

FINAL STATEMENT OF REASONS  
FOR THE ADOPTION OF RULES UNDER THE  
CALIFORNIA MONEY TRANSMISSION ACT  
PRO 07-17

In accordance with Government Code Section 11346.9, the Department of Financial Protection and Innovation (Department) sets forth below the reasons for the adoption of regulations contained in Subchapter 80, Title 10, of the California Code of Regulations (C.C.R.).

UPDATE OF INITIAL STATEMENT OF REASONS [Government Code section 11346.9, subdivision (a)(1)]

SECTION 80.126.30. The proposed regulation, as originally noticed to the public, defined “goods or services” to mean any good or service, other than money transmission services as defined in Financial Code section 2003, subdivision (q), for which the payor has a payment obligation to the payee, and stated that “services” include charitable purposes. The Department has amended Section 80.126.30 to state that “services” include charitable activities engaged in by organizations that have received recognition of tax exemption under Section 501(c)(3) of the Internal Revenue Code. The Department made this change in response to a comment received (see response to Financial Innovation Now’s Specific Comment No. 2). The Department has chosen to specify organizations that are tax exempt under Section 501(c)(3) to align with a separate exemption from the Money Transmission Act under 10 CCR § 80.3002 for public benefit nonprofits that are tax exempt under Internal Revenue Code section 501(c)(3).

“SPIRIT AND PURPOSE” STATEMENT IN ISOR. Page 5 of the Initial Statement of Reasons included the following statement: “...to the extent that a charity has appointed a person as its agent (under either general agency law or the agent of payee exemption) to accept funds on the charity’s behalf, the agent is considered not to have received money for transmission and therefore meets the spirit and purpose of the agent of payee exemption.” The Department would like to clarify this statement and expressly reject the notion that common law agency on its own “meets the spirit and purpose of the agent of payee exemption.”

10 CCR 80.3002, subdivision (a)(2) exempts “a public benefit nonprofit which has received recognition of tax exemption under IRC Section 501(c)(3).” Financial Code section 2030 exempts an agent of an exempt entity from licensure under the MTA. However, Financial Code section 2030 only exempts an agent of an exempt entity from licensure to the extent the exempt entity is conducting money transmission. An entity that is not conducting money transmission does not need to rely on an exemption from the MTA because it does not require a money transmission license to begin with.

If a 501(c)(3) tax exempt public benefit nonprofit is not conducting money transmission, then it is not exempt from licensure under 10 CCR 80.3002, subdivision (a)(2) because

it does not require a money transmission license. Therefore, under those circumstances, an agent of the charitable organization cannot be exempt from licensure as an agent of an exempt entity under Financial Code section 2030. As a result, a payment processor acting on behalf of the charitable organization would have to meet the statutory requirements of the agent of payee exemption to be exempt from licensure.

The Department emphasizes that the common law agency permitted in the specific scenario of a 501(c)(3) tax exempt public benefit nonprofit that engages in money transmission does not equate to common law agency being sufficient to exempt payment processors of charitable organizations generally under the agent of payee exemption.

#### LOCAL MANDATE DETERMINATION [Government Code section 11346.9, subdivision (a)(2)]

The proposed regulations do not impose any mandate on local agencies or school districts.

#### SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF MARCH 6, 2020 THROUGH APRIL 20, 2020 [Government Code section 11346.9, subdivision (a)(3)]

The Department received two public comment letters during the 45-day public comment period. The comments are summarized below, followed by the Department's response to each comment.

Commenter 1: The Money Services Round Table (TMSRT) submitted a letter dated April 20, 2020. TMSRT was founded in 1988 as "an information-sharing and advocacy group for the nation's leading non-bank money transmitters."

General Comments: Before commenting on specific sections, TMSRT makes general policy comments about the agent of payee exemption and the proposed rules. The Department is not required to respond to these general policy comments but does so for clarity and transparency.

General Policy Comment No. 1: TMSRT cites the Department's Initial Statement of Reasons (ISOR) which states the agent of payee exemption "was meant to keep pace with the rapidly evolving payments and e-commerce landscape by exempting transactions where certain contractual requirements are met, and consumers and other payors are protected from having to pay more than once to satisfy their obligations." TMSRT states that put differently, the primary basis for regulation under the MTA – the need to protect a sender of funds – is lacking if the sender is not at risk of its payment obligation not being met as a result of the nonperformance of an intermediary. TMSRT states that it agrees that *if* a consumer is not placed at any risk of loss by making a payment for goods or services that is received by an agent of a payee as opposed to

the payee directly, the payment transaction should not constitute money transmission under the Act. TMSRT contends that this is the case where: (1) the payor has already received or contemporaneously receives the goods or services at issue; and (2) the payment to the agent of the payee extinguishes the payor's payment obligation *to the provider of the goods or services* at the time of payment.

