



Money Services Business Association
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April 9, 2019

Submitted via E-Mail at: regulations@dbo.ca.gov

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

RE: FILE NO: PRO 01/17

Dear Ms. Rumberger,

The Money Services Business Association (“MSBA”) greatly appreciates the opportunity to comment on the proposed rulemaking with respect to the California Money Transmitter Act: Agent of the Payee (PRO - 07/17).

Established in 2015, the MSBA is the largest trade association focused on the non-bank money services industry. Specifically, we represent licensed money transmitters and their agents and/or authorized delegates, payment card issuers, and distributors, payment processors, international remittance companies, bill payment companies, mobile payment application providers, payment aggregators, virtual currency exchanges and administrators, money orders, eWallet providers and other similar money services businesses (“MSBs”) and non-MSB payments businesses that are engaged in payments. The MSBA encourages the continued innovation and development in the payments industry while promoting education and communication with federal and state regulators.¹

Our membership has a direct interest in the agent-of-the-payee exemption under California law because it impacts their licensing and business model operational decisions.

MSBA welcomes clarification of California’s Financial Code, section 2010, subdivision (l) (“CFC 2010”). We respectfully submit that the exemption to money transmitter licensure articulated in CFC 2010, often referred to as the agent-of-the-payee, bill pay or payment processor exemption (each, “AOTP”), is an important part of the California Financial Code and should continue to be available. We also believe that clarification of this important subdivision

¹ For additional information, please see: www.msbaassociation.org.



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will reduce confusion that arises for entities that fall into edge cases of CFC 2010, especially those that do not fall into the plain language of the provision. Clarity of the AOTP exemption in California and consistency with similar exemptions in other states would greatly assist MSBA members and other payments businesses operating in or serving California.

The AOTP exemption is expressly recognized in statutes, regulations or published guidance in at least twenty-one (21) states² and under U.S. Federal Bank Secrecy Act³ regulations⁴ (“Federal Regulations”) and guidance thereon published by the U.S. Department of the Treasury Financial Crimes Enforcement Network (“FinCEN”)⁵. What is more, in a number of states that do not expressly recognize the AOTP exemption, when a model that meets the basic criteria of CFC 2010 is presented to the state regulator for guidance, MSBA members have often been exempt from money transmission licensure all the same, notably because the payor is, in principle, never at risk of financial loss on account of the entity acting as agent-of-the-payee (each such entity, a “Payment Processor”).

Indeed, even without CFC 2010 or related guidance, a strong legal argument can be made for the AOTP exemption to apply on the basis of the common law of agency, as codified in the

² Arkansas; No Action No. 17-NA-004, California; Cal. Fin. Code §2010(l), Connecticut; Memorandum No Action Position on Money Transmission License Requirements for Persons Acting as an Agent of the Payee October 24, 2017, Hawaii; Department of Commerce and Consumer Affairs, Financial Institutions General Money Transmitter FAQs, Idaho; Department of Finance Licensing No Action Letter March 25, 2016, Illinois; Illinois Department of Financial and Professional Regulation Press Release July 29, 2015, Kansas; Guidance Document MT 2016-01, Kentucky; KRS §286.11-007, Michigan; Senate Bill 729 effective March 28, 2019, Montana; no licensing regime, Nebraska; Neb. Rev. Stat. §8-2716, Nevada; NRS 671.040, New York; NY Banking L §641(1), North Carolina; N.C. Gen. Stat. § 53-208.44(a)(8), North Dakota; N.D. Cent. Code §13-09-02 (13), Ohio; Ohio Rev. Code §1315.02(7), Pennsylvania; 7 P.a. Cons. Stat. §6103(4), Texas; Texas Department of Banking Opinion No. 14-01, Virginia; 10VAC5-120-10 and Washington; RCW 19.230.020(9)(c), RCA 208-690-018.

³ [31 U.S.C. 5311-5314e.](#)

⁴ [31 CFR Chapter X.](#)

⁵ FinCEN Ruling 2003-8 - Definition of Money Transmitter (Merchant Payment Processor); FinCEN Ruling 2012-R004 - Application of Money Services Business Regulations to Daily Money Management Services; FinCEN Ruling 2009-R004 Determination of Money Services Business Status and Obligations Under the Funds Transfer Recordkeeping Rule, and Request for Regulatory Relief; FinCEN Ruling FIN-2014-R009, August 27, 2014, Application of Money Services Business Regulations to a Company Acting as an Independent Sales Organization and Payment, that also cites earlier guidance on related topics.



