

ORDER NO. 2014-015a

IN THE MATTER OF:

**SMART PAYMENT PLAN, LLC,
NAPLES, FLORIDA**

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BEFORE:

**THE BANKING
COMMISSIONER OF TEXAS**

AUSTIN, TRAVIS COUNTY, TEXAS

AMENDED CONSENT ORDER NUNC PRO TUNC

On this day, the matter of SMART Payment Plan, LLC, a Florida limited liability company whose principal address is in Naples, Florida (Respondent or SPP), was submitted to me, Charles G. Cooper, Banking Commissioner of the State of Texas (Commissioner), for consideration and action. Staff of the Texas Department of Banking (Staff) states that clerical errors were made in Consent Order No. 2014-015, which was signed on October 10, 2014. Those errors were made in paragraphs 16 and 17, where references were made to other paragraphs of the Consent Order and the wrong paragraph numbers were inserted. Staff brought these errors to the attention of Respondent and Respondent has agreed that this Amended Consent Order Nunc Pro Tunc (Amended Order) may be entered to correct those clerical errors, and the Amended Order shall be effective as of October 10, 2014. Therefore, the Amended Order shall state as follows:

1. SPP is a Florida limited liability company, with its principal address listed as 999 Vanderbilt Beach Road, Suite 200, Naples, Florida 34108.
2. David W. Engelman is the Managing Member, Chief Executive Officer, and Chief Compliance Officer of SPP. His address is 54 Rainey Street, No. 922, Austin, Texas 78701.
3. The Texas Department of Banking (Department) has jurisdiction over Respondent and the subject matter of this proceeding pursuant to Texas Finance Code Chapter 151. The Commissioner has the authority to issue this Consent Order (Order) and to assess administrative penalties pursuant to Texas Finance Code §§ 151.702, 151.705, 151.706, and 151.707.
4. Respondent has been properly notified regarding its right to an administrative hearing under Texas Finance Code Chapter 151 (Chapter 151). Respondent is represented in this matter by Gardere Wynne Sewell, LLP.

5. The statutory provisions at issue in this matter include Texas Finance Code §§ 151.203 - 151.205, 151.301 - 151.304, 151.306 - 151.308, 151.701 - 151.702, and 151.705 - 151.707. Regulations at issue in this matter include 7 Texas Administrative Code (TAC) §§ 33.13 and 33.27.
6. Any violation of this Order could subject Respondent to additional regulatory or enforcement actions authorized by Texas Finance Code § 151.701, and other provisions of Texas law. Nothing in this Order diminishes the regulatory or enforcement powers of the Department, the Commissioner, or the Finance Commission of Texas under Chapter 151 or other applicable law.
7. For purposes of this proceeding, Respondent knowingly and voluntarily waives:
 - a. Service upon Respondent of this Order;
 - b. The right to present defenses to the allegations in this proceeding;
 - c. Notice and hearing prior to imposition of this Order;
 - d. The filing of proposed findings of fact and conclusions of law;
 - e. The issuance of a proposal for decision by an administrative law judge;
 - f. The filing of exceptions and briefs with respect to such proposal for decision;
 - g. Any review of this Order by the Texas Finance Commission; and
 - h. Judicial review of this Order as provided by *Texas Government Code* § 2001.171 et seq., and any other challenge to the validity of this Order.
8. Respondent agrees to this Order solely for the purpose of this proceeding, and without admitting or denying any violations of law or regulations. This Order does not constitute an admission by Respondent that Chapter 151 or a rule adopted or order issued under Chapter 151 has been violated.
9. The Commissioner has considered the matter and finds as follows:
 - a. SPP contracts with borrowers of many types of loans to make loan payments for the borrowers, some of which payments are accelerated. Pursuant to a written agreement, SPP debits a consumer's bank account and subsequently pays the consumer's creditor. Under *Texas Finance Code* § 151.301(b)(4)(A)(iii), these third party bill payment services constitute money transmission.
 - b. From August 2012 to November 2013, Wisconsin issued six orders to SPP due to SPP's repeated failure to comply with Wisconsin laws. These orders imposed penalties totaling \$86,800.

