

Texas Department of Banking Testimony

Testimony provided to the Senate Business and Commerce Committee regarding HB 2754

Date: May 10, 2007

The Honorable Troy Fraser
Texas Senate
Chairman, Senate Business and Commerce
P.O. Box 12068
Austin, Texas 78711

Re: House Bill 2754

Chairman Fraser and Members of the Committee:

House Bill 2754 is the result of various banking industry attorneys, bankers and Banking Department staff working with Representative Anchia to seek areas of appropriate improvement and relief in unnecessary regulatory burden relating to corporate activity portions of the Texas Finance Code that affect state banking in Texas.

House Bill 2754 provides for regulation of state banks and state trust companies, and would:

- [Streamline the corporate application and filing process by revising certain notice, hearing, and filing requirements and by clarifying the application of confidentiality to contents of pending applications, as follows:](#)
 - Revise cash subscription requirements applicable to proposed state bank and trust company charters;
 - Revise procedures for protests of state bank or trust company charter applications;
 - Create new exceptions to regulatory application and approval for a change in capital for state banks and trust companies;
 - Eliminate certain notice publication requirements applicable to certain state bank and trust company mergers;
 - Clarify confidentiality of information in an application for change of control of a state bank or trust company; and
 - Eliminate the requirement to file duplicate copies of certain dissolution documents of state banks or trust companies
- [Modernize the law regarding required approvals of certain voluntary asset purchases or sales to require regulatory approval only if warranted by transaction size and risk](#)

Streamline the corporate application and filing process by revising certain notice, hearing, and filing requirements and by clarifying the application of confidentiality to contents of pending applications (SECTIONS 1-4, 7-13, 16-18)

This topical heading captures a number of changes to the corporate applications and filings process at the Department of Banking. For clarity, the discussion below is grouped by sub-topical headings.

Revise cash subscription requirements applicable to proposed state bank and trust company charters (SECTIONS 1 and 10):

A problem recently arose from the sudden withdrawal of a subscription for bank stock which had been paid in cash but had not yet been legally accepted by the bank organizers, and thereby made irrevocable. The action required correction of the previously filed and approved articles. Initial capital should not be a moving target. SECTIONS 1 and 10 of the bill amend Sections 32.002(a)(8)(B) and 182.002(a)(8)(B), Finance Code, respectively, to require that subscriptions must be irrevocable before the articles are filed, eliminating the possibility that capital could change between the date of the articles of association and the date the certificate of authority is issued.

Revise procedures for protests of state bank or trust company charter applications (SECTIONS 2, 3, 11, and 12):

If a formal protest of a bank or trust company charter application is filed timely, current law mandates that the banking commissioner conduct a hearing. In recent months, the Department has noted a sharp increase in charter protests being filed by a bank competitor of a proposed state bank. Although no protesting bank in these cases has been able to articulate a reasonable objection to granting the charter based on the factors to be considered, delays in processing have been unavoidable. Some delays have been attributable to a lack of clarity in the governing statutes regarding the confidentiality restrictions applicable to specific information in the application file, including information submitted by the applicant as well as the Department's related investigation work product. The Department's position that confidentiality applies to the most commonly requested information — the financial statements of organizers and proposed directors and officers, the business plan submitted by the applicant, and the Department's investigation report — has been upheld in each instance by the hearings officer. However, each new protest raises the identical issues again, leading the Department to conclude that clarifying statutory amendments are desirable.

SECTIONS 2 and 11 of the bill amend Sections 32.004 and 182.004, Finance Code, respectively, to clarify that the Department's investigation report, the business plan of the applicant, and the financial statements of proposed officers and directors are confidential and not subject to public disclosure.

Another question that has arisen is whether the banking commissioner should be required to always hold a hearing if a protest is filed, as the law currently provides, regardless of whether the protest raises legitimate issues with respect to the statutory standards for approval of a charter.

SECTIONS 3 and 12 of the bill amend Sections 32.005, and Sections 182.005, Finance Code, respectively, to require a protesting party to file a detailed protest responding to each contested statement in the application for charter, and relate each such statement and response to the standards for approval in Section 32.003(b) or 182.003(b), Finance Code. Further, the banking commissioner cannot be compelled to hold a hearing prior to granting or denying the charter, but may do so in the exercise of discretion. A request for hearing made by a party must specifically indicate the issues involved that cannot be determined on the basis of the documentary record.

Create new exceptions to regulatory application and approval for a change in capital for state banks and trust companies (SECTIONS 4 and 13):

Section 32.103, Finance Code, requires approval of the banking commissioner before a bank may make changes to its capitalization, subject to certain exceptions. Prior approval is not required for an increase in capital when shares of common stock are sold for cash or issued as share dividends, or if a transfer is made by board resolution from undivided profits to capital or surplus. Section 182.103, Finance Code, imposes identical prior approval requirements on trust companies.

