April 9, 2019

Via Electronic Mail (regulations@dbo.ca.gov)

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

Re: Invitation for Comments on Proposed Rulemaking
Money Transmitter Act: Agent of Payee (File No. Pro 07/17)

Dear Sir or Madam:

Financial Innovation Now ("FIN")[1] is submitting this letter in response to the Invitation for Comments on Proposed Rulemaking (the "Invitation") released by the Department of Business Oversight ("DBO") on February 8, 2019. The Invitation states that the DBO intends to clarify, via a rulemaking, the scope of the exemption from the California Money Transmitter Act, Cal. Fin. Code §§ 2000 *et seq.* (the "Act"), for an "agent of a payee" as defined by Cal. Fin. Code § 2010(*l*) (the "Exemption").

The Invitation seeks comments from stakeholders to inform the DBO's forthcoming drafting of regulations regarding the Exemption. Below, we offer general comments as well as specific responses to certain questions set forth in the Invitation. In summary, FIN believes that the DBO should clarify and affirm the broad scope of the Exemption to ensure that activities that do not constitute money transmission—and for which the safety and soundness and consumer protection considerations of the Act are not implicated—remain exempted from the Act. By doing so, the DBO can ensure that California remains a home for innovative financial technology companies seeking to make financial services more accessible, safe and affordable for consumers.

[1] FIN is an alliance of technology leaders working to modernize the way consumers and businesses manage money and conduct commerce. We believe that technological transformation will make financial services more accessible, safe and affordable for everyone, and we promote policies that enable these innovations. FIN member companies include Amazon, Apple, Google, Intuit, PayPal, Square and Stripe. For more information regarding FIN's policy priorities and principles, please visit www.financialinnovationnow.org.

General Comments

An agent of a payee does not engage in money transmission

The Act, similar to other state money transmission laws, requires a license to engage in money transmission (unless exempt), and defines money transmission to include "receiving money for transmission."[2] Accordingly, in order to constitute the regulated activity of "money transmission," it follows that money must be received *for transmission*, *i.e.*, for the purpose of transmitting the money.[3] In a payee-agency transaction, however, the agent accepts payments on behalf of the payee, and does not receive or hold funds on behalf of, nor transmit funds on behalf of, consumers or other payors. By contrast, as previously observed by the DBO, an intermediary *would* be a money transmitter where it receives payments from consumers and holds them in deposit accounts "in a fiduciary capacity *on behalf of the consumer*," and then transmits the funds to a beneficiary "*on behalf of the consumer*."[4]

While the Act establishes a formal statutory exemption for payee agents (provided certain conditions are met), the principle underlying this statutory exemption is based on the common law: an agent acts "not only *for*, but *in the place of*, his principal."[5] In other words, in a payee-agency relationship, the agent "steps into the shoes" of the principal and payment to the agent is tantamount to payment to the principal. Thus, we do not believe that California AB 2209, which added the Exemption, can be appropriately characterized as exempting transactions that *would otherwise be money transmission subject to regulation* under the Act. Instead, the legislative history indicates that AB 2209 was intended to "*clarif[y]* that money transmission does not include a transaction in which the recipient of the payment (currency or other value) is an agent of the payee and delivery of payment satisfies the payor's obligation to the payee."[6] This clarification is consistent with the notion that such transactions do not constitute money

[2] Cal. Fin. Code §§ 2030(a), 2003(q). The Act further defines this concept as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means . . ." *Id.* at § 2003(u).

[3] *See, e.g.,* Tex. Fin. Code § 151.301(b)(4) (defining money transmission as "the receipt of money or monetary value by any means in exchange for a promise to make the money or monetary value available at a later time or different location"); Fla. Stat. § 560.103(23) (defining a money transmitter as an entity that "receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means . . .").

[4] *See* California Opinion Request Letter, *Opinion – "Repayment Provider – Is Subject to Money Transmission Act* (Apr. 9, 2012) (emphasis added).

[5] *People v. Treadwell*, 69 Cal. 226, 236 (1886); *accord Channel Lumber Co. v. Porter Simon*, 78 Cal. App. 4th 1222, 1227 (2000).

[6] *See AB 2209 Assembly Floor Analysis* (Aug. 13, 2014) (emphasis added).

transmission in the first instance, and that regulation of the transactions is not warranted under the Act.