Response: The Department agrees with TMSRT's general policy statements reiterating the purpose of the agent of payee exemption and the basis for regulation under the MTA: namely, the need to protect a sender of funds. The proposed rules reflect the fact that the MTA was designed to protect senders of money and that a consumer/sender does not bear a risk of loss when the requirements of the agent of payee exemption are met. However, the Department disagrees with the notion that the agent of payee exemption can only apply to a transaction where a payor has already received, or contemporaneously receives, the goods or services at issue. Financial Code section 2010, subdivision (l) contains no such requirement and the legislative record does not evidence an intent by the legislature to impose such a requirement.

On page four of the ISOR in our explanation of why the agent of payee exemption does not apply to stored value transactions, we state "The agent of payee exemption was designed to cover transactions where there is a contemporaneous receipt of money for the *purchase* of goods or services." In stored value transactions, the purchase of goods or services occurs at a later time and does not occur contemporaneously with the receipt of money for issuance of stored value. The Department emphasizes that the quoted statement does not equate to an assertion that the agent of payee exemption can only apply to a transaction where a payor contemporaneously *receives* the goods or services at issue.

General Policy Comment No. 2: TMSRT states that the purpose of the MTA and the purpose of regulating money transmission is broader than protecting consumers and cites Financial Code section 2001, subdivision (d) in stating the purpose also includes "maintain[ing] public confidence in financial institutions doing business in [California]" and "preserv[ing] the health, safety, and general welfare of the people of [California]." TMSRT states given that the agent of payee exemption is self-executing and the Department does not require that a person relying on the exemption obtain confirmation of its applicability, it is essential that the obligations and liabilities of each intermediary facilitating an exempt transaction between a payor and a payee are clearly established. TMSRT states there is always the risk that companies will try to exploit any ambiguity in the exemption, which may, in turn, create risk for consumers and other participants in the e-commerce economy. Therefore, TMSRT states that greater clarity is necessary with respect to: (1) what constitutes a multiparty transaction that qualifies as a single, exempt, agent of a payee transaction under the agent of payee exemption, and (2) what contractual or other requirements must be met by each party to the transaction seeking to rely on the agent of payee exemption (whether as the exempt statutory agent or as an exempt common law agent.)

Response: The Department agrees that because the agent of payee exemption is self-executing, the obligations and liabilities of each intermediary facilitating an exempt transaction between a payor and payee must be clearly established. This is one of the reasons the Department is clarifying through the rules that a “transaction” means an instance in which there is a payment obligation between a payor and a payee and that where there is a series of transactions involving multiple pairs of payors and payees, the agent of payee exemption can apply to each transaction *if* an agency relationship is established by written contract between each respective agent and payee *and* the other statutory requirements of Financial Code section 2010, subdivision (l) are met.

With respect to TMSRT’s statement that greater clarity is required with respect to what constitutes a multiparty transaction that qualifies as a single, exempt, agent of a payee transaction under the agent of payee exemption, the Department addressed multiparty transactions in the ISOR and addressed the two primary models that have been the subject of numerous requests for interpretive opinions:

Scenario 1: Customer → Payment Processor 1 → Marketplace → Payment Processor 2 → Merchant

Scenario 2: Customer → Payment Processor 1 → Payment Processor 2 → Merchant

The Department explained that the first scenario, which some might describe as a single purchase, may in fact entail two separate transactions since the rules clarify that a “transaction” is an instance in which there is a payment obligation between a payor and a payee. Therefore, Scenario 1 can be broken up into two transactions: (1) a transaction where the Customer, as payor, purchases a good or service from an Marketplace, a payee, and there is a payment obligation between the Customer and the Marketplace, and (2) a transaction where the Marketplace, as payor, purchases goods from a Merchant, as payee, to fulfill an order or to restock its own supply. In the first transaction, the Marketplace may be the direct provider of a good or service or an indirect provider of a good or service by facilitating the purchase of goods or services through an online platform that matches consumers with third-parties. In the latter case, the Marketplace provides a bundle of services to the consumer including a search function, an infrastructure for purchasing, shipping and processing returns, and other customer services. In each transaction, if the payee appointed a payment processor as its agent by written contract and fulfilled the other requirements of Financial Code section 2010, subdivision (l), the payment processor could be eligible for the agent of payee exemption.

