Some Legal Aspects of State Bank Organization in Illinois

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LEGISLATIVE NOTE

SOME LEGAL ASPECTS OF STATE BANK ORGANIZATION IN ILLINOIS

INTRODUCTION

Since 1946, new bank organization has increased dramatically in the United States. This nationwide expansion has occurred in all three categories of state bank regulation: (1) states permitting statewide branching; (2) states which permit limited branching; and (3) states which permit no branching at all. Of these three categories, the last one, i.e., states which permit no branching at all, has experienced the largest increase in new banks. Of states in this category, three states have experienced relatively phenomenal increases in the number of unit banks formed since World War II. Florida, Illinois and Texas have accounted for the organization of nearly 1000 new banks through the 1946-1967 period, while the states permitting statewide branching and those permitting limited branching had formed only 750 through 1961. Thus, three states have outstripped their 47 sisters through 1967 and have accounted for the organization of 25 of the 86 banks founded in the country in 1968 and 52 out of the 130 banks organized during 1969.

The reasons for this concentration of banking expansion activity in three states are many, diverse and beyond the scope of this paper. However, it is noteworthy to mention that one of the major reasons is legal: these three states have only one alternative to use in expanding banking services and that is to organize a new "unit" bank. Branching is prohibited.

Given the many factors that have brought about the increase in new bank formation across the country and given the fact that upwards of 30% of this activity is taking place in the three states, it is the intention of this pa-

2. Id.
3. Id. See also 1968 Annual Report of the Corporation, Federal Deposit Insurance Corporation 168-69 [Hereinafter referred to as 1968 Report].
4. Id.
7. Id.
per to focus on new bank organization legal procedures and mechanisms in the State of Illinois, in particular, and where relevant and helpful, compare these legal methods with those of the States of Florida and Texas.

STATUTORY AUTHORITY AND REGULATORY BODIES

In Illinois, the organization of state banks is governed by: the Illinois Banking Act of 1956; the Illinois Business Corporation Act (hereinafter BCA); the Illinois State Constitution; and the Federal Deposit Insurance Corporation Act and Regulations. In addition banks are administratively regulated by the Commissioner of Banks and Trust Companies of the State of Illinois, the Secretary of State of Illinois, and the Board of Directors and Officers of the Federal Deposit Insurance Corporation. (Both Florida and Texas have administrative agencies—i.e., Commissioners of Banking—similar to Illinois.)

It is noteworthy at this juncture to examine the applicability of the Federal Deposit Insurance Corporation Act and Regulations. This Act applies to all new banks, regardless of the state wherein located, as soon as that bank applies for deposit insurance. Although there is no mandatory application provision which controls, most states, including Illinois, will informally condition the granting of a state charter upon successful application to the Federal Deposit Insurance Corporation (hereinafter FDIC) for deposit insurance. Thus, as a practical matter, the FDIC Act and Regulations find almost universal application.

Another point which needs mention here is the dual system of banking in the United States. Both nationally-chartered banks and state-chartered banks exist and are formed. The latter are governed by three of the above statutes; the former by the same three statutes as well as the Federal Reserve Board, the United States Comptroller of the Currency and the national banking legislation. Thus, although similarity between organization procedures in the two systems does exist, national bank organization is subject to greater review and regulation. For this reason, as well as

10. Ill. Const. art. XI (1870).
12. FDIC Act § 5 provides that: “Subject to the provisions of this Act and State nonmember bank, upon application to and examination by the Corporation and approval by the Board of Directors, may become an insured bank.” 12 U.S.C. § 1815 (1964).
the fact that the corporate powers of the two types of banks *qua* banks are virtually identical, the bulk of banks organized or seeking organization in Illinois in 1969 were seeking state charters.

For purposes of clarification, the relationship of three statutes which apply in Illinois, along with the Illinois and United States Constitutions, may be graphically shown as follows:

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United States Constitution

Illinois Constitution

FDIC Act Illinois Banking Act Business Corporation Act & -Reg's
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The Business Corporation Act, although specifically exempting banks, is commonly used as a guide where the Illinois Banking Act (hereinafter IBA) is silent. This use is based on the fact that the BCA is the basic law of corporations in Illinois. It is to be noted, however, that this use is a liberty with general rules of statutory construction since both the BCA and the IBA are *general* statutes and are thus, strictly speaking, not supplementary. It is to be noted that this chart is similar to several other states, including New York, as of September 1, 1970. Thus, this paper concerns itself with *state* banks, and the terms as hereinafter used should be understood to mean those banks seeking charters from the State of Illinois, as opposed to those seeking a charter from the United States Comptroller of Currency.

