TEXAS DEPARTMENT OF BANKING
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SUPERVISORY MEMORANDUM – 1043

December 9, 2020

TO: All State-Chartered Banks and Trust Companies
All Money Services Business License Holders

FROM: Charles G. Cooper, Banking Commissioner

SUBJECT: Permissible Uses of "Bank" and Related Terms in Marketing and Other Limits Related to Marketing Regulated Financial Services

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PURPOSE

The Texas Department of Banking (Department) is required to enforce certain Texas laws regarding advertising of regulated financial services. This Supervisory Memorandum (Memorandum) interprets the state statutes governing the marketing of regulated financial services, clarifies the requirements for compliance, and addresses various legal parameters for marketing regulated financial services.[1]

To prevent deceptive advertising and protect the public, the Texas Finance Code (TFC) limits marketing of regulated financial services by unregulated entities. For instance, companies unauthorized to engage in the business of money transmission may not advertise, solicit, or represent that they engage in the business of money transmission per Section 151.302 of the TFC. Similarly, Section 31.005 of the TFC prohibits the use of "bank," "banking," and related terms in marketing by non-banks in a manner indicating those entities are engaged in banking. This Memorandum discusses the extent of these limits and describes certain permissible marketing activities that would not violate these laws.

These laws apply to all persons and entities that are located in Texas, provide services to persons or companies located in Texas, advertise services to persons or companies located in Texas, or otherwise purposefully direct their activities toward Texas or have substantial connections with Texas. Legal compliance can be achieved and maintained with reasonable effort, and the Department sincerely appreciates the continued and long-standing voluntary observance of these laws by the vast majority of financial service firms.

This Memorandum is not intended to address the marketing practices of any particular person, company, or case.

[1] This Memorandum constitutes an interpretive statement issued pursuant to §§ 31.102 and 31.104 of the Texas Finance Code.

BACKGROUND

The Department regulates banks and money transmitters, as well as other financial service providers. The Department has become aware of various instances in which unauthorized entities are holding themselves out as banks or money transmitters in violation of the TFC.

In most instances, these vendors provide banks and other regulated entities with information technology services, particularly user interface systems for account access such as websites and mobile phone applications. While such technology outsourcing is not new in the financial services industry, a recent trend has arisen where these non-bank vendors hold themselves out to the public as actual banks or providers of regulated money services without complying with applicable laws on banking and money services. For example, non-bank ABC Corp. will provide XYZ Bank deposit account customers with access to XYZ banking services through ABC's ABC-branded interface, and ABC will hold ABC itself out as a "bank." This is illegal—ABC cannot hold itself out as a bank since ABC is not a bank.

The laws of many states, including Texas, prohibit unregulated companies both from providing regulated financial services and from falsely claiming to be regulated financial service providers.[2] These marketing laws protect both consumers and lawful providers of regulated financial services by preventing deceptive advertising and enabling users of financial services to make informed decisions.

REVIEW OF APPLICABLE LAW AND REGULATION

The two primary sources of law in question are the Texas Banking Act, chapters 31 through 59 of the Texas Finance Code and the Money Services Act, chapter 151 of the Texas Finance Code. Some of the pertinent requirements of these laws are reviewed below to provide context before providing interpretations. By further explaining these laws, the Department hopes to assist organizations with compliance.

Money Transmission Law and Regulation

Many financial services do potentially involve regulated "money transmission." The Money Services Act defines "money transmission" as (a) "the receipt of money or monetary value by any means," and (b) a reciprocal "promise to make the money or monetary value available at a later time or different location."[3] Money-transmission does not require transmission to a third party; it can be a two-party transaction. Various money management services constitute money transmission if those services involve receiving money from customers and promising to repay those customers that money or value at a later time.

Unless licensed or exempt, a company (or person) may not engage in the business of money transmission in Texas or advertise, solicit, or represent that it engages in the money transmission

[2] *See id.* §§ 62.005(c) (savings and loan associations), 92.056(c) (savings banks), 181.004(a) (trust companies), and 122.003(c) (credit unions). *See also* Del. Code tit. 5, § 928; Fla. Stat. § 655.922(2); Ga. Code § 7-1-133; Mich. Comp. Laws § 487.11106; N.Y. Banking Law, § 132; N.C. Gen. Stat. § 53C-1-3; Ohio Rev. Code § 1101.15; 7 Pa. Cons. Stat. § 805.

[3] Tex. Fin. Code § 151.301(b)(4).

business.[4] The prohibition against advertising money transmission applies regardless of whether actual activities and operations constitute money transmission.