SECTIONS 4 and 13 of the bill amend Sections 32.103 and 182.103, Finance Code, respectively, to add two new exemptions to the requirement for prior approval:

- Direct cash injection by shareholders without the corresponding issuance of additional shares of stock. In effect, the bank or trust company receives additional capital at no cost, thereby improving its financial position.
- Certain accounting adjustments. Generally accepted accounting principles sometime require “book” accounting adjustments to be made to capital in connection with specific types of corporate transactions, adjustments that do not consume or generate additional financial resources. The exemption applies to such an adjustment if the corporate transaction that causes the adjustment is already subject to prior application and approval of the banking commissioner, provided the required adjustments are reasonably disclosed in the application.

Eliminate certain duplicate notice publication requirements applicable to certain state bank and trust company mergers (SECTIONS 7 and 16):

Under current law, the merger or conversion of a state bank or trust company into a successor institution under a different regulatory agency requires the state bank or trust company to publish notice of the transaction in a newspaper of general circulation in its service area, and subsequently file a publisher’s affidavit to attest to the fact of publication. These notices have proven to be unnecessary because the successor regulatory system imposes appropriate publication requirements with respect to the new, successor charter. SECTIONS 7 and 16 of the bill amend Sections 32.501(c) and 182.501(c), Finance Code, respectively, to eliminate the duplicate publication and subsequent filing requirement.

Clarify confidentiality of information in an application for change of control of a state bank or trust company (SECTIONS 8 and 17):

Questions have arisen regarding whether state law is more restrictive than federal law with respect to confidentiality of information contained in the standardized interagency form for change of control applications that is utilized by the Department for both state bank and state trust company filings. SECTIONS 8 and 17 of the bill amend Sections 33.002(d) and 183.002(c), Finance Code, respectively, to authorize the finance commission to adopt rules specifying the confidential or nonconfidential character of information contained in the change of control application. Such rules are contemplated to contain confidentiality provisions identical to those contained in applicable federal law.

Eliminate the requirement to file duplicate copies of certain dissolution documents of state banks or trust companies (SECTIONS 9 and 18):

A state bank or trust company may in theory apply for permission to voluntarily dissolve and liquidate the institution. This is a relatively common occurrence for trust companies, although banks are usually liquidated involuntarily by the FDIC. State law specifies that certain corporate resolutions must be adopted and a specified notice must be sent to shareholders, and unnecessarily requires that “duplicate certified copies” of these documents must be filed with the banking commissioner. SECTIONS 9 and 18 of the bill amend Sections 36.102 and 186.102, Finance Code, respectively, to eliminate the requirement for duplicate copies.

Modernize the law regarding required approvals of certain voluntary asset purchases or sales to require regulatory approval only if warranted by transaction size and risk (SECTIONS 5, 6, 14, and 15)

Section 32.401, Finance Code, authorizes a state bank to purchase all or substantially all of the assets of another financial institution, provided the bank obtains the prior written approval of the banking commissioner. By the plain language of the statute, approval is required only if the seller is ending its existence as a bank, and no approval is required in any event if the seller is not a bank. Section 32.405, Finance Code, similarly authorizes a state bank to sell all or substantially all of its assets, provided the bank obtains the prior written approval of the banking commissioner. By the plain language of the statute, approval is required only if the state bank is ending its existence as a bank. These roughly parallel provisions represent an antiquated regulatory scheme that was largely carried over from the Banking Code of 1943. Curiously, whether a purchase or sale of assets would or would not require regulatory approval under existing law is not based upon the level of risk to safety and soundness in the transaction.

SECTION 5 of the bill amends Section 32.401, Finance Code, to permit a state bank to exercise its own business judgment to purchase assets from any seller, provided that the prior written approval of the banking commissioner is required if the purchase price exceeds an amount equal to three times the purchasing bank’s unimpaired capital and surplus. The finance commission is authorized to create additional risk measures by rule.

SECTION 6 of the bill amends Section 32.405, Finance Code, to permit a state bank to exercise its own business judgment to sell a portion of its assets to any buyer, provided that the prior written approval of the banking commissioner is required if the sales price exceeds an amount

equal to three times the selling bank's unimpaired capital and surplus. If approval of the banking commissioner is not required but the sale would involve the disposition of a branch or other bank office accessible to the public, the state bank is required to notify the banking commissioner in writing at least 30 days prior to the expected closing date of the sale. The finance commission is authorized to create additional risk measures by rule.

SECTIONS 14 and 15 similarly amend Sections 182.401 and 182.405, Finance Code, to address the purchase or sale of assets by a state trust company, requiring prior approval of the banking commissioner only if the transaction price exceeds an amount equal to three times the trust company's equity capital less intangible assets. The finance commission is authorized to create additional risk measures by rule.

Sincerely,

Randall S. James
Banking Commissioner