

By: Truitt

H.B. No. 2282

A BILL TO BE ENTITLED

AN ACT

relating to certain enforcement powers of the banking commissioner;
providing administrative penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

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

(a) The 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) with regard
to the affairs of a financial institution, as defined by Section
201.101 [~~the bank~~]; [~~or~~]

(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 [~~in response to the same or a similar act~~]; or

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

3 (2) because of this action by the person:

4 (A) the financial institution [~~bank~~] has
5 suffered or will probably suffer financial loss or expense, or
6 other damage, including an increase in its risk profile;

7 (B) the interests of the [~~bank's~~] depositors,
8 creditors, or shareholders of the financial institution have been
9 or could be prejudiced; or

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

13 (3) the action:

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

16 (B) demonstrates reckless, wilful, or continuing
17 disregard for the safety or soundness of the financial institution
18 [~~bank~~].

19 (b) If the banking commissioner has grounds for action under
20 Subsection (a) and finds that a removal or prohibition order
21 appears to be necessary and in the best interest of the bank or
22 other entity involved and its depositors, creditors, or [~~and~~]
23 shareholders, the banking commissioner may serve a proposed removal
24 or prohibition order, as appropriate, on a person alleged to have
25 committed or participated in the action. The proposed order must:

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

(2) state with reasonable certainty the grounds for removal or prohibition; ~~[and]~~

(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.

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

SECTION 2. Section 35.005(b), Finance Code, is amended to read as follows:

(b) In each emergency order the banking commissioner shall notify the bank and any person against whom the emergency order is directed of:

(1) the specific conduct requiring the order;

(2) the citation of each law alleged to have been violated;

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

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

(5) the right to a hearing.

SECTION 3. Section 35.007(a), Finance Code, is amended to read as follows:

(a) Except as otherwise provided by law, without the prior

1 written approval of the banking commissioner, a person subject to a
2 final and enforceable removal or prohibition order issued by the
3 banking commissioner, or by another state, federal, or foreign
4 financial institution regulatory agency, may not:

5 (1) serve as a director, officer, or employee of a
6 state bank or [7] trust company, or as a director, officer, or
7 employee with financial responsibility of any other entity
8 chartered, registered, permitted, or licensed by the banking
9 commissioner under the laws of this state[, ~~including an interstate~~
10 ~~branch, trust office, or representative office in this state of an~~
11 ~~out-of-state state bank, trust company, or foreign bank~~];

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

14 (3) directly or indirectly vote for a director of such
15 an entity; or

16 (4) solicit, procure, transfer, attempt to transfer,
17 vote, or attempt to vote a proxy, consent, or authorization with
18 respect to voting rights in such an entity.

19 SECTION 4. Subchapter A, Chapter 35, Finance Code, is
20 amended by adding Section 35.0071 to read as follows:

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

27 (b) The application must be made under oath and in the form

1 required by the banking commissioner. The application must be
2 accompanied by any required fees.

3 (c) The banking commissioner, in the exercise of
4 discretion, may approve or deny an application filed under this
5 section.

6 (d) The banking commissioner's decision under Subsection
7 (c) is final and not appealable.

8 SECTION 5. Section 35.009, Finance Code, is amended to read
9 as follows:

10 Sec. 35.009. ENFORCEMENT BY COMMISSIONER [~~OF FINAL ORDER~~].

11 (a) If the banking commissioner reasonably believes that a bank or
12 other person has violated any of the following, the commissioner
13 may take any action authorized under Subsection (a-1):

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

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

18 (3) an order issued by the commissioner;

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

22 (5) any written agreement with the department.

23 (a-1) The [~~a final and enforceable cease and desist,~~
24 ~~removal, or prohibition order issued under this subchapter, the~~]
25 banking commissioner may:

26 (1) initiate an administrative penalty proceeding
27 against the bank or other person, in accordance with Sections

1 ~~[under Section]~~ 35.010 and 35.011;

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

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

6 (b) If the attorney general prevails in an action brought
7 under Subsection (a-1)(2) ~~[(a)(2)]~~, the attorney general is
8 entitled to recover reasonable attorney's fees from the bank or
9 person committing the violation ~~[violating the order]~~.

