ELECTRONIC TRANSACTIONS ASSOCIATION

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April 9, 2018

Commissioner Jan Lynn Owen
Department of Business Oversight
1515 K Street
Suite 200
Sacramento, California 95814

RE: Money Transmitter Act: Agent of Payee – PRO 07-17

Dear Commissioner Owen:

On behalf of the Electronic Transactions Association ("ETA"), we appreciate the opportunity to share our thoughts regarding the Money Transmitter Act: Agent of Payee. Money Transmission licensure at its core is designed for consumer protection. There is no need for consumer protection-focused regulation to apply where there is no likelihood of consumer harm or risk of loss. The agent of payee exemption was written broadly by the legislature to ensure that licensure was not required in instances where there is no material risk of consumer harm. As such, it is imperative that the Department of Business Oversight ("DBO" or "Department") view the agent of payee exemption broadly, just as the legislature intended.

ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services, including financial institutions, transaction processors, payments networks, licensed money transmitters, and others. ETA also has members that are engaged in online lending for commercial enterprises, primarily small businesses, either directly or in partnership with other lenders.

Money transmitters provide critical services for consumers and small businesses. The services provided by money transmitters help underserved and underbanked consumers have access to financial services through a variety of products including peer-to-peer payments, bill payment services, and mobile wallets. Technology is changing the way that consumers use financial services, but money transmission regulation should be driven primarily on whether there is risk to a consumer. As California, along with many other states, consider how to apply money transmission regulations to new technologies, it is imperative that harmonization with other states is a consideration as well. The Conference of State Banking Supervisors FinTech Industry Advisory Panel recently released their recommendations for harmonization and included in those recommendations is that agent of the payee exemption be harmonized across states. ETA supports those recommendations and asks that Department take those recommendations into consideration as it looks at this issue.

Agent of Payee Exemption

The California legislature took a detailed and thoughtful approach to the state's money transmission licensing requirements including exemptions such as the agent of payee as detailed below. In doing so, the legislature defined the agent of the payee exemption broadly for situations

where there is no material risk of consumer harm. The rationale is that the California money transmission laws are, at their core, designed for consumer protection. There is no need for consumer protection-focused regulation to apply where there is no likelihood of consumer harm or risk of loss. There is no risk of loss in cases where all consumer obligations are discharged upon receipt of funds and consumers are guaranteed rights to their items. This fundamental principle does not change even when the number of merchants or submerchants increase, nor when the types of goods or services sold increase. The legislative intent was to provide a broad exemption for situations where there is no material risk of consumer harm. As such, the items included in what is a good or service is not the appropriate question to answer. The more appropriate question, and one that aligns with the legislative purpose for the exemption, is whether there is material risk of consumer harm. No such harm exists under the exemption.

The lack of potential for consumer harm is particularly true in these types of transactions given the sophisticated payments ecosystem that protects consumers and enables selling of goods and services, regardless of whether they're selling real estate, cars, books, installation services, insurance, or pencils – customers are actually at less risk of loss due to guarantees and security of the large online service intermediaries that make sales more secure for consumers. Therefore, it doesn't matter what is being sold, but rather how it is being sold. The consumer has no risk of loss in agent of payee situations as laid out in the legislation. The legislation focused on the form of the sale protecting consumers, not the items sold, and that's what should drive regulatory oversight. This is further evidenced by the legislature intentionally not defining what goods/services were themselves, and clearly exempting online services like Amazon and Airbnb – companies that sell vastly different items/services, really spanning as broadly as could be conceived in 2015 when they drafted the legislation.

Agency Law

Additionally, any new rule should make clear that acceptable payment models can include payment processing for any services or offerings when acting as an agent of a merchant. That includes instances of multiple entities serving as simultaneous agent of the merchant. Under accepted principles of agency law, sub-agents and co-agents can represent the principal in the same manner as the original agent.[1] Agency law applied to parties involved with money transmission dictates that payments made to a sub-agent/co-agent satisfy the payor's obligation to the payee as if the payment was made directly to the principal – in other words, making a payment to one counts as a payment to all. Thus, the existence of two or more layers of agency is not, by itself, enough to negate California's agent-of-payee exemption.[2] Just as the payee and the agent collapse into a single party in the transaction (agent stands in the shoes of the principle), so too do co-agents and sub-agents collapse into one. Moreover, an agent-of-payee exemption commensurate to the bounds of agency law does not detract from the goals of California's licensure law because consumer protection concerns are satisfied when the consumer's debt is extinguished upon

