

**Discussion Paper  
on Guidelines for  
Payment  
Gateways and  
Payment  
Aggregators  
Submission to the  
Reserve Bank of  
India**

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# About Vidhi

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Vidhi Centre for Legal Policy (“**Vidhi**”) is a not for profit independent think-tank doing legal research to make better laws and improve governance for the public good.

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# Part I: Setting the Context

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India is witnessing a digital transformation of its payments landscape. With a digital consumer base comprising of 1.2 billion mobile subscriptions and 560 million internet subscriptions as of September 2018 (which is the second-largest in the world, behind only to China),<sup>1</sup> India represents one of the largest market opportunities for payments. A recent report of the Ministry of Electronics & Information Technology notes that targeted interventions by the government and private sector can help shift about 60 percent of all retail transactions by value or 30 percent of all retail transactions by number to digital channels by 2025. This would create USD 30 billion to USD 40 billion of economic value by reducing the currency in circulation by 30 to 40 percent, reducing the infrastructure and operations costs of ATMs and bank branches, and cutting printing costs for the Reserve Bank of India (“RBI”).<sup>2</sup>

The promotion of digital payments creates a unique opportunity for India for creating economic value by reducing costs associated with cash transaction, preventing tax evasion, money laundering and counterfeiting which results in loss of revenue for the government and its broader impact on macroeconomic issues.

One of the key enablers that drives the growth of digital payments is an enabling regulatory framework based on principles that promotes competition, innovation and protects the interest of the consumers.

The existing framework for payment systems in India can be traced to the Payment and Settlement Systems Act, 2007 (“PSS Act”). Since its enactment almost a decade back, the payments landscape have undergone a massive transformation with the emergence of new players and business models. While such technological disruptions creates an opportunity to tap the potential of digital payment, it also presents new and emerging risks. Such risks are particularly heightened in case of base of pyramid consumers.

## Need for a Renewed Approach

These developments necessitate a renewed regulatory approach for payment services in India that must be risk-based and that strikes a fine balance between policy priorities of securing financial stability, promoting innovation and competition in the payments ecosystem and protecting consumers.

At the time of the enactment of the PSS Act, almost a decade back, the Indian economy was heavily cash-based and the payments landscape was dominated by banks. Possibly, that may be a reason why the principles highlighted above are not reflected in the PSS Act. To its merit, RBI has sought to address these issues through several regulatory interventions, including issuance of a regulatory framework for prepaid payment instruments, regulation of merchant discount rates, issuance of directions relating to consumer protection provisions regarding unauthorised transactions and designing an enabling framework for regulatory sandbox. Despite such commendable efforts by RBI, the ever evolving payments landscape in India calls for a renewed regulatory approach to realise its true potential.

1. Under the PSS Act, a payment system must meet two conditions: (a) it must enable payment to be effected between a payer and a beneficiary; and (b) it must be involved in clearing, payment or settlement service or all of them.<sup>3</sup> While the term settlement has been defined, the terms payment and clearing has not been defined. The absence of a definition of payment service is an important regulatory gap that must be addressed. This is particularly relevant to capture new and emerging services enabled by evolving technology that may fall outside the regulatory framework despite presenting risk to payment systems. Further, absence of such a definition is also likely to cause uncertainty for businesses regarding the applicability of PSS Act.

<sup>1</sup> Ministry of Electronics & Information and Technology, ‘Report on India’s Trillion Dollar Digital Opportunity Released’, (Press Information Bureau, 20 February) available at <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1565669>> accessed 10 October 2019.

<sup>2</sup> Ibid.

<sup>3</sup> Section 2(1)(i), PSS Act.

2. Globally in jurisdictions like United Kingdom and Singapore, the regulatory framework has maintained a distinction between payment systems and payment services. For instance, in 2019 Singapore enacted the Payment Services Act (“**Singapore PS Act**”) with a view to create a modular legal framework which seeks to provide flexibility to meet evolving business models that might offer services across the payment value chain.<sup>4</sup>The Singapore PS Act provides two parallel framework: (a) the first framework focuses on licensing and regulating retail payment services; and (b) the second framework focuses on a designation regime of payment systems whose disruption will impact financial stability. The Singapore PS Act defines ‘payment services’ to include a host of services such as account issuance service, domestic money transfer service, merchant acquisition service, e-money issuance service, etc.<sup>5</sup>On the other hand, payment system is defined to mean a funds transfer system or other system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system. The legal framework in United Kingdom (UK) also makes this distinction. For instance, in UK, designated payment systems are regulated by the Payment System Regulator under the Financial Services (Banking Reform) Act, 2013. On the other hand, payment service providers are primarily regulated by the Financial Conduct Authority under the Payment Services Regulations, 2017 (“**UK PS Regulations**”). Under these regulations, payment services include services issuing payment instruments, acquiring payment transactions, money remittance, payment initiation services and account information services.<sup>6</sup>Such a distinction between payment systems and payment services may also be introduced in the PSS Act with a view to provide to a risk-based regulatory framework to regulate services across the payment value chain.
3. Currently, payment systems that have been authorised by PSS Act include Immediate Payment System, Unified Payment Interface, National Financial Switch and clearing services provided by the Clearing Corporation of India. The nature of functions and the risk posed by such payment systems and other payment systems such as Real Time Gross Settlement and National Electronic Funds Transfer cannot be equated with the services and risks posed by new and emerging payment service providers such as payment gateways and payment aggregators. Accordingly, a risk-based regulatory framework that distinguishes between payment systems that poses systemic risk and payment services as discussed above will be useful to further the objectives of financial stability, competition, innovation and consumer protection discussed earlier.
4. A ‘modular’ regulatory framework similar to the Singapore PS Act will provide RBI with the flexibility to respond to the new and emerging business models across the payment value chain. It will also provide businesses with legal certainty and flexibility to provide such services.

