

Texas Department of Banking

RQ-684

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*Catherine A. Ghiglieri
Commissioner*

April 4, 1994

APR 07 94

The Honorable Dan Morales
Attorney General of the State of Texas
Opinion Committee
P.O. Box 12548
Austin, Texas 78722-3548

Opinion Committee

[Signature]
FILE # ML-25690-94
I.D.# 25690

RE: Request for Opinion

Dear General Morales:

The Texas Department of Banking (the "Department") respectfully requests an Attorney General's opinion with respect to the following law and facts, submitted with a companion request relating to trucking company use of similar instruments:

I.
Facts

Section 51.002(a)(8) of the Texas Education Code (Vernon Supp. 1994) (the "Code") authorizes the governing board of every institution of higher education, as defined in §61.003 of the Code,¹ to control voluntary deposits of money collected from students for safekeeping. See also §51.001. Pursuant to this authority, various public universities in Texas have implemented a "debit card" program. Under this program, a university accepts money from students (and sometimes from faculty and staff) and, in turn, issues a card to each (or may accept, e.g., the student identification card) to be used for drawing against this account to obtain goods and services on campus. Under some programs, the university is the only vendor eligible to sell goods and services and "debit" the account balance for payment. In these instances, cards enable students to make general purchases from the university's bookstore, pay library fees and parking tickets, and buy traditional meal plans and tickets to on-campus events. In other cases, card use is still confined to campus, but some private vendors are authorized to participate in the program, e.g., restaurants, dry cleaners, and cable television companies.

¹Section 61.003 of the Code defines "institution of higher education" as "any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined in [section 61.003]." "Other agency of higher education" is defined to mean "The University of Texas System, System Administration; Texas Western University Museum; Texas A&M University System, Administrative and General Offices; Texas Agricultural Experiment Station; Texas Agricultural Extension Service; Rodent and Predatory Animal Control Service (a part of the Texas Agricultural Extension Service); Texas Engineering Experiment Station (including the Texas Transportation Institute); Texas Engineering Extension Service; Texas Forest Service; Texas Tech University Museum Texas State University System, System Administration; Sam Houston Memorial Museum; Panhandle-Plains Historical Museum; Cotton Research Committee of Texas; Water Resources Institute of Texas; and any other unit, division, institution, or agency which shall be so designated by statute or which may be established to operate as a component part of any public senior college or university, or which may be so classified as provided in this chapter."

Some of the programs provide that accounts can be closed within a certain number of days after written notice; others can be closed only upon semester's end, graduation, or withdrawal from the university. Typically, closing an account is the only way a student can access cash in his or her account. Some programs are advertised as a free service of the university; however, minimal processing charges (from \$5.00 to \$25.00) may be assessed against accounts for certain disruptive activities, *e.g.*, replacement of a lost debit card or termination of an account mid-semester.

II. Issues

Issue I: Does the issuance and delivery of debit cards by public universities² amount to the sale of checks under the Sale of Checks Act, TEX. REV. CIV. STAT. ANN. art. 489d (Vernon 1973 & Supp. 1993)?

The Texas Department of Banking recognizes the authority of public universities to "retain control" over voluntarily submitted student monies for "safekeeping." However, the Department maintains that §51.002(a)(8) of the Code may simply authorize a bailor/bailee relationship with respect to student funds. If this is the case, the manner these institutions have chosen to exercise control may, in effect, result in the unauthorized sale of checks under the Sale of Checks Act, TEX. REV. CIV. STAT. ANN. art. 489d (Vernon 1973 & Supp. 1993).

Section 3 of the Sale of Checks Act provides that "[n]o person [with limited inapplicable exceptions] shall engage in the business of selling³ checks⁴ as a service or for a fee or other consideration without having first obtained a license [under the Sale of Checks Act]." In short, a person who sells, issues or delivers any instrument for the transmission or payment of money must be licensed. If the legislative grant of authority to universities to accept student funds will not support the method implemented to handle those funds for safekeeping purposes, *i.e.*, issuance and delivery of "electronic" checks through the use of a debit card, the universities have exceeded their authority, and the method of controlling such funds is *ultra vires*. The Department is skeptical that the Legislature has authorized this precise method of exercising "control" over student funds for safekeeping without expressly granting such authorization.