[1] See Cal. Civ. Code § 2351 ("A sub-agent, lawfully appointed, represents the principal in like manner with the original agent."); Rest. (Third) of Agency § 1.04 ("In a relationship of co-agency, neither agent is the other's agent … Each coagent owes duties to the common principal."); Soma Surgery Center, Inc. v. Aetna Life Ins. Co., No.: CV 16–5802 DSF, 2018 WL 1989442, at *2 (C.D. Cal. April 11, 2018)("Sub-agency is a well-established legal principle").
[2] Cal. Civ. Code § 2010(l).

payment to the agent(s).

Interpretation Principles of California Legislation

California courts, when analyzing a California statute to ascertain its purpose, look to the legislative intent of the statute. In doing so:

> a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.] A statute should be construed whenever possible so as to preserve its constitutionality. [Citations.][3]

California case law thus sets forth a hierarchy of authorities to interpret the purpose of a law as follows:

1. the words of the statute themselves;[4]
2. the statutory context and construct;[5]
3. the consequences of a particular interpretation;[6] and
4. the legislative history.[7]

The California Supreme Court has consistently held in respect of statutory interpretation that "[i]f no ambiguity appears in the statutory language, we presume that the Legislature meant what it said, and the plain meaning of the statute controls."[8] Only if a plain meaning reading of a statute were to yield an absurd result or contravene the clear intent of the legislature is a deviation from a plain meaning reading appropriate.[9]

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[3] *Dep't of Water & Power v. Energy Resources Conservation & Development Com.*, 2 Cal. App. 4th 206 (Cal. Ct. App. 1991) (citations omitted).

[4] *The People v. Steven Edward Gray*, 319 P.3d 988 (Cal. 2014).

[5] *California State Restaurant Assoc. v. Witlow*, 129 Cal. Rptr. 824 (Cal. Ct. App. 1976) ("In order that legislative intent be given effect, the statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part.").

[6] *Dep't of Water & Power*, 2 Cal. App. 4th 206 (citations omitted).

[7] *Santa Barbara Country Taxpayers Assoc. v. Country of Santa Barbara*, 194 Cal. App. 3d 674, 680 (Cal. Ct. App. 1989) ("One ferrets out the legislative purpose of a statute by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated and vindicated, the social history which attends it, the effect of the particular language on the entire statutory scheme.").

[8] *The People v. Steven Edward Gray*, 319 P.3d 988 (Cal. 2014); *Caminetti v. United States*, 242 U.S. 470, 485 (1916) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which . . . [it] is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.").

[9] *Disabled and Blind Action Committee of California v. Jenkins*, 118 Cal. Rptr. 536 (Cal. Ct. App. 1974) ("Even the

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Analysis of California's Agent of the Payee Legislation

California regulates money transmission pursuant its Money Transmitter Act (the "**MTA**"). On September 20, 2014, the California Legislature amended the MTA via Assembly Bill No. 2209 ("**AB-2209**") to provide for, among other items, the so-called "**Agent-of-the-Payee Exemption**" from the MTA for a person who receives money or monetary value as an agent of a payee pursuant to a preexisting written contract and whereby the delivery of the money or monetary value to the agent satisfies the payor's obligation to the payee.[10] For purposes of the exemption, (1) agent means "one who represents another, called the principal, in dealings with third persons"; (2) payee means "the provider of goods or services, who is owed payment of money or other monetary value from the payor from the goods or services"; and (3) payor means "the recipient of goods or services, who owes payment of money or monetary value to the payee for the goods or services."[11] AB-2209 was first read by the California Legislature on February 20, 2014 and, between that date and its passage on September 20, 2014, it generated five separate pieces of legislative analysis archived with the State.