The recent Annual Report of RBI notes that the RBI “*has endeavoured to ensure that India has ‘state-of-the-art’ payment and settlement systems that are not just safe and secure, but are also efficient, fast and affordable, while recognising the need for continued emphasis on innovation, cyber security, financial inclusion, customer protection and competition. Going forward, Vision 2021 envisages to achieve a ‘highly digital’ and ‘cash-lite’ society through the goalposts of competition, cost, convenience and confidence, thus empowering every citizen with an access to a bouquet of e-payment options.*”

We believe that the aforesaid approach will also be instrumental to further the existing endeavours of RBI and its vision under the Payment Systems Vision 2021. Our comments below on the RBI Discussion Paper on Guidelines for Payment Gateways and Payment Aggregators should be read with this broader policy objective set out above.

<sup>4</sup> Monetary Authority of Singapore, ‘Consultation Paper Proposed Payment Services Bill’ (21 November 2017) available at <[https://www.mas.gov.sg/-/media/MAS/resource/publications/consult\\_papers/2017/Consultation-on-Proposed-Payment-Services-Bill-MAS-P0212017.pdf?la=en&hash=73A1734514E7394A12A30FA5C50D573CCD32F872](https://www.mas.gov.sg/-/media/MAS/resource/publications/consult_papers/2017/Consultation-on-Proposed-Payment-Services-Bill-MAS-P0212017.pdf?la=en&hash=73A1734514E7394A12A30FA5C50D573CCD32F872)> accessed 10 October 2019.

<sup>5</sup> Section 2 read with First Schedule, Singapore PS Act.

<sup>6</sup> Schedule 1, UK PS Regulations.

# Part II: Response to the RBI Discussion Paper

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On 17 September 2019, RBI issued a discussion paper on “Guidelines for Payment Gateways and Payment Aggregators” (“**RBI Discussion Paper**”) for stakeholder comments. This submission sets out our comments on the proposed regulatory approaches and the guidelines discussed in the RBI Discussion Paper.

India has made significant strides in the adoption of digital payments. The increasing usage of digital modes of payment has highlighted the role of entities that facilitate such transactions such as payment gateways and payment aggregators. Despite this, the existing regulatory framework (explained in detail later) applicable to such entities: (a) is only limited to maintenance of consumer funds by such entities; and (b) subjects them to indirect oversight of RBI. The implementation of these guidelines is monitored by RBI through banks. Therefore, RBI in its vision document for payment and settlement systems in India released in 2018<sup>7</sup> and 2019<sup>8</sup> has continuously stressed on assessing the need to regulate the payments related activities of such payment gateways and payment aggregators.

Against this background, the RBI Discussion Paper outlines three possible regulatory approaches for the purpose of regulating the activities of payment gateways and payment aggregators in India - (a) continue with the extant instructions (“**Option 1**”); (b) limited regulation of such entities (“**Option 2**”); and (c) full and direct regulation (“**Option 3**”) (collectively referred to as “**Possible Regulatory Approaches**”).

This submission sets out our comments on the Possible Regulatory Approaches and specific issues in relation to the proposed guidelines for implementation of Option 3. Our comments are based on legal issues raised by the proposed guidelines in the RBI Discussion Paper. The submission has been structured as follows:

1. Comments on the Possible Regulatory Approach;
2. Comments on specific issues for implementation of Option 3; and
3. Overview of international practices in regulating payment gateways.

For designing a framework to regulate payment gateways and payment aggregators, a clear understanding of the nature for functions carried out by such entities is crucial. We believe that this is critical to determine the scope and extent of regulatory intervention. This submission is based on the definition of ‘payment gateway’ and ‘payment aggregator’ as set out in the RBI Discussion Paper.

