



April 9, 2019

Via electronic mail (regulations@dbo.ca.gov)

Department of Business Oversight
1515 K Street, Suite 200
Sacramento, California 95814-4052

Re: *Invitation for Comments on Proposed Rulemaking, Money Transmitter Act: Agent of Payee (PRO 07/17)*

Dear Commissioner Owen:

Stripe Payments Company (Stripe) appreciates the opportunity to respond to the California Department of Business Oversight's (DBO) invitation for comments on a proposed rulemaking regarding the agent of payee exemption under the California Money Transmission Act (MTA).¹ Stripe has worked with the Department of Business Oversight for several years. Stripe also obtained its California money transmitter license in 2016, offering regulated products starting in 2017. Similarly, we are licensed as a money transmitter by states and territories across the U.S. and, under similar licensing regimes, in countries around the world. We appreciate the DBO's continued work to protect consumers, to explain and clarify rules for businesses in order to ensure compliance with money transmission requirements, to understand technologies, and to allow for both innovation and consumer protection as those technologies evolve. We also support the DBO's work to obtain input from stakeholders and the public before the DBO engages in rulemakings that could affect consumers or impact the availability and efficacy of internet commerce.

The agent of payee exemption is an important recognition of the "increasing use of the [i]nternet as a platform for the exchange of goods and services."² Among other types of transactions, the exemption was designed to "ensure that electronic commerce (e-commerce) transactions are not inadvertently regulated as money transmission."³ In this letter, we provide comments on several of the DBO's questions in its invitation for comments. These comments relate to the scope of the agent of payee exemption. In particular, these comments address the DBO's questions about how to define "goods or services" and "payor." We also discuss the treatment of commercial transactions involving multiple agents. To frame our comments, the letter first discusses the purpose and benefits of the agent of payee exemption under the MTA.

¹ Cal. Dep't of Bus. Oversight, *Invitation for Comments on Proposed Rulemaking—Money Transmitter Act: Agent of Payee (PRO 07/17)* (Feb. 8, 2019) [hereinafter *Invitation for Comments*].

² 2013 California Assembly Bill No. 2209, California 2013-2014 Regular Session, Senate Floor Analyses at 1 (Aug. 4, 2014).

³ *Id.*

The Purpose of the MTA’s Agent of Payee Exemption

The primary purpose of the MTA is to “protect the interests of consumers of money transmission businesses” in California.⁴ The agent of the payee exemption is consistent with that purpose. It is designed around the difference between money transmission and payments for goods and services. Money transmission involves the one-way transmittal of money or monetary value from a sender to a receiver. The exchange of goods and services, at its most basic, involves a purchaser of a good or service (a payor) and the provider of the good or service (a payee). In an exchange of good or services, the essential benefit for which the consumer has bargained is the good or service itself. By contrast, in a money transmission transaction, the essential benefit for which the consumer bargains is the transmission of the money itself; the MTA is designed to protect the consumer in that instance.

The agent of payee exemption also fosters innovation. It creates space for new types of commercial endeavors that benefit California consumers, for businesses to develop, and for partnerships to evolve. It allows businesses with different specialties to work together. In doing so, they are able to safely and efficiently facilitate commercial transactions without being subject to unnecessary regulatory costs and burdens. Such innovation creates jobs and expands consumer choice in the marketplace.

The exemption’s ability to advance the purpose of the MTA and to foster such innovation, however, depends on a broad reading of its key components: goods or services, payor, and the treatment of transactions involving agents. A constrained reading would contradict the California legislature’s intent by stifling the very innovation the exemption was enacted to facilitate. We respectfully encourage the DBO to choose a different outcome.

How to Define “Goods or Services”

The DBO asks whether it should further define the term “goods or services” for purposes of the agent of payee exemption.⁵ In particular, the DBO asks whether the term should be limited to particular types of goods and services.⁶ We believe that the DBO should not further define the term.

We believe that the plain meaning of the term is clear. First, the terms “goods” and “services” are already defined by relevant law and are well-understood. Division 2 of the California Commercial Code, which provides default rules for the sale of goods, defines goods to include things that are movable other than the money that is paid for the goods.⁷ Black’s Law Dictionary

⁴ See Cal. Fin. Code § 2001(d).

⁵ Invitation for Comments, at 2–3.