First, on April 28, 2014, the Assembly Committee on Banking and Finance held a hearing introducing the revised definition of money transmission as follows:

> A third party's acceptance of currency, funds, or other value from a payor and delivery of the currency, funds, or other value to the payee. "Money transmission" does not include a transaction in which the recipient of the currency, funds, or other value is an agent of the payee, and delivery of the funds to the agent satisfies the payor's obligation to the payee.[12]

Comments in the hearing clarified that AB-2209 was presented as a follow up to AB 786, Chapter 533, Statutes of 2013, titled *Emerging Technology and the Money Transmission Act*, as well as subsequent research on growing technological changes in the payments and money transmission industries.[13] The goal of AB 786 was to update the MTA in respect of a "changing marketplace" and to "ensure that it does not create unnecessary barriers to entry for new entities wishing to enter the payments space."[14] AB-2209 was introduced to clarify that a "very broad interpretation where any movement of money from one party to another party while using a third party intermediary [is not] interpreted as money transmission."[15] The commentary noted that the definition at the time (prior to the enactment of AB-2209) is "circular" and, "[a]t worst, [] is a complicated and over broad definition that fails to address the nuances of the modern payments economy."[16]

The commentary provides as a non-exclusive example of the application of the Agent-of-the-Payee

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literal language of a statute may be disregarded to avoid absurdities or to uphold the clear, contrary intent of the legislature.").

[10] Cal. Fin. Code § 2010(l).

[11] Cal. Fin. Code § 2010(l); Cal. Civ. Code § 2295.

[12] *Money Transmitter Act: Hearing on AB 2209 Before the Assembly Committee on Banking and Finance* (April 28, 2014).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

Exemption, the scenario of an online service that facilitates the purpose of goods and services as between customers and merchants while acting as an agent for such merchants.[17] The commentary makes clear that the case of the online service is merely one example of the need for the Agent-of-the-Payee Exemption.[18] To further support the need for the exemption, the commentary expressly states that "[a]t least four states have formally recognized the payee-agent exception to the definition of money transmitter," and cites New York, Nevada, Ohio, and Texas as references.[19] The commentary makes no mention of any limitation on the application of the exemption as applied in those states.[20]

The commentary, in respect of goods and services, does not discuss the scope of their meaning other than to make clear that they would arise in the context of money transmission whereby they would be purchased with funds and that such purchase proceeds, when properly structured, could be part of a transaction not subject to the MTA pursuant to the Agent-of-the-Payee Exemption. The commentary, in respect of payor and payee, does not discuss the scope of their meaning beyond their plain meanings as proposed pursuant to AB-2209.

Second, on May 14, 2014, the Assembly Committee on Appropriations held a hearing on AB-2209, reiterating briefly the purpose and background of the bill in keeping with the discussion during the April 28, 2014, hearing of the Assembly Committee on Banking and Finance.[21]

Third, on June 9, 2014, the Senate Banking & Financial Institutions Committee held a hearing on AB-2209 and reiterated the application of the bill, noting that "[m]any goods and services are exchanged with the assistance of third parties," and that "AB 2209 would amend the MTA to provide that the third party . . . is not required to be licensed as a money transmitter."[22] While the discussion noted that the internet has created services where the application of the Agent-of-the-Payee Exemption is particularly important, it did not limit the application of the exclusion to this use case and, again, cited the exemption as applied in New York, Nevada, Ohio, and Texas as examples with no further discussion of a limited application in those states.[23] In respect of the goods and services concepts, the committee record does not evidence any analysis of the concepts other than that they are capable of being exchanged with the assistance of third parties.[24] In respect of the payor and payee concepts, the committee records does not evidence any analysis of the concepts.[25]

Fourth, on August 4, 2014, the Senate Rules Committee held a third reading of AB-2209 in which the Office of Senate Floor Analysis reiterated briefly the previously discussed purpose of the bill.[26]

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[17] *Id.*
[18] *Supra* n.10.
[19] *Id.*
[20] *Id.*
[21] *Money Transmitter Act: Hearing on AB 2209 Before the Assembly Committee on Appropriations* (May 14, 2014).
[22] *Money Transmitter Act: Hearing on AB 2209 Before the Senate Banking & Financial Institutions Committee* (June 18, 2014).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Money Transmitter Act: Hearing on AB 2209 Before the Senate Rules Committee* (August 4, 2014).

