

Texas Department of Banking

Catherine A. Ghiglieri
Commissioner

March 4, 1998

FILE # ML-40133-98
I.D. # 40133

The Honorable Dan Morales
Attorney General of the State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-1105

RECEIVED

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Opinion Committee

RE: Opinion request - Whether TEX. GOV'T CODE ANN. Chapter 2256 (Vernon Pamph. 1998) applies to various funds maintained under statutes administered by the Texas Department of Banking.

Dear General Morales:

TEX. GOV'T CODE ANN. Chapter 2256 (Vernon Pamph. 1998), entitled the "Public Funds Investment Act" (the "PFI Act"), generally requires a state agency controlling public funds to comply with its provisions. Public funds are not defined in the PFI Act. Consequently, the applicability of the PFI Act to maintenance and investment of certain funds either directly or indirectly under the control of the Texas Department of Banking (the "Department") and the Banking Commissioner (the "Commissioner") is unclear, and your opinion is sought regarding whether the funds are public and therefore subject to the PFI Act and whether any exemptions apply.

I. THE FUNDS AT ISSUE

A. Statutory Authority

The Department of Banking has control of monies through several statutory provisions. They are as follows:

1. Corporate and trust funds held pursuant to court-supervised receivership and liquidation of a bank or trust company pursuant to TEX. FIN. CODE ANN. Sections 36.001 et seq. (Vernon Pamph. 1998) or TEX. REV. CIV. STAT. ANN. arts. 342a-7.001 et seq. (Vernon Supp. 1998);
2. Corporate and trust funds held pursuant to court-supervised receivership of a perpetual care cemetery pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 712.0441(g) and TEX. CIV. PRAC. & REM. CODE ANN. Sections
3. Seized trust funds of a prepaid funeral contract seller held pursuant to TEX. FIN. CODE ANN. Sections 154.412 and 154.413;

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4. The prepaid funeral contract guaranty fund established under TEX. FIN. CODE ANN. Section 154.351 and 7 T.A.C. Sections 25.17-25.20, operated and maintained by the advisory council created under TEX. FIN. CODE ANN. Section 154.355; and
5. The travel advance fund maintained by the Department.

B. Description of Funds ..

1. Bank or Trust Company Liquidation Funds

Pursuant to TEX. FIN. CODE ANN. Sections 36.001 et seq., the Commissioner has the authority to close a bank for liquidation. In virtually all such situations in the last 50 years or so, the bank has been tendered to the Federal Deposit Insurance Corporation (FDIC) for liquidation. See, Section 36.003. However, an uninsured bank could be closed for liquidation, in which case the Commissioner would serve as receiver under Sections 36.201 et seq.

Liquidation provisions regarding trust companies are substantially identical to those for uninsured banks. TEX. REV. CIV. STAT. ANN. arts. 342a-1.001 et seq. (the Trust Company Act, Sections 1.001 et seq.). At present, only one trust company is in receivership, *Providence Trust Company, In Liquidation*, Cause No. 94-11003, pending in the 345th Judicial District Court of Travis County, Texas. Funds currently held by the Commissioner in her capacity as the court-appointed receiver include approximately \$50,000 in checking accounts, \$300,000 in certificates of deposit acquired by the trust company prior to receivership that bear substantial penalties for early withdrawal, and \$1 million in the Texas Treasury Safekeeping Trust Company ("TTSTC") under the control of the Comptroller.

In the Department's view, the funds of a trust company in receivership, whether held by the trust company in a corporate or fiduciary capacity, are not "public" funds. These funds do not belong to the state or members of the general public; they belong to the trust company, its customers and creditors. The funds, therefore, are subject to specific individual ownership rights. Each claimant must comply with the claims filing procedures. Other than reimbursement for administrative expenses, there is no state interest in receivership funds. Trust Company Act Section 7.203(a) provides that "[t]he acts of the receiver are the acts of the state trust company in liquidation and this state and its political subdivisions are not liable and may not be held accountable for any debt or obligation of a state trust company in receivership." Additionally, receivership funds are in the custody of the court, not the Commissioner. Trust Company Act Section 7.202(b) provides that, upon the filing of a specified notice with the court, "the court has constructive custody of all the state trust company's assets, and any action initiated that seeks to directly or indirectly affect state trust company assets is considered to be an intervention in the receivership proceeding."