**SCOPE OF THE PAPER**

As stated above, the intended scope of this paper is to explore the legal aspects of state bank organization in Illinois as exemplified and clarified

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15. Out of 18 pending or granted applications for deposit insurance in Illinois in 1969, 16 were from banks seeking state charters. 1969 ANNUAL REPORT, COMM'R OF BANKS AND TRUST COMPANIES, STATE OF ILLINOIS 36.
16. The BCA § 157.3. See also Albers v. Continental Bank, 296 Ill. App. 596 (1938), excluding banks from BCA coverage.
17. HENN, LAW OF CORPORATIONS 32 (2d ed. 1970). [Hereinafter referred to as HENN].
by those of Texas and Florida. This will be done by tracing the development of a state bank in Illinois from "concept to charter" and demonstrating the interaction of the appropriate statutes upon this development. From this crucible the author hopes to develop concrete conclusions and logical proposals.

PRELIMINARY NON-LEGAL ASPECTS

MARKETING CONSIDERATIONS AND FACTORS

Of the six factors determinative of a proposed state bank's application for deposit insurance and a permit to organize, the pivotal factor is the "convenience and needs of the area" which the proposed bank seeks to serve. In addition to demonstrating this need and convenience in a positive fashion, general supervisory guidelines require that the negative side of need and convenience also be minimal; that is, that the proposed bank will not unduly damage existing institutions and competition. Thus, an indefinite and amorphous standard on the positive side and a demand for demonstration of minimal negative effect cause initial considerations to be non-legal and in the nature of market research.

As a general proposition, needs and convenience, both in a positive and negative sense, are demonstrated by the deposit potential that a proposed bank application can project and logically sustain. Such deposit potential can only be the product of a thorough analysis of the market in which the proposed bank will seek to do business. This analysis concerns itself with the following factors: (1) Population of the market area, i.e., current population estimates, as well as population forecasts for ten years

18. FDIC Act § 1816 provides: "The factors to be enumerated in the certificate required under section 4 and to be considered by the Board of Directors under section 5 shall be the following: The financial history and condition of the bank, the adequacy of the capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this Act."

19. IBA § 110, provides that, in addition to the factors enumerated in § 1816 of the FDIC Act, the Commissioner of Banks shall not issue a permit to organize unless he finds: "(1) that the proposed capital at least meets the minimum requirements of this Act; (2) that the future earnings prospects are favorable; (3) that the general character of its proposed management is such as to assure reasonable promise of successful operation; (4) that the name of the proposed bank is not the same as or deceptively similar to the name of any other bank then operating in the State; and (5) that the convenience and needs of the area sought to be served by the proposed bank will be promoted." (Amended 1965).

hence are generally required; (2) Wealth characteristics of the consumers, i.e., median family income, home ownership statistics and valuation, employment statistics, median age and education levels, retail sales figures, and long-term community outlook are some of the data required. Especially helpful in this area are studies of the time account, demand account and loan potential of an area's profiled consumer. In addition to an estimate of consumer deposits, industrial, commercial and governmental deposits must be estimated. This projection is often based on individual investigation and comparison with similarly-situated market areas; (3) Competitive institutions, i.e., the history of other financial institutions in the area, as well as their location relative to the proposed bank, must be evidenced. This category focuses on estimating the proposed bank's potential share of the financial market vis-a-vis the other institutions; (4) Growth potential, i.e., such data as residential developments, anticipated changes in industrial-commercial patterns, and any other anticipated or possible changes in the existing demographic appearance of the market area which might demonstrate an appreciating need for the proposed institution are also to be within the markets's analysis.

ADDITIONAL CONSIDERATIONS: REAL ESTATE AND OCCUPANCY

Having completed the gathering of the above-outlined analytical data, there remains the question of the proposed bank's location and occupancy arrangements, as well as the bank's management, before the "needs and convenience" factor can be fully answered.