Fifth, on August 13, 2014, the Senate amendments to AB 2209 were concurred in. The summary of the Assembly session notes that the Agent-of-the-Payee Exemption broadly "[e]xempts from licensure a retail 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."[27] The commentary reproduces much of the same commentary in the April 28, 2014, Assembly Committee on Banking and Finance hearing.[28] Again, it reiterates the broad nature of the exemption (using as a non-exclusive example that of an online service), and references New York, Nevada, Ohio, and Texas as examples with no further discussion of a limited application in those states.[29] It does not provide further interpretation of the goods, services, payor, or payee concepts.

In addition to these five pre-enactment documents, AB-2209 was published in the Legislative Counsel's Digest with a preamble that sets forth the purpose of the bill. In respect of the Agent-of-the-Payee Exemption, the preamble states that:

> This bill would exempt from the requirements of the [MTA] 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.[30]

The only mention the preamble makes to online activity is in respect of the amendments made to customer receipts whereby the bill would require regulatory reports made by a licensee to the Department of Business Oversight to include, if feasible, "whether an outstanding money transmission was conducted via a mobile application or an Internet Web site."[31] The preamble does not expressly state or suggest a limited focus of the Agent-of-the-Payee Exemption based on how the service is offered, or otherwise.[32] The preamble does not make mention of any particular limitation of the concepts goods, services, payor, or payee.[33]

A review of each of the five legislative analyses archived with the California Legislature in respect of AB-2209 demonstrates that the California Legislature did not intend to limit the scope of the Agent-of-the-Payee Exemption beyond the four corners of its plain meaning. While the legislative history does highlight one particular example of how the Agent-of-the-Payee Exemption would be applied, that example is non-exclusive. It is therefore inappropriate to infer from the Legislature's hearings and commentary that the Agent-of-the-Payee Exemption has any limitation beyond its plain meaning and associated defined terms. Similarly, the legislative history evidences no intention of the California Legislature to limit to scope of the goods, services, payor, and payee concepts beyond their plain means as defined, in the case payor and payee, in MTA.

Precedent States

[27] *Money Transmitter Act: Hearing on AB 2209 Before the Senate Rules Committee* (August 4, 2014).
[28] Money Transmitter Act, S. Res. (August 13, 2014).
[29] *Id.*
[30] A.B. 2209 (Ca. 2014).
[31] *Id.*
[32] *Id.*
[33] *Id.*

The bill analyses of AB-2209 refer numerous times to the agent of the payee exemptions in New York, Nevada, Ohio, and Texas as authority for the concept as incorporated in AB-2209. It is therefore instructive to review the scope of such states' exemptions.

In New York, "[n]o person shall engage in the business of selling or issuing checks, or engage in the business of receiving money for transmission or transmitting the same, without a license therefor obtained from the superintendent as provided in this article, nor shall any person engage in such business as an agent, *except as an agent of a licensee or as agent of a payee . . . .*"[34] An agent of a payee means "any person authorized by a payee to receive funds on behalf of the payee and to deliver such funds received from the payor to the payee."[35] The law is not limited by any further concept of type of business, sector, or nature of the goods or services involved. Rather, it broadly exempts from licensure any person acting as an agent of a payee and provides no definition of the payee concept.

In Nevada, "[a] person shall not engage in the business of selling or issuing checks or of receiving for transmission or transmitting money or credits unless the person is licensed."[36] Further, "[a] person shall not engage in such business as an agent except as an *agent of a licensee or a payee*."[37] Nevada's law and its implementing regulations do not limit further the application of the agent of the payee exemption to the sale of certain goods or services, nor define the payee concept.

In Ohio, "[n]o person, regardless of the location of that person, its facilities, or its agents, shall receive, directly or indirectly and by any means, money or its equivalent for transmission from a person located in this state, unless that person receiving the money or its equivalent for transmission is a licensee, an authorized delegate of a licensee that is not itself required to be licensed," or otherwise is exempt.[38] Transmit money means "to receive, directly or indirectly and by any means, money or its equivalent from a person and to deliver, pay, or make accessible, by any means, method, manner, or device, whether or not a payment instrument is used, the money received or its equivalent to the same or another person, at the same or another time, and at the same or another place, *but does not include transactions in which the recipient of the money or its equivalent is the principal or authorized representative of the principal in a transaction for which the money or its equivalent is received*, other than the transmission of money or its equivalent." [39] Authorized representative is not defined. Ohio therefore broadly exempts authorized representatives engaged in money transmission for the sale of any goods or services other than when the underlying transmission is for the purpose of money transmission itself (i.e., not connected with a separate purchase of a good or service).

