

STATE OF COLORADO

Department of Law

COLLECTION AGENCY BOARD

110 16th Street, 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4601
FAX: (303) 620-4130



Laura E. Udels
Executive Director
Jack L. Kunkel
Deputy Administrator

September 20, 1991

RE: Applicability of Collection Agency Board Licensing Requirements to a Check Guarantee Company

Dear :

This purpose of this letter is to provide an opinion as to whether must obtain a Colorado collection agency license. It is an informal opinion, and it should not be considered a formal advisory opinion issued pursuant to section 12-14-113(5), C.R.S. (1985).

FACTS

is a check guarantee company that collects debts on negotiable instruments assigned to it by its merchant subscribers. It presumably contracts to provide services to merchants in Colorado, as well as merchants throughout the United States. It does not, however, have an office in Colorado. operates its check guarantee business in Colorado through a registered fictitious name, " ."

Merchant subscribers pay a monthly service fee. Thereafter, merchants may request approval numbers for customer checks presented to their stores. If issues an approval number for the check and the check is later dishonored, pays the full face-value of the check to the merchant upon presentment (assuming the merchant has recorded certain information on the check). The merchants assign to all right, title and interest in the dishonored checks submitted to for payment. Pursuant to the service agreement merchants enter into with , merchants agree to take "any and all measures reasonably necessary to assist in locating, recovering damages from, and prosecuting any person who has tendered a dishonored check to their store." The agreement also provides that if a customer asserts a valid defense against payment of any dishonored check or a valid claim against the merchant, the merchant agrees to reimburse in the amount it paid for

the dishonored check; its costs of attempting to collect on such check; and to indemnify and hold harmless from any and all claims made by the customer.

COLORADO FAIR DEBT COLLECTION PRACTICES ACT

Section 12-14-118, C.R.S. (1990 Supp.), requires any person, firm, corporation or partnership acting as a collection agency in Colorado to possess a valid license. A "collection agency" is defined to include any person, firm, corporation or partnership which: (1) engages in any business, the principal purpose of which is the collection of debts; (2) regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another; (3) takes assignment of claims for the purpose of collecting such claims; or (4) solicits claims for the collection of debts owed or due or asserted to be owed or due another. Section 12-14-103(2)(a), C.R.S. (1985 & 1990 Supp.). "Debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction, whether or not such obligation has been reduced to judgment." Section 12-14-103(6), C.R.S. (1985).

The Colorado Fair Debt Collection Practices Act contains several exclusions from the definition of a collection agency. For example, a collection agency does not include someone who collects or attempts to collect a debt owed (or due or asserted to be owed or due) another if the collection activity concerns a debt which was not in default at the time that person obtained it. Section 12-14-103(2)(b)(VII)(C), C.R.S. (1985) (emphasis added). Further, a collection agency does not include any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor. See section 12-14-103(b)(I), C.R.S. (1985).

A "creditor" is a person, firm, corporation or partnership which offers or extends credit creating a debt or to which a debt is originally owed, but the term does not include, "any person, firm, corporation, or partnership to the extent that it receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." Section 12-14-103(5), C.R.S. (1985 & 1990 Supp.). All creditors are not exempt from Colorado's collection agency board licensing requirements. Creditors who collect their own debts, using a name other than their own which would indicate that a third-person is collecting or attempting to collect the debt, must be

licensed. Section 12-14-103(2)(c), C.R.S. (1985).

ANALYSIS

Initially, it is important to determine whether falls within the general definition of a "collection agency." Clearly, one of 's business purposes is the collection of dishonored checks. Although there is no Colorado case law on this issue, dishonored checks are considered debts under the Federal Fair Debt Collection Practices Act. See West v. Costen, 558 F.Supp. 564, 571 & 573 (W.D.Va. 1983); FTC Official Staff Commentary, 53 Fed. Reg. 50097, 50102 (December 13, 1988). Consequently, it is possible that is a collection agency simply because of the nature of its business. However, it is also possible that check verification is the principal business purpose of . You have presented no facts which would explain the "primary business purpose" of . As such, we will offer no opinion on this particular issue in view of the conclusions reached in the remaining portion of this opinion.

