

BILL ANALYSIS

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S.B. 1165
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Texas Department of Banking (TDB) regulates state-chartered banks and trust companies. S.B. 1165 expands the provisions in the Finance Code that provide the Texas Banking Commissioner (banking commissioner) with the authority to penalize bad actors in the banking industry and to protect Texas citizens from those bad actors.

There are mirroring statutes that apply to state bank and trust regulation within the Finance Code. The current law on these issues is located in Chapter 35 (Enforcement Actions) for banks, Chapter 185 (Enforcement Actions) for trust companies, and Chapter 202 (Bank Holding Companies) for bank holding companies.

S.B. 1165 focuses on "removal and prohibition orders," which are directed by the banking commissioner to people who are employed by a bank or are somehow connected to a bank. When a person has undertaken certain bad acts in the course of business, the banking commissioner may issue an order either removing the person (if an employee) or prohibiting the person (if they are a majority shareholder, et cetera) to work in the field of banking at all. The bill also makes changes to the banking commissioner's authority to levy administrative penalties.

As proposed, S.B. 1165 amends current law relating to certain enforcement powers of the banking commissioner and provides administrative penalties.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 35.003, Finance Code, by amending Subsections (a) and (b) and adding Subsection (b-1), as follows:

(a) Provides that the banking commissioner of Texas (banking commissioner) has grounds to remove or prohibit a present or former officer, director, or employee of a state bank from office or employment in, or prohibit a controlling shareholder or other person participating in the affairs of a state bank from further participation in the affairs of a state bank or any other entity chartered, registered, permitted, or licensed by the banking commissioner, if the banking commissioner determines from examination or other credible evidence that:

(1) the person:

(A) intentionally committed or participated in the commission of an act described by Section 35.002(a) (relating to issuing a cease and desist order) with regard to the affairs of a financial institution, as defined by Section 201.101 (Definitions), rather than the affairs of the bank;

(B) violated a final cease and desist order issued by a state or federal regulatory agency against the person or an entity in which the person is or

was an officer, director, or employee, rather than issued in response to the same or a similar act; or

(C) made, or caused to be made, false entries in the records of a financial institution;

(2) because of this action by the person:

(A) the financial institution, rather than the bank, has suffered or will probably suffer financial loss or expense, or other damage, including an increase in its risk profile;

(B) the interests of the depositors, creditors, or shareholders of the financial institution, rather than the interests of the bank's depositors, have been or could be prejudiced; or

(C) the person has received financial gain or other benefit by reason of the action, or likely would have if the action had not been discovered; and

(3) the action:

(A) involves personal dishonesty on the part of the person; or

(B) demonstrates reckless, wilful, or continuing disregard for the safety or soundness of the financial institution, rather than the bank.

Makes nonsubstantive changes.

(b) Authorizes the banking commissioner, if the banking commissioner has grounds for action under Subsection (a) and finds that a removal or prohibition order appears to be necessary and in the best interest of the bank or other entity involved and its depositors, creditors, or shareholders, to serve a proposed removal or prohibition order, as appropriate, on a person alleged to have committed or participated in the action. Requires that the proposed order:

(1) be delivered by personal delivery or by registered or certified mail, return receipt requested;

(2) state with reasonable certainty the grounds for removal or prohibition;

(3) state the effective date of the order, which may not be before the 21st day after the date the proposed order is delivered or mailed; and

(4) state the duration of the order, including whether the duration of the order is perpetual.

Makes nonsubstantive changes.

(b-1) Authorizes the banking commissioner to make a removal or prohibition order perpetual or effective for a specific period of time, to probate the order, or to impose other conditions on the order.

SECTION 2. Amends Section 35.005(b), Finance Code, to require the banking commissioner, in each emergency order, to notify the bank and any person against whom the emergency order is directed of certain information, including the duration of the order, including whether the duration of the order is perpetual. Makes a nonsubstantive change.

SECTION 3. Amends Section 35.007(a), Finance Code, as follows:

(a) Prohibits a person subject to a final and enforceable removal or prohibition order issued by the banking commissioner, or by another state, federal, or foreign financial institution regulatory agency, except as otherwise provided by law, without the prior written approval of the banking commission, from:

(1) serving as a director, officer, or employee of a state bank or trust company, or as a director, officer, or employee with financial responsibility of any other entity chartered, registered, permitted, or licensed by the banking commissioner of this state, rather than serving as a director, officer, or employee of a state bank, trust company, or other entity chartered or licensed by the banking commissioner under the laws of this state, including an interstate branch, trust office, or representative office in this state of an out-of-state bank, trust company, or foreign bank;

(2) directly or indirectly participating in any manner in the management of such an entity;

(3) directly or indirectly voting for a director of such an entity; or

(4) soliciting, procuring, transferring, attempting to transfer, voting, or attempting to vote a proxy, consent, or authorization with respect to voting rights in such an entity.