Key functions carried out by payment gateways and payment aggregators as highlighted in the RBI Discussion Paper is set out below:

1. they provide the technology infrastructure to route and / or facilitate processing of online payment transactions without handling funds;<sup>9</sup>

<sup>7</sup> RBI, ‘Payment and Settlement Systems in India Vision-2018’ (2018) available at <<https://rbidocs.rbi.org.in/rdocs/PublicationReport/PDFs/VISION20181A8972F5582F4B2B8B46C5B669CE396A.PDF>> accessed 10 October 2019.

<sup>8</sup> RBI, ‘Payment and Settlement Systems in India – Vision 2019-2021’ (15 May 2019) <<https://www.rbi.org.in/Scripts/PublicationVisionDocuments.aspx?Id=921>> accessed 10 October 2019.

<sup>9</sup> Paragraph 2.2 (a), RBI Discussion Paper.

2. they facilitate e-commerce sites and merchants to accept various payment instruments from the customers for completion of their payment obligations to the merchants without the need for merchants to create a separate payment integration system of their own;<sup>10</sup>
3. they facilitate merchants to connect with acquirers during which they may receive payments from customers, pool and transfer them on to the merchants after a time-lag. We understand that in such a case, these entities may handle funds;<sup>11</sup>
4. they have access to sensitive consumer data;<sup>12</sup>
5. they may also be involved in generation of settlement via netting of the funds received by the merchants onboarded by them.<sup>13</sup>

We note that the RBI Discussion Paper draws a distinction between payment gateways and payment aggregators while defining these terms.<sup>14</sup> It defines a 'payment gateway' as "*a technology infrastructure provider to route and facilitate processing of an online payment transaction, without any involvement in the actual handling of funds*". Further, 'payment aggregator' has been defined as "*an intermediary in an online payment transaction accepting payments on behalf of the merchant from the customers and then transferring the money to the merchant's account*". We understand that unlike payment gateways defined earlier, payment aggregators are involved in the actual handling of funds.

<sup>10</sup> Paragraph 2.2(b), RBI Discussion Paper.

<sup>11</sup> Paragraph 2.2 (c), RBI Discussion Paper.

<sup>12</sup> Paragraph 2.2 (c) and paragraph 3.4, RBI Discussion Paper.

<sup>13</sup> Paragraph 2.3, RBI Discussion Paper.

<sup>14</sup> Glossary, RBI Discussion Paper.

# Part III: Comments on Possible Regulatory Approaches

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A brief description of the Possible Regulatory Approaches and our comments on each of this approach is set out below.

## Option 1- Continue with extant instructions

### *Description*

As discussed above, intermediaries like payment gateways and aggregators that facilitate online transactions are currently indirectly regulated by RBI through directions issued pursuant to Section 18 of the PSS Act. By way of its notifications dated 24 November 2009 (“**2009 Directions**”),<sup>15</sup> RBI issued directions requiring banks to maintain a nodal account of the intermediaries with permissible credits, debits and the settlement cycle for credit to the merchants. This nodal account is required to be in the form of an internal account of the bank. Option 1 proposes that RBI should continue with these directions with certain changes in the timelines for settlement and clarification regarding applicability of the guidelines. The RBI Discussion Paper submits that these directions have fared well and no major complaints have been received in this regard.<sup>16</sup>

### *Our Response*

The RBI Discussion Paper itself notes that the activities of payment gateways and aggregators are extremely crucial in case of online payments, with entities handling funds and sensitive customer data. Further, the paper notes that there is a lack of proper consumer redress mechanisms and there is no uniformity in practice across the entities.<sup>17</sup> Further, the technology set-up varies amongst the entities and the architecture changes over time with a view to provide efficient processing and seamless customer experience.<sup>18</sup> In light of the ever evolving nature of digital payments landscape, the absence of a framework that clearly delineates the role, rights and liabilities of such payment intermediaries which have access to sensitive customer data and funds is a regulatory gap that merits intervention. These issues assume significance in light of the increasing impetus on adoption of digital payments which makes the existing framework of indirect regulation inadequate. Further, such a framework is also not in line with practices in other jurisdictions (discussed below in Annexure A) that regulates the activities of such entities. Separately, while the RBI Discussion Paper provides that under Option 1, RBI will clarify the applicability of the 2009 Guidelines, the paper is silent on the nature of clarifications that is sought to be inserted.

For reasons above, we do not recommend implementation of Option 1.