The Invitation suggests, however, that while "it appears clear" based on the legislative history of AB 2209 that the Exemption is intended to "exempt online marketplace platforms," it is only due to the Exemption that an online marketplace (or any other agent of a payee) "would not need to obtain a money transmitter license." In other words, the Invitation appears to suggest that an agent of a payee is a money transmitter subject to regulation *but for* the Exemption. Specifically, the Invitation states that an intermediary such as a marketplace that facilitates transactions "receives funds from buyers to transmit to sellers." As discussed above, however, FIN respectfully believes, notwithstanding the Exemption, that payee agents (including, but not limited to, marketplaces) do not engage in money transmission subject to regulation by facilitating transactions between buyers and sellers—or between debtors or creditors, or when acting as an agent of any other type of payee.

FIN believes this is an appropriate interpretation because the basis for excluding agent of payee transactions from regulation is that they do not constitute money transmission and, therefore, do not raise the safety and soundness, consumer protection, and anti-money laundering[7] concerns implicated by money transmission licensing laws, including the Act. In other words, the Exemption is based on the policy that the regulation of agent of a payee transactions is not necessary for the purposes of the Act.[8] But, that policy—that an agent of a payee does not receive money for transmission—applies much more broadly than only to online marketplace transactions. Indeed, while the Invitation references such marketplaces, the statute itself refers generally to a "transaction in which the recipient of the money or other monetary value is an agent of the payee . . ."[9]

Furthermore, in the context of any transaction pursuant to an appropriately executed agency appointment—including, but not limited to, a marketplace transaction—the agent acts on behalf

[7] We note that the regulations implementing the federal Bank Secrecy Act, which is an anti-money laundering compliance regime, generally excludes from regulation a person that only "[a]cts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller." 31 C.F.R. § 1010.100(ff)(5)(ii)(B).

[8] The Exemption is, therefore, distinguishable from other categories of exemptions under the Act, such as for banks or other depository financial institutions that are already subject to regulation. *See* Cal. Fin. Code § 2010(d). *See also, e.g.,* Cal. DBO Opinion Request letter (Aug. 16, 2018) (exempting from the Act the regulation of bank-issued stored-value cards purchased by consumers from retailers on the grounds that the cardholder funds are held in FDIC-insured accounts and that risk of loss of customer funds resides with the issuing bank—which is already subject to state and federal regulatory oversight—at all times).

[9] Cal. Fin. Code § 2010(*l*).

of a seller to accept payment on behalf of that seller (regardless of what is being sold or provided). The settlement of funds to the agent is settlement of funds to the principal, as a matter of agency law. Therefore, consistent with the Act's definition of "money transmission," which requires that funds be received *for transmission*, it follows that a payor does not provide funds to an agent for the purpose of transmitting funds, and, thus, no funds are received by an agent of a payee *for* transmission.

Because no funds are received for transmission, the transaction does not implicate the policies underlying the Act. The Act imposes numerous requirements on licensed money transmitters, including providing a receipt that contains information such as the name of the sender, the name of the designated recipient, the name of the licensee, and a disclosure of a "right to refund" based on required language.[10] When a consumer makes a purchase from a merchant—such as buying shoes—and the transaction is facilitated by an agent (whether a marketplace or a payment processor), the consumer nonetheless presumably assumes that they are entering into a transaction to buy shoes, and not to transmit funds. An agent of the payee providing a money transmission receipt as required by the Act in this context would likely confuse the consumer (assuming it were even possible for the agent to deliver the receipt). Providing the receipt also not provide the consumer with any added protections or benefits, because the consumer has not transmitted funds to a designated recipient. Rather, the consumer has made a purchase from a merchant, the funding of which happens to have been facilitated by an agent of the merchant.[11]

This reasoning is also consistent with other states, which have affirmed through means such as regulation, opinion letter, or guidance that transactions facilitated as an agent of a payee do not constitute money transmission as defined by statute. Most significantly, in 2014 (around the time of the adoption of the Exemption in California), the Texas Department of Banking ("Texas DOB") affirmed that:

> … a properly authorized agent of a principal who receives payment on behalf of the principal within the scope of that agency, does not engage in the business of money

[10] Cal. Fin. Code § 2103(a). The required language includes the statement that "You, the customer, are entitled to a refund of the money to be transmitted as the result of this agreement if [name of licensee] does not forward the money received from you within 10 days of the date of its receipt, or does not give instructions committing an equivalent amount of money to the person designated by you within 10 days of the date of the receipt of the funds from you unless otherwise instructed by you."