⁶ To illustrate its point, the DBO asks whether government debts are goods or services. We note that the MTA specifically addresses government debts in Cal. Fin. Code § 2010(c). If an agent accepts payment on behalf of the government, the agent would be exempt from regulation under the MTA not through the agent of the payee, but through the agency relationship with the government.

⁷ Cal. Com. Code § 2105(1).

defines goods as “[t]angible or movable property other than money” and “[t]hings that have value, whether tangible or not.”⁸ The term “services” is less amenable to definition. Nonetheless, there is ample case law under Division 2 and otherwise that distinguishes when a contract is for goods and when it is for services.⁹

Second, the legislative history of the exemption does not support a special or more limited definition of “goods or services.” As the California legislature recognized in enacting the agent of payee exemption, the MTA is not meant to regulate the purchase of goods and services.¹⁰ The broad drafting of the exemption evidences the legislature’s intent that all businesses transacting in goods and services should be eligible to rely upon the exemption.

In addition, we do not believe that the California legislature intended to limit the agent of payee exemption only for commerce through online marketplaces. Although the legislative history for the exemption focuses on online marketplaces, the statutory text is drafted in more general terms—to include all goods and services. We interpret the legislature’s discussion of marketplaces as illustrative of how online commerce can grow as a result of the exemption, rather than an attempt to limit the exemption to the goods and services found on online marketplaces.

If the DBO does wish to define “goods and services” further, we believe that “goods or services” should mean that which is exchanged for economic value that is not itself money or monetary value. This definition would most closely adhere to the legislature’s intent for the MTA and the exemption. In addition, this definition would be consistent with the common understanding and usage of the terms “goods” and “services” in the other legal contexts, including California statutes and case law.¹¹

Drafting a narrower definition would put the DBO in the position of picking and choosing which types of goods and services should qualify for the exemption.¹² The California legislature specifically rejected this approach in the final text of the 2014 amendment. Having deliberated

⁸ Black's Law Dictionary (10th ed. 2014).

⁹ See generally 25 A.L.R.7th Art. 4 (Originally published in 2017) for a discussion of case law distinguishing between contracts for goods and contracts for services under Article 2 of the Uniform Commercial Code, which Division 2 of the California Commercial Code implements.

¹⁰ See 2013 California Assembly Bill No. 2209, California 2013-2014 Regular Session, Concurrence in Senate Amendments at 8 (Aug. 13, 2014) (“[T]he extent of the payee/agent exemption is to clarify that retail transactions for goods and services are not money transmission.”).

¹¹ See Cal. Com. Code § 2105, *supra* note 7. See also, e.g., *Wall St. Network, Ltd. v. New York Times Co.*, 164 Cal. App. 4th 1171, 1186 (2008) (distinguishing between contracts for the sale of goods and contracts for the sale of services).

¹² Stripe also acknowledges that certain types of goods and services may pose particular policy concerns. Stripe urges the DBO to address these through other means, where and when consistent with other legislative mandates. The DBO should instead reserve use of its interpretive authority under the MTA to regulate money transmission businesses.

over the exemption in the context of online marketplaces,¹³ the legislature wrote the exemption to apply broadly to all types of commercial transactions.¹⁴

How to Define “Payor”

The DBO also has asked how it should think about the term “payor.”¹⁵ A “payor” is defined under the MTA as the “recipient” of “goods or services.” The DBO asks whether it should further define what it means to “receive” goods or services for purposes of understanding a “payor” in the context of the agent of payee exemption. Like “goods and services,” we believe that the DBO should not further define the term “receive.”

The purpose of the agent of payee exemption is to promote the development of the modern economy, including through the evolution of different payment chains, while protecting consumers from financial harm. As the DBO recognizes, commercial transactions in the modern economy may involve a series of interconnected steps between parties like an end-merchant, marketplace, wholesaler, distributor, payment processor (or multiple payment processors), and consumer. These sorts of transactions often involve not only more than one payor, but also multiple payees.

For example, a single online transaction can involve multiple parties, including a consumer, an online marketplace, and an end-merchant. As illustrated below, this transaction results in two payors (the consumer and end-merchant) and two payees (the marketplace and end-merchant). A payment processor facilitates the payments for the transaction, and acting as an agent stands in the shoes of its payee principals.

- The marketplace offers listing and advertising services on its website, for which the end-merchant pays a listing/advertising fee. The end-merchant is the payor and the marketplace is the payee.
- The consumer buys logistical convenience from the marketplace as well as a product from the end-merchant.¹⁶ The consumer is the payor and both the end-merchant and marketplace are payees.
- The marketplace engages the payment processor to accept the listing fees that the marketplace charges. This is a transaction for services. The payment processor is the agent of the marketplace payee.

