November 30, 2020

Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

Re: Misc. Docket No. 20-9103 – Order Amending Texas Rules of Civil Procedure 106 and 108a

On behalf of the American Financial Services Association (AFSA),[1] thank you for the opportunity to comment on the Supreme Court's amendments to Texas Rules of Civil Procedure 106 and 108a (Misc. Docket No. 20-9103).

While we understand these rules implement changes enacted by the legislature via SB 891 and generally support the changes, we have concerns about service of business entities by social media or e-mail and believe slight modifications of the rules would address these concerns. Service by social media, e-mail or other technology should be available only as a last resort when all other methods are unavailable, and we support the Supreme Court setting the bar for such service as high as possible. Our proposed modifications outlined below would ensure that the rules do just that, consistent with the original legislation.

We request that the Supreme Court consider establishing a higher threshold for social media or e-mail service of business entities or even prohibit such service of business entities all together. Because business entities already have multiple readily available methods of receiving service of process—in-person, via certified mail, via a registered agent, or leaving the suit with a person older than 16 at a location where the defendant is likely to be found—it is unlikely that service of a business entity would ever necessitate escalation to social media or e-mail. However, in the event escalation did occur, the practical realities of business social media and e-mail practices would complicate the service, and it would not be in the best interest of the Supreme Court to allow it. Many business entities have social media accounts managed and monitored by third-party service providers rather than employees and multiple public-facing e-mail accounts that may not be regularly monitored. Moreover, while smaller businesses may have set up a business website or social media account for generating public exposure or advertising, it is unlikely that they will have the staffing to constantly monitor or check for messages on a routine basis.

Further complicating service by social media of business entities is that various employees (e.g., the CEO or General Counsel) may have individual social media accounts that, although linked to the company, are separate from the main business account. The proposed rule lacks specificity that would ensure service of an official business social media account rather than those of individual employees. Without a requirement that service occur via an official business account, it is possible that the notice may be missed, provided to an employee unfamiliar with the protocol for handling such information or submitted to an account of an employee who is no longer with the company.

[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

Moreover, and possibly of more concern, is that companies often have similar names but are not related entities. For example, one of our traditional installment loan member companies operating only in the southeast is routinely confused with and is often sued by persons who intend to sue a now-defunct mortgage company with a similar name that once operated in 49 or 50 states. Obviously, if the wrong company is served via social media, a court may not be aware of the issue, and the company may face significant problems were a default judgment to be entered against the company that never received any service of process. All of these circumstances make it difficult to infer proper service and ensure receipt by the correct employee in the correct organization.

We believe limiting this rule to non-business entities is the best plan. If, however, the Supreme Court elects not to exclude service of business entities from the proposed changes, we propose the following additions to amended Rule 106(b)(1) (added language in **bold**):

> (b) Upon motion supported by a statement—sworn to before a notary or made under penalty of perjury—listing any location where the defendant can probably be found and stating specifically the facts showing that service has been attempted **(i) upon a natural person** under (a)(1) or (a)(2) at the location named in the statement but has not been successful, **or (ii) upon a business entity under (a)(1) and (a)(2),** the court may authorize service:
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> > (1) by leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement; or **if there is no known location where the defendant can probably be found, then**
> >
> > (2) **(i) in the case of an individual,** in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit**; or (ii) in the case of a business entity, by service upon the person designated as agent for service of process with the Secretary of State's office in any state in which the business entity has registered to do business**.

Thank you for your consideration of our comments. If you have any questions or if AFSA can be of any further assistance to you as you move forward, please do not hesitate to contact me at 202-469-3181 or mkownacki@afsamail.org.

Sincerely,

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