In contrast, the second scenario involves only one transaction but two successive payment processors within the transaction. Here, the Customer, as payor, purchases a good from a Merchant, as payee, and there is a payment obligation between the Customer and the Merchant constituting one transaction. If the Merchant appoints Payment Processor 2 as an agent by written contract and the other requirements of Financial Code section 2010, subdivision (l) are met, then Payment Processor 2 is

eligible for the agent of payee exemption. Separately, Payment Processor 2 may appoint Payment Processor 1 as its agent under the laws of agency. If Payment Processor 1 is the agent of Payment Processor 2 under general agency law, money received from the Customer by Payment Processor 1 on behalf of Payment Processor 2 would not constitute money transmission because the Customer's funds are deemed received by Payment Processor 2 at that moment.

In discussing these two scenarios, the Department's goal is to address the primary models in which questions surrounding the agent of payee exemption have arisen and provide a framework for understanding how the agent of payee exemption can be applied to different transactions. Based on the numerous inquiries the Department has received regarding the agent of payee exemption over the years, it has become quite evident that myriad business models and transaction structures currently exist and will develop in the marketplace. Rather than attempt to imagine and address every possible model, the Department has instead provided a framework that can be applied to various scenarios and transaction structures.

General Policy Comment No. 3(a): TMSRT states that if the obligations of each paying party in the chain of transactions – starting with the paying consumer – are not clearly structured, participants in exempt agent of payee transactions (including the providers of goods or services) may not understand the liability they are taking on, and consumers may be at risk in the event of an intermediary's nonperformance. TMSRT states that maintaining the integrity of the financial system and ensuring consumers are protected thus requires clear guidance from the Department on the regulatory expectations for non-regulated transactions. TMSRT argues that greater precision regarding how agent of payee transactions must be structured to fall outside the scope of the MTA will help ensure that the delivery of funds from the consumer to the payee (1) does not involve unregulated money transmission creating risk of loss for an intermediary payor and (2) does not result in loss or risk of loss to the consumer if the payee is unwilling or unable to deliver the consumer's goods and services either because the payee lacks the funds to perform its obligation or is not appropriately bound by the applicable agreement to deem the consumer's payment received upon receipt by the payee's agent.

TMSRT argues that caution is warranted with respect to a broad interpretation of the scope of exempt agent of payee transactions. TMSRT states the Department should precisely set forth specified criteria for a transaction to qualify for the agent of payee exemption and explain the basis for distinctions between regulated and non-regulated activity under the MTA. TMSRT states it is concerned that ambiguity in the regulation could result in a lack of oversight of money transmission activity that puts payors and the financial system at risk.

Response: In drafting rules to clarify the agent of payee exemption and the types of transactions it can apply to, the Department seeks to strike a balance between providing guidance that is specific enough to provide clarity to industry participants and general enough to be applied to the myriad business models and transaction structures that exist now and will exist in the future. However, in providing clarity, the Department is

bound by the language of the statute and its legislative history, which show the Department was *not* intended to regulate exempt transactions.

Agent of payee transactions must meet the requirements of Financial Code section 2010, subdivision (l), which requires that the agent of the payee be the payee's agent pursuant to a preexisting written contract *and* delivery of the money or other monetary value to the agent satisfies the payor's obligation to the payee. The regulations, which define the term "transaction" and address the concept of a "series of transactions," along with the ISOR, serve to clarify various aspects of the agent of payee exemption including scenario one discussed above. Specifically, the Department has addressed the key concept that scenario one, which some might describe as a single purchase, may in fact entail two separate transactions. However, each transaction will only be exempt from the MTA under the agent of payee exemption if the requirements of Financial Code section 2010, subdivision (l) are met. In sum, the proposed rules set forth specified criteria regarding how the agent of payee exemption applies to various transactions.

General Policy Comment No. 3(b): TMSRT provides the example of a consumer who has purchased goods or services for delivery or receipt at a future date and states that the consumer may still be at risk of harm if the payee lacks the funds to deliver the goods or services, or provide a refund, because the intermediary has not yet settled, or cannot settle, the funds to the payee. TMSRT argues that because of this risk, some state regulators such as North Carolina's Office of the Commissioner of Bank have concluded that their state's agent of payee exemption does not apply to a payment for a future obligation because the payment obligation is not outstanding when the payment is made, but rather when the transaction is consummated on a future date. TMSRT argues that there are differences in risk to consumers and to financial intermediaries between transactions involving a contemporaneous purchase of a good or service and transactions involving the payment for a good or service to be delivered or performed in the future.