¹³ See Concurrence in Senate Amendments at 11-12, *supra* note 10 .

¹⁴ *Id.*, at 1 (“[T]his bill:…Exempts from licensure a retail transaction in which the recipient of 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.”).

¹⁵ Invitation for Comments, at 3.

¹⁶ We note this is just one example of how different payors/payees in a modern payments chain can be economically connected; other variants can apply as well. We would similarly encourage the DBO to view those variants as commercial exchanges rather than money transmissions.

- The end-merchant engages the payment processor to accept the payment for the product. This is a transaction for goods. The payment processor is the agent of the end-merchant payee.

None of the steps listed above should be considered money transmission, because all of them facilitate payment for goods and services. The inherently commercial nature of this transaction is not diminished by the fact that it involves several steps. Rather, each step is integral to the underlying commercial transaction, helping to connect consumers with merchants and streamlining the payments.

As above with “goods and services,” Stripe recognizes that the DBO may wish to further define “receive” goods or services. In that case, we encourage the DBO to define “receive” so that a good or service is received by a payor when the payor’s counterparty has performed the duties owed to the applicable payee in the economic exchange. This definition would accommodate the types of multi-step commercial transactions described above, consistent with the purpose of the MTA and the exemption.

Limiting the availability of the exemption based on a narrow reading of payor would stifle growth by forcing businesses that “receive” the good or services in multi-step transactions to become money transmitters themselves. This would be contrary to the purpose of the exemption. The legislature designed the agent of payee exemption so that marketplaces, wholesalers, end-merchants, and other similar businesses could focus on their commercial activities—whatever goods they make or sell and whatever services they provide. We do not believe the legislature intended for those businesses to become money transmitters.¹⁷

Transactions Involving Co-Agents and Sub-Agents

Aside from considering how the DBO should evaluate “goods and services” and “payor” in the context of the agent of payee exemption, the DBO also invites comments on the “the full range of commercial transactions based on agency law principles to which you believe the agency-based exemption should apply.”¹⁸ We believe that the exemption is designed to keep payments for goods and services outside the scope of the MTA. The exemption’s legislative history supports this view, as do the fundamental elements of agency law. As such, we respectfully ask the DBO to recognize that co-agency and sub-agency is part of (rather than excluded from) the agent of payee exemption.

The MTA regulates money transmission. As in other jurisdictions, California’s definition of money transmission includes “receiving money for transmission.”¹⁹ This definition

¹⁷ Concurrence in Senate Amendments, *supra* note 10 at 7-8 (explaining that the bill enacting the agent of payee exemption continues the work of a previous bill, which “made numerous changes to the MTA to update its application in a changing marketplace, but also ensure that it does not create unnecessary barriers to entry for new entities wishing to enter the payments space.”).

¹⁸ Invitation for Comments, at 4.

¹⁹ Cal. Fin. Code § 2003(q)(3).

contemplates three parties: (1) a sender, (2) a transmitter acting for the sender, and (3) a recipient. It also contemplates a single transaction: the transmission itself. Finally, that single transaction involves movement only in one direction: from sender to recipient.

Payments for goods and services are different. Payments for goods and services involve two parties: (1) a buyer and (2) a seller. Payments for goods and services thus also involve movement in two directions: payment from the buyer and performance by the seller. Unlike money transmissions, payments for goods/services involve an exchange amongst parties.

The principles of agency law introduce an element to a transaction for goods and services that is not available in a transaction for money transmission: an agent.²⁰ It is fundamental that when a principal engages an agent, the agent stands in the shoes of the principal such that the two effectively become one.²¹ When a seller engages an agent to accept payment on the seller's behalf, the seller and the agent become one. To the buyer, there is no difference. The buyer makes the payment and the buyer's obligation in the exchange is satisfied.²² And the California legislature made clear that a seller's use of an agent to accept payments on its behalf is not subject to the MTA.²³

As described above, payments for those goods/services in the modern economy can grow beyond the single-buyer-single-seller model. The DBO identifies this growing complexity in its request, noting that “[a]s Internet-based commerce grows and evolves, payment chains have become longer and more convoluted.”²⁴ As above, those longer chains can involve multiple payors and multiple payees.