In Texas, pursuant to the Texas Money Services Act ("MSA"), "[a] person may not engage in the business of money transmission or advertise, solicit, or hold itself out as a person that engages in

[34] N.Y. Banking Law § 641.
[35] N.Y. Comp. Codes R. & Regs. tit. 3, § 406.2.
[36] Nev. Rev. Stat. § 671.040.
[37] *Id.*
[38] Ohio Rev. Code Ann. § 1315.02(A).
[39] Ohio Rev. Code Ann. § 1315.01(G).

the business of money transmission unless the person" benefits from an applicable exemption.[40] One exemption provided by the Texas MSA is for "a person acting as an agent" for federally insured financial institutions and foreign bank branches or agencies provide that: (1) the entity is liable for satisfying the money services obligation owed to the purchaser on the person's receipt of the purchaser's money, and (2) the entity and person enter into a written contract that appoints the person as the entity's agent and the person acts only within the scope of authority conferred by the contract."[41] Notably, on May 9, 2014, the Texas Department of Banking, in Opinion No. 14-01, clarified that "a properly authorized agent of a principal (not limited to banking institutions) who receives payment on behalf of the principal within the scope of that agency, does not engage in the business of money transmission, and therefore does not need a license under the Act."[42] Purchaser is not defined.

In each precedent state there is no limitation of the agent of the payee (or equivalent) provision to certain types of business models (e.g., e-commerce or online services) or certain types of goods and services that serves as the underlying predicate for the transmission of money (except that in Ohio there must be a transaction separate from the mere transmission of money, such as the separate sale of a good or service). The payor and payee concepts, and their equivalents, are not further limited or defined.

8 other states have subsequently adopted the agent of the payee exemption as well, all of them focused on facilitating commercial economic exchange.[43]

Statutory Construction

Pursuant to California case law, if the plain meaning of a statute is unclear, an analysis of its construct is appropriate. In respect of the MTA, an analysis of its overall construction demonstratives that the agent of the payee exemption is not to be narrowly construed or read as being more narrow than the plain meaning of the words used to craft it.

Notably, AB-2209 expressly amended the MTA to add the definition of e-commerce to mean "any transaction where the payment for goods or services is intended via a mobile application or an Internet Web site."[44] The e-commerce concept is used in the MTA in other places, such as in

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[40] Tex Fin. Code § 151.302(a).
[41] Tex Fin. Code § 151.003(5).
[42] Texas Department of Banking, Opinion No. 14-01 (May 9, 2014), *available at* http://txdob.ctspublish.com/texas/DocViewer.jsp?doccode=z20000511&z2collection=texas#JD_LO-14-01.
[43] Kentucky - Ky. Rev. Stat. § 286.11-007(6); North Carolina - N.C. Gen. Stat. § 53-208.44(a)(8); Washington - Wash. Rev. Code § 19.230.020(9)(c); Hawaii - Hawaii Department of Commerce and Consumer Affairs, "General Money Transmitter FAQS", available at http://cca.hawaii.gov/dfi/mt-faq/; Illinois - Illinois Department of Financial and Professional Regulation, Division of Financial Institutions, "Statement Regarding Third-Party Payment Processors and the Transmitter of Money Act," available at https://www.idfpr.com/forms/DFI/CCD/07292015StatementThirdPartyProcTOMA.pdf; Connecticut - State of Connecticut Department of Banking, Memorandum, "No Action Position on Money Transmission Licensure Requirement for Persons Acting as an Agent of a Payee," (October 24, 2017), available at https://portal.ct.gov/-/media/DOB/consumer_credit_nonhtml/102417MemoAgentofPayeepdf.pdf?la=en; Kansas - Kansas Office of the State Bank Commissioner Guidance Document, MT 2016-01, "Regulatory Treatment of an Agent-of-the-Payee," (November 30, 2016), available at http://www.osbckansas.org/mt/guidance/mt2016_01_agent_of_the_payee.pdf; West Virginia – Senate Bill 603 (Effective June 7, 2019), amending West Virginia §32A-2-3.
[44] Cal. Fin. Code § 2003(j).

