

BILL ANALYSIS

C.S.H.B. 955
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Financial Institutions
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Texas has some of the strictest lending laws in the nation, and they are increasingly constricting the ability of Texas-based institutions to compete against out-of-state lenders. As technology and a broad nationalization of lending laws—through the passage of laws by other states easing their usury limits to the outright preemption of state laws by federal regulators—permit borrowers to transact business with institutions without respect to geography, maintaining a series of strict limits on lenders will continue to choke disadvantaged local depository institutions.

Texas used to be home to some of the nation's largest depository institutions. Today, the largest national bank based in Texas ranks 80th nationally in terms of assets. It, and all other depository institutions based in Texas, are effectively unable to grow their business outside of the state because Texas law makes them uncompetitive in other states. In addition, because branches of out-of-state banks can import the laws of their home states into Texas, many of the laws passed decades ago to protect consumers now only protect out-of-state banks from Texas banks.

The complexity of our laws also leads to unexpected, and harmful, judicial decisions, such as the *Alamo Lumber* case, which has stifled commercial lending for years. The more that borrowers are forced to look out of state for capital, the more capital will leave this state for others. Additionally, Texas consumers must be protected from unscrupulous and predatory lending practices. Ultimately, economic development may suffer if action is not taken to restore Texas as a leader for financial services.

C.S.H.B. 955 provides for the regulation of financial businesses and practices; providing civil penalties.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Finance Commission in SECTION 4 (Section 4.05), SECTION 5 (Sections 5.02, 5.05, 5.16), and SECTION 6 (Sections 6.09, 6.12) of this bill.

ANALYSIS

C.S.H.B. 955 amends Title 3 and Title 4, Finance Code, as follows:

The substitute prohibits unregulated lenders from engaging in false, misleading, or deceptive advertising. It permits regulatory agency personnel to investigate possible violations and have enforcement action using federal law as a guideline. If a creditor complies with applicable federal law, creditor is deemed to be in compliance with state law. The substitute precludes double liability or enforcement of a creditor for the same act or practice. The substitute prohibits lenders from using any device, subterfuge, or pretense to evade regulation.

The substitute allows for a creditor to charge reasonable fees and expenses in connection with a consumer loan transaction. The substitute provides that a lender who contracts for usurious interest in connection with a commercial loan is liable for triple the usurious interest; consumer loan lenders liable for triple usurious interest or \$2,000 or 20 percent of the amount of principle.

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The substitute clarifies that forfeiture of twice the principal and interest for charging greater than twice the legal interest applies only to consumer loans.

The substitute provides for a 60-day abatement period to allow creditor to cure a violation including the payment of reasonable attorney's fees. The substitute creates an "exempt commercial loan" which is defined as \$7 million or more if the commercial loan is secured by real property; or \$500,000 or more if the commercial loan is not secured by real property. The substitute lowers the minimum principal amount required for a transaction to be a qualified commercial loan to \$1 million (from \$3 million) or less than \$7 million for commercial loans secured by real property and to \$100,000 (from \$250,000) or less than \$500,000 for unsecured commercial loans.

The substitute permits a creditor to require a commercial borrower to give a guaranty of existing or future obligations of an obligor, as a condition of making a commercial loan, to the obligor's own use, forbearance, or detention of money. The substitute clarifies that such a guaranty is not interest, which is intended to reverse the *Alamo Lumber* decision.

The substitute modifies the original by adding language to identify lending institutions may use an optional rate structure for consumer loans and to modify the definition of "interest" and "affiliates." The substitute modifies the term prepayment "penalty" to "premium" and includes various types of such premiums that do not constitute interest. The substitute also removes the term reasonable from delinquent charges for commercial loans of 5 percent of total amount of installment and provides a limit for a returned check fee.

The substitute allows for commercial and consumer lenders to opt-in/op-out of revolving credit accounts.

The substitute authorizes specific fees which may be charged as part of a credit card agreement. The bill formally defines the terms "motor home" and "towable recreation vehicle," and it provides retail sellers the flexibility to have the financing of such vehicles governed under Chapter 348 (Motor Vehicle Installment Sales) or Chapter 345 (Retail Installment Sales).