As a general proposition, the matter of a bank's location within a market area is determined by such factors as the traffic patterns prevalent therein, the zoning and commercial character of the surroundings, and the distance of the proposed bank from its competitors. The matter of the bank's occupancy arrangements are determined by purely internal economic considerations; that is, a proposed bank may own its quarters entirely, lease them from owner, or lease the land and/or building and own the necessary furniture and equipment. This consideration is greatly determined by the amount of capital which the bank wishes to invest in fixed assets and a ceiling investment is generally suggested by the FDIC.

21. The Consumer Research Institute of the University of Michigan makes an annual study of time account, demand account and loan potentials of consumers based on their family income level.
22. Generally-accepted FDIC standards call for a two mile distance between banks in a Chicago suburban market.
23. A range of 40-50% of total capital (i.e. the paid-in surplus account) is the generally accepted FDIC ceiling on the amount a new bank may invest in its
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The matter of the proposed bank’s management traditionally presented a problem to the organizers of the bank. Both the FDIC\(^{24}\) and the Illinois Commission of Banks\(^{25}\) required that the proposed management be sound and experienced so that the proposed bank was assured of “a reasonable promise of successful operation.”\(^ {26}\) Today, however, in Illinois, with the advent of group banking and the rise of bank management consultant and servicing corporations,\(^ {27}\) this problem is greatly simplified, if not eliminated. The proven ability of these management corporations to provide capable advice and personnel without jeopardizing the independence of the bank’s Board of Directors has offered shareholder and depositor additional security and promise of profit, as well as satisfying the above described requirements.

With the completion of this thorough market analysis\(^ {28}\) and the conclusion that the “needs and convenience” factor is apparently satisfied, all economic, non-legal factors now warrant initiation of formal, legal steps to organize the proposed state bank.

LEGAL ASPECTS

INITIAL CONSIDERATIONS: CAPITAL REQUIREMENTS AND INCORPORATORS

The discussion of capital required of a new state bank will use the term “capital” in the following senses: (1) minimum statutory capital required for organization; (2) minimum capital required by the administrative agencies; (3) allocation of capital; and (4) capital as an economic consideration.

First, the Illinois Banking Act requires that a new state bank conform with minimum capital requirements dependent on the population of the trade area which the bank proposes to serve.\(^ {29}\) These requirements are as

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own fixed assets. Thus, for a bank with an initial $750,000 capital, $300,000-$375,000 is the available limit for purchasing land, building, furniture, fixtures and equipment.

24. FDIC Act § 1816.
25. IBA § 110.
26. IBA § 110.
27. Financial Management Associates, Inc. (FMA) is an example of the innovation this type of corporation represents in banking. FMA, a Chicago based company, contracts with investor groups to organize new banks. In addition, FMA then contracts with the newly-formed bank to provide it expert management advice and operational services, such as data processing, accounting services and loan administration. At present, FMA has some seventeen client banks and banks in organization in the six county Chicago metropolitan areas. Total assets of these clients exceed $350,000,000.
28. See SPOFFORD, GUIDEPOSTS FOR BANKING EXPANSION Ch. IV (1961) for further detailed discussion of market analysis methodologies.
29. IBA § 107.
follows: For a community of 10,000 people or less, a minimum capital of $50,000 is required; for a community of more than 10,000 but less than 50,000 people, a minimum capital of $100,000 is required; and for a community with 50,000 people or more, a minimum capital of $200,000 is required.\(^{30}\)

In addition to this minimum capital, the IBA requires that all new state banks, regardless of population in the community, must also maintain a minimum surplus of at least 50% of the capital and a minimum reserve for operating losses of at least 25% of the capital account.\(^{31}\) Thus, a new bank seeking to locate in a community of more than 50,000, a total minimum capital of $350,000 is required.

It is noteworthy to emphasize the fact that the key upon which the determination of the total capital account rests is population. One of the reasons for this nexus in Illinois is constitutionally-based:

Section 6 of Article 11 of the [Illinois] Constitution provides every shareholder in a banking corporation shall be liable, over and above the amount of his stock to an amount equal to such stock for all liabilities of the institution accruing while he remains a shareholder. This section of the constitution is self-executing. It will thus be seen that the extent of the protection afforded depositors of a banking corporation is measured by the amount of the capital stock. It was a fair and natural assumption on the part of the legislature that the larger the number of inhabitants in any city, town or village, the larger would be the wealth of that community. In order to insure the depositors of banking corporations organized under the Act relatively equal protection, a classification in reference to population is a just and reasonable one and the classification made by Section 11 of the State Bank Act is not in conflict with Section 22 of Article 4 of the [Illinois] Constitution.\(^{32}\)