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California Civil Code.⁶ Where a payor delivers value to an agent, the payor is deemed, at law, to have delivered the value to the principal.⁷

Given that the existing CFC 2010 provides for a broad AOTP exemption and that the invitation for comments makes no reference to any removal thereof, there are perhaps two vectors along which an amendment to CFC 2010 can be discussed: (i) can its language be made clearer; and (ii) should availability of the exemption be abrogated? We welcome any clarification to the language of CFC 2010 and wish to register opposition to abrogation of the exemption.

1. What items do and do not fall within the term “goods or services”?

As an industry association representing a wide variety of MSBs, the MSBA is not in a position to advocate for one or another type of underlying good or service to be excluded or included in the AOTP exemption. We are supportive of a final rule that is (i) clear and (ii) consistent with the AOTP exemption in other states, as it relates to the “goods and services” for which a Payment Processor may rely on the AOTP exemption in CFC 2010.

(i) *Clarity*

Any lack of clarity in the California AOTP rule will delay access to the exemption for lack of certainty, create confusion in the marketplace and produce a new volume of requests for guidance for the California Department of Business Oversight (“DBO”). It is our understanding that since at least February of 2018, DBO has withheld providing guidance on certain AOTP models pending its present review of CFC 2010. In the fast-paced market of fintech, that is an eternity, during which California startups have seen their window of opportunity open, only to be left in a regulatory grey zone for want of clarity on AOTP in California. We would also add that the speed with which CFC 2010 is updated, or settled, has value that is commensurate with the precision of the final wording.

⁶ Cal Civ Code § 2295, § 2305, the latter providing: “Every act which, according to this code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.”

⁷ *Pacific Acceptance Corp. v. Jones*, 95 Cal. App. 365, 272 P. 1084, 1928 Cal. App. LEXIS 590 (Cal. App. December 7, 1928) where the court held: “Where an agent is authorized to collect money without specifically limiting him to the collection of cash, and a valid check is accepted in lieu of cash, it is equivalent to a payment to the principal although the agent absconds with the proceeds. (*California Stearns Co. v. Treadwell*, 82 Cal. App. 553, 563 [256 P. 242].)”



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(ii) *MSBA Supports the AOTP Used by Other States*

We respectfully submit that DBO has an interest in defining the “goods and services” for which a Payment Processor may rely on the AOTP exemption in a manner that is consistent with those provide for in other states.

What do other states do?

The current statutory exemption under CFC 2010 requires two conditions for the exemption to apply: (i) a preexisting written contract; and (ii) delivery of funds to the agent satisfies the payor’s obligation. Several other states provide similar exemptions from their money transmission licensing regimes but add a further requirement, that the payment for goods or services for which the agent is accepting payment on behalf of the payee not be for money transmission services.

As a typical example, Kansas, in its Guidance Document MT 2016-01⁸ confirms that based on the common law principles of agency, that an AOTP would not require licensure if it can be proven:

1. There is a preexisting written agreement between the payee and the agent;
2. The payee expressly grants authority to the agent to accept payments on the payee’s behalf in the preexisting written agreement;
3. Payment is treated as received by the payee upon receipt by the agent; and
4. Payment is for goods or services other than money transmission that has been provided or to be provided by the payee⁹.

Ohio Payment Processors benefit from an AOTP exemption when accepting payment for “goods or services that are other than money transmitter services.”¹⁰ A new Vermont bill S0154¹¹,

⁸ http://www.osbckansas.org/mt/guidance/mt2016_01_agent_of_the_payee.pdf

⁹ *Idem*

¹⁰ 13 Ohio Rev. Code. § 1315.02, available at <http://codes.ohio.gov/orc/1315>

proposes to track the same rule whereby the AOTP exemption would be recognized on the condition that there be a written contract, that the obligation to the payee is extinguished upon payment to the agent and that the payment facilitates the purchase of goods or services *other than* money transmission.

(iii) AOTP for all goods and services except Money Transmission is best

Our review of the AOTP exemption in other states has found that it is either broadly available, without restrictions as to one good or service and, if any, the only good or service which renders it unavailable is only money transmission, as per the above-cited examples of Kansas, Ohio and Vermont.