## Option 2 – Limited Regulation

### *Description*

This option proposes a framework that will regulate payment gateways and payment aggregators on specific aspects relating to minimum net-worth, merchant on-boarding, timelines for settlement of funds, maintenance of escrow account, security, and submission of returns to RBI. We understand that under this framework, there will

<sup>15</sup> RBI Notification dated 24 November 2009 bearing no. RBI/2009-10/231DPSS.CO.PD.No.1102/02.14.08/2009-10 on Directions for opening and operation of Accounts and settlement of payments for electronic payment transactions involving intermediaries

<sup>16</sup> Paragraph 3.3, RBI Discussion Paper.

<sup>17</sup> Paragraph 3.2, RBI Discussion Paper.

<sup>18</sup> Paragraph 3.5, RBI Discussion Paper.

be no immediate requirement for licensing and / or registration of such entities and RBI can only conduct off-site monitoring for such entities.

## ***Our Response***

We understand that one of the key differences between Option 2 and Option 3 is that while Option 2 does not impose an immediate requirement for registration, Option 3 mandates payment gateways and payment aggregators to obtain an authorisation under the PSS Act. While Option 2 does not envisage imposition of an immediate registration requirement, the RBI Discussion Paper provides that a registration / licensing requirement for payment gateways and payment aggregators will be imposed in a phased manner.<sup>19</sup> The implementation of this option without any registration / licensing requirement coupled with off-site monitoring will impact the effective enforcement of the provisions and the real translation of the protections afforded by the provisions into practice. The requirement to register will be relevant in identifying and monitoring such entities.

While Option 2 sets out an inclusive list of areas where payment gateways and payment aggregators will be regulated, it does not set out the scope and extent of the proposed regulation. This limits the understanding of Option 2. A review of the aspects on which payment gateways and payment aggregators will be regulated under Option 2 indicate that it is similar to the aspects set out in Option 3 and appears to be overlapping. Provisions referred to in Option 3 which do not find mention in Option 2 are limited to authorisation requirement under PSS Act, customer grievance redressal and dispute management and security and fraud prevention and risk management.

## **Option 3 – Full and Direct Regulation**

### ***Description***

This option envisages authorisation of payment gateways and payment aggregators under the PSS Act. Under this option, these entities will be subject to direct regulatory supervision of RBI in respect of requirements relating to authorisation, capital, governance, anti-money laundering (“AML”) and know your customer (“KYC”), consumer grievance redressal and dispute management, security, fraud and risk management and submission of reports to RBI.<sup>20</sup> Under this option these entities shall be subject to both on-site and off-site monitoring.<sup>21</sup>

### ***Our Response***

The payments services landscape has undergone several changes since the enactment of the PSS Act. The evolution of digital payments has presented new risks that arise from activities not expressly covered by the PSS Act and directions thereunder. With the growing impetus on the promotion and adoption of digital payments, there is a need for a relook at the regulatory framework for payment services in India. This calls for a proportionate and risk-based regulation of activities along the payments chain. The implementation of this option will empower RBI to exercise direct regulatory oversight over payment gateways and payment aggregators. Such an approach is also in line with the approach adopted in other jurisdictions as discussed in Annexure A below. With the growing role of third party payment providers / payment intermediaries in facilitating digital payments, jurisdictions such as United Kingdom and Singapore have specifically renewed their regulatory framework for payment services to recognise and regulate such entities. Therefore, we recommend the implementation of Option 3. However, this recommendation must be read with our comments set out in Part IV below.

<sup>19</sup> Paragraph 4.2, RBI Discussion Paper.

<sup>20</sup> Paragraph 5.1, RBI Discussion Paper.

<sup>21</sup> Paragraph 4.3.2, RBI Discussion Paper.

# Part III: Comments on Specific Issues

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## *Nature of Regulatory Intervention*

For the purposes of implementing Option 3, the RBI Discussion Paper does not expressly specify the mode of implementing the proposed provisions. It is not clear if the intention is to amend the PSS Act to provide an enabling power to RBI to expressly regulate payment gateways and payment aggregators or to issue directions pursuant to its powers under Section 18 of the PSS Act. Notably, paragraph 6.1 of the RBI Discussion Paper provides that payment gateways and payment aggregators are a critical link in the transaction flow and there is a case to regulate activities and these fall within the ambit of PSS Act.

Currently, the PSS Act mandates authorisation of a 'payment system' by RBI. We understand that Option 3 proposes that a payment gateway and a payment aggregator must be authorised as a payment system under PSS Act. The definition of 'payment system' envisaged under the PSS Act requires that payment systems must meet two broad criteria: (a) it must enable payment to be effected between a payer and beneficiary; and (b) it should provide payment, clearing or settlement service or all of them. If a payment gateway and a payment aggregator is sought to be brought within the ambit of PSS Act as a payment system, it has to meet these requirements. We understand that a payment aggregator that has access to consumer funds and facilitates payments may meet these tests. However, in case of a payment gateway as defined by the RBI Discussion Paper, given that such an entity does not have any involvement in the actual handling of funds, such an entity may not qualify for the second part of the twin test.