In addition to the “double shareholder liability” that exists in Illinois, other reasons for using community population as the nexus for capital structure exist. The most compelling and common of these is the logical relationship community size and wealth bear to a banking corporation’s ability to attract deposits and invest them profitably.\(^{33}\)

Secondly, the minimum capital statutorily required of a new state bank may not be sufficient to satisfy the administrative agencies charged with the regulation and insurance of Illinois banks. The Commissioner of Banks and Trust Companies, activated by statute\(^ {34}\) and motivated by a concern

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30. IBA § 107.
31. IBA § 107 at ¶ (3). (Amended 1965).
33. Other states, like Florida, also rely on population in determining capital structure. See FLA. STAT. § 659.04(1) (1966).
34. IBA § 110 provides that the Commissioner, upon the filing of an application for a permit to organize (discussed infra) shall: “consider the proposed bank’s capi-
for the security of potential depositors and shareholders of the bank, regularly requires a capital structure greater than that minimum prescribed by the IBA, as described above. The Federal Deposit Insurance Corporation, although a governmental corporation, is motivated in seeking a greater than minimum capital structure by a pure profit motive—i.e., the greater the capital structure of a bank, the less likely are its chances of early failure (and the less likely are the chances that the FDIC will have to ever disburse to protect insured depositors). In addition, the FDIC has a statutory mandate similar to that of the Commissioner of Banks. As a result of these activations and motivations, the FDIC and Commissioner of Banks have developed rules of thumb which they apply to new banks seeking a location in the Chicago metropolitan region. The suggested capital structure for suburban banks is $750,000; for banks seeking a location in the City of Chicago proper—$1,000,000; and for banks seeking a location in the Chicago Loop—$2,000,000.

Third, in line with the power and authority which the administrative agencies exercise in this regard, the Commissioner of Banks and the FDIC require that the capital structure be allocated as follows: 40 percent to capital stock, 40 percent to surplus, and 20 percent to reserve for operating expenses. Again, this allocation is greater than that provided by the minimum provisions of the IBA, and is motivated, in the main, by the consciousness for depositor protection which is the duty of both agencies. In addition, this allocation allows greater ease of absorption of the early year operating losses of the bank, while preserving the integrity of surplus and capital accounts.

Lastly, capital must also be considered in its more traditional, "equity" meaning. Thus, for a group of new state bank organizers and investors, minimum capital means maximum equity positions (and even control) with a smaller financial commitment. Conversely, the larger the capital structure, the greater the financial commitment required if dilution is to be avoided. However, from a marketing standpoint, the more shareholders the bank has in the community, the more depositors the bank will enjoy.

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35. FDIC Act § 1816 provides that the Board of Directors of the FDIC shall consider "[t]he inadequacy of the capital structure (of the proposed bank)."

36. As a general proposition, a new bank requires three years of operation to recoup early operational losses and begin to operate “in the black.” Thus, since the surplus account is usually represented by the bank’s own fixed assets, (see note 23, supra) a generous allowance for operating losses insures the capital stock account from danger of impairment or invasion to meet losses.
Thus, the alternative of depositors v. dilution is often a capital consideration.\textsuperscript{37}

It is to be noted that with the selection and approval of a capital structure, two intangible elements take final shape: first, the amount available for fixed asset investment, usually the surplus account (see notes 36 and 23, supra) and, second, the amount of personal investment required of each incorporator (1\% of total capital structure, as described \textit{infra}) is now calculable.

Finally, when the capital structure has been selected in conformity with the above guidelines, financial statements (balance sheet and profit and loss statement) for the new bank must be projected. This financial information is required as supporting data for new bank applications for a permit to organize as well as for applications for deposit insurance.\textsuperscript{38} Generally, this information covers the first three years of the bank’s operation and contains information relating to the effective income rates on bank investments, all types of projected expenses, net profit and loss, and deposit projections for the three year period. Income and expenses, as well as balance sheet accounts with the exception of the capital accounts) are generally computed by ratio and comparison with the projected size of the bank and other new banks of comparable projected size. As stated above, a new bank should look to an operation “in the black” within three years of operation,\textsuperscript{39} and the financial statements should strive to achieve this goal.