respect of the obligation of a licensee or its agent to give a customer a receipt at the time of a transaction related to e-commerce that details "the amount that will be received by the designated recipient before any fees, taxes, or other amounts payable by the designed recipient are deducted, using the term "total to recipient" or a substantially similar term."[45] The California Legislature considered how e-commerce transactions should be applied in respect of the MTA and expressly decided not to incorporate such concept into the broad context of agent of the payee. Instead, the Legislature decided to apply that definition in the narrow context of transaction receipts. The resultant statutory construction of the MTA following AB-2209 evidences clear legislative intent to apply the agent of the payee exemption broadly, to cover all relevant agent of the payee structures and underlying transactions, similar to the other states' similar exemptions from which the California Legislature drew precedential authority, not limited by any concept of e-commerce or other technology-enabled service.

In respect to the goods, services, payor, and payee concepts, the MTA does not define goods or services. It does define, however, payor as "the recipient of goods or services, who owes payment of money or monetary value to the payee for the goods or services," and payee as "the provider of goods or services, who is owed payment of money or other monetary value from the payor for the goods or services."[46] Thus, the payor and payee concepts are defined in reference to each other, requiring only that they are counterparties in the purchase of goods and services for which payment obligations flow from a payor to a payee. The MTA imposes no further limitations on the concepts on the plain meaning of the terms. The legislative history evidences no further meaning imputed on such terms, and their addition to the MTA in connection with Agent-of-the-Payee Exemption evidence the California Legislature's intention not to limit their application to e-commerce, technology-enabled services, or any other transaction type.

Summary

In applying each of the major cannons of California statutory interpretation it is clear that (a) the concept of goods and services is broad, (b) the Agent-of-the-Payee Exemption applies beyond the context of e-commerce sites selling products and collecting payments on behalf of vendors, and (c) the concepts of payor and payee have their plain meanings as ascribed to them in the MTA. First, the plan meaning of the exemption and each term is clear and unrestricted. Second, the MTA's statutory construct following the adoption of AB-2209 demonstrates that e-commerce limitations apply to certain aspects of the MTA, but the Agent-of-the-Payee Exemption, along with its associated concepts of goods, services, payor, and payee, is not one of them. Third, interpreting the Agent-of-the-Payee Exemption and its associated concepts of goods, services, payor, and payee broadly would not have adverse consequences and, in fact, such a broad interpretation would be in line with the precedential states reviewed during the passage of AB-2209 and various states' corresponding exemptions since. Fourth, none of the five legislative analyses created during the legislative process restrict the Agent-of-the-Payee Exemption and its associated concepts of goods, services, payor, and payee to the exclusive application of online services, offerings or any other application; rather, they evidence that such services and offerings, among other business types that

[45] Cal. Fin. Code § 2003(1)(I).
[46] Cal. Fin. Code § 2010(l).

satisfy the transactional requirements of the exemption, benefit from it.

Specific Responses to Questions Posed by The Proposed Rulemaking

Goods and Services

1. **Financial Code section 2010, subdivision (l)(1), makes the agent-of-payee exemption available for transactions in "goods or services." What items do and do not fall within the term "goods or services"?**

ETA believes that term "goods or services" should be interpreted to be as broadly as possible and in line with the intent of the legislature which does not discriminate for purposes of the agent of payee exemption which "good or services" are being provided, but rather the risk of loss for consumers. The nature of the types of "goods or services" offered by merchants and bought by consumers is ever changing and providing for a broad interpretation of "goods or services" provides regulatory consistency for all parties including consumers, merchants, and the companies that help those transactions take place. This should include all types of good and services.

   a. **Does the term "goods or services" encompass assets, rights, interests, or benefits of any kind or nature (e.g., residential housing, real estate, right of publicity, goodwill, intellectual property, insurance, etc.)?**