Response: As discussed in the response to General Policy Comment No. 1, the Department disagrees that the agent of payee exemption requires that a payor has already received, or contemporaneously receives, the goods or services at issue. Financial Code section 2010, subdivision (l) contains no such requirement and the legislative record does not evidence an intent by the legislature to impose such a requirement. The legislature found, and the Department agrees, that a consumer/sender does not bear a risk of loss when the requirements of the agent of payee exemption are met.

Specific Comments: TMSRT's comments about specific rules follow.

Specific Comment No. 1: Regarding Section 80.126.19, subdivision (b), TMSRT agrees that an agent of a payor or sender cannot be eligible for the agent of payee exemption.

Response: The Department affirms this point.

Specific Comment No. 2: TMSRT states the rulemaking will affirm that the agent of payee exemption does not apply to the sale or issuance of stored value as defined in the MTA because the ISOR explains that “the payment obligation element cannot be met in the stored value context because no payment obligation exists, and no payee is identified.” TMSRT is concerned that this statement conflates the nature of a regulated stored value product with a transaction involving the *purchase* of such a regulated stored value product. TMSRT states that an issuer of stored value holds funds on behalf of the holder of stored value and that the issuer has no specific, immediate obligation when receiving the funds to deliver the funds to another person. However, stored value is a payment obligation based on the definition of “outstanding” with respect to stored value under Financial Code section 2003, subdivision (r). Therefore, TMSRT asserts the Final Statement of Reasons should clarify that a transaction involving the sale of a regulated stored value product is not exempt because it is a transaction involving the sale of a regulated money transmission product and therefore does not constitute the sale of goods or services “other than money transmission service.”

TMSRT argues this distinction is important because in the context of a purchase or reloading of stored value, the issuer of the stored value *can be a payee*, even if the issuer cannot meet the definition of a “payee” under the agent of payee exemption, if the consumer is making a purchase of the stored value from the issuer, and the consumer’s funds are accepted by an intermediary as the agent of the issuer (or of a third-party distributor). TMSRT contends that in this case, however, the intermediary is an agent facilitating the sale or reloading of a regulated money transmission product, and therefore must be an authorized agent of a licensed money transmitter pursuant to Financial Code sections 2060-2063.

Response: TMSRT and the Department are reaching the same conclusion on this point. The agent of payee exemption cannot apply to the *issuance* of stored value because when stored value is issued, no payee is identified and therefore, there is no immediate obligation to deliver funds to a specific person. The Department agrees with TMSRT that in a transaction involving the *sale* of stored value, the agent of payee exemption cannot apply because the transaction involves the sale of a money transmission product and therefore, does not constitute the sale of goods or services “other than money transmission services” (Section 80.126.30 defines goods or services to mean “any good or service, other than money transmission services, for which the payor has a payment obligation to the payee”).

Regarding TMSRT’s second point, TMSRT contemplates a transaction where an issuer of stored value has an authorized agent. The Department agrees that an issuer of stored value could conceivably have an authorized agent pursuant to Financial Code sections 2060 et seq.

Specific Comment No. 3: TMSRT expresses concern that the ISOR suggests that the requirements of the agent of payee exemption are not applicable to a payment processor for a charity because the ISOR states “to the extent that a charity has

appointed a person as its agent (under either general agency law or the agent of payee exemption) to accept funds on the charity's behalf, the agent is considered not to have received money for transmission and therefore meets the spirit and purpose of the agent of payee exemption." TMSRT states the Final Statement of Reasons should clarify that a payment processor acting on behalf of a charitable organization must meet the statutory requirements of the agent of payee exemption as interpreted by the final rule. TMSRT argues otherwise, the Department should explain why a payment processor for a charitable organization only needs to be a common law agent and why this flexibility would not apply to payment processors of other types of payees. TMSRT argues the suggestion that meeting the "spirit and purpose" of the exemption would suffice calls into question the purpose of the statutory agent of payee exemption.

Response: 10 CCR 80.3002, subdivision (a)(2) exempts "a public benefit nonprofit which has received recognition of tax exemption under IRC Section 501(c)(3)." Financial Code section 2030 exempts an agent of an exempt entity from licensure under the MTA. However, Financial Code section 2030 only exempts an agent of an exempt entity from licensure to the extent the exempt entity is conducting money transmission. An entity that is not conducting money transmission does not need to rely on an exemption from the MTA because it does not require a money transmission license to begin with.

