

April 9, 2019

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Department of Business Oversight, Legal Division
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Re: *Invitation for Comments on Proposed Rulemaking, Money Transmitter Act: Agent of Payee (Pro 07/17)*

To Whom It May Concern:

These comments are submitted on behalf of The Money Services Round Table ("TMSRT") in response to the Invitation for Comments on Proposed Rulemaking (the "Invitation") relating to the agent of a payee exemption under the California Money Transmitter Act, Cal. Fin. Code § 2000 *et. seq.* (the "Act").

TMSRT Background

TMSRT was founded in 1988 as an information sharing and advocacy group for the nation's leading non-bank money transmitters. Its current members are RIA Financial Services, Sigue Corporation, American Express Travel Related Services Company, Inc., Moneydart Global Services, Inc. and Travelex Currency Services Inc., Viamerica Corporation, Western Union Financial Services, Inc., and MoneyGram Payment Systems, Inc. These companies offer services including bill payments and funds transfers (domestic and international) through retail points of sale, the Internet, and mobile devices, as well as the sale of money orders and other payment instruments, and the issuance, sale, and reloading of stored value products.

TMSRT members are licensed in all U.S. states that have nonbank licensing laws currently in effect,¹ including in California, and are Money Services Businesses ("MSBs") as defined by the Bank Secrecy Act, 31 USC § 5311 *et seq.* and its implementing regulations at 31 C.F.R. Chapter X (collectively, the "BSA"). Since TMSRT's founding 30 years ago, its members have worked collaboratively with states and others to assist in the passage of more than 27

¹ With the exception of one member that has a license application pending in New York State.

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state licensing laws, as well as countless revisions and amendments to such laws and their implementing regulations.

A payments services business is a business that is based on trust. Individual consumers and businesses obtain payments services (including funds transfers as well as other products and services that expand beyond the core remittance model) from nonbank companies that they believe are safe and sound, and they rely on these companies to appropriately and timely deliver or otherwise make available their funds consistent with any applicable contractual agreements. A money transmission regulatory system that provides appropriate protections to the public provides enhanced public confidence in the industry. This confidence, in turn, helps promote the payment services industry. Thus, TMSRT supports the implementation and maintenance of fair, reasonable and consistent money transmission laws designed to protect consumers.

The Agent of a Payee Exemption

The Act provides that a “person shall not engage in the business of money transmission in [California] . . . unless the person is licensed or exempt from licensure under [the Act] or is an agent of a person licensed or exempt from licensure under [the Act].”² The Act sets forth a number of exemptions, such as for banks, certain operators of clearance and settlement systems, and registered securities broker-dealers. Additionally, in 2014, the California legislature enacted AB 2209, which added an exemption for a “transaction in which the recipient of the money or other monetary value is an agent of the payee pursuant to a preexisting written contract and delivery of the money or other monetary value to the agent satisfies the payor’s obligation to the payee” (the “Agent of a Payee Exemption”).³ With respect to the Agent of a Payee Exemption:

- “An agent is one who represents another, called the principal, in dealings with third persons,” as defined by Cal. Civ. Code § 2295.
- A “payee” is the “provider of goods or services, who is owed payment of money or other monetary value from the payor for the goods or services.”
- The “payor” is the “recipient of goods or services, who owes payment of money or monetary value to the payee for the goods or services.”⁴

² Cal. Fin. Code § 2030(a).

³ *Id.* at § 2010(l).

⁴ *Id.*

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The Invitation indicates that the Department of Business Oversight (“DBO”) is seeking input from stakeholders to assist the DBO in developing regulations to clarify the scope of the Agent of a Payee Exemption. Drawing on the collective experience of its members, TMSRT offers the following comments in response to the Invitation.

TMSRT Comments Regarding the Agent of a Payee Exemption

General Comments

The Agent of a Payee Exemption, as explained in the legislative history of AB 2209, was intended to clarify that money transmission does not include a transaction in which the recipient of the payment is an agent of the payee and delivery of payment to the agent satisfies the payor’s obligation to the payee.⁵ Since the adoption of this express statutory exemption, a number of other states have followed California’s lead and affirmed—whether through legislation, regulation, guidance, opinion letter or otherwise—that, subject to certain conditions, state money transmission licensing laws do not apply to services provided as an agent of a merchant or other payee pursuant to a contractual agreement.

