expressly sweeps much more broadly to cover handling of funds as agent of a payee in all transactions for goods or services, regardless of whether those payments originated in a physical or virtual environment.

Accordingly, while the priorities articulated by the bill's sponsor and certain of its supporters indicate that the Department should take special care not to interpret the MTA in a way that would interfere with the application of the exemption to online marketplace transactions and e-commerce, the references to marketplace transactions and e-commerce do not provide a basis to interpret the broad statutory text in a manner that restricts its application to *only* online marketplace transactions and e-commerce.

B. The Terms "Goods and Services" Should Be Read as Broadly Inclusive

Although the agent of the payee exemption applies broadly in connection with the provision and receipt of "good or services," the Department seeks comment as to whether "good and services" should be further defined or limited. Given the broad ordinary meaning of "goods and services" and the ever-expanding scope of assets, rights, interests and benefits available on e-commerce platforms and in the physical environment, the Department should maintain a broad interpretation of "good or services" to encompass assets, rights, interests and benefits of any kind or nature.

The legislature did not define "goods or services," suggesting an intent to apply those terms in accordance with their ordinary meanings, which would include a wide, potentially unbounded, variety of commercial transactions. Such a broad understanding is consistent with the legislature's intent to not impede a growing and diversifying marketplace and ensure the MTA "does not create unnecessary barriers to entry for new entities wishing to enter the payments space."[2] In the past two decades, online marketplaces have exploded in size and scope, and even in the few years since the legislature passed Assembly Bill 2209, the scope of "good or services" available on online marketplaces has grown and

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[1] We note that the brief bill summary used the Senate Banking and Financial Institutions Committee report, in the Senate Rules Committee report, and the Department of Finance Bill Analysis report indicate the bill would "ensure that electronic commerce (e-commerce) transactions are not inadvertently regulated as money transmission...". "E-commerce" is defined in AB 2209 to include "any transaction where the payment for goods or services is initiated via the Internet or a mobile device", and therefore extends more broadly than only those transactions initiated through marketplace platforms. Sen. Noreen Evans, S. Banking & Fin. Inst. Comm., 2013-2014 Sess., AB 2209 (Dickenson), at Summary (Cal. 2014); S. Rules Comm., 2013-2014 Sess., Third Reading, AB 2209, at Digest (Cal. 2014); Dep't of Fin. B. Analysis, AB 2209, at Bill Summary (Cal. Aug. 4, 2014).

[2] Assemb. Roger Dickenson, Assemb. Comm. Banking & Fin., 2013-2014 Sess., AB 2209, at Comments (Cal. 2014) (indicating the purposes of AB 2209 are a continuation of those supporting AB 786 (passed Oct. 4, 2013)).

shifted in unpredictable ways. Online marketplaces offer all manner of tangible property for both personal and commercial purposes, ranging from electronics, to perishable groceries, to industrial equipment. Non-tangible goods are also widely available for purchase and lease including music, movies, photos and computer software. Housing rentals, transportation services by car, limo and helicopter, and an ever-expanding number of services including babysitting, in-home furniture assembly, courier service, line waiting, translation services, and website building are also available through e-commerce.

Given the on-going expansion and unbounded potential of e-commerce, the Department should define "goods or services" broadly to encompass all commercial exchange of assets, rights, benefits and interests for consideration. A more narrow definition would have the result of arbitrarily favoring certain types of existing platforms or creating arbitrary barriers to entry for e-commerce providers that intend to expand to new areas.

Furthermore, drawing fine lines among various types of goods or services would create substantial practical difficulties. As one of the largest third-party merchant processors in the country, we facilitate payments for a variety of "goods or services," but generally do not have visibility into the details of the goods and service handled in each transaction. Instead, we and our acquiring banks rely on merchant representations that transactions are lawful and do not violate certain basic standards. It simply would not be practicable to implement a requirement to differentiate whether any particular transaction received from a marketplace was within a more narrowly tailored category of goods or services.

C. Who is a Payor?

Pursuant to Financial Code §2010(l), the delivery of money or monetary value to an agent must satisfy the payor's obligation to the payee. The payor is considered the "recipient" of the goods or services and "owes" the payment of money or other monetary value to the payee. The Department has asked whether the definition of "recipient" in this regard should be limited to persons that intend to consume, use or experience the good or service, in effect limiting the definition of "payors" to end users. The effect of an overly narrow interpretation of the exemption would be to impose an arbitrary preference for certain business models over others.