10 SECTION 6. Section 35.010, Finance Code, is amended to read
11 as follows:

12 Sec. 35.010. ADMINISTRATIVE PENALTY. (a) The banking
13 commissioner may initiate a proceeding for an administrative
14 penalty against a bank or other person by serving on the bank or
15 other person, as applicable, notice of the time and place of a
16 hearing on the penalty. The hearing may not be held earlier than
17 the 20th day after the date the notice is served. The notice must:

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

20 (2) contain a statement of the conduct alleged to
21 constitute a violation ~~[violate the order]~~.

22 (b) In determining the amount of any penalty to be imposed
23 ~~[whether an order has been violated]~~, the banking commissioner
24 shall consider the following factors:

25 (1) the size of financial resources and good faith of
26 the bank or other person alleged to have committed a violation;

27 (2) the gravity of the violation;

1 (3) the history of previous violations; and

2 (4) any other matter that justice may require

3 ~~[maintenance of procedures reasonably adopted to ensure compliance~~
4 ~~with the order]~~.

5 (c) If the banking commissioner determines after the
6 hearing that the alleged conduct occurred and that the conduct
7 constitutes a violation ~~[order has been violated]~~, the banking
8 commissioner may impose an administrative penalty against a ~~[the]~~
9 bank or other person, as applicable, in an amount not to exceed:

10 (1) if imposed against a bank, \$10,000 for each
11 violation for each day the violation continues, except that the
12 maximum administrative penalty that may be imposed is the lesser of
13 \$1 million or one percent of the bank's assets; or

14 (2) if imposed against a person other than a bank,
15 \$5,000 for each violation for each day the violation continues,
16 except that the maximum administrative penalty that may be imposed
17 is \$500,000 ~~[\$500 for each day the bank violates the final order]~~.

18 SECTION 7. Section 35.011, Finance Code, is amended to read
19 as follows:

20 Sec. 35.011. PAYMENT OR APPEAL OF ADMINISTRATIVE PENALTY.

21 (a) When a penalty order under Section 35.010 becomes final, the
22 bank or other person, as applicable, shall pay the penalty or appeal
23 by filing a petition for judicial review.

24 (b) The petition for judicial review stays the penalty order
25 during the period preceding the decision of the court. If the court
26 sustains the order, the court shall order the bank or other person,
27 as applicable, to pay the full amount of the penalty or a lower

amount determined by the court. If the court does not sustain the order, a penalty is not owed. If the final judgment of the court requires payment of a penalty, interest accrues on the penalty, at the rate charged on loans to depository institutions by the Federal Reserve Bank of New York, beginning on the date the judgment is final and ending on the date the penalty and interest are paid.

(c) If the bank or other person, as applicable, does not pay the penalty imposed under a final and nonappealable penalty order, the banking commissioner shall refer the matter to the attorney general for enforcement. The attorney general is entitled 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. Section 35.012, Finance Code, is amended to read as follows:

Sec. 35.012. CONFIDENTIALITY OF RECORDS. A copy of a notice, correspondence, transcript, pleading, or other document in the records of the department relating to an order issued under this subchapter is confidential and may be released only as provided by Subchapter D, Chapter 31, except that the banking commissioner periodically shall publish all final removal and prohibition orders. The banking commissioner may release a final cease and desist order, a final order imposing an administrative penalty, or information regarding the existence of any of those orders [~~the order~~] to the public if the banking commissioner concludes that the release would enhance effective enforcement of the order.

SECTION 9. Section 185.003, Finance Code, is amended by

1 amending Subsections (a) and (b) and adding Subsection (b-1) to
2 read as follows:

3 (a) The banking commissioner has grounds to remove or
4 prohibit a present or former officer, director, manager, managing
5 participant, or employee of a state trust company from office or
6 employment in, or ~~[to]~~ prohibit a controlling shareholder or
7 participant or other person from participation in the affairs of,
8 the state trust company or any other entity chartered, registered,
9 permitted, or licensed by the banking commissioner if the banking
10 commissioner determines from examination or other credible
11 evidence that:

12 (1) the person:

13 (A) intentionally committed or participated in
14 the commission of an act described by Section 185.002(a) with
15 regard to the affairs of a financial institution as defined by
16 Section 201.101 ~~[the state trust company]~~; ~~[or]~~

17 (B) violated a final cease and desist order
18 issued by a state or federal regulatory agency against the person or
19 an entity in which the person is or was an officer, director, or
20 employee ~~[in response to the same or a similar act]~~; or

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

23 (2) because of this ~~[that]~~ action by the person:

24 (A) the financial institution ~~[state trust~~
25 ~~company]~~ has suffered or will probably suffer financial loss or
26 expense, or other damage, including an increase in its risk
27 profile;

1 (B) the interests of the [~~trust company's~~]
2 clients, depositors, creditors, or shareholders of the financial
3 institution have been or could be prejudiced; or

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

7 (3) that action by the person:

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

10 (B) demonstrates reckless, wilful, or continuing
11 disregard for the safety or soundness of the financial institution
12 [~~state trust company~~].

