

Texas Department of Banking

RQ-694

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Catherine A. Ghiglieri
Commissioner

April 4, 1994

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

Opinion Committee

FILE # ~~ME25690-94~~ 26189

I.D.# ~~25704~~ 26189

RE: Request for Opinion

Dear General Morales:

RE: 25690

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 university debit cards:

I.

Section 3 of the Sale of Checks Act, TEX. REV. CIV. STAT. ANN. art. 489d (Vernon 1973 & Supp. 1994) (the "Act"),¹ provides that "[n]o person [with limited inapplicable exceptions] shall engage in the business of selling² checks³ as a service or for a fee or other consideration without having first obtained a license [under the Act]." In short, a person who sells, issues or delivers any instrument for the transmission or payment of money must be licensed. The Department's legal counsel has determined that sale of a check, as defined under the Act, occurs at the place it is physically completed (i.e., issued) and where it is first delivered to a holder or remitter (i.e., delivered) although the sale or some part of the transaction may also occur elsewhere.

Certain companies argue that various details of their operations distinguish them from those that are subject to the Act. However, there are some basic aspects of their businesses which, though varied in form, are substantially the same in principle from those which have voluntarily submitted to licensure. It is these aspects the Department has tried to capture in reducing the facts of this opinion request to their essence. If other facts, not expressed herein, appear pertinent to you, we will be happy to provide them if they can be ascertained.

A number of financial services companies ("companies") transact business with the trucking industry involving "instruments for the transmission or payment of money." Each of them has an arrangement with one or more trucking companies (or other businesses that, in turn, have an

¹Unless otherwise noted, all references to sections in this document are to the Sale of Checks Act.

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

³Section 2(c) of the Act defines "check" as "any check, draft, money order, personal money order, or other instrument for the transmission or payment of money."

agreement with trucking companies) ("carriers") to provide financial services which facilitate the availability of fuel, lodging, repairs and other services to truck drivers who are *en route*. (Carriers have found it unsatisfactory to entrust drivers with cash advances and credit cards.) Companies may require collateral, security or prepayment from carriers prior to transacting business with them. Occasionally, a company will only do business with a carrier on a prepayment basis. Typically, a company furnishes the carriers with instruments (usually blank checks; see attached example) for their drivers to use at truck stops and other locations ("truck stops") across the country. Sometimes, the truck stops maintain supplies of such instruments. Checks are drawn on a chartered bank and paid through the company's account at that bank.

The truck stop, which may be under written contract with the company, agrees to handle the individual sale of check transactions for the company for a service charge. In executing a transaction with the truck stop, the truck driver presents the attendant with an instrument (which, as noted, may be held in blank by the truck stop). In order to be validly issued, this instrument must have an authorization code affixed. Consequently, the truck stop attendant contacts the company with the information necessary to complete the transaction pursuant to the terms of the carrier's contract with the company (e.g., the amount of the purchase or, perhaps, the purpose of the transaction, such as for purchase of tires, gas, or lodging). If the company approves the transaction, its home office gives the truck stop an authorization code. Once the code is affixed to the instrument and the instrument is delivered to the driver,⁴ it becomes the company's obligation to pay the face amount thereof to anyone who will accept it, e.g., the issuing truck stop or a financial institution or, perhaps, even an automotive dealership or mechanic. Sometimes, the instrument is retained by the truck stop in exchange for merchandise, services, or cash. Some carriers arrange for payment of driver wages through this system.

ISSUE I: Are companies which provide the services described herein (or some part thereof) engaging in sale of check activities requiring licensure under the Act?

Those companies which have failed to seek licensure under the Act argue that their customers are business enterprises that have negotiated arm's-length contracts for their services (as distinguished from individual consumers or the public at large) and, therefore, are not intended to be covered by the Act. However, once issued, instruments sometimes enter the marketplace without restraint as to who may accept them, which places the public at risk and, consequently, runs counter to sound public policy. In fact, even a bank that is part of the clearing process is subject to risk of loss if a check is not good.

These same companies also have argued that the sale, issuance and delivery take place outside of Texas at the location where checks may be signed⁵ or from which they are mailed or at the

⁴Insofar as the actions performed by the truck stop typically include "issuance" and "delivery" of the check, as defined by the Department, the truck stop must either be licensed as engaging in sale of checks activities or regarded as an agent of the company. See §4(c) of the Act which provides licensure exemption for "agents."