[11] By contrast, when a consumer requests that a money transmitter send funds to a designated recipient on the consumer's behalf, the consumer presumably believes he or she is initiating a money transmission transaction (and intends to do so) and would rightfully expect a money transmission receipt in this context.

> transmission, and therefore does not need a license under the [Texas Money Services] Act.[12]

The Texas DOB elaborated that this conclusion "stems from the general doctrine of agency, which essentially states that whoever acts through another does the act himself."[13] Hence, the Texas DOB concluded that "when acting through its agent" it is as if the principal is "receiving the funds."[14] As noted above, California courts have expressly embraced this same notion—that an agent acts as, and in place of, the principal.

Based on this rationale, a payee-agency transaction is not money transmission because, as a matter of agency law, the buyer's payment to the agent is deemed payment to the seller. Thus, no money is received for transmission, and the Act does not apply. And, as discussed below in response to the Invitation's specific questions, this rationale applies to a broad range of transactions that do not raise the safety and soundness, consumer protection, and anti-money laundering concerns implicated by money transmission licensing laws, including the Act.

A "payment processor" is also not a money transmitter

FIN believes that the DBO should also affirm in its rulemaking that a payment processor is not subject to regulation as a money transmitter under the Act. The concept of a "payment processor" often arises in discussions regarding payee-agency,[15] but the services provided by a payment processor are not the same as those provided by other types of payee agents. For purposes of addressing the potential applicability of the Act, or other state money transmission laws, the term "payment processor" should be understood to relate to an agent that provides services to enable a consumer-facing merchant to accept payments from consumers directly.[16] Payment methods facilitated may include ACH payments (*i.e.,* payments made directly from the consumer's checking account) or credit cards or debit cards ("Payment Cards"). In each case, the payment processor enables the merchant to confirm that the payment transaction is

[12] Texas DOB, Opinion No. 14-01 (May 9, 2014).

[13] *Id.* (citing *Baldwin v. Polti*, 101 S.W. 543, 544 (Tex. Civ. App. 1907, writ ref'd) ("It is a general rule that the act of an agent is the act of his principal, which is expressed in the maxim: 'Qui facit per alium, facit per se.'")

[14] *Id. See also Kansas Guidance Document MT 2016-01* (reasoning that "[b]ecause the customer's transaction is completed upon the agent-of-the payee receiving payment, *there is no money transmission*"), http://www.osbckansas.org/mt/guidance/mt2016_01_agent_of_the_payee.pdf.

[15] *See, e.g.,* DBO Opinion Request, Oct. 4, 2018 (regarding a "determination that the [company's] payment processing services" do not constitute money transmission); DBO Opinion Letter, Feb. 27, 2018 (requesting a determination that the agent of a payee exemption applies to company's payment processing activity).

[16] *See, e.g.,* 7 Tex. Admin. Code § 33.4(d).

authorized at the moment the consumer makes the purchase (whether point-of-sale or online).[17] The payment processor subsequently receives funds through applicable settlement networks on behalf of the merchant.

With respect to Payment Card transactions in particular, the merchant treats the consumer as having paid, and the consumer is able to leave with his or her goods or services, when the *transaction is authorized by the cardholder's issuing bank*. Subsequently, issuing banks and acquiring banks clear and settle funds for authorized transactions through the applicable payment card networks, and the acquiring bank settles transaction proceeds to the merchant.[18] The involvement of a "payment processor"—also sometimes referred to as a "payment facilitator"—in a Payment Card transaction *does not alter this fundamental structure and does not alter in any material sense the interaction between the consumer and the merchant.* The only distinction, from a flow of funds perspective, is that in addition to providing data processing services a payment processor also receives transaction settlement proceeds funds *from an acquiring bank* as an agent of a merchant, and then settles those transaction proceeds to the merchant.