However, an unlicensed company can hold itself out as a money transmitter if an exemption applies. For example, an exemption may apply if the unlicensed company is:

- A bank or other federally insured financial institution (collectively, "banks");[5]
- An agent of a bank or other federally insured financial institution;[6]
- An authorized delegate appointed by a licensed money transmitter, or an intermediary working on behalf of a licensed money transmitter;[7]
- A payment processor accepting payments on behalf of merchants and retailers;[8] or
- Another specifically authorized type of regulated entity, such as a Texas-chartered trust company, a registered securities dealer or debt management service provider, a licensed armored carrier, a licensed attorney, or a licensed title company.[9]

Many of these exemptions have reasonable, yet important, conditions and requirements that protect the interests of the public, such as by ensuring customers have recourse against both the exempt service provider and its sponsoring bank, licensed money transmitter, or principal retailer if the exempt service provider steals or mishandles customer funds.[10]

Bank Law and Regulation

The Texas Banking Act, like the Money Services Act, states that a non-bank shall neither "conduct the business of banking" nor "represent to the public that it is conducting the business of banking."[11]

The Texas Banking Act specifically addresses the use of "bank"-related terms in the context of financial service marketing. A non-bank may not "use the term 'bank,' 'bank and trust,' or a similar

[4] *Id.* § 151.502(a).

[5] *Id.* §§ 151.003(3) & 151.302(a)(3).

[6] *Id.* §§ 151.003(5) & 151.302(a)(3).

[7] *Id.* §§ 151.302(a)(2) & 151.302(a)(7).

[8] 7 Tex. Admin. Code § 33.4(c)-(d).

[9] *See, e.g.,* Tex. Fin. Code §§ 151.003(9-a) (exempting Texas trust companies), 151.003(9) (licensed armored carrier when delivering to or from a financial institution or on behalf of the same company), and 151.003(8) (attorney or title company that in connection with a real property transaction); 7 Tex. Admin. §§ 33.53 (registered debt management service providers) and 33.54 (registered securities dealers).

[10] *See, e.g.,* Tex. Fin. Code §§ 151.302(a)(7) & 151.401; 7 Tex. Admin. Code §§ 33.3(b)(2), 33.4(c)(3), and 33.4(d)(3).

[11] Tex. Fin. Code § 31.004(a). *See also* Tex. Bus. Org. Code § 2.003(b).

term" in its advertising "in a manner that would imply to the public that the person is engaged in the business of banking in this state."[12]

However, unlike the Money Services Act, the Texas Banking Act has no exclusions or exemptions permitting non-bank agents, delegates, or vendors of banks to conduct the business of banking or hold themselves out or market themselves as "banks." Non-bank vendors to banks cannot advertise those vendors' own "banking" services or falsely represent that such non-bank entities are "banks."

COMPLIANCE WITH APPLICABLE LAW AND REGULATION

As previously noted, the Department has become aware of various companies, particularly technology companies that are vendors to banks, violating these laws on marketing as a "bank" and marketing other financial services. At the same time, other companies manage to accurately and competitively market similar services without violating these financial service marketing laws. To achieve voluntary compliance with these laws without litigation or other unnecessary efforts, the Department is issuing this Memorandum relating to marketing restrictions and permissible marketing activities under both the Money Services Act and the Texas Banking Act.

Relating to Marketing Money Transmission Services

Complying with the Money Services Act restrictions on marketing requires adherence to these basic principles (among others):

- *"Store-your-cash-here" services are a regulated money transmission business in Texas.* Money transmission occurs where a company receives funds and promises to repay those funds either to that same person or some other person at a later time or different location on a non-deposit basis.[13] Various other money management services can constitute money transmission as well.
- *Advertising "store-your-cash-here" services is regulated in Texas.* Since non-deposit "store-your-cash-here" services are money transmission, and advertising money transmission is regulated, advertising "store-your-cash-here" is regulated.
- *"We-store-your-cash" is a regulated service even if someone else stores the cash.* Advertising for money services is regulated, even if the money services are outsourced to a third-party. (And this third-party may need to be licensed or exempt as well.)

Companies advertising or providing money transmission services without a license must qualify for an exemption or exclusion.

[12] Tex. Fin. Code § 31.005.

[13] The Texas Banking Act defines "deposits" and states that providing such deposit services is an "exclusive" banking service and constitutes the business of banking, not money transmission. *See* Tex. Fin. Code §§ 31.002(a)(4) & (15).

Relating to Permissible Marketing of Banking Services and Use of "Bank," Banking" or Related Terms in Marketing

As noted above, the Texas Banking Act prohibits all non-banks from holding themselves out as "banks" in a manner indicating that such entities are engaged in banking. The chief concern here is with providers of financial services—blood banks and food banks may continue to use the term "bank" in their non-financial activities.

However, when the goods, services, or products in question relate to finance or financial services, non-banks are prohibited from advertising themselves as banks. While a non-bank agent of a bank may be exempt from the Money Services Act and therefore permitted to both provide money transmission services and advertise such services, those advertisements still cannot falsely claim that the non-bank is a "bank" or engaged in "banking."