⁵The definition of "deliver" makes it clear that the deliverer need not sign the check to make delivery. Section 2(f).

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place where the authorization code originates. The Department does not disagree that some activities may occur outside its territorial jurisdiction. Those which do, of course, may not require licensure by the State of Texas. Nonetheless, the Department believes that when the company's business in Texas includes the act that completes the instrument or results in delivery to the first holder or remitter, the transaction is a sale, issuance or delivery in Texas and must be conducted under the auspices of state licensure.

Furthermore, companies sometimes argue that state regulation in this area would unduly burden interstate commerce; however, regulation is not imposed on the carriers involved in interstate commerce but on the companies engaged in financial transactions subject to permissible state regulation.

Finally, since proposed legislation to exempt commercial operations from the Act did not pass this last session,⁶ the Texas Legislature has indicated its intent to include commercial operations within the scope of the Act. See *Grasso v. Cannon Ball Motor Freight Lines*, 125 Tex. 154, 81 S.W.2d 482 (1935).

II.

In one instance known to the Department, the company is a national bank insured by the Federal Deposit Insurance Corporation. As with other companies, the bank has contracted to provide the same financial service described in "Part I" hereof using an official bank check (as opposed to an ordinary check).⁷

Issue II: Assuming that the answer to Issue I is "yes," is a national bank required to become licensed under the Act in order to engage in transactions with carriers that are substantially the same as those of the non-bank companies described in this opinion request?

In this case, it is argued, risk of loss falls completely to the company, which extends "commercial loans," as classified by its federal regulators,⁸ when engaging in these transactions. Furthermore, because its transactions are "loans," the bank contends they are not sales of checks. It is generally true that risk of loss to members of the public who become holders in

⁶Section 2 of the Committee Amendment to Senate Bill 1066, which was proposed in the Seventy-Third Legislative Session, added subsection (d): this subsection would have exempted from the Act's operations "[p]ersons involved in commercial transactions in interstate commerce with motor carriers and their employees involving Checks, as defined herein, which Checks are not for sale to the general public."

⁷An "official bank check" is a check drawn on the bank's own funds. However, the term includes not only checks used to disburse loan proceeds (typically by cashier's checks), but also cashier's checks or money orders used for other customer purposes. (Note the Act's definition of check includes "any check" or "money order.") In addition to the use of official bank checks to facilitate customer transactions, checks used to pay a bank's bills (though not in issue here) are considered official bank checks.

⁸The bank reports these transactions as commercial loans on its quarterly call statements. It may, then, be more accurate to say that the federal regulators have not challenged this categorization than to say that they have classified these transactions as commercial loans.

due course should be substantially reduced when the company is a bank. However, the characterization of these transactions by other regulators is irrelevant to application of the Act to them. Even if a transaction is a loan in fact, it is irrelevant; the Act does not admit such an exception.

It is also important that the Act carves out an express exception for banks: banks are not required to become licensed under the Act "provided . . . that they do not issue or sell checks, other than traveler's checks, off premises and that they do not issue or sell checks, other than traveler's checks, through agents who are not directly or indirectly owned by them" However, the subject bank engages in the described activities off its premises through truck stops which it does not own.

III.

Issue III: Assuming that the answer to Issue I is "yes," what constitutes a "location" at which the business of selling checks is conducted?

Pursuant to the terms of section 7(c), an application for a sale of checks license must be accompanied by a

surety bond . . . in the principal sum of One Hundred Thousand Dollars (\$100,000), and an additional principal sum of Fifty Thousand Dollars (\$50,000) for each location, in excess of one, at which the applicant proposes to sell⁹ checks¹⁰ in this state, but in no event shall the bond be required to be in excess of Five Hundred Thousand Dollars (\$500,000). If the bond accompanying the application be in a principal sum of less than Five Hundred Thousand Dollars (\$500,000), the application shall also be accompanied by a list of the locations at which the business is to be conducted.

The Act states that the bond "shall run to the state for the benefit of any claimants against the applicant or his agents to secure the faithful performance of the obligations of the applicant and his agents with respect to the receipt, handling, transmission and payment of money in connection with the sale of checks." Section 7(c). Alternate provision is made for deposit of certain securities in lieu of a corporate surety bond. Section 7(d). Finally, section 9 requires each licensee under the Act to "[m]aintain the bond or securities in the amount prescribed by Section 7" [Subsection (a)] and, unless the maximum principal of the bond or securities is on deposit, to increase the principal (within a given time frame) "to reflect any increase in the number of locations" [Subsection(b)(1)].