It should be clear from this description that no "money transmission" transaction takes place when a consumer uses a Payment Card to purchase goods or services, regardless of whether a payment processor is involved. The DBO should affirm in its rulemaking that these payment processing activities—receiving settlement funds from a bank on behalf of a merchant for a purchase transaction that has already been authorized and completed—do not constitute money transmission, and do not in any event implicate any consumer protection concerns.[19] This approach can ensure that financial innovation continues without unnecessary impediments in California. It will also mitigate potential confusion with respect to how payment processors can work with other payee agents, such as marketplaces, without triggering inapplicable obligations under the Act, such as the aforementioned receipting requirement.

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[17] *See, e.g.,* Illinois Department of Financial and Professional Regulation, *Statement Regarding Third-Party Payment Processors and the Transmitter of Money Act* (stating that "there is essentially no risk of consumer harm because the customer will always leave the transaction with the goods or services bargained for, and only the merchant would bear the risk of non-performance" by the payment processor), http://www.idfpr.com/DFI/CCD/pdfs/07292015StatementThirdPartyProcTOMA.pdf.

[18] ACH payments similarly involve authorization and subsequent settlement of funds, but transactions are processed through the Automated Clearing House (*i.e.,* the ACH) instead of payment card networks.

[19] The DBO should specifically consider the Texas rule, at 7 Tex. Admin. Code § 33.4, in its rulemaking on this issue. As the Texas DOB observed, these types of payment processing 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." *Id.* at § 33.4(a).

The "agent of a payee" is a broad concept and the Exemption should be construed accordingly

Cal. Fin. Code § 2010(*l*) operates to expressly exclude from the Act 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." For purposes of the Exemption, the statute adopts the definition of an "agent" as set forth in Cal. Civ. Code § 2295, *i.e.,* "one who represents another, called the principal, in dealings with third persons." Additionally, a "payee" is defined 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," and a "payor" as the "recipient of goods or services, who owes payment of money or monetary value to the payee for the goods or services."[20]

These definitions should be construed broadly to exclude from regulation any transaction—other than money transmission on behalf of a payor—in which an intermediary acts as agent of a principal. In other words, the above-described common-law agency concept that forms the basis of excluding a transaction from money transmission regulation (because the funds are deemed received by the principal upon receipt by the agent) should operate to exclude any transaction in which an agent is acting on behalf of a recipient of funds. This broad application is consistent with the Exemption, and the Act generally, because it is only when an intermediary is acting on behalf of a sender of funds—to transmit funds at the sender's direction and on the sender's behalf—that the sender's funds are at risk of loss. That is, when the intermediary is acting on behalf of the sender, the intermediary is holding funds in trust on behalf of the sender, and the regulation of the intermediary protects the sender's funds. In an agent of the payee transaction, there are no "sender's funds" and there is no intermediary—only a payee, acting through its agent, to receive a payment.

By embracing a broad view of the types of transactions that come within an agent of a payee exemption, while maintaining the underlying principle that the payor's obligation must be extinguished upon receipt of funds by the agent, the DBO can encourage innovation in financial services products without creating undue risk for consumers. In this regard, any type of transaction where the intermediary acts on behalf of the recipient of funds (provided that it does not constitute an otherwise regulated funds transfer initiated on the behalf of the payor), pursuant to a duly established agency arrangement, should be clarified as exempt from the Act.

[20] Cal. Fin. Code § 2010(*l*)(2)-(3).

This approach is consistent with the well-established common law agency principles that affirm that payment to an agent is tantamount to payment to the principal directly. And, it should not matter from a policy perspective whether the agent receives such funds on behalf of a principal in connection with a point-of-sale purchase transaction, a payment of a bill or other obligation, or any other transaction where the agent acts on behalf of a principal to facilitate the principal's receipt of funds.[21]

The agent of a payee concept does not preclude sub-agency

Consistent with this view, the DBO also should affirm in its rulemaking that sub-agency does not turn an exempt payee-agency arrangement into a regulated money transmission transaction. In some instances, an agent acting on behalf of a seller of goods or services may wish to appoint another entity, such as a payment processor, as its agent to facilitate its receipt of funds on behalf of its principals. As discussed previously, we do not believe that a payment processor engages in money transmission in the first instance. This conclusion would not be inconsistent with affirming the acceptability of sub-agency arrangements.

