

By: Carona

S.B. No. 1165

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;

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 wilful or continuing disregard  
17 for the safety or soundness of the financial institution [~~bank~~].

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

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

27                    (2) state with reasonable certainty the grounds for

1 removal or prohibition; ~~and~~

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

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

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

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

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

16 (1) the specific conduct requiring the order;

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

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

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

23 (5) the right to a hearing.

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

26 (a) Except as otherwise provided by law, without the prior  
27 written approval of the banking commissioner, a person subject to a

1 final and enforceable removal or prohibition order issued by the  
2 banking commissioner, or by another state, federal, or foreign  
3 financial institution regulatory agency, may not:

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

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

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

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

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

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

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

1 accompanied by any required fees.

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

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

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

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

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

13 (1) this subtitle or rules enacted under this subtitle  
14 and, as a result of that violation, exposed or could have exposed  
15 the bank or the bank's depositors, creditors, or shareholders to  
16 harm;

17 (2) other applicable law of this state and, as a result  
18 of that violation, exposed or could have exposed the bank or the  
19 bank's depositors, creditors, or shareholders to harm; or

20 (3) a final order issued by the banking commissioner.

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 an administrative penalty proceeding  
25 against the bank or other person, in accordance with Sections  
26 [under Section] 35.010 and 35.011;

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 the bank or  
7 person committing the violation [~~violating the order~~].

8 SECTION 6. Section 35.010, Finance Code, is amended to read  
9 as follows:

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

16 (1) be served by personal delivery or by registered or  
17 certified mail, return receipt requested; [~~and~~]

18 (2) contain a statement of the conduct alleged to  
19 constitute a violation; and

20 (3) if the alleged violation is described by Section  
21 35.009(a)(1) or (2), identify corrective action that the bank or  
22 other person must take to avoid or reduce the amount of a penalty  
23 that would otherwise be imposed under this section [~~violate the~~  
24 ~~order~~].

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

1           (1) the financial resources of the bank or other  
2 person;

3           (2) the good faith of the bank or other person,  
4 including any corrective action taken;

5           (3) the gravity of the violation;

6           (4) the history of previous violations;

7           (5) an offset of the amount of the penalty by the  
8 amount of any penalty imposed by another state or federal agency for  
9 the same conduct; and

10           (6) any other matter that justice may require  
11 [maintenance of procedures reasonably adopted to ensure compliance  
12 with the order].

13           (c) If the banking commissioner determines after the  
14 hearing that the alleged conduct occurred and that the conduct  
15 constitutes a violation [~~order has been violated~~], the banking  
16 commissioner may impose an administrative penalty against a [the]  
17 bank or other person, as applicable, in an amount:

18           (1) if imposed against a bank, not less than \$500 and  
19 not more than \$10,000 for each violation for each day the violation  
20 continues, except that the maximum administrative penalty that may  
21 be imposed is the lesser of \$500,000 or one percent of the bank's  
22 assets; or

23           (2) if imposed against a person other than a bank, not  
24 less than \$500 and not more than \$5,000 for each violation for each  
25 day the violation continues, except that the maximum administrative  
26 penalty that may be imposed is \$250,000 [~~not to exceed \$500 for each~~  
27 ~~day the bank violates the final order~~].

1 SECTION 7. Section 35.011, Finance Code, is amended to read  
2 as follows:

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

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

7 (b) The petition for judicial review stays the penalty order  
8 during the period preceding the decision of the court. If the court  
9 sustains the order, the court shall order the bank or other person,  
10 as applicable, to pay the full amount of the penalty or a lower  
11 amount determined by the court. If the court does not sustain the  
12 order, a penalty is not owed. If the final judgment of the court  
13 requires payment of a penalty, interest accrues on the penalty, at  
14 the rate charged on loans to depository institutions by the Federal  
15 Reserve Bank of New York, beginning on the date the judgment is  
16 final and ending on the date the penalty and interest are paid.

17 (c) If the bank or other person, as applicable, does not pay  
18 the penalty imposed under a final and nonappealable penalty order,  
19 the banking commissioner shall refer the matter to the attorney  
20 general for enforcement. The attorney general is entitled to  
21 recover reasonable attorney's fees from the bank or other person,  
22 as applicable, if the attorney general prevails in judicial action  
23 necessary for collection of the penalty.