Reference is drawn to Section 18 of the PSS Act which empowers the RBI to lay down policies relating to the regulation of payment systems and give necessary directions to system providers or the system participants or any other person, pertaining to the conduct of business relating to payment systems. Such a power can be exercised by RBI if it is satisfied that such direction is necessary for the purpose of enabling it to regulate the payment systems or in the interest of management or operation of any of the payment systems or in public interest. While one may argue that Section 18 empowers RBI to issue directions to any person, any such direction must meet the principles of delegated legislation. It is a settled position of law that essential legislative functions cannot be delegated and that a subordinate legislation cannot exceed the scope of the parent legislation. Under the scheme of the PSS Act, requirement to obtain authorisation for operating a payment system, RBI's power to issue or revoke such authorisation and imposition of penalty can be traced to the parent statute. Accordingly, it may be argued that these are essential legislative functions which cannot be delegated by way of Section 18 of the PSS Act.<sup>22</sup>

Therefore, by way of abundant caution and in line with established principles of delegated legislation, imposition of direct and full-fledged regulatory oversight (including requirement to obtain authorisation) over an entity that does not meet the twin requirements of a payment system should be undertaken by way of a legislative amendment to the PSS Act. In this regard, we reiterate our recommendations set out in Part I to amend the PSS Act to make a distinction between payment system and payment service providers.

## *Provision of technical services*

It must be noted that the Singapore PS Act which covers online payment gateways within the ambit of the definition of 'payment services' expressly provides that any service provided by a technical service provider that

<sup>22</sup> Notably, the Master Directions on Prepaid Payment Instruments have been issued by RBI pursuant to its powers under Section 18 read with Section 10(2) of the PSS Act. While prepaid payment instruments have not been expressly included within the definition of 'payment system' under the PSS Act based on a review of the existing regulatory framework, it is evident that such instruments qualify as a payment system for the purposes of PSS Act. Therefore, the authority to regulate such entities and impose requirements relating to authorisation may be traced back to the provisions of the PSS Act.

supports the provision of any payment service, but does not at any time enter into possession of money does not qualify as a payment service and accordingly is outside the ambit of the Singapore PS Act.<sup>23</sup> Such services may include the service of processing and storing data, any information technology security, trust or privacy protection service, any data and entity authentication service, any information technology service, service of providing a communication network and the service of providing and maintaining any terminal or device used for any payment service.<sup>24</sup> Similarly, in the European Union, where the Payment Services Directive<sup>25</sup> seeks to regulate third party payment service providers, a similar carve out is provided for a technical service provider. Therefore, based on a study of the nature of services provided by payment gateways and payment aggregators, a similar clarification may also be considered for entities that solely provide such technical services.

## ***Regulatory Prescriptions for Banks***

Paragraph 4.3.3 of the RBI Discussion Paper which deals with the implementation of Option 3, notes that as banks are already regulated entities of RBI, payment gateway services provided by them will not require a separate authorisation as these activities form part of regular banking business.<sup>26</sup> However, when such banks act as payment aggregator, they should obtain authorisation under the PSS Act. Contrary to this, paragraph 1.5 of Annex 1 that sets out the regulatory prescriptions for implementation of Option 3 provides that banks acting as payment gateways and payment aggregators should obtain authorisation / approval under PSS Act along with a 'No Objection Certificate' from the respective regulatory department of RBI.

The RBI Discussion Paper defines payment gateway services provided by banks to include services provided by banks for facilitating collection of electronic payments for the merchants on boarded by them. Such a bank credits the monies received on behalf of a merchant for such transactions into the current account of the merchant opened with that bank like any other routine banking operation. We agree with the RBI Discussion Paper that since the funds being managed by banks on behalf of the merchants are a part of their banking relationship and the merchants have other safety nets to have recourse vis-à-vis the banks, their activities may not be equated with that of non-bank payment aggregators.

In this regard, reference may be drawn to the Singapore PS Act which requires payment service providers (which includes a payment gateway provider) to obtain a license from the Monetary Authority of Singapore ("MAS") for providing such services. The Act exempts a bank licensed under the banking law from obtaining a license for providing payment services.<sup>27</sup> Despite such exemption, banks are required to comply with specific provisions dealing with obligation to notify MAS of specific events, obligation to provide information to MAS, obligation to submit periodic reports and provisions regarding safeguarding of consumer funds.<sup>28</sup>

Therefore, while banks providing payment gateway services may be exempted from obtaining authorisation under PSS Act, they should be required to obtain an approval / no objection certificate from RBI for the purposes of providing such services. Having said that, such banks should be required to comply with specific requirements, including provisions relating to technical requirements, submission of information, reports, etc.