SECTION 4. Amends Subchapter A, Chapter 35, Finance Code, by adding Section 35.0071, as follows:

Sec. 35.0071. APPLICATION FOR RELEASE FROM FINAL REMOVAL OR PROHIBITION ORDER. (a) Authorizes a person who is subject to a prohibition or removal order issued under this subchapter, regardless of the order's stated duration or date of issuance, to apply to the banking commissioner to be released from the order after the expiration of 10 years from date of issuance.

(b) Requires that the application be made under oath and in the form required by the banking commissioner. Requires that the application be accompanied by any required fees.

(c) Authorizes the banking commissioner, in the exercise of discretion, to approve or deny an application filed under this section.

(d) Provides that the banking commissioner's decision under Subsection (c) is final and not appealable.

SECTION 5. Amends Section 35.009, Finance Code, as follows:

Sec. 35.009. New heading: ENFORCEMENT BY COMMISSIONER. (a) Authorizes the banking commissioner, if the banking commissioner reasonably believes that a bank or other person has violated any of the following, to take any action authorized under Subsection (a-1):

(1) this subtitle or rules enacted under this subtitle;

(2) other applicable law of this state that the banking commissioner may enforce;

(3) an order issued by the banking commissioner;

(4) a condition imposed in writing by the banking commissioner in connection with any application, notice, or other request by the bank or other person; or

(5) any written agreement with the Texas Department of Banking (TDB).

(a-1) Creates this subsection from existing text. Authorizes the banking commissioner to:

- (1) initiate an administrative penalty proceeding against the bank or other person, in accordance with Sections 35.010 and 35.011;
- (2) refer the matter to the attorney general for enforcement by injunction or other available remedy; or
- (3) pursue any other action the banking commissioner considers appropriate under applicable law.

Deletes existing text authorizing the banking commissioner, if the banking commissioner reasonably believes that a bank or person has violated a final and enforceable cease and desist, removal, or prohibition order issued under this subchapter to take certain actions. Makes conforming and nonsubstantive changes.

(b) Entitles the attorney general, if the attorney general prevails in an action brought under Subsection (a-1)(2), rather than (a)(2), to recover the reasonable attorney's fees from the bank or person committing the violation, rather than violating the order.

SECTION 6. Amends Section 35.010, Finance Code, as follows:

Sec. 35.010. ADMINISTRATIVE PENALTY. (a) Authorizes the banking commissioner to initiate a proceeding for an administrative penalty against a bank or other person by serving on the bank or other person, as applicable, notice of the time and place of a hearing on the penalty. Prohibits the hearing from being held earlier than the 20th day after the date the notice is served. Requires that the notice:

- (1) be served by personal delivery or by registered or certified mail, return receipt requested; and
- (2) contain a statement of the conduct alleged to constitute a violation, rather than to violate the order.

(b) Requires the banking commissioner, in determining the amount of any penalty to be imposed, rather than in determining whether an order has been violated, to consider the following factors:

- (1) the size of financial resources and good faith of the bank or other person alleged to have committed a violation;
- (2) the gravity of the violation;
- (3) the history of previous violations; and
- (4) any other matter that justice may require, rather than to consider the maintenance of procedures reasonably adopted to ensure compliance with the order.

(c) Authorizes the banking commissioner, if the banking commissioner determines after the hearing that the alleged conduct occurred and that the conduct constitutes a violation, rather than that the order has been violated, to impose an administrative penalty against a bank or other person, as applicable, in an amount not to exceed:

(1) if imposed against a bank, \$10,000 for each violation for each day the violation continues, except that the maximum administrative penalty that may be imposed is the lesser of \$1 million or one percent of the bank's assets; or

(2) if imposed against a person other than a bank, \$5,000 for each violation for each day the violation continues, except that the maximum administrative penalty that may be imposed is \$500,000, rather than \$500 for each day the bank violates the final order.

SECTION 7. Amends Section 35.011, Finance Code, to read as follows:

Sec. 35.011. PAYMENT OR APPEAL OF ADMINISTRATIVE PENALTY. (a) Requires the bank or other person, as applicable, when a penalty order under Section 35.010 becomes final, to pay the penalty or appeal by filing a petition for judicial review.

(b) Requires the court, if the court sustains the order, to order the bank or other person, as applicable, to pay the full amount of the penalty or a lower amount determined by the court.

(c) Requires the banking commissioner, if the bank or other person, as applicable, does not pay the penalty imposed under a final and nonappealable penalty order, to refer the matter to the attorney general for enforcement. Entitles the attorney general to recover reasonable attorney's fees from the bank or other person, as applicable, if the attorney general prevails in judicial action necessary for collection of the penalty.