The substitute permits the finance commission to adopt rules to implement certain provisions of the bill.

The substitute renames the Texas Savings and Loan Department as the Texas Department of Savings and Mortgage Lending (TDSML). The substitute provides for the self-funding function of the Texas Savings and Loan Department. The substitute increases the maximum administrative penalty TDSML may assess a savings bank to \$10,000 (from \$1,000) for each day that a violation occurs. The substitute requires TDSML to study the desirability and feasibility of developing alternative thrift charters and report its findings to the legislature.

The substitute permits the consumer credit commissioner to issue cease and desist orders, or an order to take affirmative action, if the commissioner has reasonable cause to believe a person is violating the law. The substitute provides for the appeal process either through the district court or the finance commission. The substitute provides for a stay of suit if person pays penalty or files supersedeas bond. The substitute permits the consumer credit commissioner to accept an assurance of voluntary compliance from licensees in lieu of taking various enforcement actions. A licensee must provide restitution to an aggrieved person before an assurance of voluntary compliance may be accepted. The substitute eliminates the requirement that the amount of an administrative penalty assessed against a pawnshop be based upon its average daily profit. The substitute provides that precludes an aggrieved party from being assessed multiple penalties for a single act or transaction in violation of the Code.

The substitute makes numerous amendments to statutes relating to the organization and chartering of savings banks, including:

- Permitting a savings bank to be organized as a limited savings bank, which limits the liability of its members and managers, and providing the conditions for such an organization, including reporting dates and filing deadlines; allows directors or president and secretary to certify application of incorporation.
- Allowing a savings bank to be reorganized as a mutual holding company, and providing the conditions for such a reorganization;
- Enabling a savings bank or a limited savings bank to choose which business organization law it wishes to be governed under in accordance with other applicable state statutes;
- Clarifying that a savings bank may exercise any power that is permissible for any depository institution organized under the law of another state, subject to certain limitations;
- Eliminating the outdated Internal Revenue Code asset test and replacing it with a new qualified thrift lender test; and
- Prohibiting a savings bank from issuing a cash dividend if it is in an unsafe condition or has negative total retained income without the approval of TDSML.

The substitute makes numerous amendments to the Texas Mortgage Broker License Act. The substitute provides for the liability of mortgage brokers and/or loan officers for certain conduct. The substitute increases the education requirements to obtain a loan officer license to 30 hours (from 15 hours). The substitute provides for disciplinary action by the commissioner for certain conduct including revocation and suspension of a license. The substitute prohibits a licensee from renewing a license if it has been expired for more than 90 days. The substitute provides for the appeal process of an person whose been subjected to a denial, suspension, or revocation of a license. The substitute permits TDSML to issue and enforce subpoenas. The substitute permits the TDSML commissioner to order restitution for any amount of money received by a mortgage broker in violation of the law. The substitute requires the TDSML commissioner to inform the finance commission of any record vote taken by the mortgage broker advisory committee. The record vote is not supersede the rulemaking authority of the finance commission. The substitute permits the TDSML commissioner to assess an administrative penalty up to \$1,000 per day per violation against an unlicensed mortgage broker or loan officer. The substitute provides for the requirements of certain fees charged by the TDSML. The substitute provides for the net asset requirements for mortgage brokers and loan officers. The substitute provides for certain exemptions from licensing. The substitute provides for certain limitations to the Mortgage Broker Recovery Fund.

The substitute clarifies that the prime rate published by the Board of Governors of the Federal Reserve System is the standard by which the postjudgment interest is calculated. The substitute provides that the finance commission and credit union department are required to study the potential preemption of state lending laws and report findings and recommended statutory changes to the legislature.

EFFECTIVE DATE

September 1, 2005

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 955 modifies the original by the fact that it has been reviewed and formatted by the Legislative Council.

The substitute modifies the original by removing Article 1, Chapter 10, Unfair or Deceptive Trade Practices, regarding consumer protections; removing provisions dealing with revolving credit accounts including maximum interest rates and allowable fees; and removing ability for credit unions to set interest rates for credit cards.

The substitute modifies the original by adding language that gives the regulatory agencies enforcement authority over false, misleading, or deceptive advertising, single recovery

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provisions, and penalties, under a newly created Chapters 308 and 350, Finance Code. The substitute prohibits lenders from using any device, subterfuge, or pretense to evade regulation.