In particular, the Texas Department of Banking (“Texas DOB”) established, by rule, that a payment processor that “receives funds from a consumer on behalf of a consumer-facing entity that either sells goods or services other than money services” is exempt from licensing if certain specific criteria are met.⁶ In promulgating this rule, the Texas DOB explained that these types of transactions present “low risk to purchasers of money services, low risk of money laundering or related financial crimes, and low risk to the safety and soundness of MSBs.”⁷ At around the time of the passage of AB 2209 in California, the Texas DOB also affirmed by opinion letter that an intermediary acting as an “agent of a payee” was not engaged in money transmission because “payment to an authorized agent of a person is payment to the person.” The DOB elaborated that this conclusion:

...stems from the general doctrine of agency, which essentially states that whoever acts through another does the act himself. In essence, the agency relationship renders the exchange a two-party transaction between the [payee] and the customer. Without receipt of money in exchange

⁵ See, e.g., *AB 2209 Assembly Floor Analysis* (Aug. 13, 2014).

⁶ 7 Tex. Admin. Code §§ 33.4(d); see also, e.g., Mich. Comp. Laws §§ 487.1003(e), 487.1004(f) (as amended by S.B. 729, effective April 1, 2019); Kansas Guidance Document MT 2016-01 (stating that pursuant to Kansas’s common law of agency, “[b]ecause the customer’s transaction is completed upon the agent-of-the payee receiving payment, *there is no money transmission*”).

⁷ 7 Tex. Admin. Code § 33.4(a). Relatedly, the Financial Crimes Enforcement Network, which implements the BSA, reasoned in establishing a “payment processor” exemption under the BSA that a “contractual agreement for transmission services between the creditor or seller and the money transmitter is a relatively controlled flow of money that poses little money laundering risk, provided that the funds are transmitted only to the creditor or seller with whom the payment processor has contracted and not to another location or person.” 76 Fed. Reg. 43585, 43593 (Jul. 21, 2011).

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for a promise to make it available at a later time or different location, there is no money transmission.⁸

Similarly, Cal. Civ. Code § 2295 defines an agent as “one who represents another, called the principal, in dealings with third persons.” California courts have affirmed that:

The essence of an agency relationship is the delegation of authority from the principal to the agent which permits the agent to act “not only *for*, but *in the place of*, his principal” in dealings with third parties. (*People v. Treadwell* (1886) 69 Cal. 226, 236, italics in original.) “The heart of agency is expressed in the ancient maxim: ‘*Qui facit per alium facit per se.*’ [He who acts through another acts by or for himself.]” (*Wallace v. Sinclair* (1952) 114 Cal. App. 2d 220, 229; *see* 3 Am.Jur.2d (1986) Agency, § 2, p. 510.).⁹

Exemptions for an agent of a payee are grounded in the notion that the activity does not constitute money transmission because the payor’s funds are deemed received by the principal upon receipt by the agent; the agent acts *in the place of* the principal. No money is received for transmission, and no funds are held in trust on behalf of a payor. After the funds are delivered to the agent, the payor’s debt to the payee is fully extinguished. Thus, the function of money transmission law to protect consumers is not needed in this situation.¹⁰ The consumer’s interests are fully protected by the legal conclusion that his or her obligations with regard to any payment are extinguished to the same extent as if the funds had been delivered directly to the principal.

The agent of a payee exemption is thus distinct from other types of exemptions from money transmission licensing regimes, such as the exemption for banks. A bank may provide funds transfer services (in addition to a diverse array of other financial services), but applying the money transmission licensing regime to banks is unwarranted *because banks are already appropriately subject to regulation and oversight* under other laws and regulations; it is not because their funds transfer services are not the same as money transmission. It is important, therefore, that the contours of the Agent of a Payee Exemption be construed with precision so that only transactions that do *not* constitute money transmission, and that do not therefore warrant financial services oversight and regulation, are excluded. Such transactions are those in which [1] the intermediary acts on behalf of, and as a duly appointed agent of, a payee that is owed money for goods and services by a payor; and [2] by virtue of this agency appointment, payment by the payor to the intermediary is deemed payment to the payee.

