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GREG GONZALES
COMMISSIONER

June 26, 2024

The Honorable Kevin Vaughan
Chairman, House Commerce Committee
425 Rep. John Lewis Way N.
Suite 622, Cordell Hull Bldg.
Nashville, TN 37243

Chairman Vaughan,

On June 10, 2024, the Office of the Attorney General and Reporter notified the Department that it had received a letter from you dated May 30, 2024, requesting a legal opinion regarding HB2100 (Pub. Ch. 746). At that time, the Office of the Attorney General and Reporter advised us that it would be unable to address your request and that you had hoped that the Department might be able to provide information as requested in your letter, a copy of which was provided to us.

The Department is, of course, happy to attempt to address your inquiries to the best of our ability.

At the outset, let me give you some fundamental views of how we supervise financial institutions that may help explain our approach to regulation and how we go about applying the laws under our jurisdiction.

The Department's mission under the Tennessee Banking Act is to provide citizens with a safe and sound state banking system while giving institutions the opportunity to support economic progress in Tennessee and throughout the United States.

An important principle in accomplishing this mission is tailored supervision: The fundamental idea that every institution is unique, and the Department should make every effort to tailor its supervision to the risk profile and merits of each institution so as to avoid a one size fits all regulatory environment. We believe such an effort is important to accomplishing balanced regulation. I also think it is important to keep in mind that our regulatory experience is established on community banks and not institutions of the size and complexity that are the focus of Pub. Ch. 746. Because we do not have firsthand experience in supervising the largest banks in the nation and in how those banks operate, we are not able to perhaps answer certain issues to the extent that an answer might depend specifically on how those large banks engage in certain operations.

I would also say that having a good knowledge as to how the largest banks operate would also support the ability of government to provide important guidance to helps banks comply with Pub. Ch. 746, which is why you have asked your questions. It should always be the goal of government to provide as much guidance as possible because it is better for citizens that we prevent consumer harm by giving institutions the clarity necessary to fully understand and comply with law, rather than simply trying to find violations and then clean it up after the fact.

In addition, please note that the Department does not and does not intend to assert any regulatory jurisdiction over federally-chartered banks or credit unions under the Tennessee Banking Act. Further, as of today, there are no Tennessee state-chartered banks or credit unions that would be defined as "financial institutions" subject to HB2100, as no such entities currently have more than one hundred billion dollars ($100,000,000,000) in assets.[1] Below, please find our responses to each of your individual inquiries.

1. *A new law, Tenn. Code Ann. § 45-1-128, is applicable to "financial institutions" defined as "a state or national bank, a savings and loan association, savings bank, credit union, industrial loan and thrift company, or mortgage lender that has more than one hundred billion dollars ($100,000,000,000) in assets." State banks are defined in Tenn. Code Ann. § 45-1-103(26) as "any bank chartered by this state" and, thus, are state-chartered banks chartered by another state not subject to this new law?*

   Response:

   As indicated in your inquiry, the term "state bank" is defined at Tenn. Code Ann. *§ 45-1-103(26)* as "any bank chartered by this state." Accordingly, the Department would not interpret the term "financial institution" as defined in HB2100 to include state-chartered banks chartered by a state other than Tennessee.

2. *Tenn. Code Ann. § 45-1-128(a)(2) excludes a loan, as defined in Tenn. Code Ann. § 45-4-601, from the scope of products or services offered by covered financial institutions that this law applies to.*

   a. *Tenn. Code Ann. § 45-4-601 falls under the statutes regulating credit unions – are only loans offered by credit unions excluded from the scope of this law or are loans offered by any financial institution excluded?*

[1] In a March 5, 2024 meeting of the House Banking and Consumer Affairs Subcommittee and in a March 18, 2024 House Floor Session, Chairman Zachary, HB2100's prime house sponsor, likewise noted that the bill would not apply to any Tennessee state-chartered banks and further indicated that a primary purpose of the bill was to place protections under the Tennessee Consumer Protection Act of 1977, to better enable the Office of the Attorney General and Reporter to address matters subject to the bill's provisions.

b. *Are credit cards considered loans for purposes of this new law?*

c. *Would a "buy now pay later" in a merchant-oriented credit scenario where, through a merchant processor, credit is extended to retail customers by a financial institution, be considered a loan and thus, excluded from the scope of the new law?*

d. *Would this apply to indirect auto lending where a bank or other financial institution purchases a loan made by a car dealer?*

Response:

The Department would not interpret the term "loan" as used in HB2100 to be limited solely to products or services offered by credit unions. Whether any particular product or service would constitute a "loan" as used in HB2100 would be highly dependent on the specific facts and circumstances. While the Department generally cannot address hypotheticals, we would be happy to consider and, to the best of our ability, provide guidance regarding any specific inquiry that may be raised by a financial institution subject to our regulatory jurisdiction and HB2100's provisions.

