

**An out-of-state trust company may not lawfully engage an individual in Texas to provide business development and marketing services in Texas without first complying with the requirements of Chapter 187, Finance Code, to establish a trust representative office. (See 7 TAC §21.44)**

Opinion No. 17-01

April 11, 2017

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This letter is in response to your email of February 27, 2017, to Dan Frasier of the Texas Department of Banking ("Department"), in which you requested the Department of Banking to review a proposed marketing arrangement and provide an opinion as to whether such arrangement can be implemented as proposed in compliance with Texas law.

As more fully developed below, we are of the opinion that the proposed arrangement would constitute de facto establishment of a representative trust office in Texas subject to [7 TAC 21.44].

## **FACTS**

XYZ (the "Company"), is a Tennessee-chartered nondepository trust company with offices only in the State of Tennessee. The only types of accounts handled by the Company are trust, estate and foundation accounts, either as fiduciary or as agent for the fiduciary. For trust accounts, the Company acts only as a "directed trustee" that does not make investment decisions.

The Company is interested in engaging an individual in Texas on an independent contractor basis to provide business development for the Company in the Houston area. The individual would not be treated as an employee, but would be compensated on a commission basis under a contract that would include non-compete and non-solicitation provisions for a term not to exceed one year, cancellable by either party upon appropriate notice.

The individual's activities would include setting up and attending meetings with investment, tax and legal professionals (as potential referral sources), as well as prospective trust, estate, and foundation clients, to market the Company. The individual would assist in the setup of new accounts (such as gathering information and signatures from new clients) that have been accepted by the Company. The individual would also periodically communicate with Texas clients, primarily by phone and email, to facilitate the flow of information between the Company and the client(s).

All Texas clients accepted as a result of the individual's marketing efforts would be assigned a trust officer in Tennessee. The individual would not be involved in any fiduciary activities or decisions of the Company, including account acceptance decisions and discretionary distribution decisions, which would all take place at the Company's trust offices in Tennessee.

The individual's home and office (if any) would not be represented as offices of the Company, no Company signage would be posted at such locations, the addresses of such locations would

not be included on Company letterhead/correspondence or marketing materials, and the individual would not conduct meetings at such locations with clients or prospective clients.

## **ANALYSIS**

In pertinent part, Section 187.002, Texas Finance Code, provides as follows:

(a) A company may not conduct a trust business in this state unless the company is a trust institution and is:

... (3) a trust company chartered under the laws of another state or a foreign country that has a trust office in this state licensed by the banking commissioner pursuant to this chapter...

(b) Notwithstanding Subsection (a), a trust institution that does not maintain a principal office, branch, or trust office in this state may act as a fiduciary in this state to the extent permitted by Subchapter A, Chapter 505, Estates Code.

(c) A company does not engage in the trust business in this state in a manner requiring a charter or license under this subtitle by engaging in an activity identified in Section 182.021, except that the registration requirements of Section 187.202 may apply to a trust representative office engaging in the activity.

Pursuant to Section 187.004, Finance Code, an out-of-state trust company that establishes a trust office in Texas pursuant to Subchapter B, Chapter 187, Finance Code, or a representative trust office in Texas pursuant to Subchapter C, Chapter 187, Finance Code, may serve as a fiduciary in Texas and conduct any activity at the office that would be authorized under the laws of this state for a state trust company to conduct at that type of office.

Subchapter A, Chapter 505, Estates Code, specifically Section 505.003, permits an out-of-state trust company that does not have an office in Texas to serve as a fiduciary for a Texas resident if the Texas resident by written instrument appoints the trust company as a fiduciary, but only if (1) the trust company does not directly or indirectly solicit the appointment, (2) the laws of the trust company's home state would permit a Texas-chartered corporate fiduciary to be similarly appointed by a resident of such home state to serve in like fiduciary capacity, and (3) the out-of-state trust company complies with the filing requirements of Section 505.004, Estates Code. See Section 187.005, Finance Code, and Texas Atty. Gen. Op. No. JM-1032 (1989).

The Texas Attorney General, in Opinion No. JM-1032, addressed a situation similar to the proposed scenario presented in this matter. An out-of-state trust company proposed to supply information and forms to brokers employed by an affiliated Texas brokerage firm, with the intent that they be distributed to customers of the firm who make general inquiries about the availability of trust services. Interpreting Section 105A, Texas Probate Code, the predecessor statute to current Subchapter A, Chapter 505, Estates Code, the Attorney General ruled that the arrangement violated Texas law, and any appointments as trustee obtained by the out-of-state trust company pursuant to the unlawful plan of business would also violate Texas law. As stated in Opinion JM-1032, “[a] design to prompt inquiries, or to respond to general inquiries with a presentation of the benefits offered by the foreign trust company and its services, is a design to circumvent the statute...”

As a result of and coincident with the modernization of Texas law regarding interstate offices and activities of trust institutions, the prohibition on solicitation no longer appears in Subchapter A, Chapter 505, Estates Code. A conforming amendment made to Section 105A, Probate Code by Acts 1999, 76th Leg., R.S. ch. 344, § 6.002, removed the prohibition. The same Act also enacted the predecessor statute to Section 187.002, Finance Code, quoted above.<sup>1</sup> An out-of-state trust company is thus permitted to engage in and may solicit trust business in Texas upon compliance with the requirements of Chapter 187, Finance Code.

Section 187.201(a)(1), Finance Code, specifically permits a registered trust representative office of an out-of-state trust institution to “solicit, but not accept, fiduciary appointments...” By negative implication, an out-of-state trust company that does not have an office in Texas may not directly or indirectly solicit fiduciary appointments from Texas residents, and would be subject to an enforcement action for unauthorized activity in Texas in the event of any such solicitation, see Section 187.202(f), Finance Code.

## **CONCLUSION**

The Company would violate Texas law by engaging an individual in Texas on an independent contractor basis to solicit trust business for the Company, as proposed. Such conduct constitutes the establishment by the Company of a de facto representative trust office in Texas without first complying with the requirements of Subchapter C, Chapter 187, Finance Code.

Without limiting other options, a representative trust office can be established at the address of the home or office of the individual engaged by the Company to solicit trust business, even if the location will not be represented as offices of the Company, no Company signage would be posted at such locations, the addresses of such locations would not be included on Company letterhead/correspondence or marketing materials, and the individual would not conduct meetings at such locations with clients or prospective clients.

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<sup>1</sup>TEX. REV. CIV. STAT. ANN. art. 342a-9.002 (Vernon’s), originally enacted by Acts 1999, 76th Leg., R.S. ch. 344, § 3.001, was nonsubstantively codified as Section 187.002, Finance Code, by Acts 2001, 77th Leg., ch. 1420, § 6.001(a), eff. Sept. 1, 2001.