Issue II: Where a public university accepts monies on deposit pursuant to §51.002(a)(8) of the Code and thereafter handles them in the manner set out herein, is the university acting as a bank and, accordingly, required to hold a bank charter issued by an appropriate regulatory agency in order to engage in such activity⁵?

²The Department knows of three public universities that have established a debit card program: Texas A&M University, Stephen F. Austin State University, and Texas Tech University.

³"Sell" is defined in §2(e) of the Sale of Checks Act as "to sell, to issue, or to deliver a check."

⁴Section 2(c) of the Sale of Checks Act defines "check" as "any check, draft, money order, personal money order, or other instrument for the transmission or payment of money."

⁵*See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 342-101, *et seq.*, the Texas Banking Code.

No educational institution has obtained a certificate of authority to do business as a state or national bank, each of which must be chartered pursuant to state or federal law. Although accepting deposits is not the only function of a bank,⁶ it appears to be the distinguishing characteristic of banks, setting them apart from other financial institutions. *Brenham Production Credit Ass'n v. Zeiss*, 264 S.W.2d 95, 97 (Tex. 1953). It is abundantly clear that, except for §51.002(a)(8) of the Code, there would be no authority for public universities, being creatures of the Legislature, to accept deposits, an activity which has long been characterized as a banking function. Therefore, if public universities, in accepting and controlling student funds, transgress upon functions of banks that have not been authorized under §51.002(a)(8) of the Code, they have exceeded their legislative grant of authority, and their activities are *ultra vires*.

Issue III: Does a public university's acceptance of deposits of money from and issuance and delivery of debit cards to its faculty or staff amount to the unauthorized business of banking or the unauthorized sale of checks or both?

The legislative grant of authority to public universities under §51.002(a)(8) of the Code contains no reference with respect to accepting deposits of funds from faculty or staff. Therefore, since public universities can cite no plausible statutory empowerment for their sale of checks or banking activities as to these persons, such activities are clearly unauthorized.

Issue IV: Does the issuance and delivery of debit cards by a private university⁷ amount to the sale of checks under the Sale of Checks Act, TEX. REV. CIV. STAT. ANN. art. 489d (Vernon 1973 & Supp. 1993) or to the unauthorized business of banking or both?

Since Southern Methodist University does not fall within the definition of "institution of higher education" as defined in §61.003 of the Code, there is no plausible authority for it to engage in either sale of checks or banking activities without a license or a certificate of authority, respectively, to engage in such activities.

III. Conclusion

The Department is unaware of any grant of legislative authority to a private university that would arguably allow it to accept deposits and engage in the described debit card activities. As a consequence, it appears these activities are not legitimate functions of a private university that does not have specific authorization from this Department to engage in them. Likewise, public universities can cite no possible authorization to engage in sale of checks or banking functions with respect to their faculties and staffs and, therefore, cannot engage in such activities with respect to these individuals.

⁶See, e.g., TEX. REV. CIV. STAT. ANN. art. 342-301 which lists the receipt of "demand deposits" among the powers of a bank.

⁷The only private university that the Department knows is operating such a program is Southern Methodist University.

April 4, 1994

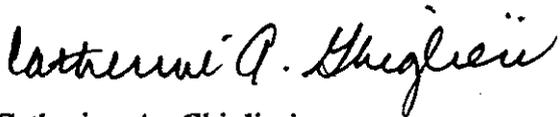
Page 4

Of course, the Department does not contest the authority of public universities to accept student monies voluntarily submitted for safekeeping. Nonetheless, any activity that goes beyond what is reasonably necessary and proper to execute this power is *ultra vires* and may rise to the level of banking or sale of checks requiring further authorization from this department, if such authorization would be permitted under the institution's legislative grant of powers, or ceasing the *ultra vires* operations altogether.

Resolution of these issues will significantly enhance the Department's ability to perform its regulatory responsibilities under the Act. Thank you for the service you provide in responding to this request for opinion.

If you require additional information, please contact Sharon Gillespie, Assistant General Counsel, at 475-1300.

Sincerely,

A handwritten signature in cursive script that reads "Catherine A. Ghiglieri".

Catherine A. Ghiglieri
Banking Commissioner