⁸ Texas Dept. of Banking, Opinion No. 14-01 (May 9, 2014) (internal citations omitted).

⁹ *Channel Lumber Co. v. Porter Simon*, 78 Cal. App. 4th 1222, 1227 (2000).

¹⁰ *See, e.g.*, Cal. Fin. Code § 2002 (stating that the purposes of the Act include protecting the interests of persons who use money transmission services and providing for the safe and sound conduct of money transmission business).

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Bill Payment Transactions May Come within the Scope of the Agent of a Payee Exemption

Legislative history for AB 2209 includes the statements that: (1) “online marketplace transactions are not money transmission”; and (2) “a bill payment service would not qualify for this limited payee/agent exemption.”¹¹ These statements implicitly assume that the former transaction is conducted pursuant to a written agreement that establishes an agency arrangement, and that the latter is not. It may be the case, however, that an online marketplace transaction or any other payment processing transaction involving the sale of goods or services is *not* handled by an intermediary as an agent of the payee. And, it may be the case that a bill payment transaction *is* handled by an intermediary as an agent of the payee. The DBO should affirm in its rulemaking that a transaction may come within the agent of a payee exemption—provided that it meets the appropriate criteria—regardless of whether it is for the payment of a bill for goods or services already obtained, or for the payment for goods and services sold at the point of sale or through an online marketplace.

The agent of a payee concept can be consistent with a “bill pay” transaction. In many cases, a biller or a vendor, such as a wireless carrier, an energy company, or some other utility (each, a “Biller”), may wish to expand the means by which consumers can pay their bills for these services. For many consumers, it may be easier, more convenient, and more cost-effective to pay such a bill in cash. It would be prohibitive, however, for each Biller to create its own cash-acceptance payment network through physical walk-up locations. Instead, the Biller can enter into contractual agreements with payment services intermediaries to provide its customers the option to make payments through multiple convenient locations or payment channels.

In some cases, Billers enter into such agreements with licensees directly and are able leverage their broad retail agent networks for such bill payment services. In other cases, however, Billers enter into agreements with intermediaries who have relationships with other Billers and money transmission licensees. These latter arrangements enable money transmission licensees to provide similar bill payment services on behalf of a broad array of Billers. In both instances, consumers benefit from more options to pay their bills, with no increased risk because payment is deemed received by the biller upon receipt by the (common-law) agent.¹²

The DBO should affirm that, where these arrangements are structured such that the Biller appoints the intermediary as its common-law agent pursuant to Cal. Fin. Code § 2010(I), and

¹¹ AB 2209 *Assembly Floor Analysis* (Aug. 13, 2014).

¹² We use the term “common-law” agent here to affirm that these arrangements are different from the use by a California licensed money transmitter of “statutory” agents pursuant to Cal. Fin. Code § 2060 – 2063 (*i.e.*, what other state licensing laws refer to as “authorized delegates” or “authorized agents”).

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the receipt of funds by the agent is deemed receipt by the Biller, the transactions do not constitute money transmission subject to regulation under the Act. The DBO should affirm that this exemption holds even when the Biller appoints an agent and that agent in turn appoints the licensee (and its statutory authorized agent locations) as its agent to receive bill payments on behalf of the Biller.¹³

In short, the DBO should affirm that the § 2010(*I*) applies to exempt any transaction processed pursuant to a preexisting written agency contract between a Biller and its agent that provides that the receipt of funds by the agent is deemed receipt of funds by the Biller. The DBO should affirm that this is so even where the agent appoints another entity (such as a licensed money transmitter) as its agent to receive funds on its behalf, again pursuant to a preexisting written agency contract. Doing so will continue to ensure that consumers have low-cost and convenient options to pay bills directly to Billers, and will not create any undue risk to consumers or to the financial system.

We caution, however, that § 2010(*I*) should *not* operate to exempt transactions where there is no written agreement affirming that the payor's obligation to the payee is extinguished upon receipt of funds by an intermediary. That is, where an intermediary receives and transmits funds on behalf of a payor—and holds funds in trust on behalf of a payor—the intermediary should rightly be understood to be holding the payor's funds in trust. In these cases, the payor's obligation is not extinguished until the funds are actually delivered to the Biller (or any other payee), and the protections of the Act are therefore warranted. In short, for a transaction to be exempt under Cal. Fin. Code § 2010(*I*), the receipt of funds by the agent from the payor must extinguish the payor's obligation to the payee—regardless of whether the payment is for a utility bill, a lease, an insurance premium, or any other good or service (other than money transmission) that a consumer has obtained or is obtaining and must consequently pay for.