## ***Safeguarding of funds***

We understand that payment aggregators accept funds on behalf of the merchant from the customers and then transfer such funds to the merchant. Given that such entities will have access to funds, the 2009 Guidelines with a view to safeguard the interests of the customers and to ensure that the payments made by them are duly accounted for by the intermediaries required banks to maintain a nodal account of such intermediaries in the form of an internal account of the bank. We note the concerns recorded by RBI in paragraph 6.3 of the RBI Discussion

<sup>23</sup> First Schedule, Part 2(h), Singapore PS Act.

<sup>24</sup> Ibid.

<sup>25</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC

<sup>26</sup> However, under this option, such banks will be required to comply with other prescriptions regarding time-lines, customer grievance redressal mechanism, etc.

<sup>27</sup> Section 13(1), Singapore PS Act.

<sup>28</sup> Section 13(2), Singapore PS Act.

Paper regarding the maintenance of the nodal accounts. Accordingly, we welcome the suggestion regarding the maintenance of an escrow account for fund management. In paragraph 6.3, the RBI Discussion Paper further notes that shifting to an escrow arrangement will be relevant to take the benefit of Section 23A of the PSS Act which provides protection to the funds collected from customers and maintained in escrow accounts with banks. Such protection is provided to funds collected by a system provider of a payment system designated by RBI under Section 23A of the PSS Act. In this regard, please refer to our comments on 'Nature of Regulatory Intervention' that sets out the legal issues for extending the regulatory framework of payment systems to an entity that does not meet the twin test.

### ***Merchant On-boarding***

Paragraph 6.1 of the RBI Discussion Paper provides that payment gateways and payment aggregators shall ensure compliance to KYC and AML while onboarding merchants. Further, it provides that payment aggregators must undertake background and antecedent check of the merchants, to ensure that such merchants do not have any malafide intention of duping customers, do not sell fake, counterfeit, prohibited products, etc. It is not clear if such an obligation is over and above the KYC and AML requirements discussed earlier. If not, such a requirement to undertake background and antecedent check can be interpreted to be an onerous and broad requirement.

# Annexure A – International Perspective

Set out below is a brief description of the regulatory approach in other jurisdictions for the purposes of regulating payment gateways and / or third party payment service providers. Please note that this part is based on a review of the parent statutes mentioned herein and as publicly available.

Jurisdiction	Legal Framework	Scope	License / Registration	Key Provisions
Singapore	Singapore Payment Services Act, 2019 (“Singapore PS Act”) <sup>29</sup>	It regulates ‘payment services’ which is defined to include merchant acquisition service. <sup>30</sup> The FAQ on the Act clarifies that ‘merchant acquisition service’ will usually include online payment gateway. <sup>31</sup>  The Act clarifies that any service provided by any technical service provider that supports the provision	License is required. <sup>33</sup>  Banks licensed under the banking law are exempted from the licensing requirement. However, specific provisions of the Act are applicable to such banks. <sup>34</sup>	<ul style="list-style-type: none"> <li>For a major payment institution,<sup>35</sup> provisions relating to safeguarding of money received from consumers is set out under the Act. Amongst other things, this includes depositing the relevant money in a trust account maintained with a safeguarding institution and in such manner as may be prescribed by MAS.<sup>36</sup></li> <li>MAS may seek information relating to the operations of the licensee and the pricing of, or any other form of consideration for, any payment service provided by the licensee.<sup>37</sup></li> <li>Provisions regarding submission of periodic reports<sup>38</sup> audit of accounts,<sup>39</sup> and powers of inspection of MAS<sup>40</sup> is also applicable.</li> </ul>

<sup>29</sup> Singapore PS Act, available at <<https://sso.agc.gov.sg/Acts-Supp/2-2019/Published/20190220?DocDate=20190220>> accessed 10 October 2019.

<sup>30</sup> Section 2 of the Singapore PS Act defines merchant acquisition service to mean any service of accepting and processing a payment transaction for a merchant under a contract between the provider of the service and the merchant, which results in a transfer of money to the merchant pursuant to the payment transaction, regardless whether the provider of the service comes into possession of any money in respect of the payment transaction, in a case where: (a) the merchant carries on business in Singapore, or is incorporated, formed or registered in Singapore; or (b) the contract between the provider of the service and the merchant is entered into in Singapore;

<sup>31</sup> Monetary Authority of Singapore, ‘Frequently Asked Questions (FAQs) on the Payment Services Act (PS Act)’ available at <<https://www.mas.gov.sg/-/media/MAS/FAQ/Payment-Services-Act-FAQ-4-October-2019.pdf>> accessed 10 October 2019.

<sup>33</sup> Section 5, Singapore PS Act.

