

1-1 By: Flynn, Heflin, Hopson (Senate Sponsor - Nichols) H.B. No. 77
1-2 (In the Senate - Received from the House April 23, 2009;
1-3 April 27, 2009, read first time and referred to Committee on
1-4 Finance; May 15, 2009, reported favorably by the following vote:
1-5 Yeas 10, Nays 0; May 15, 2009, sent to printer.)

1-6 A BILL TO BE ENTITLED
1-7 AN ACT

1-8 relating to the collateralization of certain public funds and to
1-9 custodians with which certain pledged securities may be deposited;
1-10 providing administrative penalties.

1-11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-12 SECTION 1. Section 404.031(e), Government Code, is amended
1-13 to read as follows:

1-14 (e) Instead of depositing pledged securities with the
1-15 comptroller, a depository may deposit them with a custodian. The
1-16 custodian may be (i) the Texas Treasury Safekeeping Trust Company,
1-17 (ii) [or] a state or national bank that has a capital stock and
1-18 permanent surplus of not less than \$5 million, is a state
1-19 depository, and has been designated as a custodian by the
1-20 comptroller, or (iii) a financial institution authorized to
1-21 exercise fiduciary powers that has a capital stock and permanent
1-22 surplus of not less than \$5 million, has its main office, a branch
1-23 office, or a trust office in this state, and has been designated as
1-24 a custodian by the comptroller. For purposes of this subsection,
1-25 "financial institution" has the meaning assigned by Section
1-26 201.101(1), Finance Code. The comptroller may designate those
1-27 custodial applicants that are acceptable and may reject those whose
1-28 management or condition, in the opinion of the comptroller, does
1-29 not warrant the placing of securities pledged by state
1-30 depositories. The comptroller may adopt and enforce rules
1-31 governing the designation and conduct of custodians with respect to
1-32 the acceptance and holding of securities pledged by state
1-33 depositories that the public interest requires and that are not
1-34 inconsistent with the law governing custodians as set forth in this
1-35 chapter. The state depository and the custodian of securities
1-36 pledged by that state depository may not be the same bank or be
1-37 owned by the same bank holding company. The securities shall be
1-38 held in trust by the custodian to secure funds deposited by the
1-39 comptroller in the state depository pledging the securities. On
1-40 receipt of the securities, the custodian shall immediately, by book
1-41 entry or otherwise, identify on its books and records the pledge of
1-42 the securities and shall promptly issue and deliver to the
1-43 comptroller controlled trust receipts for the securities pledged.
1-44 The security evidenced by the trust receipts is subject to
1-45 inspection by the comptroller at any time. The depository pledging
1-46 the securities shall pay the charges, if any, of the custodian bank
1-47 for accepting and holding the securities. The custodian, acting
1-48 alone or through a permitted institution, is for all purposes under
1-49 state law and notwithstanding Chapters 8 and 9, Business & Commerce
1-50 Code, the bailee or agent of the comptroller. The security interest
1-51 arising out of a pledge of securities to secure deposits of the
1-52 state is created, attaches, and is perfected for all purposes under
1-53 state law from the time the custodian identifies the pledge of the
1-54 securities on its books and records and issues the trust receipts.
1-55 The security interest remains perfected as of that time in the hands
1-56 of all subsequent custodians and permitted institutions.

1-57 SECTION 2. Section 2257.041(d), Government Code, is amended
1-58 to read as follows:

1-59 (d) A custodian must be approved by the public entity and
1-60 be:

- 1-61 (1) a state or national bank that:
1-62 (A) is designated by the comptroller as a state
1-63 depository;
1-64 (B) has its main office or a branch office in this

2-1 state; and
 2-2 (C) has a capital stock and permanent surplus of
 2-3 \$5 million or more;
 2-4 (2) the Texas Treasury Safekeeping Trust Company;
 2-5 (3) a Federal Reserve Bank or a branch of a Federal
 2-6 Reserve Bank; ~~[or]~~
 2-7 (4) a federal home loan bank; or
 2-8 (5) a financial institution authorized to exercise
 2-9 fiduciary powers that is designated by the comptroller as a
 2-10 custodian pursuant to Section 404.031(e).

2-11 SECTION 3. Chapter 2257, Government Code, is amended by
 2-12 adding Subchapter F to read as follows:

2-13 SUBCHAPTER F. POOLED COLLATERAL TO SECURE
 2-14 DEPOSITS OF CERTAIN PUBLIC FUNDS

2-15 Sec. 2257.101. DEFINITION. In this subchapter,
 2-16 "participating institution" means a financial institution that
 2-17 holds one or more deposits of public funds and that participates in
 2-18 the pooled collateral program under this subchapter.