We are not aware of any basis for a narrow definition of the term "recipient" that would apply only to persons (including entities) that physically receive or consume a good. Individuals or entities that receive goods, physically or constructively, with the intent to resell those goods are no less "receivers" of the goods under any ordinary meaning of the term. Interpreting the term "payor" to exclude entities that receive goods or services for purposes of resale would constitute a preference for direct sale business models, notwithstanding the broader language of the statute. Indeed, we are aware of nothing in the legislative history to indicate that the legislature's desire to nurture the growth of online marketplaces was limited solely to retail, rather than wholesale activities. To the contrary, sites like Amazon have long offered services to both retail and wholesale communities.

If a business were to purchase goods or services either for its own use and for its inventory, and make a payment to a vendor through the vendor's contracted agent, there is nothing within the text of the exemption to indicate that such a payment should not fall within this exemption, or that goods purchased for the business' own use versus inventory goods should be treated differently. Pursuant to Section 2010(l), a "payor" is the person who *both* receives goods or services *and* owes the underlying

payment obligation to the payee in connection with the receipt of such goods or services. A limited interpretation of "recipient of goods or services" undermines a critical element of the meaning of "payor," which is the identification of the person that owes a payment obligation to the payee in respect of the receipt of the goods or services purchased. The manner in which the payor uses the goods or services is irrelevant both to the payee and to the public policy basis of the exemption. As a result, if a person receives, in any capacity, the goods or services purchased and owes the payment of money directly as a result of the benefit received in connection with its purchase, said person should meet the definition of "payor" under the statute. Furthermore, any difference in treatment between goods for corporate use and inventory goods would be unworkable in practice. As a payment processor, the transaction values that we see are aggregate amounts only. We have no knowledge of the specific goods or services purchased in any particular transaction or the uses to which the goods or services acquired in such transactions will be put.

d. Examples

(i) **Marketplaces.** A simple marketplace that directly pays its merchant participants must still work with banks and merchant processors in order to have access to the payment systems to receive payments in the first place. Thus, even the most basic marketplace transaction may have two parties between the payor and payee, i.e., the merchant acquirer and the Marketplace itself, as in the following flow:

Payor → Payment Processor → Marketplace → Payee

(ii) **Payment Facilitators.** MasterCard and Visa each have adopted rules to establish a category of "payment facilitators" or "payfacs" that provide a critical intermediary role in enabling small merchants to participate in e-commerce platforms, which may include a wide range of services to assist in enabling front-end onboarding of the merchants, on-going services and gateway connections to payment processors and back-end settlement. Thus, an entire industry exists for servicing small merchants that is premised on the idea that the payfac may assist in the receipt of payments on behalf of merchants, notwithstanding that the payments from the networks are first received by a marketplace, platform or other payments provider, for example:

Payor → Marketplace → PayFac → Merchant

As the foregoing two examples demonstrate, if the Department were to interpret Section 2010(l) in a manner that does not allow for multiple intermediaries between the payor and the agent of the payee, the result would be to eliminate the exemption for the very industry that the legislature sought to support. The statutory language of the exemption provides, in part, the "delivery of the money or other monetary value *to the agent* satisfies the payor's obligation to the payee" (emphasis added). Noticeably, the statutory language omits a direct link from the payor to the agent of the payee in respect of the settlement of the underlying payment obligation. Under a plain reading of the statute, it is evident the exemption does not explicitly require that the payor make payment *directly* to the agent of the payee. As a result, the complexity of the modern payments ecosystem and the "payment chains" becoming increasingly longer and more convoluted (as the Department notes in its request for comment) creates a scenario in which rigid statutory interpretation will stifle innovation and yield unintended consequences (*i.e.*, an exemption incapable of being satisfied). Each intermediary in the payment chain receiving funds for settlement has independent requirements to comply with the MTA for California payment

transactions. The current non-cash based payment schemes employed in California, and the country, are predicated on multiple intermediaries providing value adding technology and settlement solutions. While the payment stack may seem large, for payment processors the additional intermediaries are often federally chartered acquiring banks. Their presence in the payment chain only bolsters the safety and soundness of the payment system. As a result of the evolution of technology, it is rare for an agent of the payee to receive a payor's payment obligation directly from the payor in a non-cash context. To this end, we ask that the Department consider the plain reading of the exemption and the public policy reasons underpinning the exemption and clarify that an agent of the payee need not directly receive payment directly from the payor in order to meet the exemption.