13 (b) If the banking commissioner has grounds for action under
14 Subsection (a) and finds that a removal or prohibition order
15 appears to be necessary and in the best interest of the state trust
16 company or other entity involved and its clients, creditors, [~~and~~]
17 shareholders, or participants, the banking commissioner may serve a
18 proposed removal or prohibition order, as appropriate, on an
19 officer, employee, director, manager or managing participant,
20 controlling shareholder or participant, or other person alleged to
21 have committed or participated in the violation or other conduct
22 described by Section 185.002(a). The order must:

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

25 (2) state with reasonable certainty the grounds for
26 removal or prohibition; [~~and~~]

27 (3) state the effective date of the order, which may

not be before [~~earlier than~~] 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 [~~or delivered~~].

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

SECTION 10. Section 185.005(b), Finance Code, is amended to
read as follows:

(b) In each emergency order the banking commissioner shall
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; [~~and~~]
- (4) the duration of the order, including whether the
duration of the order is perpetual; and
- (5) the right to a hearing.

SECTION 11. Section 185.007(a), Finance Code, is amended to
read as follows:

(a) Except as provided by other law, without the prior
written approval of the banking commissioner, a person subject to a
final and enforceable removal or prohibition order issued by the
banking commissioner, or by another state, federal, or foreign

1 financial institution regulatory agency, may not:

2 (1) serve as a director, officer, or employee of a
3 state trust company or ~~[7]~~ state bank, or as a director, officer, or
4 employee with financial responsibility of any other entity
5 chartered, registered, permitted, or licensed by the banking
6 commissioner under the laws of this state while the order is in
7 effect~~[, including an interstate branch, trust office, or~~
8 ~~representative office in this state of an out-of-state bank, trust~~
9 ~~company, or foreign bank]~~;

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

12 (3) directly or indirectly vote for a director of such
13 an entity; or

14 (4) solicit, procure, transfer, attempt to transfer,
15 vote, or attempt to vote a proxy, consent, or authorization with
16 respect to voting rights in such an entity.

17 SECTION 12. Subchapter A, Chapter 185, Finance Code, is
18 amended by adding Section 185.0071 to read as follows:

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

25 (b) The application must be made under oath and in the form
26 required by the banking commissioner. The application must be
27 accompanied by any required fees.

1 (c) The banking commissioner, in the exercise of
2 discretion, may approve or deny an application filed under this
3 section.

4 (d) The banking commissioner's decision under Subsection
5 (c) is final and not appealable.

6 SECTION 13. Section 185.009, Finance Code, is amended to
7 read as follows:

8 Sec. 185.009. ENFORCEMENT BY COMMISSIONER ~~[OF FINAL ORDER]~~.

9 (a) If the banking commissioner reasonably believes that a state
10 trust company or other person has violated any of the following, the
11 commissioner may take any action authorized under Subsection (a-1):

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

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

16 (3) an order issued by the commissioner;

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

20 (5) any written agreement with the department.

21 (a-1) The ~~[a final and enforceable cease and desist,~~
22 ~~removal, or prohibition order issued under this subchapter, the]~~
23 banking commissioner may:

24 (1) initiate administrative penalty proceedings
25 against the state trust company or other person, as applicable, in
26 accordance with Sections ~~[under Section]~~ 185.010 and 185.011;

27 (2) refer the matter to the attorney general for

1 enforcement by injunction or other available remedy; or

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

4 (b) If the attorney general prevails in an action brought
5 under Subsection (a-1)(2) [~~(a)(2)~~], the attorney general is
6 entitled to recover reasonable attorney's fees from a state trust
7 company or person committing the violation [~~violating the order~~].