Yes. Of the examples used in this question, Insurance is the closest to what our members do. Processing payouts of contractual insurance benefits (particularly when the payor is a large, established insurance company) doesn't have the inherent risks of money laundering or terrorist financing that usually prompt money transmission regulation.

   b. **Does the term "goods or services" refer only to the types of items and services one typically finds available on online marketplaces like Amazon and Airbnb?**

No. Any goods and services.

   c. **Are payments in satisfaction of debts to the government (e.g., taxes, fees, fines) a payment for "goods or services?"**

Yes, so long as there is no risk of loss and where all consumer obligations (taxes, fees, fines) are discharged upon receipt of funds.

With respect to each of the alternative interpretations described above, what is the economic impact that each interpretation would have on industry?

Supporting (a) and (c) opens up technological solutions for consumers and businesses who currently may be limited to antiquated payment methods to receive their funds. Think of how much better, e.g., a life insurance payout would be if the recipient – who clearly has other issues to deal with – could receive funds in his/her bank account immediately instead of waiting for a paper

check, having to deposit it at the bank, etc. Supporting (b) maintains the status quo, limits innovation, and is not consistent with legislative intent.

Receives Goods

Financial Code section 2010, subdivision (l)(3), defines "payor" as a "recipient" of "goods." What does it mean to "receive" goods? Does one "receive goods" only by being an end consumer – i.e., someone who intends to consume, experience, use, or gift those goods?

No.

Alternatively, does one "receive goods" by physically receiving them but without consuming or experiencing them (e.g., by being a retailer that maintains goods in stock)?

Yes – an example would be merchants receiving goods wholesale. There's no difference in processing the payment for a merchant receiving wholesale goods from a wholesaler versus a business receiving retail goods from a merchant.

Alternatively, does one "receive goods" merely by receiving title to them, without having either physically received or consumed them (e.g., by being a merchant of record for goods that it acquired title to but never physically received)?

Yes – one example would be of a drop-ship e-commerce businesses that take "flash title" to goods as part of the logistics services that they offer to merchants. There's no difference in processing the payment for a consumer purchasing from a drop-shipper versus a consumer purchasing from a reseller.

With respect to each of the alternative interpretations described above, what is the economic impact that each interpretation would have on industry?

These open up technological solutions for consumers and businesses who currently may be limited to antiquated payment methods to receive their funds. Also, the limited read of "goods" doesn't acknowledge the complexities of commerce, so ends up with an inconsistent result of receiving an exemption for merchants selling goods via a third-party online service, but other forms of distribution (wholesale, drop-shippers, etc.) being deemed money transmission. If the transaction is part of a legal commerce business model, the payments processing risks are not different between the different forms of distribution.

2. **Financial Code section 2010, subdivision (l)(3), also defines "payor" as a "recipient" of "services." What does it mean to "receive" services?**

(a) Clearly, one "receives services" by virtue of experiencing and enjoying such services as an end user. For example, a Lyft passenger is "receiving services" from a Lyft driver when the passenger receives a ride to the airport. Does a commercial entity

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"receive services" when contractors perform contractual duties owed to the entity? For example, is Lyft "receiving services" from a Lyft driver within the meaning of Financial Code section 2010, subdivision (l)(3)?

Yes.

(b) **Generally, does a party "receive services" from a counterparty whenever that counterparty performs contractual duties owing to that party?**

Yes – One example of this is everyone who enters into a Master Services Agreement with a vendor, but a contractual obligation is a contractual obligation, so there's no difference in processing payment for vendor services under an MSA versus two parties with mutual obligations under a Joint Venture Agreement.

With respect to the interpretation articulated in (a) and (b) above, what is the economic impact that the interpretations would have on industry if recognized? What is the economic impact if the interpretations were rejected?

Supporting interpretations above would open up technological solutions for consumers and businesses who currently may be limited to antiquated payment methods to receive their funds. No doing so would maintain the status quo and accordingly limits innovation.

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Thank you for the opportunity to participate in the discussion on this important issue. If you have any additional questions, you can contact me or ETA Senior Vice President, Scott Talbott at stalbott@electran.org.

Sincerely,

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