<sup>34</sup> Section 6(1), Singapore PS Act.

<sup>35</sup> This will typically include institutions which carry out one or more of the payment services as defined under the Act, the average value of payment transactions accepted, processed or executed by the licensee in a month meets the limit prescribed under the Act.

<sup>36</sup> Section 23, Singapore PS Act. MAS may prescribe regulations amongst other things to provide for the manner to deal with the consumer funds in case of insolvency of the major payment institution. S)

<sup>37</sup> Section 16(2).

<sup>38</sup> Section 17, Singapore PS Act.

<sup>39</sup> Section 37, Singapore PS Act.

<sup>40</sup> Section 72, Singapore PS Act.

		of any payment service, but does not at any time enter into possession of any money under that payment service will not fall within the ambit of payment services. <sup>32</sup>		<ul style="list-style-type: none"> <li>Failure to comply with fit and proper guidelines issued by MAS may lead to revocation of license.<sup>41</sup></li> </ul>
European Union	Payment Services Directive <sup>42</sup>	Third party service providers offering services based on information access to information from the payment account is included within the ambit of the directive. This includes payment initiation services which is defined to mean a service to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider. <sup>43</sup> Further, account information services are also covered. <sup>44</sup>	Authorisation as a payment institution. <sup>45</sup>	<ul style="list-style-type: none"> <li>Initial capital and net owned funds for payment institutions have been prescribed.<sup>46</sup></li> <li>Payment initiation service providers cannot hold payer's funds in connection with provision of the services, store sensitive payment data of user and modify the amount, payee or any other feature of the transaction.<sup>47</sup></li> <li>Provisions relating to disclosure of information, including information pertaining to disclosure of charges payable, form and procedure for giving consent, safeguards and corrective measures, etc. is also set out.<sup>48</sup></li> <li>Payment service providers should establish a framework to mitigate risks and maintain effective incident management procedures. A regular reporting mechanism should be established, to ensure that such providers provide the competent authorities with an updated assessment of their security risks and the measures that they have taken in response to those risks.<sup>49</sup></li> </ul>

<sup>32</sup> Part 2 of First Schedule, Singapore PS Act.

<sup>41</sup> Section 11(2), Singapore PS Act.

<sup>42</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC ("PSD2").

<sup>43</sup> Article 4(15), PSD2.

<sup>44</sup> Article 4(16), PSD2.

<sup>45</sup> Article 11, PSD2.

<sup>46</sup> Article 7 and 8, PSD2.

<sup>47</sup> Article 66(3), PSD2.

<sup>48</sup> Chapter 3, PSD2.

<sup>49</sup> Paragraph 91, PSD2.

Thailand	Payment Systems Act 2017 (“Thailand Act”) <sup>50</sup>	<p>The Minister with the advice of Bank of Thailand (“BOT”) is empowered to notify designated payment services which should apply for a license from the Minister.<sup>51</sup></p> <p>Payment services include provision of a service of receiving electronic payments for and on behalf of sellers, service providers or creditors.<sup>52</sup>We understand that this may include payment facilitator or online payment gateway.<sup>53</sup></p> <p>Further, innovative payment service on service testing period, or payment service provided to a limited group of customers with no widespread impact on the payment system or public interest may be designated</p>	Designated payment services must obtain a license.	<ul style="list-style-type: none"> <li>• Fit and proper criteria for a director and managerial person is prescribed.<sup>55</sup></li> <li>• Provisions relating to protection of funds received in advance by the service provider in case of insolvency has been provided.<sup>56</sup></li> <li>• BOT is empowered to issue notifications prescribing rules for designated payment services in relation to management, risk management, data disclosure, use of third party’s services, preparation of accounts and submission of financial statements and results of operations, etc.<sup>57</sup></li> <li>• BOT may require a business provider<sup>58</sup> to submit financial statements, reports or data in specified form and with specified timelines.<sup>59</sup></li> </ul>
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<sup>50</sup> Translated version of the law is available at <[https://www.bot.or.th/English/AboutBOT/LawsAndRegulations/SiteAssets/Law\\_E40\\_Payment.pdf](https://www.bot.or.th/English/AboutBOT/LawsAndRegulations/SiteAssets/Law_E40_Payment.pdf)> accessed 10 October 2019.

<sup>51</sup> Section 12, Thailand Act.

<sup>52</sup> Section 16(4), Thailand Act.

<sup>53</sup> BakerMcKenzie, ‘The Payment System Act: New Age of Payment Regulatory Landscape’ (27 October 2017) available at <<https://www.bakermckenzie.com/en/insight/publications/2017/10/targetText=The%20Payment%20System%20Act%20New%20Age%20of%20Payment%20Regulatory%20Landscape,-Share&targetText=The%20Payment%20System%20Act%20B.E.,Gazette%20on%2018%20October%202017.&targetText=The%20PSA%20regulates%20Systemically%20Important,and%20Regulated%20OE-Payment%20Services>> accessed 10 October 2019.