SECTION 8. Amends Section 35.012, Finance Code, to authorize the banking commissioner to release a final cease and desist order, a final order imposing an administrative penalty, or information regarding the existence of any of those orders to the public if the banking commissioner concludes that the release would enhance effective enforcement of the order.

SECTION 9. Amends Section 185.003, Finance Code, by amending Subsections (a) and (b) and adding Subsection (b-1), as follows:

(a) Provides that the banking commissioner has grounds to remove or prohibit a present or former officer, director, manager, managing participant, or employee of a state trust company from office or employment in, or prohibit a controlling shareholder or participant or other person from participation in the affairs of, the state trust company or any other entity chartered, registered, permitted, or licensed by the banking commissioner if the banking commissioner determines from examination or other credible evidence that:

(1) the person intentionally committed or participated in the commission of an act described by Section 185.002(a) with regard to the affairs of a financial institution as defined by Section 201.101, rather than of the state trust company; violated a final cease and desist order issued by a state or federal regulatory agency against the person or an entity in which the person is or was an officer, director, or employee, rather than issued in response to the same or a similar act; or the person made, or caused to be made, false entries in the records of a financial institution;

(2) because of this action by the person the financial institution, rather than state trust company, has suffered or will probably suffer financial loss or expense, or other damage, including an increase in its risk profile; the interests of the clients, depositors, creditors, or shareholders of the financial institution, rather than the trust company's clients, have been or could be prejudiced; or the person has received financial gain or other benefit by reason of the violation, or likely would have if the action had not been discovered; and

(3) that action by the person involves personal dishonesty on the part of the person, or demonstrates reckless, wilful, or continuing disregard for the safety or soundness of the financial institution, rather than state trust company.

(b) Authorizes the banking commissioner, if the banking commissioner has grounds for action under Subsection (a) and finds that a removal or prohibition order appears to be necessary and in the best interest of the state trust company or other entity involved and its clients, creditors, shareholders, or participants, to serve a proposed removal or prohibition order, as appropriate, on an officer, employee, director, manager or managing participant, controlling shareholder or participant, or other person alleged to have committed or participated in the violation or other conduct described by Section 185.002(a). Requires that the order:

(1) be delivered by personal delivery or by registered or certified mail, return receipt requested;

(2) state with reasonable certainty the grounds for removal or prohibition;

(3) state the effective date of the order, which may not be before the 21st day after the date the proposed order is delivered or mailed; and

(4) state the duration of the order, including whether the duration of the order is perpetual.

Makes nonsubstantive changes.

(b-1) Authorizes the banking commissioner to make a removal or prohibition order perpetual or effective for a specific period of time, to probate the order, or to impose other conditions on the order.

SECTION 10. Amends Section 185.005(b), Finance Code, as follows:

(b) Requires the banking commissioner, in each emergency order, to notify the state trust company and any person against whom the emergency order is directed of:

(1) the specific conduct requiring the order;

(2) the citation of each statute or rule alleged to have been violated;

(3) the immediate and irreparable harm alleged to be threatened;

(4) the duration of the order, including whether the duration of the order is perpetual; and

(5) the right to a hearing.

SECTION 11. Amends Section 185.007(a), Finance Code, as follows:

(a) Prohibits a person subject to a final and enforceable removal or prohibition order issued by the banking commissioner, or by another state, federal, or foreign financial institution regulatory agency, except as provided by other law, without the prior written approval of the banking commissioner, from:

(1) serving as a director, officer, or employee of a state trust company or state bank, or as a director, officer, or employee with financial responsibility of any other entity chartered, registered, permitted, or licensed by the banking commissioner under the laws of this state while the order is in effect, rather than serving as a director, officer, or employee of a state trust company, state bank, or other entity chartered or licensed by the banking commissioner under the laws of this state while the order is in effect, including an interstate branch, trust office, or

representative office in this state of an out of state bank, trust company, or foreign bank;

(2) directly or indirectly participating in any manner in the management of such an entity;

(3) directly or indirectly voting for a director of such an entity; or

(4) soliciting, procuring, transferring, attempting to transfer, voting, or attempting to vote a proxy, consent, or authorization with respect to voting rights in such an entity.

SECTION 12. Amends Subchapter A, Chapter 185, Finance Code, by adding Section 185.0071, as follows:

Sec. 185.0071. APPLICATION FOR RELEASE FROM FINAL REMOVAL OR PROHIBITION ORDER. (a) Authorizes a person who is subject to a prohibition or removal order issued under this subchapter, regardless of the order's stated duration or date of issuance, to apply to the banking commissioner to be released from the order after the expiration of 10 years from date of issuance.