If a 501(c)(3) tax exempt public benefit nonprofit is not conducting money transmission, then it is not exempt from licensure under 10 CCR 80.3002, subdivision (a)(2) because it does not require a money transmission license. Therefore, under those circumstances, an agent of the charitable organization cannot be exempt from licensure as an agent of an exempt entity under Financial Code section 2030. As a result, a payment processor acting on behalf of the charitable organization would have to meet the statutory requirements of the agent of payee exemption to be exempt from licensure.

In contrast, if a 501(c)(3) tax exempt public benefit nonprofit engages in money transmission, it would be exempt from licensure under 10 CCR 80.3002, subdivision (a)(2). In this case, the charitable organization may appoint a payment processor as an agent under common law and the payment processor would be exempt from licensure under Financial Code section 2030.

The above explanation responds to TMSRT's request for to Department to explain "why a payment processor for a charitable organization only needs to be a common law agent and why this flexibility would not apply to payment processors of other types of payees." A payment processor for a charitable organization only needs to be a common law agent *if* the charitable organization is engaging in money transmission because 10 CCR 80.3002, subdivision (a)(2) exempts "a public benefit nonprofit which has received recognition of tax exemption under IRC Section 501(c)(3)" and Financial Code section 2030 exempts an agent of an exempt entity from licensure under the MTA. The common law agency permitted in this specific scenario does not equate to "flexibility" that can apply to payment processors of all types of payees.



Specific Comment No. 4: TMSRT states more clarity is needed regarding how the Department interprets the agent of payee exemption to apply to a transaction involving successive agents. TMSRT argues by definition, the agent in direct contractual privity with the payee must be the entity exempted by the agent of payee exemption from regulation as a money transmitter. TMSRT also states only one entity per transaction can be exempt under the agent of payee exemption. TMSRT argues the final statement of reasons should be more precise than the ISOR which states that “some” participants may be common law agents and “some” may be agents of a payee under the statutory definition. Specifically, TMSRT states the Department should affirm there can only be one statutory agent of a payee and that person must be in direct privity with the payee. TMSRT states any other entity that either receives or transmits funds in connection with the consumer’s payment must be either a common law agent of the entity asserting the agent of payee exemption, or subject to regulation as a money transmitter.

TMSRT argues this construct is consistent with the statutory exemption which establishes that payment to the statutory agent of payee extinguishes the payor’s obligation to the payee and accordingly, there is no reason the intermediary cannot appoint its own agent under the common law, to facilitate its acceptance of funds. However, TMSRT reiterates the Department has stated there can only be one instance of a payment obligation between a payor and a payee per transaction and argues in turn, only payment to the payee can extinguish the payment obligation. Therefore, TMSRT argues that only the payee can appoint the agent whose receipt of funds extinguishes the payor’s obligation to the payee in accordance with the agent of payee exemption. TMSRT agrees that an agent can appoint other common law agents to accept funds on its behalf by “stepping into its shoes” but asserts that a common law agent cannot be a “payee” under the exemption because the common law agent is not the provider of the goods or services.

Response: TMSRT makes two points: (1) the agent of payee exemption should only apply to one entity per transaction and (2) the agent of payee exemption should only be available to the agent in direct contractual privity with the payee.

The Department agrees with TMSRT’s reasoning and affirms that the agent of payee exemption can only apply to one entity per transaction and reiterates that a transaction is one instance of a payment obligation between a payor and a payee. The Department also affirms that the agent of payee exemption can only apply to the agent in direct contractual privity with the payee who meets the statutory criteria.

However, the Department reiterates that a scenario involving a consumer, an online marketplace, and a merchant which some might describe as a single purchase, may in fact entail two separate transactions for the purposes of the exemption. This is because the rules clarify that a “transaction” is an instance in which there is a payment obligation between a payor and a payee and the rules further introduce the concept of an “indirect provider of goods or services” and an “indirect recipient of goods or services.” Therefore, one transaction may take place when a customer, as payor, purchases a good from a marketplace, as payee, and another transaction may take place when a

marketplace, as payor, purchases a good from a merchant, as payee, to fulfill an order or to restock its own supply. Each transaction involves a payment obligation and in either transaction, if the payee appointed a payment processor as its agent by written contract and fulfilled the other requirements of Financial Code section 2010, subdivision (l), the payment processor could be eligible for the agent of payee exemption.