We respectfully submit that the exemption of money transmission itself from AOTP is a legitimate exclusion because of the risk of would-be money transmitters side-stepping licensing and oversight by simply contracting with payees, even within the context of non-business family remittance. We are sensitive to the possibility that where the AOTP exemption is so broad as to include payments for money transmission, the whole money transmission licensing regime could be rendered moot.

The invitation for comments asks whether the AOTP ought to be available to only marketplaces like Amazon and Airbnb. We respectfully submit that there is scarcely a product sold to Californians that is not already available on a marketplace. In other words, to limit AOTP to marketplaces is almost synonymous with no limit at all – which is acceptable to MSBA, subject to the foregoing discussion of money transmission. By way of supporting example, one startup helps merchants sell on about thirty-six (36) marketplaces all at once.¹² In any case, if the AOTP exemption is to be limited as a function of product-type, MSBA believes that product-type should not be determined by method of sale. In other words, MSBA believes that it is, perhaps, simplistic to believe that one or another method of selling (e.g. Amazon) is

¹¹ <https://legislature.vermont.gov/Documents/2020/Docs/BILLS/S-0154/S-0154%20As%20Introduced.pdf>

¹² <https://www.linnworks.com/integrations>. See also the following lists of marketplaces:
https://en.wikipedia.org/wiki/List_of_online_marketplaces,
<http://blog.linnworks.com/complete-list-of-online-marketplaces>,
<https://www.shopify.com/enterprise/global-ecommerce-marketplace>,
<https://www.practicalecommerce.com/ecommerce-marketplaces-worldwide>



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necessarily tied to a fixed set of goods or services. We respectfully submit that where the AOTP exemption is to be limited as a function of goods or services, those goods or services should be identified explicitly (e.g. money transmission) and not according to the vehicle by which they are offered (e.g. marketplaces) because those vehicles are apt to change from one moment to the next.

MSBA acknowledges that some markets of commercial activity, such as real estate, may be subject to other consumer protection and security laws. The MSBA does not see an inconsistency between recognizing a broad AOTP exemption and the California legislature still exercising its full authority over more highly-regulated spheres of commercial activity. For example, where real estate transactions are subject to certain rules in California, the payments for those transactions being processed by a Payment Processor that is exempt from licensure under the AOTP exemption does not diminish the authority of the legislature over those, more regulated, spheres of commercial activity. There are a variety of regulated businesses that rely on payment processing in California today, such as gun sales, sale of medicine, sale of medical services, sale of legal services and payment of state and local taxes.

In conclusion, therefore, we respectfully submit that it is not necessary to exclude the California AOTP exemption from applying to one or another set of goods or services, with the exception of money transmission itself, which is an exclusion already favored by a number of other states.

(iv) Consistency across state-lines is good for California

Insofar as the CFC 2010 AOTP exemption functions in a manner that is materially different from the exemption widely accepted in other states, there would be inefficiencies in the operation of a California Payment Processor placing it at a competitive disadvantage relative to those operating in other states. This is not to say that California should simply follow the other states blindly, but instead, MSBA believes it is important to weigh the cost of a distinct California regime for California Payment Processors when deciding on the final form of CFC 2010. We respectfully submit that the cost of inconsistency is considerable, because it would interfere in the implementation of a nationally active Payment Processor, which, realistically, constitutes most such entities in the contemporary commercial and technological reality.

2. What does it mean to “receive” goods or services?

There is, of course, California case law on the meaning of being in receipt of goods¹³ or services¹⁴. MSBA respectfully submits that CFC 2010 should not serve to create a new set of rules to determine the legal or factual delivery of goods or services, over and above those already established at law in California. Indeed, a Lyft driver may *de facto* deliver the service to a passenger, while the passenger uses their credit card to pay Lyft that, in turn, pays the driver. Looking only a little into the future, we can also foresee a driverless Lyft vehicle, piloted by a remote third party service, delivering the transportation guidance service for the benefit of Lyft, the passenger and, perhaps, a third party whose package is being transported by the same vehicle. Similarly, in the brick-and-mortar world, a customer at a private music school, will pay the college that, in turn, pays teachers, administrators, instrument vendors or lessors, maintenance personnel etc. to operate the school. There has been, and will always be, an ever-changing mixture of persons providing and benefitting from the delivery of goods or services. Proof of whether a given good or service has been delivered or not will be a function of the underlying contractual promises made and applicable consumer protection law¹⁵ and MSBA believes that CFC 2010 should not create an alternative set of rules by which those same relationships must be recast.