A non-bank cannot call itself a bank under the Texas Banking Act. For example, ABC Corp., a non-bank, cannot call itself "ABC Bank" or have a website such as www.abc-bank.com. There is no permissible way to offer a "white-labeled bank account" or white-labeled banking services under circumstances where a non-bank holds itself out as the entity offering a "bank" account or other banking services.

Likewise, a non-bank's use of "bank" or "banking" in advertising violates the Texas Banking Act in the following examples:

- A television advertisement for ABC Corp., a non-bank, stating that ABC offers "mobile banking" or that ABC "provides a mobile banking account";
- A website of ABC with "banking" tabs or statements that ABC provides "banking made awesome" and that ABC customers are "more than a bank balance"; or
- A telemarketing campaign by ABC describing ABC as a "banking platform" that offers "safe banking" or "a better way to bank."

Non-banks can comply simply by not using words like "bank" or "banking" in marketing in a manner implying that the non-bank is engaged in banking. Non-banks can accurately describe the non-banking services they provide, such as bank account management software. The following "bank"-related marketing statements by non-bank ABC will not be viewed as implying that ABC is a bank as long as all of ABC's related marketing materials reasonably identify the banks providing the actual banking services:

- ABC offers "access to mobile banking" or "provides access to your mobile banking account";
- ABC provides "bank account management made awesome"; and
- ABC is a "banking management platform" that offers "safe bank account control" or "a better way to access your bank."

In addition, the use of "bank"-related terms in non-bank advertising does not imply the non-bank is providing banking services if the sponsoring bank is at least as prominent as the non-bank within the context of those "bank"-related terms. For instance, the examples above will be viewed as compliant if modified to disclose that ABC's sponsor XYZ bank is providing the banking services:

- The television ad can state that ABC offers "mobile banking thru XYZ" or that ABC "is an XYZ mobile banking account";
- A website branded by ABC can have "XYZ banking" tabs or statements that ABC provides "XYZ banking made awesome" and that ABC customers are "more than an XYZ bank balance"; or
- A telemarketing campaign by ABC can describe ABC as an "XYZ banking platform" that offers "safe banking with XYZ" or "a better way to bank with XYZ."

Alternatively, the marketing materials as a whole can be co-branded by XYZ and ABC, so that their names and logos are featured with equal prominence and plural statements such as "we offer mobile banking," "bank with us," and "we make banking awesome" are used. Again, all marketing statements relating to regulated financial services should reasonably identify the entity providing the regulated financial services to avoid illegal solicitation of regulated financial services by unauthorized entities.

Relating to Permissible Joint Marketing of Regulated Financial Services by Corporate Affiliates

The Department has noted that regulated financial services are often collectively using tradenames and trademarks common among a family of affiliated corporations. For example, "XYZ Holdings Corp." may wholly own subsidiary XYZ Money Services Corp. XYZ Holdings is not licensed, excluded, or exempt from money transmission licensing, but XYZ Money Services is. Both entities collectively advertise various financial services, including regulated money transmission services, simply as "XYZ" without explaining which entity provides which services.

In such circumstances, an advertisement that states "XYZ can manage your money and pay your bills" could be construed as XYZ Holdings illegally advertising that this particular entity provides money services.

However, the Department has determined such collective advertising for banking services, money transmission services, or other regulated financial services by affiliated companies under a common trade name or mark will not be considered to constitute illegal advertising of regulated financial services by the non-exempt or unlicensed affiliates as long as all of the following conditions are met:

- At least one of the companies in question is licensed or exempt from applicable licensing for any regulated financial services being advertised;
- Any actual regulated financial services are only provided by the applicable licensed, excluded, or exempt entities;
- All advertising and other representations relating to regulated financial services reasonably identify the entity providing the regulated financial services;
- No advertising or other representations state that an unauthorized entity is providing regulated financial services;
- All entities using or benefitting from the common tradenames or marks (each, an "applicable entity") are fully affiliated with each other, meaning that each

applicable entity, for all other applicable entities, directly or indirectly controls the other applicable entity, or is directly or indirectly controlled by the other applicable entity, or is otherwise under full common control and ownership with the other applicable entity; and

- All advertising, including use of common tradenames and trademarks, is conducted pursuant to written inter-company agreements and permissible under all other applicable law, including but not limited to federal trademark law and federal and state consumer protection law.

CONCLUSION

This memorandum confirms that considerable latitude exists for marketing regulated financial services. However, the Department will enforce compliance with these financial service marketing regulations if still needed after issuance of this memorandum on permissible marketing activities. State banks and other regulated financial service providers can protect their own brands and industries by requiring all vendors to comply with the laws requiring truth in the advertising of regulated financial services.

Formal determinations regarding exemption claims can be sought from and provided by the Department. Companies concerned with the legality of their operations or advertising can contact the Department's Legal Division at (877) 276-5554.