As another point of clarification, an agent of payee in direct contractual privity with the payee, who meets the statutory criteria, could theoretically use a licensed money transmitter to transfer money to the payee, for instance because the licensed money transmitter offers a foreign currency exchange capability that the agent of payee does not have. This would be permitted because the agent of payee meets the requirements of Financial Code section 2010, subdivision (l) and the entity transferring funds between the agent of payee and the payee is a licensed money transmitter.

Specific Comment No. 5: TMSRT argues that if a marketplace is a payee and the customer a payor, then for there to be a second transaction the marketplace must be the payor for that second transaction. TMSRT states the Department should clarify how a marketplace can be a payor even if the marketplace does not “have title to, or possession of, a good or service provided to a consumer.” TMSRT states in this case, the marketplace would be an “indirect” payee as defined by Section 80.128 of the rules. TMSRT states the ISOR suggests that the marketplace could only subsequently be a payor if the marketplace, “as payor, purchas[es] goods from Merchant, as payee, to fulfill an order, or restock its own supply after a consumer purchase.” TMSRT states the ISOR also suggests that both the marketplace and the merchant can each be payees even if the marketplace does not take title to the goods or services and is not paying the merchant to “restock its own supply.” TMSRT argues that industry participants will not be able to ascertain who the payor would be in such a situation, and therefore what types of transactions or aspects of transactions (e.g. settlement to a third party merchant on behalf of a marketplace), would be subject to regulation as money transmission, if any. TMSRT emphasizes the importance of clarity and argues that the Department should explain, on a step-by-step basis, how each participant in a multiparty transaction or series of transactions would or would not be subject to regulation as a money transmitter under the MTA.

Response: The key to understanding how a marketplace may be a payor or a payee in a particular transaction, even if the marketplace does not have title to, or take possession of, a good or service provided to a consumer, lies in the definitions of payor and payee under Sections 80.128.10 and 80.128 and the concept of an indirect recipient and indirect provider. A simple marketplace transaction would consist of the following flow of funds:

Customer → Marketplace → Merchant

However, the industry has made clear through numerous inquiries that a more complex flow of funds often exists and includes additional payment processors. The Department used the following example in the ISOR:

Scenario 1: Customer → Payment Processor 1 → Marketplace → Payment Processor 2 → Merchant

This basic example was used to show that a flow of funds which a consumer may conceive of as one transaction (because of the user interface) may in fact entail two transactions:

Transaction 1: Customer → Payment Processor 1 → Marketplace

Transaction 2: Marketplace → Payment Processor 2 → Merchant

In the first transaction, the Customer is a payor and direct recipient of a good or service while the Marketplace is a payee and may be a direct provider or indirect provider of the good or service. As explained in the ISOR, the Marketplace would be a direct provider of a good if it had actual or constructive possession of, or title to, the good. The Marketplace would be an indirect provider of a good if it did not have title to, or possession of, the good but facilitated the purchase of the good through, for instance, an online platform consisting of a bundle of services such as a search function, an infrastructure for purchasing, shipping and processing returns, etc.

In the second transaction, the Marketplace is a payor and may be a direct recipient or indirect recipient of a good or service while the Merchant is a payee and the direct provider of the good or service. If the Marketplace takes actual or constructive possession of, or title to, a good (such as in its warehouse as part of its inventory), then the Marketplace would be a direct recipient of the good. If the Marketplace purchases a good from a Merchant and does not take actual or constructive possession of, or title to, the good, for instance because the good will immediately be used to fulfill an order by a Customer, the Marketplace would be an indirect recipient of the good.

In each transaction, Payment Processor 1 and Payment Processor 2 may be eligible for the agent of payee exemption *if* the requirements of Financial Code section 2010, subdivision (l) are met. This basic example shows that Scenario 1, which a consumer may conceive of as one transaction, may in fact entail two transactions based on the definition of transaction, payor and payee in the Sections 80.130, 80.128.10, and 80.128. However, as discussed above, the Department cannot address or conceive of every possible transaction structure. In drafting regulations to clarify the agent of payee exemption and providing basic examples of transactions, the Department seeks to strike a balance between providing guidance that is specific enough to provide clarity to industry participants and general enough to be applied to various business models and transaction structures.

Commenter 2: Financial Innovation Now (FIN) submitted a letter dated April 20, 2020. FIN is “an alliance of technology leaders working to modernize the way consumers and businesses manage money and conduct commerce.”

General Comments: Before commenting on specific sections, FIN makes general comments about the agent of payee exemption and the proposed rules. FIN generally expresses agreement with the Department's interpretation of the agent of payee exemption and therefore, the Department will not respond to these comments.