Court supervision is extensive. See, Trust Company Act Sections 7.206 (a comprehensive inventory of the trust company's assets must be filed with the court); 7.207(a) (the receiver [not the

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"Commissioner"] has the title to all the state trust company's property, contracts, and rights of action, wherever located, beginning on the date the trust company is closed for liquidation); 7.218(a) (the receiver acts under the court's orders); 7.220(a) (receiver must file quarterly reports with the court); and 7.221 (the court may order an audit of the receivership).

Further, the receivership funds do not become "state funds" merely by virtue of being deposited in the Texas Treasury Safekeeping Trust Company ("TTSTC"). TEX. GOV'T CODE ANN. Sections 404.102(a) was amended by Acts 1991, 72nd Leg., 2nd C.S., ch. 12, §1.24, to revise its statement of TTSTC purposes as enabling "the treasurer to manage, disburse, transfer, safekeep, and invest [public] funds and securities more efficiently and economically. The treasurer may deposit [public] funds and securities with the trust company to achieve its purpose." The 1991 legislation reformed insurance receivership proceedings and the manner in which the various insurance guaranty funds operated, in part by requiring insurance receivership funds and guaranty funds to be deposited in the TTSTC. Acts 1991, 72nd Leg., 2nd C.S., ch. 12, §1.25, added a phrase to TEX. GOV'T CODE ANN. Sections 404.103(a), revising the articulated powers of the TTSTC to state that TTSTC "may receive, transfer, and disburse money and securities as provided by statute or belonging to the state...." Such revisions reflect a clear understanding by the legislature that receivership funds are not "public funds" as well as reflect legislative intent to allow the TTSTC to accept deposits of "non-public" funds if authorized by another statute. In addition, the definition of "deposit of public funds" in the Public Funds Collateral Act, TEX. GOV'T CODE ANN. §2257.001, et seq., excludes funds that the Comptroller manages under the Texas Government Code Chapter 404.

Consequently, in the Department's view, the funds are not "public" funds or funds in the "custody" of a state agency.

Question: Does the PFI Act apply to bank or trust funds held in receivership proceedings?

Question: If the PFI Act applies, is the portion of the funds deposited with the TTSTC under the control of the Comptroller exempt under Section 2256.004(2) (state funds invested as authorized by TEX. GOV'T CODE ANN. Section 404.024)?

2. Perpetual Care Cemetery Liquidation Funds

Pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 712.0441(g), the Commissioner has the authority to report uncorrected violations of law by a perpetual care cemetery corporation "to the attorney general, who shall bring suit or quo warranto proceedings for the forfeiture of the corporation's charter and dissolution of the corporation in the district court of any county in which its perpetual care cemetery is operated." Dissolution necessarily entails a court-supervised receivership under TEX. CIV. PRAC. & REM. CODE ANN. Chapter 64. The Department always seeks to have a third party appointed receiver but must sometimes serve as the receiver because of the unusual nature of the entity and its property in receivership. At present, no such receivership is in

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existence. These funds are not deposited in the TTSTC because no statute authorizes the deposit, cf. TEX. GOV'T CODE ANN. Sections 404.103(a).

While differing statutory provisions govern this type of receivership, the same arguments made regarding a trust company receivership apply here. The funds of a cemetery in receivership, whether corporate or fiduciary, are not "public" funds. These funds do not belong to the state or members of the general public; they belong to the cemetery company. Court supervision is extensive. See TEX. CIV. PRAC. & REM. CODE ANN. Sections 64.039 (the receiver is under the control of the court), and 64.032 (an inventory of all property must be filed with the court). The court may order an audit. See TEX. R. CIV. P. 171 and 172. Additionally, the funds are not in the custody of the Commissioner, but the Court. The Department therefore is of the opinion that the PFI Act does not apply to these receivership funds because they are not public and not in the custody of a state agency.

Question: Does the PFI Act apply to perpetual care trust funds held in receivership proceedings?

