**Opinion No. 15-1692**

November 30, 1915

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Hon. R. H. Carter, Santa Fe, New Mexico.

**As to the doing of a banking business by mercantile companies.**

**OPINION**

*{*261}* I have your letter of yesterday in which you say that complaints have come to you from many sections of the state with reference to the practice of mercantile companies engaging in lines of business which the banks claim as their exclusive right, such as receiving money on deposit from their customers, keeping checking accounts, issuing certificates of deposit and buying and selling exchange, even though they do not, in the language of the statute, "advertise and hold themselves out to the public as receiving money on deposit, whether on certificates or subject to check."

There can be no doubt that the banking business should be confined, in the interest of the public, to corporations created for that purpose in accordance with the provisions of Chapter 67 of the Laws of 1915, or under Chapter 109 of the Laws of 1903, which reappears as Sections 456 to 458 of the codification. The existence of such corporations as those provided for in the last cited sections, is recognized in Section 9 of the new law and Chapter 67 of the Laws of 1915. Those sections are the ones that authorize mercantile companies to transact a general banking business upon the terms and conditions and subject to the liabilities prescribed by the laws of the state, but as I understand, this does not enter into the consideration of the matters referred to in your letter.

The only point suggested which raises any doubt, is as to whether mercantile companies which do not "advertise and hold themselves out to the public," even though they actually do a banking business, can be considered as falling within the implied prohibition in Section 3 of said Chapter 67. This might depend upon what is meant by advertising and holding out to the public. If it is generally known in a community that a mercantile company is actually engaged in a banking business in the manner described in your letter, and that it is ready and willing to do such business with anyone who may apply, it would seem reasonable that here is a holding out to the public that the company would receive "money on deposit, whether on certificates or subject to check."

With such a condition of things, I am of opinion that such a company ought not to be allowed to do a banking business. On the other hand, if it should be the fact that a company merely for the accommodation of its ordinary customers receives money and pays it out upon the order of customers for their accommodation, it would hardly seem

to be doing a banking business. The varying circumstances of different cases might be such that we could not reach a conclusion which would be universally applicable.

One test might be as to whether the company used the money so deposited as a bank does, loaning it to other persons, making investments with it, using it in the other business of the company, *{*262}* or whether such deposits were to be intact and ready to respond to any order that might be given.

I would recommend in any case where such complaints are made as those of which you speak in your letter, that your office should make an investigation, and upon the facts as they develop, decide whether or not the company complained of is unlawfully engaged in a banking business. If it appears to be so engaged, the remedy would be through some action in the courts, and the facts should be laid before the proper district attorney for his official action.