2-19 Sec. 2257.102. POOLED COLLATERAL PROGRAM. (a) As an
 2-20 alternative to collateralization under Subchapter B, the
 2-21 comptroller by rule shall establish a program for centralized
 2-22 pooled collateralization of deposits of public funds and for
 2-23 monitoring collateral maintained by participating institutions.
 2-24 The rules must provide that deposits of public funds of a county are
 2-25 not eligible for collateralization under the program. The
 2-26 comptroller shall provide for a separate collateral pool for any
 2-27 single participating institution's deposits of public funds.

2-28 (b) Under the program, the collateral of a participating
 2-29 institution pledged for a public deposit may not be combined with,
 2-30 cross-collateralized with, aggregated with, or pledged to another
 2-31 participating institution's collateral pools for pledging
 2-32 purposes.

2-33 (c) A participating institution may pledge its pooled
 2-34 securities to more than one participating depositor under contract
 2-35 with that participating institution.

2-36 (d) The pooled collateral program must provide for:

2-37 (1) participation in the program by a participating
 2-38 institution and each affected public entity to be voluntary;

2-39 (2) uniform procedures for processing all collateral
 2-40 transactions that are subject to an approved security agreement
 2-41 described by Section 2257.103; and

2-42 (3) the pledging of a participating institution's
 2-43 collateral securities using a single custodial account instead of
 2-44 an account for each depositor of public funds.

2-45 Sec. 2257.103. PARTICIPATION IN POOLED COLLATERAL PROGRAM.
 2-46 A financial institution may participate in the pooled collateral
 2-47 program only if:

2-48 (1) the institution has entered into a binding
 2-49 collateral security agreement with a public agency for a deposit of
 2-50 public funds and the agreement permits the institution's
 2-51 participation in the program;

2-52 (2) the comptroller has approved the institution's
 2-53 participation in the program; and

2-54 (3) the comptroller has approved or provided the
 2-55 collateral security agreement form used.

2-56 Sec. 2257.104. COLLATERAL REQUIRED; CUSTODIAN TRUSTEE. (a)
 2-57 Each participating institution shall secure its deposits of public
 2-58 funds with eligible securities the total value of which equals at
 2-59 least 102 percent of the amount of the deposits of public funds
 2-60 covered by a security agreement described by Section 2257.103 and
 2-61 deposited with the participating institution, reduced to the extent
 2-62 that the United States or an instrumentality of the United States
 2-63 insures the deposits. For purposes of determining whether
 2-64 collateral is sufficient to secure a deposit of public funds,
 2-65 Section 2257.022(b) does not apply to a deposit of public funds held
 2-66 by the participating institution and collateralized under this
 2-67 subchapter.

2-68 (b) A participating institution shall provide for the
 2-69 collateral securities to be held by a custodian trustee, on behalf

3-1 of the participating institution, in trust for the benefit of the
 3-2 pooled collateral program. A custodian trustee must qualify as a
 3-3 custodian under Section 2257.041.

3-4 (c) The comptroller by rule shall regulate a custodian
 3-5 trustee under the pooled collateral program in the manner provided
 3-6 by Subchapter C to the extent practicable. The rules must ensure
 3-7 that a custodian trustee depository does not own, is not owned by,
 3-8 and is independent of the financial institution or institutions for
 3-9 which it holds the securities in trust, except that the rules must
 3-10 allow the following to be a custodian trustee:

3-11 (1) a federal reserve bank;
 3-12 (2) a banker's bank, as defined by Section 34.105,
 3-13 Finance Code; and
 3-14 (3) a federal home loan bank.

3-15 Sec. 2257.105. MONITORING COLLATERAL. (a) Each
 3-16 participating institution shall file the following reports with the
 3-17 comptroller electronically and as prescribed by rules of the
 3-18 comptroller:

3-19 (1) a daily report of the aggregate ledger balance of
 3-20 deposits of public agencies participating in the pooled collateral
 3-21 program that are held by the institution, with each public entity's
 3-22 funds held itemized;

3-23 (2) a weekly summary report of the total market value
 3-24 of securities held by a custodian trustee on behalf of the
 3-25 participating institution;

3-26 (3) a monthly report listing the collateral securities
 3-27 held by a custodian trustee on behalf of the participating
 3-28 institution together with the value of the securities; and

3-29 (4) as applicable, a participating institution's
 3-30 annual report that includes the participating institution's
 3-31 financial statements.

3-32 (b) The comptroller shall provide the participating
 3-33 institution an acknowledgment of each report received.

3-34 (c) The comptroller shall provide a daily report of the
 3-35 market value of the securities held in each pool.

3-36 (d) The comptroller shall post each report on the
 3-37 comptroller's Internet website.