As previously noted, the Department's legal counsel has determined that a sale, issuance or delivery of a check occurs at the place the check is physically completed, i.e., the place where it is issued, or the place the check is first delivered to a holder or remitter, although sale or part of a sale may also occur elsewhere. However, certain companies licensed to sell checks in

⁹See footnote 2 for definition.

¹⁰See footnote 3 for definition.

Texas ("licensees") contest this interpretation.¹¹ These companies engage in financial services that are substantially the same as those heretofore described, i.e., they contract with carriers to transmit or pay monies through checks (e.g., presigned drafts drawn on the licensee's bank account) which, under their contract, become effective once a proper authorization code is affixed. Apparently, there are hundreds of truck stops that may facilitate such transactions routinely.¹² Typically, licensees maintain that the locus where checks are signed, from which they are mailed, or from which an authorization code is issued¹³ (generally the same place, being the home office), constitutes the only "location" under the Act. Indeed, if this were the case, a company could engage in the business of selling checks from headquarters in another state for ultimate issuance and delivery of that instrument in Texas without necessity of licensure under the Act.

The first question, then, is whether the truck stop, which charges the licensee a fee for the transaction, acts as agent for the licensee (1) in affixing the authorization code, thereby rendering the instrument effective, and/or (2) in delivering the instrument to the driver.¹⁴ If so, does the location where the authorization code is affixed to the instrument or where the instrument is given to the driver become, for purposes of the Act, a "location" at which the business of selling checks is conducted?

IV.

As previously mentioned, sometimes a company will only do business with a carrier on a prepayment basis. Although accepting deposits is not the only function of a bank,¹⁵ it appears to be the activity which generally distinguishes banks from other financial institutions. *Brenham Production Credit Ass'n v. Zeiss*, 264 S.W.2d 95, 97 (Tex. 1953).

¹¹In the situation described, i.e., where the amount of bond is in issue, the company is a licensee. Unlicensed companies also contest the Department's definition of location, generally claiming that all "sales" occur outside the territorial jurisdiction of Texas. The most prevalent argument of both licensed and unlicensed companies is that checks are effective once they are validated through their centralized computer systems and confirmed to the truck stops; and, therefore, all of a company's "sales" occur at the home office where the computer system is found. For the company whose home office is out-of-state, it then follows that, since no sale occurs in Texas, licensure in Texas is not required. For the company whose home office is in Texas, there is only one location in Texas where sales occur.

¹²Licensees complain that this poses a problem insofar as there are numerous truck stops authorized to perform certain parts of the described transaction, although, at any given time, the licensee does not know with complete accuracy which truck stops are actively engaging in such activities. As a consequence, accurate reporting of the exact locations under section 9(b) may be difficult if not impossible.

¹³One licensee pursues this rationale in arguing that it sells a "service" that includes (1) the sale of drafts, which occurs at the time the carrier subscribes to the service at its headquarters' office; (2) the issuance of blank drafts at that office, which renders the carrier a "holder" of the instruments under TEX. BUS. & COM. CODE §3.102(a)(1); and (3) the delivery of blank drafts by mail from the headquarters to the carriers and truck stops.

¹⁴Typically, these acts are performed at the same location and within a few moments of each other.

¹⁵See, e.g., TEX. REV. CIV. STAT. art. 342-301 which lists the receipt of "demand deposits" among the powers of a bank.

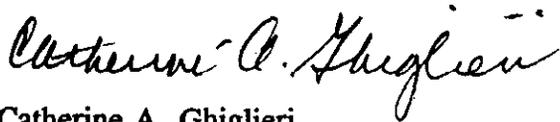
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Issue IV: Where a company or its agent(s) accept monies on deposit for future draws by employees of a carrier, is the company acting as a bank or bank branch and, accordingly, required to hold a bank charter issued by the appropriate regulatory agency in order to engage in such activity¹⁶?

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,



Catherine A. Ghiglieri
Banking Commissioner

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¹⁶See, e.g., TEX. REV. CIV. STAT. ANN. art. 342-101, *et seq.*, the Texas Banking Code.