Pursuant to a valid agreement, receipt of funds by an agent is deemed receipt of funds by the principal. As discussed herein, this principle is well established at common law, and is embraced by the Exemption. Given that an agent acts in the place of its principal, a sub-agent does not alter this arrangement. Thus, funds received by an agent of an agent of the principal are, as a matter of common law, received by the principal. This type of transaction should not be regulated as money transmission based on this common law principle. Additionally, the Act itself already excludes an agent of an exempt entity,[22] and that provision should extend to an exempt transaction. In other words, if the licensing requirement does not apply to a transaction because it comes within the Exemption, the same transaction should not be regulated on the grounds that the exempt agent has used another agent to facilitate the transaction.

[21] This is true not only from a consumer protection standpoint, but also from the perspective of protecting the financial system from money laundering and other illicit activity. FinCEN has interpreted its "payment processor exemption" (excluding a person that "facilitate[s] the purchase of, or payment of a bill for, a good or service . . ." provided certain conditions are met) to require only that the transaction involve "a person to whom money was owed ***either to complete a transaction, or because of a previously incurred debt***"); FIN-2013-R002, *Whether a Company that Offers a Payment Mechanism Based on Payable-Through Drafts to its Commercial Customers is a Money Transmitter*, Nov. 13, 2013 (emphasis added).

[22] *See* Cal. Fin. Code § 2030(a) (excluding from the licensing requirement, among others, "an agent of a person . . . exempt from licensure under" the Act).

Furthermore, a conclusion to the contrary would not support the intent of the Act and would—like any other agent of a payee transaction subject to regulation as money transmission—create confusion for consumers and industry alike. Here, the confusion would be especially acute, as pursuant to the agent of a payee exemption, the agent of the principal would be exempt. This means that the *transaction* would be exempt—the receipt of funds by the agent extinguishes the consumer's obligation to the payee, and the consumer has not received a money transmission service. The addition of another agent acting on behalf of the agent of the principal would not suddenly turn the consumer's purchase transaction into a money transmission transaction, as he or she is still not requesting a funds transfer, and the obligation to the payee is still extinguished upon payment to the sub-agent. As a result, if the sub-agent's involvement were not exempt, what is the regulated transaction? It cannot be the consumer's payment—that has already been deemed received by the principal. And, if the sub-agent has not received money for transmission from the consumer, whose money would the sub-agent be transmitting? These questions are not answerable because the same principles that operate to exclude an agent of a payee transaction operate in the same fashion when the agent uses a sub-agent to facilitate the transaction.

Responses to Specific Questions

Virtually any item can fall within the definition of "goods and services"

The Invitation asks for comments on what "items do and do not fall within the term 'goods or services'?" FIN believes that any transaction, other than a funds transfer requested by a sender, can be exempt provided that it is properly structured as an agent of a payee transaction. In construing the Exemption, therefore, the DBO should look to the common law principles underlying the concept of agency, as well as the structure of payee-agency exemptions in other jurisdictions.

As discussed above, the common-law agent of a payee concept is not limited to any particular transaction type; the agent simply acts for, and in the place of, the principal.[23] Thus, a "third party's payment to, or settlement of accounts with, an agent discharges the third party's liability to the principal if the agent acts with actual or apparent authority in accepting the payment or

[23] *See Treadwell, supra* n.5; *see also, e.g.,* Restatement (Third) of Agency § 1.01 (2006) ("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").

settlement."[24] Consistent with this general principle of agency, other states have established broad payee-agency exemptions. For example:

- By regulation, the Arkansas Money Transmitters Act excludes a service that "transfers money or monetary value directly from a purchaser to a creditor of the purchaser or to an agent of the creditor."[25]
- The Hawaii Division of Financial Institutions has issued guidance affirming that a Hawaii money transmitter license "will not be required" if: (1) an agent "operates pursuant to a written agreement with the payee to act on the payee's behalf"; and (2) any payment processed by the agent "is deemed to have been made to the payee when that payment transaction is successfully processed."
- Nebraska defines money transmission services to exempt "bill payment services in which an agent of a payee receives money or monetary value on behalf of such payee."[26]
- New York exempts from licensing an "agent of a payee,"[27] which is "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."[28]