3-38 Sec. 2257.106. ANNUAL ASSESSMENT. (a) Once each state
 3-39 fiscal year, the comptroller shall impose against each
 3-40 participating institution an assessment in an amount sufficient to
 3-41 pay the costs of administering this subchapter. The amount of an
 3-42 assessment must be based on factors that include the number of
 3-43 public entity accounts a participating institution maintains, the
 3-44 number of transactions a participating institution conducts, and
 3-45 the aggregate average weekly deposit amounts during that state
 3-46 fiscal year of each participating institution's deposits of public
 3-47 funds collateralized under this subchapter. The comptroller by
 3-48 rule shall establish the formula for determining the amount of the
 3-49 assessments imposed under this subsection.

3-50 (b) The comptroller shall provide to each participating
 3-51 institution a notice of the amount of the assessment against the
 3-52 institution.

3-53 (c) A participating institution shall remit to the
 3-54 comptroller the amount assessed against it under this section not
 3-55 later than the 45th day after the date the institution receives the
 3-56 notice under Subsection (b).

3-57 (d) Money remitted to the comptroller under this section may
 3-58 be appropriated only for the purposes of administering this
 3-59 subchapter.

3-60 Sec. 2257.107. PENALTY FOR REPORTING VIOLATION. The
 3-61 comptroller may impose an administrative penalty against a
 3-62 participating institution that does not timely file a report
 3-63 required by Section 2257.105.

3-64 Sec. 2257.108. NOTICE OF COLLATERAL VIOLATION;
 3-65 ADMINISTRATIVE PENALTY. (a) The comptroller may issue a notice to
 3-66 a participating institution that the institution appears to be in
 3-67 violation of collateral requirements under Section 2257.104 and
 3-68 rules of the comptroller.

3-69 (b) The comptroller may impose an administrative penalty

4-1 against a participating institution that does not maintain
4-2 collateral in an amount and in the manner required by Section
4-3 2257.104 and rules of the comptroller if the participating
4-4 institution has not remedied the violation before the third
4-5 business day after the date a notice is issued under Subsection (a).

4-6 Sec. 2257.109. PENALTY FOR FAILURE TO PAY ASSESSMENT. The
4-7 comptroller may impose an administrative penalty against a
4-8 participating institution that does not pay an assessment against
4-9 it in the time provided by Section 2257.106(c).

4-10 Sec. 2257.110. PENALTY AMOUNT; PENALTIES NOT EXCLUSIVE.
4-11 (a) The comptroller by rule shall adopt a formula for determining
4-12 the amount of a penalty under this subchapter. For each violation
4-13 and for each day of a continuing violation, a penalty must be at
4-14 least \$100 per day and not more than \$1,000 per day. The penalty
4-15 must be based on factors that include:

4-16 (1) the aggregate average weekly deposit amounts
4-17 during the state fiscal year of the institution's deposits of
4-18 public funds;

4-19 (2) the number of violations by the institution during
4-20 the state fiscal year;

4-21 (3) the number of days of a continuing violation; and

4-22 (4) the average asset base of the institution as
4-23 reported on the institution's year-end report of condition.

4-24 (b) The penalties provided by Sections 2257.107-2257.109
4-25 are in addition to those provided by Subchapter D or other law.

4-26 Sec. 2257.111. PENALTY PROCEEDING CONTESTED CASE. A
4-27 proceeding to impose a penalty under Section 2257.107, 2257.108, or
4-28 2257.109 is a contested case under Chapter 2001.

4-29 Sec. 2257.112. SUIT TO COLLECT PENALTY. The attorney
4-30 general may sue to collect a penalty imposed under Section
4-31 2257.107, 2257.108, or 2257.109.

4-32 Sec. 2257.113. ENFORCEMENT STAYED PENDING REVIEW.
4-33 Enforcement of a penalty imposed under Section 2257.107, 2257.108,
4-34 or 2257.109 may be stayed during the time the order is under
4-35 judicial review if the participating institution pays the penalty
4-36 to the clerk of the court or files a supersedeas bond with the court
4-37 in the amount of the penalty. A participating institution that
4-38 cannot afford to pay the penalty or file the bond may stay the
4-39 enforcement by filing an affidavit in the manner required by the
4-40 Texas Rules of Civil Procedure for a party who cannot afford to file
4-41 security for costs, subject to the right of the comptroller to
4-42 contest the affidavit as provided by those rules.

4-43 Sec. 2257.114. USE OF COLLECTED PENALTIES. Money collected
4-44 as penalties under this subchapter may be appropriated only for the
4-45 purposes of administering this subchapter.

4-46 SECTION 4. The comptroller of public accounts shall adopt
4-47 rules as necessary to implement Subchapter F, Chapter 2257,
4-48 Government Code, as added by this Act, so that the pooled collateral
4-49 program established under that subchapter may begin operating not
4-50 later than the first business day of April 2010.

4-51 SECTION 5. This Act takes effect September 1, 2009.

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