Application for a permit to organize, and for deposit insurance, requires five or more incorporators.\textsuperscript{40} In addition to providing for a statutory minimum of five, the Illinois Banking Act also provides that each of these

\textsuperscript{37} The bank must take care, however, to note that 500 or more shareholders (and operating assets in excess of $1,000,000), will subject the bank to a security registration and disclosure process which, due to the time and expenses involved, may make life more difficult, if not impossible, for a struggling new bank. See Securities Exchange Act of 1934, 15 U.S.C. § 78(g)(1) (1964).

\textsuperscript{38} See text \textit{infra}, “Filing Applications with Commissioner of Banks and FDIC.”

\textsuperscript{39} Note the parallel to financial information required in a registration of securities. However, securities registration generally requires certified financial statements for the last three years of operation, while the financial statements required of a new bank are uncertified and projected for the first three years of operation.

\textsuperscript{40} IBA § 108. Note that an application for deposit insurance, if and when granted, is granted to chartered banks. FDIC Rules and Regs., Pt. 303.1. Thus, incorporators, per se, are not the receivers of deposit insurance and are not required by the FDIC Act. However, since, as a practical matter, application for deposit insurance is made simultaneously with an application for a permit to organize, FDIC practice calls (and application forms so provide) for five incorporators.
five incorporators be individuals, not partnerships, corporations, associations and the like.\textsuperscript{41} Besides these statutory requirements, general agency practice requires that the five individuals be free from conflicts of interest with the new bank, be of good character and reputation, and be financially secure. Taken as a whole, these requirements, both by statute and practice, have a rationale which relates to the nature of the business of banking; that is, banks, as institutions that are highly dependent on public confidence for successful operation, require founders and organizers in whom the community may place that confidence. In addition, since organizers generally develop into directors after the bank is chartered, initial public confidence is highly desirable.

As an indication to the public and of their own interest and concern with the proposed bank, the Illinois Banking Act requires that each incorporator purchase, in cash, not less than one per cent par value of the total capital structure as set out in the section of the Act describing minimum capital requirements.\textsuperscript{42} On its face, this requirement seems to pose no problems; however, as discussed above,\textsuperscript{43} the agencies regularly require more capital than the statute. Consequently, where more capital is required, an incorporator is required to buy one percent par value of \textit{that} amount or one percent par value of the \textit{minimum} amount for a bank in a community with a certain population?\textsuperscript{44} As a general agency rule, since the statute and practice conflict, an incorporator commitment to purchase the statutory minimum required of a director of a bank\textsuperscript{45} is generally acceptable. This practice is based on the fact that most incorporators do develop into directors and the fact that most organizers make financial commitments beyond all statutory requirements or interpretations. However, for those organizers who do not wish to become directors and for

\begin{itemize}
\item \textsuperscript{41} IBA § 108. Both the minimum incorporator number of five and the limitation to individual, natural persons are common in other jurisdictions. See \textit{Tex. Rev. Civ. Stat.} art. 342-301 (1960); and \textit{Fla. Stat.} § 658.02(12) (1966).
\item \textsuperscript{42} IBA § 108. See IBA § 107 and discussion thereof in text, \textit{infra} note 29.
\item \textsuperscript{43} \textit{Supra} text at note 37.
\item \textsuperscript{44} For example, a proposed Chicago suburban bank in a town with a 35,000 population would require a minimum total capital of $175,000 as per § 107 of the IBA. The agencies, however, generally require $750,000 total capital in this case. Thus, is an incorporator of this bank then required to buy $1,000 or $3,000 of par value stock? Given our Chicago suburban bank with $750,000 total capital, par value of 30,000 shares would be $10.00 while the market price is $25.00. Hence, $1,000 of par value stock would sell for $1,750; $3,000 of par value stock would sell for $7,500.
\item \textsuperscript{45} IBA § 116(4). This provision requires an ownership, free of lien and/or encumbrance, of $1,000 par value stock. In our above example, this would mean an incorporator of a bank with $750,000 total capital would purchase 100 shares at $10.00 per share (par value) for which he would pay $25.00 per share, or a total of $2,500.
\end{itemize}
whom a non-literal interpretation of the minimum investment requirement of the Act is impossible or a hardship, the dilemma remains.

In addition to the minimum share purchase requirement, the Act requires incorporators to be residents of the State and to submit their business or occupation, addresses, a statement of their financial worth, and three references as to their personal character.