24 SECTION 8. Section 35.012, Finance Code, is amended to read  
25 as follows:

26 Sec. 35.012. CONFIDENTIALITY OF RECORDS. A copy of a  
27 notice, correspondence, transcript, pleading, or other document in



1 the records of the department relating to an order issued under this  
2 subchapter is confidential and may be released only as provided by  
3 Subchapter D, Chapter 31, except that the banking commissioner  
4 periodically shall publish all final removal and prohibition  
5 orders. The banking commissioner may release a final cease and  
6 desist order, a final order imposing an administrative penalty, or  
7 information regarding the existence of any of those orders [~~the~~  
8 ~~order~~] to the public if the banking commissioner concludes that the  
9 release would enhance effective enforcement of the order.

10 SECTION 9. Section 185.003, Finance Code, is amended by  
11 amending Subsections (a) and (b) and adding Subsection (b-1) to  
12 read as follows:

13 (a) The banking commissioner has grounds to remove or  
14 prohibit a present or former officer, director, manager, managing  
15 participant, or employee of a state trust company from office or  
16 employment in, or [~~to~~] prohibit a controlling shareholder or  
17 participant or other person from participation in the affairs of,  
18 the state trust company or any other entity chartered, registered,  
19 permitted, or licensed by the banking commissioner if the banking  
20 commissioner determines from examination or other credible  
21 evidence that:

22 (1) the person:

23 (A) intentionally committed or participated in  
24 the commission of an act described by Section 185.002(a) with  
25 regard to the affairs of a financial institution, as defined by  
26 Section 201.101 [~~the state trust company~~]; [~~or~~]

27 (B) violated a final cease and desist order

1 issued by a state or federal regulatory agency against the person or  
2 an entity in which the person is or was an officer, director, or  
3 employee [in response to the same or a similar act]; or

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

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

7 (A) the financial institution [~~state trust~~  
8 ~~company~~] has suffered or will probably suffer financial loss or  
9 expense, or other damage;

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

13 (C) the person has received financial gain or  
14 other benefit by reason of the action, or likely would have if the  
15 action had not been discovered [~~violation~~]; and

16 (3) that action by the person:

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

19 (B) demonstrates wilful or continuing disregard  
20 for the safety or soundness of the financial institution [~~state~~  
21 ~~trust company~~].

22 (b) If the banking commissioner has grounds for action under  
23 Subsection (a) and finds that a removal or prohibition order  
24 appears to be necessary and in the best interest of the state trust  
25 company involved and its clients, creditors, [~~and~~] shareholders, or  
26 participants, the banking commissioner may serve a proposed removal  
27 or prohibition order, as appropriate, on an officer, employee,

1 director, manager or managing participant, controlling shareholder  
2 or participant, or other person alleged to have committed or  
3 participated in the violation or other conduct described by Section  
4 185.002(a). The order must:

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

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

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

12 (4) state the duration of the order, including whether  
13 the duration of the order is perpetual ~~[or delivered]~~.

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

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

20 (b) In each emergency order the banking commissioner shall  
21 notify the state trust company and any person against whom the  
22 emergency order is directed of:

23 (1) the specific conduct requiring the order;

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

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

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

3           (5) the right to a hearing.

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

6           (a) Except as provided by other law, without the prior  
7 written approval of the banking commissioner, a person subject to a  
8 final and enforceable removal or prohibition order issued by the  
9 banking commissioner, or by another state, federal, or foreign  
10 financial institution regulatory agency, may not:

11           (1) serve as a director, officer, or employee of a  
12 state trust company or ~~[r]~~ state bank, or as a director, officer, or  
13 employee with financial responsibility of any other entity  
14 chartered, registered, permitted, or licensed by the banking  
15 commissioner under the laws of this state while the order is in  
16 effect~~[, including an interstate branch, trust office, or~~  
17 ~~representative office in this state of an out-of-state bank, trust~~  
18 ~~company, or foreign bank];~~

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

21           (3) directly or indirectly vote for a director of such  
22 an entity; or

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

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

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

7       (b) The application must be made under oath and in the form  
8 required by the banking commissioner. The application must be  
9 accompanied by any required fees.

10       (c) The banking commissioner, in the exercise of  
11 discretion, may approve or deny an application filed under this  
12 section.

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

15       SECTION 13. Section 185.009, Finance Code, is amended to  
16 read as follows:

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

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

22       (1) this subtitle or rules enacted under this subtitle  
23 and, as a result of that violation, exposed or could have exposed  
24 the state trust company or its clients, creditors, shareholders, or  
25 participants to harm;

26       (2) other applicable law of this state and, as a result  
27 of that violation, exposed or could have exposed the state trust

1 company or its clients, creditors, shareholders, or participants to  
2 harm; or

3 (3) a final order issued by the banking commissioner.