- c. SPP registered with FinCEN as a money transmitter in 2011 and has renewed annually. In its January 3, 2014, renewal registration with FinCEN, SPP stated it was doing money services business in all 50 states and U.S. territories.
- d. Respondent states that since February of 2012, SPP has been conducting money transmission in Texas. It has represented to the Department that as of August 30, 2014, it has been providing bill payment services for 23,378 persons located in Texas and has made payments for Texas consumers totaling \$173,512,229.
- e. The Department regulates money transmission under the authority of Texas Finance Code Chapter 151, Subchapter B.
- f. The Department has not licensed SPP to engage in the business of money transmission in Texas.
- g. *Texas Finance Code* § 151.302(a) provides that "a person may not engage in the business of money transmission or advertise, solicit, or hold itself out as a person that engages in the business of money transmission" without a license. Because SPP's website advertises bill payment services and because SPP is currently making third party bill payments for over 23,000 consumers in Texas, SPP is in violation of *Texas Finance Code* § 151.302(a).
- h. As a result of this violation, the Commissioner issued an Order to Cease and Desist Activity, Order Number 2014-011, on August 18, 2014 (Cease and Desist). Order No. 2014-011 ordered SPP to cease and desist from engaging in the unauthorized business of money transmission in Texas with respect to new customers, and to cease conducting transmission for existing customers within four months. SPP requested a hearing on the Cease and Desist, therefore it is not yet effective.
- i. The Department issued a Notice of Hearing on August 28, 2014, Docket No. BM-1401-14-231, to determine whether the Commissioner should assess administrative penalties for violations of the *Texas Finance Code*.
- j. On September 5, 2014, the Department received an application from SPP for a money transmission license. Due to the application's missing essential components, and in accordance with 7 TAC § 33.13(d)(1) and (2), the application was found unacceptable for filing and was returned to SPP on September 12, 2014.
- k. On September 8, 2014, the Department issued a First Amended Notice of Hearing, which set for hearing the issues of whether the Cease and Desist should be made

effective and whether penalties should be imposed. The hearing was set for September 30, 2014.

- l. On September 23, 2013, SPP filed a Motion for Continuance asking for additional time to negotiate a Consent Order upon its engagement of Gardere Wynne Sewell, LLP. The Department responded with no objection to the continuance, and the hearing was reset for October 7, 2014. The parties subsequently agreed to reset the hearing to October 16, 2014.
- m. As required by *Texas Finance Code* § 151.707(d), the Commissioner has considered the seriousness of the violations, Respondent's compliance history, and Respondent's good faith in attempting to comply with Chapter 151. The Commissioner finds that the violations are very serious because (1) SPP is required to be a licensed money transmitter in Texas but has been operating without said license; and (2) SPP has contracted with over 23,000 Texas residents and transmitted over \$173,000,000 without the protections in place that are required of a company that holds a money transmission license.
- n. The Commissioner finds SPP's prior compliance history unsatisfactory because it failed to apply for a Texas money transmitter license and has yet to submit a fully executed application for a money transmission license in Texas in light of the requirements of *Texas Finance Code* §§ 151.304 and 151.306 by omitting, among other things, an audited financial statement sufficient for the Commissioner to determine that SPP has the minimum net worth required to obtain a license, the filing fee, and the security required by *Texas Finance Code*.
- o. Based on these findings and based on the representations made by SPP as to the volume of transactions and length of time it has been conducting an unlicensed money transmission business in Texas, the Commissioner finds that a penalty of \$90,000 is appropriate.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED that:

10. Upon the effective date of this Order, SPP will cease and desist any and all money transmission for any new customers in Texas until a temporary or full license is granted by the Texas Department of Banking. This includes business conducted directly or

through the activity of others and includes but is not limited to advertising and soliciting persons in Texas, and the acceptance of customers who are located in Texas;