Based on well-established agency principles, and consistent with approaches in other states, the DBO should affirm in its rulemaking that other types of payments services are exempt from regulation as money transmission pursuant to the Exemption. For instance, payments processed on behalf of a government agency (*e.g.*, taxes, parking tickets, fines) should be exempt where payment to the agent extinguishes the payor's obligation to the applicable government agency. (We note that such transactions would likely be exempt in any event because government entities are generally exempt from the Act in their own right, see Cal. Fin. Code §§ 2010(a), (c), as are agents of exempt entities, see *id.* at § 2030(a).) Similarly, payments processed on behalf of payees to extinguish obligations such as a mortgage payment, residential housing rent payment, or insurance payments should be deemed to come

[24] Restatement at § 6.07(2); *see also* 60 Am.Jur.2d Payment § 60 (2008) ("[p]ayment to an obligee's agent discharges the debt if the agent has actual or apparent authority to receive payment, regardless of whether the agent ever pays the money over to the principal").

[25] Arkansas Money Services Rule 102(10)(A), 14 Code Ark. Rules & Regs. 010.

[26] Neb. Rev. Stat. § 8-2716.

[27] N.Y. Banking Law § 641(1).

[28] N.Y. Sup. Regs. § 406.2(*l*). The New York Department of Financial Services has also affirmed by interpretive letter that "an entity which acts as an agent of a payee is not engaged in money transmission and need not obtain a money transmission license." *See* New York Department of Financial Services, Staff Interpretation, "NYSBL 640 & 641" (Apr. 24, 2007), https://www.dfs.ny.gov/legal/interpret/lo070426.htm.

within the Exemption. In each case: (1) no money transmission occurs because of the operation of common-law agency principles; and (2) the policy imperatives of the Act are not implicated because customer funds are never at risk.

We also note that such an approach would be consistent with the intent of the Exemption, which is to clarify that agent of a payee transactions are not intended to be regulated under the Act. Furthermore, while Cal. Fin. Code § 2010(*l*) uses the terms "goods and services," we do not believe that these terms should be interpreted narrowly. Instead, they are representative of the concept that any transaction that is not money transmission may come within the Exemption. For example, the agent of a payee exemptions established by Connecticut and Kansas refer to selling goods or services "other than money transmission." In the same vein, the reference in the Exemption to "goods and services" should be understood to mean *any transaction* involving goods or services, including rights, interests, or obligations other than money transmission itself.

This interpretation of the scope of goods and services is consistent with the Invitation's confirmation that the Exemption is clearly intended to exempt a diverse array of marketplaces.[29] We agree with a reading of the term "goods and services" that construes it to encompass as any transaction involving some economic exchange, which is what we believe the Invitation implicitly does. An economic exchange affirms that there is some obligation of a payor that owes to a payee in exchange for something that a payee provided, and, thus, some obligation of a payor that can be extinguished by the payment.[30]

Any contractual counterparty can be a "recipient" of goods or services

The Invitation asks for comments on what it means to "'receive' goods." As described above, FIN believes that a broad interpretation of the scope of "goods and services" is appropriate. This broad interpretation should largely address the DBO's concerns about what it means to "*receive* goods" or to "*receive* services." In other words, a payor receives "goods and services" by paying the payee to extinguish an obligation in connection with something provided by the payee to the payor. Provided that the payor's payment to the agent extinguishes its obligation

[29] We note that "goods" can be defined to constitute things that are "movable at the time of identification to the contract of sale other than the money in which the price is to be paid [and] . . . things in action." *See* U.C.C. § 2-105(1). And, "services" are generally understood to constitute "duty or labor to be rendered by one person to another" including intangible items such as accounting, consulting, education, insurance, and so on. *See* Black's Law Dictionary.

[30] This approach is also consistent with the FinCEN interpretation, *i.e.,* that a transaction involving payment of money owed either to complete a transaction, or because of a previously incurred debt, would be a transaction not involving money transmission.

to the payee, what the payor actually does with the goods or services should be immaterial—it does not change the underlying analysis of whether money has been received for transmission and whether the transaction should be subject to the Act.

Thus, a person or an entity can "receive goods" by physically receiving them but without otherwise consuming or experiencing them. For example, a merchant can receive goods wholesale from a supplier within the contours of the Exemption. The nature of the underlying transaction is the same, regardless of whether the transaction is between a merchant receiving wholesale goods from a wholesaler versus a consumer "receiving" goods at retail from that merchant. Similarly, one can "receive goods" under the Exemption merely by taking title to the goods (again, provided that the recipient had a payment obligation to the provider of the goods that was extinguished when payment for the goods was tendered to the provider's agent). For example, a drop-ship e-commerce business that takes "flash title" to goods (including digital goods) as part of the platform services offered to merchants should not undermine the Exemption. This type of transaction between the e-commerce business and the seller is also analogous to a consumer "receiving" goods at retail from a merchant.