3. *What is the scope or definition of customer under Tenn. Code Ann. § 45-1-128? Would this law apply only to Tennessee residents, any bank operating within Tennessee regardless of where an alleged violation occurs, or to any account or service offered within the state? Customer is not defined.*

Response:

HB2100 does not appear to set forth a scope or definition for the term "customer," nor does it appear to provide clear guidance or parameters regarding the term's meaning.

4. *Does Tenn. Code Ann. § 45-1-128 (c)(3) prohibit covered financial institutions from using nonquantitative data (like character or conduct) and a person's business sector as a factor when making determinations on who to provide covered products or services to?*

Response:

HB2100's new Tenn. Code Ann. § 45-1-128(c)(3) references "any factor if it is not a quantitative, impartial, and risk-based standard, including any such factor related to the person's business sector;" however, the bill does not appear to provide clear, specific

guidance fully addressing the complete impact and operations of § 45-1-128(c). In addition, the Department generally cannot address hypotheticals, but as noted above, we would be happy to consider and, to the best of our ability, provide guidance regarding any specific inquiry that may be raised by a financial institution subject to our regulatory jurisdiction and HB2100's provisions.

5. *Does Tenn. Code Ann. § 45-1-128 create a private right of action or is enforcement only by the Attorney General and, if so, must a customer first file a complaint with the Attorney General's office before the Attorney General initiates an investigation, or what triggers the Attorney General's ability to begin an investigation into an alleged violation of this new law?*

   Response:

   HB2100 does not appear to clearly state whether it creates a private right of action. In addition, the Department cannot speak as to the determinations and operations of the Office of the Attorney General and Reporter.

6. *How does a covered financial institution identify a request as being made under Tenn. Code Ann. § 45-1-128(d) as opposed to a request under 12 CFR Part 1002 – Equal Credit Opportunity Act (Regulation B)? The Tennessee law does not appear to require a customer to invoke the law in their request. Specifically, how should a covered financial institution identify a request made pursuant to Tenn. Code Ann. § 45-1-128(d) – must it include direct reference to "request for reasons" for termination or denial? What if a person simply claims discrimination, but makes no request for reasons – must a financial institution provide a detailed explanation as required by Tenn. Code Ann. § 45-1-128?*

   Response:

   HB2100 does not appear to provide clear, specific guidance regarding the questions above, which also involve application and interpretation of federal law.

7. *What constitutes a "detailed explanation of the basis for the denial, restriction, or termination of service" under Tenn. Code Ann. § 45-1-128(d)(1)? Oftentimes financial institutions terminate or deny service because a person's business falls outside the scope of a bank's risk profile. Would stating that in response to a request be considered a sufficiently detailed explanation to satisfy the requirements of the new law?*

a. *Would a response or adverse action notice provided under other federal law, such as Regulation B, be considered a "detailed explanation"?*

b. *If a financial institution closes an account or terminates services based on suspicious, illegal, or fraudulent activity, the institution must comply with federal law, including the Bank Secrecy Act and Anti-Money Laundering Act, and file a suspicious activity report, and federal law prohibits the institution from disclosing that a SAR has been filed. A reply to the customer stating that providing an explanation for termination/closure is prohibited by federal law could imply that a SAR had been filed and would therefore be a violation of those laws. In those circumstances is no response an acceptable response?*

Response:

HB2100 does not appear to provide clear, specific guidance regarding the questions above, which also involve application and interpretation of federal law.

8. *Does a financial institution not need to provide the information required under Tenn. Code Ann. §§ 45-1-128(d)(2) and (3) for customers denied service, as no terms and conditions would have been provided or agreed to?*

Response:

HB2100 does not appear to provide clear, specific guidance regarding the question above.

9. *Tenn. Code Ann. §§ 45-1-128(d)(2) and (3) require a financial institution to provide a "copy of the terms of service agreed to by the person and the financial institution" and a "citation to the specific provisions of the terms of service upon which the financial institution relied to refuse to provide restrict or terminate service". In cases where the applicable terms of service are available online does a web link contained in an email or mailed letter satisfy the requirement?*

Response:

HB2100 does not appear to provide clear, specific guidance regarding the question above.

Please note that while the Department has attempted to, to the best of its ability, provide information regarding HB2100 at this time, HB2100 has not yet taken effect and the Department has not had any opportunity to consider any actual specific practices of any Tennessee state-chartered banks or credit

unions under the bill's provisions. Accordingly, any interpretations noted above are subject to change and the Department reserves the right to reach different conclusions and determinations in the future.

We hope that this response is helpful. Please do not hesitate to reach out to the Department at any time if we can be of any further assistance.

Sincerely,

Greg Gonzales

GG/MA/DE/TS/de