The substitute modifies the original by removing the maximum ceiling for interest rates and allowing for floating ceilings based on computations. The substitute modifies the original by removing the term "authorized lender" from the type of lenders that may charge certain fees as well as clarifying that fees paid to third parties is not considered interest.

The substitute modifies the original by adding language to identify lending institutions may use an optional rate structure for consumer loans and to modify the definition of "interest" and "affiliates." The substitute modifies the term prepayment "penalty" to "premium" and includes various types of such premiums that do not constitute interest. The substitute also removes the term reasonable from delinquent charges for commercial loans of 5 percent of total amount of installment.

The substitute modifies the original by adding language by allowing a defendant/creditor filing a counterclaim a 60-day abatement period to correct a violation, defendant/creditor may pay for reasonable attorney fees for other party, and a creditor who corrects violation is not liable to obligor for violation.

The substitute adds language that allows for commercial and consumer lenders to opt-in/op-out of revolving credit accounts.

The substitute modifies the original by adding language that creates an "exempt commercial loan" which is defined as \$7 million or more if the commercial loan is primarily secured by real property; or \$500,000 or more if the commercial loan is not primarily secured by real property. The substitute also adds language to provide that the minimum principal amount required for a transaction to be a qualified commercial loan is \$1 million (from \$3 million) or less than \$7 million for commercial loans primarily secured by real property and to \$100,000 (from \$250,000) or less than \$500,000 for commercial loans not primarily secured by real property.

The substitute modifies the original by amending language regarding the guaranty of another person's obligation as a condition of the obligor's own use, forbearance, or detention of money.

The substitute modifies the original by removing the language "by a manufactured home" to add clarity to the proposed statute.

The substitute modifies the original by adding language that provides for the self-leveling funding of the Texas Savings and Loan Department.

The substitute modifies the original by adding language that allows an aggrieved party to appeal the ruling by the consumer credit commissioner to either the finance commission or district court. The substitute modifies the original by removing the commissioner as a person who presides over an administrative hearing. The substitute removes the \$2500 administrative penalty and adds a cap of \$100,000 or 5% of the net worth of the creditor or \$5000, whichever is greater. The substitute adds language that an assurance of voluntary compliance may be voided by a court for good cause. The substitute provides that amounts paid as restitution and any action under assurance of voluntary compliance is considered a factor in determining compliance with Sections 349.201, 349.202, 349.203, Finance Code. The date of filing the assurance is considered to be the date of: actual discovery of the violation or possible violation, written notice, and filing of the action alleging the violation.

The substitute modifies the original by adding language that precludes an aggrieved party from being assessed multiple penalties for a single act or transaction in violation of the Code. Administrative agencies will consider any relief recovered in a private suit or proceeding as a mitigating factor when assessing an administrative remedy.

The substitute modifies the original by removing the aggregate amount of penalties of \$50,000 per year for pawnbrokers.

The substitute modifies the original by adding language that allows the president and secretary to execute copies and sign an application for certificate or incorporation.

The substitute modifies the original by adding language that allows Texas chartered savings banks to achieve parity with other state chartered savings banks in other states with oversight from the finance commission with certain limitations.

The substitute modifies the original by removing the definition of "mortgage loan."

The substitute modifies the original by adding language that requires the finance commission to consult with the TDSML commissioner only and the Mortgage Broker Advisory Committee to consult the commissioner only. The TDSML commissioner will take a record vote of the Mortgage Broker Advisory Committee on any required matter. The record vote is not to supersede the rulemaking authority of the Finance Commission.

The substitute modifies the original by adding language that allows the commissioner to have enforcement authority over a mortgage broker and loan officer in connection with a the origination of a mortgage loan or any transaction in connection with a mortgage loan that the mortgage broker knew or should have known of such transaction.

The substitute modifies the original by adding language that exempt assets shall not be included in determining the financial requirements for licensing mortgage brokers. All assets and liabilities are subject to verification by the commissioner. The substitute removes the requirement of filing a \$50,000 surety bond.

The substitute modifies the original by adding repealers of the Occupations Code.