The Invitation also asks for comments on what it means to "'receive' services," and we believe that the answer is the same. A party "receives services" as a general proposition whenever a counterparty performs contractual duties owing to its counterparty. This performance of services is what creates the payment obligation. To put it another way, any party that has a payment obligation to a counterparty must have received services (or goods) from the counterparty, or else it would not have the payment obligation. In turn, because any such payment obligation in exchange for some performance can be extinguished by a payment to the provider's agent (as affirmed by the common law of agency), any such transaction should be deemed to come within the scope of the Exemption.

<u>If the DBO does not interpret § 2010(*l*) broadly in its rulemaking, then the DBO should initiate a rulemaking using its authority under Cal. Fin. Code § 2011(a) to affirm a broad agent of a payee exemption from the Act</u>

If the DBO does not issue a rulemaking that interprets the Exemption broadly to include within the scope of "goods and services" any transaction involving a payment that extinguishes a corresponding obligation, we believe the DBO should use its authority under § 2011(a) to broadly exclude agent of a payee transactions from regulation. The DBO should do so based

on the underlying policy that justifies exempting *any* agent of a payee transaction, namely that the receipt of funds by the agent is the receipt of funds by the principal. This regulation should also affirm that an exempt agent of a payee may operate through sub-agents to facilitate its own agent of a payee transactions, provided that receipt of funds by the sub-agent extinguishes the payor's obligation to the principal (the payee). Furthermore, the DBO should consider separately affirming that payment processors are not money transmitters, in a manner similar to the approach taken by Illinois[31] or by Texas in its recent rulemaking.[32] These types of clarifications will mitigate the risk of incongruities if only parts of payee-agency transactions are exempt, even though the consumer's obligation to the payee would in fact be extinguished.

Conclusion

FIN appreciates that the DBO has issued the Invitation and has welcomed comments on a broad array of issues with respect to the scope of the Exemption, including the suggestion that it may consider "exempting a broader range of commercial transactions based on agency law principles." As described herein, FIN believes that *any* transaction—other than a transaction involving *only* money transmission—can be excluded from regulation as money transmission based on common law agency principles. That is, through its rulemaking, the DBO should affirm the exclusion from the Act of any transaction in which [1] an agent [2] receives payment on behalf of a payee [3] for an obligation owed by a payor to the payee [4] arising out of a transaction (including a contractual agreement) between the payor and the payee.

Regardless of the specifics of the underlying transaction—whether for payment of an insurance premium, a utility bill, a rideshare ride, a short- or long-term property lease, a loan payment, or a television sold by a retailer through an e-commerce platform—the nature of the agent of a payee transaction is the same. Receipt of funds by the agent extinguishes the payor's obligation to the payee, no payor funds are at risk, and the transaction is not money transmission. This holds true whether the agent is a marketplace or a payment processor, or even a payment processor providing services on behalf of a marketplace.

Attempting to parse out particular transactions that would come within the Exemption while excluding others, even though the same agency principles underlie the transactions, would result in an inconsistent and unpredictable regulatory regime. This would create confusion for

[31] *See Statement Regarding Third-Party Payment Processors*, *supra* n.17.
[32] 7 Tex. Admin. Code § 33.4

consumers and businesses and stifle innovation in financial products and services. We, thus, respectfully believe that the DBO rulemaking should affirm that § 2010(*l*) is intended to encompass any transaction (other than money transmission) in which the agent acts on behalf of a principal (including through any sub-agent) and payment to the agent is deemed payment to the principal. In the alternative, the DBO should use its authority under § 2011(a) to affirm in a rulemaking that these transactions are exempt, consistent with other types of transactions that the DBO has exempted because they do not create risks to consumers or other payors. Doing so will ensure that consumers and business are able to benefit from innovative payments services that facilitate commerce and opportunity for millions of Americans and others around the world.

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FIN and its participating members would be happy to meet with representatives from the DBO to discuss further the issues raised herein, or to address any questions that you may have.

Respectfully submitted,

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