Sub-Agency is Consistent with the Agent of a Payee Exemption for Bill Payment

In many cases, licensed money transmitters such as TMSRT members provide regulated money transmission services through agents pursuant to a written agreement, per Cal. Fin. Code § 2060. Pursuant to Cal. Fin. Code § 2030(a), no license is required of an agent of a person licensed, and as such these agents are not required to be licensed to provide regulated money transmission services on behalf of the licensee. As described above, however, a

¹³ As discussed further below, TMSRT does not believe that sub-agency arrangements are inconsistent with the agent of a payee exemption of § 2010(*I*). In addition, a common-law sub-agency arrangement in connection with an agent-of-a-payee bill payment transaction does not implicate the prohibition on a statutory agent under using a sub-agent under Cal. Fin. Code § 2060(g) because an agent-of-a-payee transaction is exempt in the first place, even if processed by a licensee or its statutory agent.

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licensed money transmitter may also process transactions as an agent of a payee. We respectfully believe that the DBO rulemaking should expressly affirm that such transactions, processed through retail agent locations, come within the Agent of a Payee Exemption. Specifically, transactions should be exempt under the Agent of a Payee Exemption where: (1) an intermediary operates pursuant to a written agreement with a biller pursuant to which payment to the intermediary is deemed payment to the Biller; (2) the intermediary receives payments on behalf of the Biller through its own agent network; and (3) the intermediary acts under its own name (*i.e.*, the licensee name) through those agents.

Where these criteria are met, as a matter of agency law and as set forth in the applicable agreements, the receipt of funds by the retail agent location is deemed receipt of funds by the intermediary and, in turn, by the Biller. As noted above, an agent acts in the place of its principal, and a sub-agency arrangement does not disrupt this principle. Indeed, the California Civil Code expressly contemplates that an agent (as defined by Cal. Civ. Code § 2295 and incorporated by reference into Cal. Fin. Code § 2010(*l*)) may operate through a sub-agent.¹⁴ And, the Act itself further supports this notion in expressly excluding from the licensing requirement an agent of an exempt entity.¹⁵ If the licensing requirement does not apply—whether to a bank or to a transaction processed as an agent of a payee—the use of an agent to facilitate the transaction should not turn it into a regulated transaction. In short, where the receipt of funds by an agent is deemed the receipt of funds by the principal, the receipt of funds by the agent’s agent can also be deemed the receipt of funds by the principal.¹⁶

Conclusion

TMSRT believes that an effective money transmission licensing and oversight regime helps to maintain both consumer trust and the viability of the businesses by ensuring that these businesses are operated on a sound financial basis and that consumer funds are not impaired. Any DBO rulemaking regarding the Agent of a Payee Exemption should thus ensure that the scope of exempted transactions is not overly broad. The DBO should ensure, however, that its regulations are sufficiently flexible to allow transactions that meet the intent of the exemption—that do not involve receiving money for transmission—are appropriately exempted.

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¹⁴ See Cal. Civ. Code § 2349.

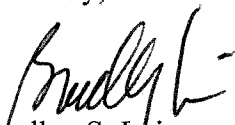
¹⁵ See Cal. Fin. Code § 2030(a) (excluding from the licensing requirement, among others, “an agent of a person . . . exempt from licensure under” the Act).

¹⁶ We also reiterate that the prohibition on sub-agency under § 2060(g) does not apply to such arrangements, because the transactions at issue are exempt under § 2010(l) and thus are not processed pursuant to the agency provisions (including the limitation on *statutory* sub-agency) under § 2060.

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TMSRT appreciates the opportunity that to provide input through the Invitation on the DBO's forthcoming rulemaking on the Agent of a Payee Exemption. We thank you for your consideration of the items raised herein, and we would be happy to discuss them further at your convenience.

Sincerely,



Bradley S. Lui
Counsel to The Money Services Round Table