Section 12-14-103(2)(a) defines a collection agency, in part, as any "person, firm, corporation or partnership which "regularly collects or attempts to collect, directly or indirectly, debts which are owed or due or asserted to be owed or due another" (emphasis added). We have already established that dishonored checks are considered "debts" for purposes of the Colorado Fair Debt Collection Practices Act. There is no definition of "regularly" in the federal or state versions of the Fair Debt Collection Practices Act. However, "regularly" has been interpreted to mean, "normally, usually or customarily." Holmes v. Telecredit Services, Inc., 736 F.Supp. 289, 1291 (D.Del. 1990). Certainly, those entities such as , which service Colorado merchant subscribers in the ordinary course of business, are "regularly" collecting or attempting to collect such debts. The more difficult issue, then, is whether or not is collecting debts owed or due another. You contend that 's collection activities are not conducted on behalf of a third party, but that they are performed on behalf of , itself, since has legal title and physical possession of the checks. However, federal courts interpreting the phrase "owed or due another" in this context have held that it means debts originally owed or due another. Id., at 1292-93; Kimber v. Federal Financial Corp., 668 F.Supp. 1280, 1485 (W.D.Ala. 1987); see also FTC Official Staff

Commentary, 53 Fed. Reg. 50097, 50101-10102; Klayman, FTC Informal Opinion Letter (November 22, 1988). **1 Under the circumstances you have described, the dishonored checks (or debts) were originally owned by _____'s merchant subscribers. Consequently, _____ is collecting debts originally owed to another, and it meets the threshold definition of a "collection agency."

The inquiry does not end there, however. If _____ is a "creditor," then it is excluded from the definition of a "collection agency" for most purposes. Section 12-14-103(2)(c) generally defines a "creditor" as one who "offers or extends credit creating a debt or to which a debt is owed . . ." None of the facts you have provided indicate that _____ offers or extends credit to consumers. Again, one could argue that _____ is the entity to whom the debt is owed, since it has purchased the dishonored checks. However, courts interpreting the phrase "owed or due another" in this context have also concluded that it means originally owed or due another. Holmes, 736 F.Supp. at 1292-93; Kimber, 668 F.Supp. at 1485. Even if this interpretation is rejected, _____ would be excluded from the definition of a "creditor" pursuant to the remaining portion of the "creditor" definition.

The definition specifically excludes those person or entities which "receive an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." Section 12-14-103(2)(c) (emphasis added). Title to the checks _____ purchased transfers from the merchant subscribers to _____ sometime after the checks have been dishonored. As such, _____ is purchasing debts which are in default. Again, the phrase "owed or due another" at the end of the exception has been interpreted to mean originally owed or due another. Id. Further, it seems obvious that one of _____'s functions is to facili-

1**No Colorado courts have interpreted this phrase. However, the definitions of a "collection agency" and a "creditor" in the Colorado Fair Debt Collection Practices Act are virtually identical to the definitions of a "debt collector" and a "creditor" provided in the Federal Fair Debt Collection Practices Act. There is no reason, then, not to adopt the reasoning of federal cases and the Federal Trade Commission interpreting the Federal Act.

tate collection in the event that a merchant subscriber's check is dishonored, as _____ receives title to the dishonored checks pursuant to the terms of service agreement it enters into with its merchant subscribers. Therefore, the dishonored checks can only be assigned for the purpose of facilitating collection for another. See Holmes, 736 F.Supp. at 1293.

_____, then, is required to be licensed as a collection agency so long as it collects dishonored checks it purchases from merchant subscribers in Colorado. **2

Please feel free to contact me at your earliest convenience if you have any questions regarding this matter.

Sincerely,



Alesia M. McCloud
Assistant Attorney General
Collection Agency Board
(303) 620-4601

AMM

2**This informal opinion represents the current enforcement position of this office. It is possible that this position differs from verbal advice previously provided. Nonetheless, this position reflects our interpretation of recent developments in federal law addressing this issue.