(iii) **Non-US Based Payment Networks**. Please see the Department's letter dated February 21, 2019, http://www.dbo.ca.gov/Laws_&_Regs/dfi_orders_files/2019/2-21-19-Ltr-Re-agent-of-payee-exemption-AMENDED.JR.pdf (the "February 21 Letter"). In that case, the Department concluded that a foreign accountholder would not be considered the "payor" under the MTA because the starting place for the funds flow was outside of the jurisdiction of the MTA, which consequently resulted in an interpretation that the transaction lacked a payor. We respectfully request that the Department reconsider this position.

While it is true that transmission of funds from abroad into the U.S. is not a regulated activity, that does not alter the consideration of who is the payor in a purchase of goods by a Chinese consumer from a U.S. merchant. The defined term "payor" means "the recipient of goods or services, who owes payment of money or monetary value to the payee for the goods or services." Cal. Fin. Code §2010(l)(3). Read literally the definition clearly and accurately includes every foreign cardholder/account holder who uses an international payments service, whether a Visa or Mastercard credit or debit card, or the payment service described in the February 21 Letter, to make a purchase from a U.S.-based merchant, whether in person or over the internet. There is no support in the statute, in the legislative history or in public policy, for the position that the California legislature intended that payments by U.S. cardholders could qualify for the exemption while payments by a foreign cardholder could not.

For example, there is no doubt that the agent of the payee exemption applies to an online marketplace acting as agent for a merchant selling goods on the marketplace. For a typical Visa card transaction, the cardholder's bank would make a settlement payment to Visa, which in turn would make a settlement payment to the acquiring bank/merchant processor. Funds would then be transferred to the marketplace that would receive those funds as agent of the ultimate seller, and the marketplace would transfer the funds to the seller/payee. As indicated above, with appropriate documentation of the marketplace agent of the payee relationship, including that receipt of payment by the marketplace satisfies the cardholder's obligation to the seller/payee, this is exactly the fact pattern that the agent of the payee exemption was intended to address.

Now, assume that the cardholder is from Paris rather than New York. Nothing in the funds flows or legal relationships above changes in any way, except that the bank that makes the settlement payment to Visa is a French bank rather than a U.S. bank. Indeed, because Visa, the marketplace and the payment processors settle on an aggregate basis, the marketplace will receive a single payment that includes both U.S. and foreign-originated funds and the marketplace will similarly make a single combined payment to the seller/payee. In each case, the cardholder's obligation to the seller is extinguished upon payment to the marketplace. Under the logic of the February 21 Letter, however, the portion of the

payment that originated with a U.S. cardholder would be subject to the exemption, but the portion that originated from the French cardholder would not, all because of the assumption that a foreign cardholder/payor cannot be a "payor" within the meaning of the statute.

This result is not driven by the statutory language, since there is no mention of the location of the "payor" at section 2010(l). The fact that the payment from abroad is not considered money transmission until funds are received in the U.S. does not change the fact that the foreign cardholder is still the "payor" of this purpose.

Furthermore, attempting to draw such a distinction would serve no public policy purpose. The California legislature clearly intended the marketplace in this example to benefit from the agent of the payee exemption in order to facilitate ordinary course commercial payments for goods or services. Interpreting the statute to require licensing in order to receive payments from foreign cardholders but not US cardholders would mean that online marketplaces would need to either (i) undercut the very commercial activity the legislature sought to encourage by ceasing acceptance of foreign cards (in violation of network rules) or (ii) obtain precisely the license the exemption was designed to avoid. The fact pattern presented by the February 21 Letter is indistinguishable from the above, as payments from the foreign-issued payment devices were first routed through a U.S. registered money transmitter. Accordingly, we urge that Department to reconsider the rationale for its February 21 Letter.

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We appreciate the opportunity to provide our thoughts on the pending rulemaking and would welcome further dialogue as the Department moves toward proposed regulatory language. As indicated at several points above, if the Department does not ultimately agree with any aspect of our statutory analysis, we encourage the Department to use its exemptive authority to reach the same result. We believe that these clarifications would provide helpful certainty to the market without having a harmful effect on consumer protection or systemic soundness.

Very Truly Yours,

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First Data Corporation

cc: Jennifer Rumberger, Senior Counsel