The stacking of service providers, meaning one entity promising a consumer multiple services that are ultimately delivered by a variety of suppliers, is not novel and does not need a new legal paradigm. Where a marketplace promises delivery of a toaster that is, in fact, sent by a manufacturer overseas, the marketplace and toaster vendor should simply be held to the promises

¹³ *Chartered Bank of London v. Chrysler Corp.*, 115 Cal. App. 3d 755, 171 Cal. Rptr. 748, 1981 Cal. App. LEXIS 1393, 30 U.C.C. Rep. Serv. (Callaghan) 1438 (Cal. App. 2d Dist. February 5, 1981) the existence of a sale contract and security interest concerning a boat is not sufficient to prove that the would-be purchaser is in possession of the boat, notably when would-be purchaser is neither in possession nor in delivery of the boat. *Conrad v. Fisher*, 37 Mo. App. 352, 1889 Mo. App. LEXIS 362 (Mo. Ct. App. January 2, 1889) The rights of the unpaid distillers, based on their vendor's lien founded on actual possession, took precedence over the creditors' constructive possession as pledgees of a debtor purchaser.

¹⁴ *Howell v. Grindr, LLC*, 2015 U.S. Dist. LEXIS 167669 (S.D. Cal. December 15, 2015) discussing rights of notice and termination in California service contracts. *Christensen v. Superior Court*, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79, 1991 Cal. LEXIS 5401, 91 Daily Journal DAR 14722 (Cal. December 2, 1991) addressing a dispute over the classes of persons entitled to make a claim for failure to deliver funeral-related services.

¹⁵ Such as the *Federal Trade Commission Act*, 15 U.S.C. §§41-58.



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they make, which are subject to ordinary consumer protection laws. That standard of defining delivery of goods or services should not be given a different definition for a Payment Processor handling the transaction funds.

MSBA respectfully submits that the AOTP exemption should be available to all sellers of goods and services and need not intervene to create a new set of legal standards for delivery of either, notably because such new standards are far too numerous for one to expect DBO or the courts to administer in two separate regimes – one for ordinary sales and the other for sales where a Payment Processor handles the funds.

3. Other Comments

Based on MSBA members' experiences, where a licensed MSB engages in activities that are exempt activities under the AOTP exemption, the licensed MSB is held to a higher standard than an unlicensed entity engaging in the same exempt activities. In other words, where a licensed MSB and an unlicensed entity both operate under an AOTP exemption, the licensed MSB is required to comply with requirements that do not apply to the unlicensed entity. As a result, the licensed MSB incurs a higher cost of compliance and finds it difficult, if not impossible, to compete with unlicensed entities that do not incur such costs. In essence, the licensed MSB feels penalized for being licensed despite being able to rely on the AOTP exemption. We respectfully recommend that the final rule allow licensed money transmitters that perform substantially the same activities as exempt entities be allowed to operate on a level playing field with their unlicensed counterparts and competitors so that all entities operating under an AOTP exemption are held to the same operational and reporting standards. As an alternative, unlicensed entities operating under an AOTP exemption should be held to operational and reporting standards that are similar to those required of licensed money transmitters. We would be happy to discuss with you further the experiences of our members.

We feel there is another important criterion that has been overlooked in the analysis of the AOTP exemption – geographic location. We are seeking clarity on whether and how the exemption applies when the payee, payor or the agent are located within or outside of California or the USA. All too frequently, entities must seek guidance on both the federal and state levels on regulations that do not speak to the geographic location of one of the parties in the flow as being a factor. For example, does the AOTP exemption apply to a Payment Processor located in California that only serves persons outside of California? We hope that the amended regulations



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will clarify the rule, insofar as it varies as a function of location of the payor, payee and Payment Processor.

4. Conclusion

In sum, the MSBA supports the continued broad application of the AOTP exemption in California and respectfully submits the foregoing comments as possible improvements thereon. The MSBA is grateful to have the opportunity to comment on the applicability of the exemption.

We are happy to meet with you and discuss our comments and recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Kathy Tomasofsky".

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A handwritten signature in blue ink that reads "Adam Atlas".

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