<sup>55</sup> Section 14 read with Section 18, Thailand Act.

<sup>56</sup> Section 20, Thailand Act.

<sup>57</sup> Section 24, Thailand Act.

<sup>58</sup> Any entity which obtains a license or registration under the Act.

<sup>59</sup> Section 26, Thailand Act.

		to be registered with the BOT. <sup>54</sup>		
Indonesia	Bank Indonesia Regulation Number 18/40/PBI/2016 concerning the Operation of Payment Transaction Processing (“BI Regulations”) <sup>60</sup>	<p>Payment Service providers defined under the BI Regulations include a payment gateway service provider.<sup>61</sup></p> <p>The regulations define ‘payment gateway’ as an electronic service that allow merchants to process payment transactions using card-based payment instrument, electronic money and / or proprietary channel.<sup>62</sup> A payment gateway provider is defined to mean a bank or non-bank institution providing payment gateway activities.<sup>63</sup></p>	<p>License is required to be obtained by a payment gateway provider.<sup>64</sup></p> <p>No specific exemption for banks is provided in the BI Regulations.</p>	<ul style="list-style-type: none"> <li>• A payment gateway provider must fulfil requirements relating to operational readiness, information security and reliability of system, business feasibility, risk management and consumer protection.<sup>65</sup></li> <li>• A payment gateway provider which also settles payments to merchants must amongst other things, conduct evaluation for ensuring smoothness and security of payment transactions conducted through the merchants.<sup>66</sup></li> <li>• It must also comply with consumer protection related principles / provisions in relation to fairness and reliability, transparency, protection of consumer data and / or information and effective handling and settlement of complaints.<sup>67</sup></li> </ul>
South Korea	Electronic Financial Transactions Act (“EFT Act”) <sup>68</sup>	A payment gateway is recognised as a ‘subsidiary electronic financial		<ul style="list-style-type: none"> <li>• The intention and negligence of a payment gateway operator in relation to an electronic financial transaction is deemed to be the intention or negligence of the relevant financial entity or electronic</li> </ul>

<sup>54</sup> Section 16, Thailand Act.

<sup>60</sup> BI Regulations, available at <http://intr.insw.go.id/files/ecommerce/7.%20Regulation%20of%20BI%20No%2018.40.PBI.2016%20on%20Concerning%20the%20implementation%20of%20payment%20transaction.pdf> accessed 10 October 2019.

<sup>61</sup> Article 2, BI Regulations.

<sup>62</sup> Article 1(6), BI Regulations.

<sup>63</sup> Article 1(10), BI Regulations.

<sup>64</sup> Article 4, BI Regulations.

<sup>65</sup> Article 9 and Article 20(2), BI Regulations.

<sup>66</sup> Article 23, BI Regulations.

<sup>67</sup> Article 24 and Article 25, BI Regulations.

<sup>68</sup> EFT Act, available at <http://www.law.go.kr/eng/engLsSc.do?menuId=1&query=electronic+financial+transactions+act&x=0&y=0#liBgcolor0> accessed 10 October 2019.

		<p>businesses entity' and imposes indirect liability on such entities.<sup>69</sup></p> <p>A 'payment gateway system' means any financial data processing system that deals with business affairs relating to the settlement of accounts and payments by transmitting electronic financial transaction information between a financial company and an electronic financial business entity.<sup>70</sup></p>		<p>financial business entity. When such entities compensates users for incurring a liability, it can exercise the right of indemnity against the payment gateway operator.<sup>71</sup></p> <ul style="list-style-type: none"> <li>• An operator of a payment gateway must ensure safe processing of electronic financial transactions<sup>72</sup></li> <li>• A contract between the financial institution or electronic financial business entity in relation to an electronic financial transaction with an operator of a payment gateway must meet the standards determined by the Financial Services Commission ("FSC") to ensure the safety and reliability of electronic financial transactions. The FSC has the power to require such payment gateway operator to provide such information as per the standards set out by FSC during an inspection of the financial company or the electronic financial business entity.</li> </ul>
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<sup>69</sup> Article 2(5) of the EFT Act defines the term "subsidiary electronic financial business entity" to means any person prescribed by the Financial Services Commission established under Article 3 of the Act on the Establishment, etc. of Financial Services Commission who assists in electronic financial transactions; or vicariously performs the part of such transactions for a financial company or an electronic financial business entity; or who operates a payment gateway system.

<sup>70</sup> Article 2(6), EFT Act.

<sup>71</sup> Article 11, EFT Act.

<sup>72</sup> Article 21, EFT Act.



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