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

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

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

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

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

18 SECTION 14. Section 185.010, Finance Code, is amended to  
19 read as follows:

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

27 (1) be served by personal delivery or by registered or

1 certified mail, return receipt requested; ~~and~~

2 (2) contain a statement of the conduct alleged to  
3 constitute a ~~be in~~ violation; and

4 (3) if the alleged violation is described by Section  
5 185.009(a)(1) or (2), identify corrective action that the state  
6 trust company or other person must take to avoid or reduce the  
7 amount of a penalty that would otherwise be imposed under this  
8 section ~~of the order~~.

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

12 (1) the financial resources of the state trust company  
13 or other person;

14 (2) the good faith of the state trust company or other  
15 person, including any corrective action taken;

16 (3) the gravity of the violation;

17 (4) the history of previous violations;

18 (5) an offset of the amount of the penalty by the  
19 amount of any penalty imposed by another state or federal agency for  
20 the same conduct; and

21 (6) any other matter that justice may require  
22 ~~[maintenance of procedures reasonably adopted to ensure compliance~~  
23 ~~with the order].~~

24 (c) If the banking commissioner determines after the  
25 hearing that the alleged conduct occurred and that the conduct  
26 constitutes a violation ~~an order has been violated~~, the banking  
27 commissioner may impose an administrative penalty against a state

1 trust company or other person, as applicable, in an amount:

2 (1) if imposed against a state trust company, not less  
3 than \$500 and not more than \$10,000 for each violation for each day  
4 the violation continues, except that the maximum administrative  
5 penalty that may be imposed is the lesser of \$500,000 or one percent  
6 of the state trust company's assets; or

7 (2) if imposed against a person other than a state  
8 trust company, not less than \$500 and not more than \$5,000 for each  
9 violation for each day the violation continues, except that the  
10 maximum administrative penalty that may be imposed is \$250,000 [~~not~~  
11 ~~to exceed \$500 for each day the state trust company violates the~~  
12 ~~final order~~].

13 SECTION 15. Section 185.011, Finance Code, is amended to  
14 read as follows:

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

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

19 (b) The petition for judicial review stays the penalty order  
20 during the period preceding the decision of the court. If the court  
21 sustains the order, the court shall order the state trust company or  
22 other person, as applicable, to pay the full amount of the penalty  
23 or a lower amount determined by the court. If the court does not  
24 sustain the order, a penalty is not owed. If the final judgment of  
25 the court requires payment of a penalty, interest accrues on the  
26 penalty, at the rate charged on loans to depository institutions by  
27 the [~~New York~~] Federal Reserve Bank of New York, beginning on the



1 date the judgment is final and ending on the date the penalty and  
2 interest are paid.

3 (c) If the state trust company or other person, as  
4 applicable, does not pay the penalty imposed under a final and  
5 nonappealable penalty order, the banking commissioner shall refer  
6 the matter to the attorney general for enforcement. The attorney  
7 general is entitled to recover reasonable attorney's fees from the  
8 state trust company or other person, as applicable, if the attorney  
9 general prevails in judicial action necessary for collection of the  
10 penalty.

11 SECTION 16. Section 185.012, Finance Code, is amended to  
12 read as follows:

13 Sec. 185.012. CONFIDENTIALITY OF RECORDS. A copy of a  
14 notice, correspondence, transcript, pleading, or other document in  
15 the records of the department relating to an order issued under this  
16 subchapter is confidential and may be released only as provided by  
17 Subchapter D, Chapter 181, except that the banking commissioner  
18 periodically shall publish all final removal and prohibition  
19 orders. The banking commissioner may release a final cease and  
20 desist order, a final order imposing an administrative penalty, or  
21 information regarding [~~relating to~~] the existence of any of those  
22 orders [~~the order~~] to the public if the banking commissioner  
23 concludes that the release would enhance effective enforcement of  
24 the order.

25 SECTION 17. Subsection (a), Section 202.005, Finance Code,  
26 is amended to read as follows:

27 (a) The commissioner may:

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

4           (2) bring an enforcement proceeding under Chapter 35  
5 against a bank holding company or other person that violates or  
6 participates in a violation of Subtitle A, an agreement filed with  
7 the commissioner under this chapter, or a rule adopted by the  
8 finance commission or order issued by the commissioner under  
9 Subtitle A, as if the bank holding company were a Texas state bank.

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

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