(b) Requires that the application be made under oath and in the form required by the banking commissioner. Requires that the application be accompanied by any required fees.

(c) Authorizes the banking commissioner, in the exercise of discretion, to approve or deny an application filed under this section.

(d) Provides that the banking commissioner's decision under Subsection (c) is final and not appealable.

SECTION 13. Amends Section 185.009, Finance Code, as follows:

Sec. 185.009. New heading: ENFORCEMENT BY COMMISSIONER. (a) Authorizes the banking commissioner, if the banking commissioner reasonably believes that a state trust company or other person has violated any of the following, to take any action authorized under Subsection (a-1):

(1) this subtitle or rules enacted under this subtitle;

(2) other applicable law of this state that the banking commissioner may enforce;

(3) an order issued by the banking commissioner;

(4) a condition imposed in writing by the banking commissioner in connection with any application, notice, or other request by the state trust company or other person; or

(5) any written agreement with TDB.

(a-1) Creates this subsection from existing text. Authorizes the banking commissioner to, rather than authorizes the banking commissioner, if the banking commissioner reasonably believes that a state trust company or person has violated a final and enforceable cease and desist, removal, or prohibition order issued under this subchapter, to:

(1) initiate administrative penalty proceedings against the state trust company or other person, as applicable, in accordance with Sections 185.010 and 185.011;

(2) refer the matter to the attorney general for enforcement by injunction or other available remedy; or

(3) pursue any other action the banking commissioner considers appropriate under applicable law.

(b) Entitles the attorney general, if the attorney general prevails in an action brought under Subsection (a-1)(2), rather than Subsection (a)(2), to recover reasonable attorney's fees from a state trust company or person committing the violation, rather than violating the order.

SECTION 14. Amends Section 185.010, Finance Code, as follows:

Sec. 185.010. ADMINISTRATIVE PENALTY. (a) Authorizes the banking commissioner to initiate a proceeding for an administrative penalty against a state trust company or other person by serving on the state trust company or other person, as applicable, notice of the time and place of a hearing on the penalty. Prohibits the hearing from being held earlier than the 20th day after the date the notice is served. Requires that the notice:

(1) be served by personal delivery or by registered or certified mail, return receipt requested; and

(2) contain a statement of the conduct alleged to constitute a violation, rather than to be in violation of the order.

(b) Requires the banking commissioner, in determining the amount of any penalty to be imposed, rather than in determining whether an order has been violated, to consider the following factors:

(1) the size of financial resources and good faith of the state trust company or other person alleged to have committed a violation;

(2) the gravity of the violation;

(3) the history of previous violations; and

(4) any other matter that justice may require, rather than to consider the maintenance of procedures reasonably adopted to ensure compliance with the order.

(c) Authorizes the banking commissioner, if the banking commissioner determines after the hearing that the alleged conduct occurred and that the conduct constitutes a violation, rather than that an order has been violated, to impose an administrative penalty against a state trust company or other person, as applicable, in an amount not to exceed:

(1) if imposed against a state trust company, \$10,000 for each violation for each day the violation continues, except that the maximum administrative penalty that may be imposed is the lesser of \$1 million or one percent of the state trust company's assets; or

(2) if imposed against a person other than a state trust company, \$5,000 for each violation for each day the violation continues, except that the maximum administrative penalty that may be imposed is \$500,000, rather than \$500 for each day the state trust company violates the final order.

SECTION 15. Amends Section 185.011, Finance Code, as follows:

Sec. 185.011. PAYMENT OR APPEAL OF ADMINISTRATIVE PENALTY. (a) Requires a state trust company or other person, as applicable, rather than a state trust company, when a penalty order under Section 185.010 becomes final, to pay the penalty or appeal by filing a petition for judicial review.

(b) Makes a conforming and a nonsubstantive change.

(c) Makes conforming changes.

SECTION 16. Amends Section 185.012, Finance Code, to authorize the banking commissioner to release a final cease and desist order, a final order imposing an administrative penalty, or information regarding the existence of any of those orders to the public if the banking commissioner concludes that the release would enhance effective enforcement of the order.

SECTION 17. Amends Section 202.005(a), Finance Code, to authorize the banking commissioner to take certain actions, including bringing an enforcement proceeding under Chapter 35 (Enforcement Actions) against a bank holding company or other person that violates or participates in a violation of Subtitle A (Banks), an agreement filed with the banking commissioner under this chapter, or a rule adopted by the finance commission or order issued by the banking commissioner under Subtitle A, as if the bank holding company were a Texas state bank.

SECTION 18. Makes application of this Act prospective.

SECTION 19. Effective date: upon passage or September 1, 2011.