²⁰ Black's Law Dictionary defines “agency” as a “relationship that arises when one person (a principal) manifests assent to another (an agent) that the agent will act on the principal's behalf, subject to the principal's control, and the agent manifests assent or otherwise consents to do so. An agent's actions have legal consequences for the principal when the agent acts within the scope of the agent's actual authority or with apparent authority, or the principal later ratifies the agent's action.” Black's Law Dictionary (10th ed. 2014). *See also* Restatement (Third) of Agency, § 1.01 (2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that 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.”).

²¹ *See* Cal. Civ. Code § 2330 (“An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.”). *See also, e.g.,* Daniels v. Select Portfolio Servicing, Inc., 246 Cal. App. 4th 1150, 1171 (2016) (“The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties.”); Nels E. Nelson, Inc. v. Tarman, 163 Cal. App. 2d 714, 727 (1958) (“[A] principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract.”).

²² *See* Restatement (Third) Of Agency § 6.07(2) (2006) (“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 settlement.”).

²³ Cal. Fin. Code § 2010(l).

²⁴ Invitation for Comments, at 2.

And accordingly, the agent of payee exemption is designed to apply equally to a complex commercial transaction as it does a simple one, because the exemption relies on the fundamental elements of agency law. Those elements contemplate the existence of co-agents and sub-agents.²⁵ Just as an agent stands in the shoes of its principal (in the exemption's case, the seller's shoes), co-agents and sub-agents stand in those very same shoes.²⁶

In addition, the existence of a co-agent or sub-agent does not automatically create a money transmitter where one otherwise would not exist. A consumer who buys a product intends to buy the product. The consumer does not intend to engage in a money transmission. Multiple agents supporting the payment chain (whether one seller in the chain or several sellers in the chain) do not lose their abilities to serve as agents to those sellers just because there are multiples of them. Nor does one agent's acceptance of payment automatically transform the transaction into a money transmission. The nature of the transaction remains consistent regardless of how many agents act on behalf of the seller: it is a payment for goods/services, an exchange between buyer and seller.

Not only does the concept of co-agency and sub-agency not create the existence of a money transmitter where one did not otherwise exist, but co-agency and sub-agency equally does not create any new consumer risk. The consumer's payment still satisfies the consumer's obligation in the exchange. Equally, the established payments system (network rules, other applicable state laws) protect the consumer's interest in the goods/services purchased.²⁷

The concept of co-agency and sub-agency also does not create any new risk to the financial system. Just as agency requires a contract with the principal, co-agency and sub-agency requires contracts as well. As such, the contracts make clear the identities of all agents in the transaction chain and what their respective roles are in the chain.

* * * *

For these reasons, we believe that the DBO should not take any action that has the potential to disturb the balance the California legislature created in the agent of payee exemption. We believe the legislation was enacted to apply to all sales of goods/services; to apply when sellers rely on single agents and multiple agents, and also when agents rely on each other. We do not believe the California legislature contemplated the exemption to apply only to specific types of

²⁵ See, e.g., Restatement (Third) Of Agency § 3.15(1) (2006) (“A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal.”); Restatement (Third) Of Agency § 1.04(1) (2006) (“Coagents have agency relationships with the same principal. A coagent may be appointed by the principal or by another agent actually or apparently authorized by the principal to do so.”).

²⁶ See, e.g., *Trane Co. v. Gilbert*, 267 Cal. App. 2d 720, 727 (Ct. App. 1968) (“Where an agent is authorized to employ a subagent, or his act in doing so is ratified by the principal, the latter is, as to third persons, bound by the acts of the subagent to the same extent as if they had been performed by the agent. That is, the relation of principal and agent exists between the principal and subagent.”).

²⁷ See, e.g., Cal. Civ. Code § 1770 *et seq.*

goods/services; to apply only to online marketplaces; to apply only where there is one agent. We believe the legislature's intent was to create space for innovation and commercial expansion in the market, not to constrain or stifle such growth.

Stripe appreciates the opportunity to respond to the DBO's invitation for comment. As always, Stripe is committed to working with the DBO, and all of Stripe's regulators, to advance the goals of protecting consumers from harm and protecting the financial system from illicit use. If you have any questions, please contact me at cli@stripe.com.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Chor Li', written in a cursive style.

Chor Li
Director, Regulatory Affairs

cc: Senior Counsel Jennifer Rumberger (Jennifer.Rumberger@dbo.ca.gov)