11. By October 10, 2014, at 5 p.m. CDT, SPP will have delivered to the Department a completed application for a Money Transmitter License; an audit reflecting a minimum net worth of \$1,000,000; pro forma financial statements that demonstrate that the net worth will be maintained if a license is issued; a bond for \$1,000,000; a check made payable to the Texas Department of Banking in the amount of \$90,000 as an administrative penalty; and written evidence satisfactory to the Department that it has informed all its agents, employees and others through whom it solicits customers that they must cease doing so.
12. If SPP fails, by 5 p.m. CDT on October 10, 2014, to comply with any requirement of Paragraphs 10 or 11, such failure will constitute the October 10 Event of Default, the effect of which is detailed below.
13. If the October 10 Event of Default occurs, the Department will mail the October 10 Default Notice to SPP at 54 Rainey Street, No. 922, Austin, Texas 78701, and to its registered agent, Rodney Tobiason, 999 Vanderbilt Beach Road, Suite 200, Naples, Florida 34108.
14. On the date the Department mails the October 10 Default Notice (the October 10 Default Notice Date), SPP will be required to:
 - a. Within three days of the October 10 Default Notice Date, cease and desist from engaging new customers in in Texas, whether conducted directly or through the activity of others. This includes but is not limited to advertising and soliciting persons in Texas, and the acceptance of customers who are located in Texas.
 - b. Within 10 days of the October 10 Default Notice Date, have paid the Texas Department of Banking whatever amount is needed to make the total penalty equal \$180,000.
 - c. Within 30 days of the October 10 Default Notice Date, notify its existing Texas customers that it will cease providing bill payment services to them, and make reasonable efforts to ensure that these customers understand their responsibilities to resume making their own payments. This notification must be made in writing, and a copy of the notice must be sent contemporaneously to the Department.
 - d. Within 120 days of the October 10 Default Notice Date, cease and desist from servicing customers currently under contract at the time of the October 10 Default

- Notice Date and have returned to its customers all customer funds held by SPP for payment of loans.
- e. Within seven days of achieving full compliance with this paragraph, SPP must confirm to the Department in writing that it has ceased all unlicensed activities in Texas.
15. SPP knowingly and voluntarily waives any rights, including those listed in paragraph 7 of this Order, with regard to the imposition of the requirements after the October 10 Event of Default.
 16. If SPP fully complies, in the sole discretion of the Department, with the requirements of paragraphs 10 and 11 of this Order, SPP will be allowed to continue to provide bill payment services to its existing customers while its license application is pending at the Department, subject to paragraph 17 below.
 17. If SPP has fully complied, in the sole discretion of the Department, with the requirements of paragraphs 10 and 11 of this Order, and subsequently its license application is suspended pursuant to Texas Finance Code § 151.204, determined abandoned pursuant to 7 TAC § 33.13(g)(1), or denied pursuant to Texas Finance Code § 151.205, SPP will do the following:
 - a. Within 15 days of the Department's notification to SPP of said suspension, abandonment or denial, notify its existing Texas customers that it will cease providing bill payment services to them, and make reasonable efforts to ensure that these customers understand their responsibilities to resume making their own payments. This notification must be made in writing, and a copy of the notice must be sent contemporaneously to the Department.
 - b. Within 120 days of the Department's notification to SPP of said suspension, abandonment or denial, cease and desist from engaging in the unauthorized business of money transmission in Texas with respect to customers currently under contract at the time of the notification and have returned to its customers all customer funds held by SPP for payment of loans.
 - c. Within seven days of achieving full compliance with this paragraph, SPP must confirm to the Department in writing that it has ceased all unlicensed activities in Texas.

18. This Order does not restrict the Department with respect to any enforcement action or other recourse regarding any other past, current, or future violations by Respondent that come to the attention of the Department.

Effective Date

This Order against Respondent is effective on October 10, 2014, and subject to its terms, Respondent may not appeal.

Signed on this 15th day of October, 2014.

/s/Stephanie Newberg for
Charles G. Cooper
Banking Commissioner of Texas

AGREED AS TO FORM AND SUBSTANCE:

SMART Payment Plan, LLC.

By: /s/David Engelman
David Engelman
Managing Member, Chief Executive Officer, and Chief Compliance Officer

Date: October 14, 2014

APPROVED AS TO FORM:

/s/Leslie R. Robnett
Leslie Ritchie Robnett
Counsel for SMART Payment Plan, LLC

Date: October 14, 2014

/s/Deborah H. Loomis
Deborah H. Loomis
Deputy General Counsel
Texas Department of Banking

Date: October 14, 2014