8 SECTION 14. Section 185.010, Finance Code, is amended to
9 read as follows:

10 Sec. 185.010. ADMINISTRATIVE PENALTY. (a) The banking
11 commissioner may initiate a proceeding for an administrative
12 penalty against a state trust company or other person by serving on
13 the state trust company or other person, as applicable, notice of
14 the time and place of a hearing on the penalty. The hearing may not
15 be held earlier than the 20th day after the date the notice is
16 served. The notice must:

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

19 (2) contain a statement of the conduct alleged to
20 constitute a [~~be in~~] violation [~~of the order~~].

21 (b) In determining the amount of any penalty to be imposed
22 [~~whether an order has been violated~~], the banking commissioner
23 shall consider the following factors:

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

27 (2) the gravity of the violation;

1 (3) the history of previous violations; and

2 (4) any other matter that justice may require

3 ~~[maintenance of procedures reasonably adopted to ensure compliance~~
4 ~~with the order]~~.

5 (c) If the banking commissioner determines after the
6 hearing that the alleged conduct occurred and that the conduct
7 constitutes a violation ~~[an order has been violated]~~, the banking
8 commissioner may impose an administrative penalty against a state
9 trust company or other person, as applicable, in an amount not to
10 exceed:

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

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

21 SECTION 15. Section 185.011, Finance Code, is amended to
22 read as follows:

23 Sec. 185.011. PAYMENT OR APPEAL OF ADMINISTRATIVE PENALTY.

24 (a) When a penalty order under Section 185.010 becomes final, a
25 state trust company or other person, as applicable, shall pay the
26 penalty or appeal by filing a petition for judicial review.

27 (b) The petition for judicial review stays the penalty order

1 during the period preceding the decision of the court. If the court
2 sustains the order, the court shall order the state trust company or
3 other person, as applicable, to pay the full amount of the penalty
4 or a lower amount determined by the court. If the court does not
5 sustain the order, a penalty is not owed. If the final judgment of
6 the court requires payment of a penalty, interest accrues on the
7 penalty, at the rate charged on loans to depository institutions by
8 the [~~New York~~] Federal Reserve Bank of New York, beginning on the
9 date the judgment is final and ending on the date the penalty and
10 interest are paid.

11 (c) If the state trust company or other person, as
12 applicable, does not pay the penalty imposed under a final and
13 nonappealable penalty order, the banking commissioner shall refer
14 the matter to the attorney general for enforcement. The attorney
15 general is entitled to recover reasonable attorney's fees from the
16 state trust company or other person, as applicable, if the attorney
17 general prevails in judicial action necessary for collection of the
18 penalty.

19 SECTION 16. Section 185.012, Finance Code, is amended to
20 read as follows:

21 Sec. 185.012. CONFIDENTIALITY OF RECORDS. A copy of a
22 notice, correspondence, transcript, pleading, or other document in
23 the records of the department relating to an order issued under this
24 subchapter is confidential and may be released only as provided by
25 Subchapter D, Chapter 181, except that the banking commissioner
26 periodically shall publish all final removal and prohibition
27 orders. The banking commissioner may release a final cease and

1 desist order, a final order imposing an administrative penalty, or
2 information regarding [~~relating to~~] the existence of any of those
3 orders [~~the order~~] to the public if the banking commissioner
4 concludes that the release would enhance effective enforcement of
5 the order.

6 SECTION 17. Section 202.005(a), Finance Code, is amended to
7 read as follows:

8 (a) The commissioner may:

9 (1) examine a bank holding company that controls a
10 Texas bank to the same extent as if the bank holding company were a
11 Texas state bank; and

12 (2) bring an enforcement proceeding under Chapter 35
13 against a bank holding company or other person that violates or
14 participates in a violation of Subtitle A, an agreement filed with
15 the commissioner under this chapter, or a rule adopted by the
16 finance commission or order issued by the commissioner under
17 Subtitle A, as if the bank holding company were a Texas state bank.

18 SECTION 18. The changes in law made by this Act apply only
19 to conduct occurring on or after the effective date of this Act.
20 Conduct occurring before the effective date of this Act is governed
21 by the law in effect on the date the conduct occurred, and the
22 former law is continued in effect for that purpose.

23 SECTION 19. This Act takes effect immediately if it
24 receives a vote of two-thirds of all the members elected to each
25 house, as provided by Section 39, Article III, Texas Constitution.
26 If this Act does not receive the vote necessary for immediate
27 effect, this Act takes effect September 1, 2011.