Specific Comment No. 1: FIN cites Section 80.126.30 of the proposed rules which affirm that "services... include charitable purposes" meaning an organization that provides charitable services can be a "payee" under Financial Code section 2010, subdivision (l)(2) because the charitable organization is a provider of services and is "owed" payment by a payor for the purchase of those services. FIN then cites the ISOR which states "to the extent that a charity has appointed a person as its agent (*under either general agency law or the agent of payee exemption*) to accept funds on the charity's behalf, the agent is considered not to have received money for transmission and therefore meets the spirit and purpose of the agent of payee exemption." FIN argues that these statements are inconsistent because the proposed rules appear to indicate that a charity's activities are consistent with the definition of a payee under the MTA and therefore, a payment processor acting as a duly appointed agent of such a payee in accordance with the statutory requirements would be exempt under the agent of payee exemption while the statement in the ISOR suggests that a common law agency appointment is sufficient to exclude a payment processor acting on behalf of a charity from regulation under the MTA. FIN states that if a common law agency appointment is sufficient to exclude a payment processor acting on behalf of a charity from regulation under the MTA, then it is not clear why a payment processor acting on behalf of any other type of payee would need to rely on the express statutory requirements of the agent of payee exemption. Therefore, FIN argues the Department should expressly state: (i) the arrangement with a charity does not need to meet the express requirements of the agent of payee exemption and that an appointment as agent of a payee under general agency law is sufficient; and (ii) because an appointment under general agency law is sufficient, it is sufficient *not only* in the case of serving as an agent for a charity but also in other instances in which any payments intermediary that is providing payment services on behalf of a principal consistent with general agency law would be excluded from the MTA and not required to meet the specific criteria set forth in the agent of payee exemption, even if no party to a transaction meets such criteria.

Response: See discussion in Update to ISOR clarifying the "spirit and purpose" comment made in the ISOR. Also, see response to Specific Comment No. 3 from The Money Services Round Table.

Specific Comment No. 2: FIN requests the Department clarify what constitutes "charitable purposes" under Section 80.126.30. FIN cites current regulation Section 80.3002, subdivision (a)(2) which exempts from the MTA a "public benefit nonprofit which has received recognition of tax exemption under Internal Revenue Code Section 501(c)(3)." FIN states under this existing regulation, it would appear that an agent, including a common law agent, of a charity that is itself exempt from regulation as a money transmitter should also be exempt because no license is required under the MTA

for an agent of an exempt person. However, FIN states it is unclear what constitutes an exempt charity since neither “charity” nor “charitable purposes” are defined in the current regulations, the proposed rules, or the ISOR. Therefore, FIN requests the Department amend the proposed rules to state: “Services include charitable activities including, but not limited to, activities engaged in by organizations that have received recognition of tax exemption under Internal Revenue Code.”

Response: In response to FIN’s first point, 10 CCR 80.3002, subdivision (a)(2) exempts “a public benefit nonprofit which has received recognition of tax exemption under IRC Section 501(c)(3).” Financial Code section 2030 exempts an agent of an exempt entity from licensure under the MTA. However, Financial Code section 2030 only exempts an agent of an exempt entity to the extent the exempt entity is conducting money transmission. If a 501(c)(3) tax exempt public benefit nonprofit is not conducting money transmission, then it is not exempt under 10 CCR 80.3002, subdivision (a)(2) because it does not need a money transmission license to begin with.

If a charitable organization is not performing money transmission because it is the recipient of funds, then an agent of the charitable organization cannot be exempt from licensure as an agent of an exempt entity under Financial Code section 2030. Instead, the agent of the charitable organization would have to meet the statutory requirements of the agent of payee exemption to be exempt from licensure. On the other hand, if a 501(c)(3) tax exempt public benefit nonprofit is conducting money transmission, then it would be exempt from licensure under 10 CCR 80.3002, subdivision (a)(2) and a common law agent of the charitable organization would be exempt from licensure under Financial Code section 2030.

In response to FIN’s statement that it is unclear what constitutes an exempt charity, the Department revised the language in Section 80.126.30 and provided the public with a Notice of Modifications and an opportunity to respond. However, the Department disagreed with FIN’s specific recommendation regarding how to revise the language of Section 80.126.30. The Department revised Section 80.126.30 to state “Services include charitable activities engaged in by organizations that have received recognition of tax exemption under Section 501(c)(3) of the Internal Revenue Code.” The Department’s decision to specify tax exemption under Section 501(c)(3) was deliberate because it aligns with the separate exemption from the MTA under 10 CCR 80.3002 for public benefit nonprofits that are tax exempt under Internal Revenue Code section 501(c)(3).

#### SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY COMMENT PERIOD OF JUNE 30, 2020 THROUGH JULY 15, 2020 [Government Code section 11346.9, subdivision (a)(3)]

The Department received one public comment letter during the 15-day public comment period. The comments are summarized below, followed by the Department’s response to each comment.

Commenter 1: Stripe Payments Company (Stripe) submitted a letter dated July 15, 2020. Stripe is a California-licensed money transmitter.

Comment: Stripe requests the Department clarify that “services” include charitable activities engaged in by nonprofit organizations other than 501(c)(3) organizations and therefore, revise Section 80.126.30 of the regulations to state: “Services” include charitable activities, *such as those* engaged in by organizations that have received recognition of tax exemption under Section 501(c)(3) of the Internal Revenue Code.

Response: The Department disagrees with the requested revision in language. The Department has decided to specify that “Services” include charitable activities engaged in by organizations that have received recognition of tax exemption under Section 501(c)(3) of the Internal Revenue Code so it aligns with the current exemption under 10 CCR 80.3002 for public benefit nonprofits that have received tax exemption under IRC Section 501(c)(3).

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY COMMENT PERIOD OF April 15, 2021 THROUGH May 3, 2021 [Government Code section 11346.9, subdivision (a)(3)]

On April 15, 2021, the Commissioner proposed additional modifications to the text of the proposed regulations. The modifications were necessary for the following reasons:

- Section 80.126.10 was revised to add the word “other” in front of the term “monetary value” for consistency in the language of the regulation. Also, authority and reference citations were added.
- Section 80.126.20 was revised to add authority and reference citations.
- Section 80.126.30 was revised to clarify that the term “money transmission” is defined in Financial Code section 2003, subdivision (q). Also, authority and reference citations were added.
- Section 80.128 defines the term “payee” in Financial Code section 2010, subdivision (l) to mean the direct or indirect provider of goods or services, who is owed payment of money or other monetary value. Section 80.128 was revised to add the phrase “from the payor for the goods or services” to align with the language of Financial Code section 2010, subdivision (l). Section 80.128 was also revised to clarify that a direct provider of a good or service has actual or constructive possession of, or title to, a good or service while an indirect provider enables the provision of goods or services even if it does not have title to, or take actual or constructive possession of, the goods or services provided. Also, authority and reference citations were added.
- Section 80.128.10 defines the term “payor” in Financial Code section 2010, subdivision (l) to mean the direct or indirect recipient of goods or services.

Section 80.128.10 was revised to add the phrase “who owes payment of money or monetary value to the payee for the goods or services” to align with the language of Financial Code section 2010, subdivision (l). Also, authority and reference citations were added.

- Section 80.130 was revised to add authority and reference citations.

The Department received one public comment letter during the second 15-day public comment period. The comments are summarized below, followed by the Department’s response to each comment.

Commenter 1: The Third-Party Payment Processing Association (TPPPA) submitted a letter dated May 3, 2021. TPPPA is an industry association formed in 2013 whose members include payment processors and financial institutions.

Comment: TPPPA states that the plain language of the regulations do not readily reflect the interpretations of the rule, i.e. the agent of payee exemption in Financial Code section 2010, subdivision (l), that are clearly articulated in the statement of reasons. The TPPPA requests that the statement of reasons be made readily available and easily identified as a companion document for the rule. TPPPA believes this will help to limit confusion and misinterpretation of the plain language of the rule.

Response: The Department agrees that the statement of reasons is an important companion document to the text of the regulations. Both the initial statement of reasons (ISOR) and the final statement of reasons (FSOR) are part of the rulemaking file and a link to the ISOR is available on the Department’s website on the Legal Division’s Rulemaking page. A link to the FSOR will also be made available on the same page.

#### ALTERNATIVES THAT WOULD LESSEN THE ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES [Government Code section 11346.9, subdivision (a)(5)]

Money transmitters are not small businesses under Government Code section 11342.610, subdivision (b), and therefore no alternatives would lessen the impact of the proposed regulations on small businesses.

#### ALTERNATIVES DETERMINATION [Government Code section 11346.9, subdivision (a)(4)]

The Department has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purposes for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The regulations adopted by the Department are the only regulatory provisions identified by the Department that accomplish the goal of protecting the interests of consumers and preserving the health, safety, and general welfare of the people of this state, through the adequate regulation of money transmission businesses in this state. Except as set forth and discussed in the summary and responses to comments, no other alternatives have been proposed or otherwise brought to the Department's attention.