3. Prepaid Funeral Contract Seized Funds

Pursuant to TEX. FIN. CODE ANN. Section 154.412(a), in certain circumstances "the commissioner may issue an order to seize the prepaid funeral money, including earnings, where that money is held." Prepaid funeral funds are fiduciary funds originally deposited by the seller in a depository institution in an insured, interest-bearing account or with a trust company or the trust department of a bank in this state. TEX. FIN. CODE ANN. Section 154.253. The funds represent money paid or collected on trust-funded, prepaid funeral benefits contracts. TEX. FIN. CODE ANN. Section 154.251. The Commissioner may also seek liquidation of a permit holder through court-supervised receivership, after the seizure order becomes final and nonappealable. Section 154.414.

The Commissioner assumes control of seized funds by delivering certified copies of the seizure order to the financial institution that controls the funds. The funds are generally left in their current status to facilitate the ultimate transfer to a responsible successor permit holder. However, in two cases, one currently active, funds have been transferred to the TTSTC. Funds are withdrawn upon the death of a contract holder to pay funeral expenses. The Department and Commissioner have no interest in the trust funds.

The Department believes these seized funds are not "public" funds as defined in the PFI Act. These funds do not belong to the state, and the beneficiaries of the funds are identifiable owners with property rights in the funds.

Question: Is the PFI Act applicable to prepaid funeral trust funds seized by the Commissioner?

Question: If the PFI Act applies, is the portion of the funds deposited with the TTSTC under the

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control of the Comptroller exempt under Section 2256.004(2) (state funds invested as authorized by TEX. GOV'T CODE ANN. Section 404.024)?

4. Prepaid Funeral Contract Guaranty Fund

Pursuant to TEX. FIN. CODE ANN. Sections 154.351 et seq. and 7 T.A.C. Sections 25.17-25.20, a prepaid funeral contract guaranty fund is operated and maintained by the Department and the advisory council created under TEX. FIN. CODE ANN. Section 154.355. Nothing in the statute or rules indicates the fund "belongs" to the industry assessed to create it or even to the intended beneficiaries of the fund, and no prospect for refund to the assessed industry exists in the statute or rules. The fund is apparently held in perpetuity to be available to satisfy a regulated obligation to public members of the protected class. The Guaranty Fund Advisory Council is likely considered to hold custody of the fund. Although the Advisory Council is not considered a "state agency," the special definition of state agency in PFI Act Section 2256.002(13) ("an office, department, commission, board, or other agency that is part of any branch of state government, an institution of higher education, and any nonprofit corporation acting on behalf of any of those entities") is possibly broad enough to encompass the advisory council. The guaranty fund currently contains approximately \$750,000, all deposited with the TTSTC pursuant to TEX. FIN. CODE ANN. Sections 154.353(a)(5).

The Department believes the guaranty fund may constitute "public" funds as defined in the PFI Act, although the application of that definition is ambiguous. If the guaranty fund constitutes "public" funds subject to the PFI Act, the Department is of the view that the exemption provided by Section 2256.004(2) of the PFI Act applies to the guaranty fund deposited with the TTSTC.

Question: Is the Guaranty Fund "public funds" so that the PFI Act applies?

Question: Does the exemption provided by Section 2256.004(2) of the PFI Act apply to the Guaranty Fund monies deposited with the TTSTC?

5. Travel Advance Fund

The Department currently has approximately \$32,000 in appropriated funds on deposit in a checking account at a state bank in Austin, Texas, for use in funding travel advances. Several agencies have advised the Department that they have concluded their travel advance funds are exempt from the PFI Act because the funds are invested as authorized by TEX. GOV'T CODE ANN. Section 404.024, even though the invested funds are not in the custody of the Comptroller.

Question: Does the PFI Act apply to the travel advance funds?

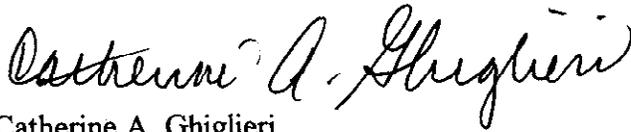
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Question: If the Act applies, are travel advance funds exempt under TEX. GOV'T CODE ANN. Section 404.024?

Attached to this letter is a list of parties we believe would be interested in commenting on this request. If you have any questions or desire further information, please contact our General Counsel, Everette Jobe, at (512) 475-1300. Thank you for your assistance.

Sincerely,



Catherine A. Ghiglieri
Commissioner

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cc: See Attached List