A final word concerning incorporators deals with their liability. The IBA and BCA being silent on the liability of incorporators, it is assumed that the general common law of corporations applies. An investigation of Illinois common law reveals no, or, in a few instances, very limited liability. However, where the incorporator can be said to be a promoter, definite duties and liability attach.

Generally, the duties and liabilities of a promoter are:

During promotion, the promoters are in a fiduciary relationship to each other, as in a joint venture. After the corporation is formed, the joint venture relationship is usually terminated and replaced by corporate relations. The liabilities of promoters are two-fold: to the corporation and to the shareholder-creditors of the corporation. The promoters owe the corporation "good faith, fair dealing and full disclosure." To the extent that these duties are not met and damage results to the corporation, the promoters are liable, usually to the extent of the wrongful profit thereby. As to the shareholders and creditors of the corporation, promoters owe: fiduciary duties. Promoters are liable, apart from any liability to the corporation, to any defrauded shareholders and creditors, who would recover either in-

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46. IBA § 108.
47. IBA § 108.
48. IBA § 109 Florida and Texas have similar residency, financial and character disclosure requirements. See FLA. STAT. § 659.02(1) (1966); and TEX. REV. CIV. STAT. art. 342-305 (1960).
49. Ohio and Wisconsin.
50. As a general rule, the liability of incorporators arises where the corporation begins business before satisfying certain statutory conditions precedent. The most common example of this condition precedent is one which prohibits the corporation from transacting business until consideration for shares has been received of at least the value prescribed by statute or in the articles of incorporation. In such a case, the liability of "corporate personnel" (including incorporators) varies from unlimited personal liability in some jurisdictions to personal liability for the unpaid consideration in other jurisdictions. HENN, supra note 17, at 247.
51. According to Henn, a promoter is one who "forms and sets in motion the corporation, continuing in control." Promotional activities include "discovery, investigation, and assembly." Thus, to the extent that incorporators fit this definition and perform these activities, they may be said to be promoters.
52. HENN, supra note 17, at 173.
53. HENN, supra note 17, at 174.
54. HENN, supra note 17, at 177.
dividually or in behalf of their class and not derivatively in behalf of the corpora-
tion.\textsuperscript{56}

Thus, it is seen that where the roles of incorporator and promoter coin-
cide, liabilities attach, not by virtue of incorporators status, but by virtue
of promoter status. In this regard, it is noteworthy to mention that the
retaining of a bank management consultant and servicing corporation as
described earlier\textsuperscript{56} to perform the promoter's function will sever these roles
and provide the incorporators with professional assistance and liability as-
sumption.\textsuperscript{57}

Incorporators having gathered, qualified and assembled their financial
and character information, and all marketing considerations, including
capital structure, location and occupancy, having been determined, for-
mal applications for a permit to organize (to the Commissioner of Banks)
and for deposit insurance (to the FDIC) are now required.

FILING APPLICATIONS WITH THE COMMISSIONER AND FDIC

As stated earlier, the key element in applications for a permit to organize
and deposit insurance is "the needs and convenience" factor.\textsuperscript{58} Accordingly, it is to this factor that the bulk of the applications and required ex-
hibits are addressed. In particular, the following exhibits, which bear
directly on this factor, are required:

(1) A community description which embodies and summarizes the
marketing and research data developed in analyzing the bank po-
tential of the area;\textsuperscript{59} (Specifically, the four factors of population,
wealth characteristics, competitive institutions, and growth po-
tential must be discussed.)

(2) A map displaying the main points of interest in the community
description, especially competing institutions.

(3) A description of banking facilities, including site plans, floor lay-
outs, preliminary blueprints, and a sketch of the proposed building

\textsuperscript{55.} See \textit{supra} note 27 and accompanying text.
\textsuperscript{56.} Generally, the bank management consultants, such as Financial Management
Associates, Inc., described, \textit{supra} note 27, contract with incorporators to perform
the promoter function. Thus, where such a contract is in force, incorporators' sole
liability is for this contract in the unlikely event that the proposed bank should
not adopt it or otherwise novate. Again, this liability is one of contract and is not
imposed by common or statutory corporation law, per se.

\textsuperscript{57.} See "Preliminary Non-Legal Aspects: Marketing Considerations," text \textit{supra}.

\textsuperscript{58.} See "Preliminary Non-Legal Aspects: Marketing Considerations," text \textit{supra}.

\textsuperscript{59.} It is to be remembered that land, building and fixtures may not exceed the
bank's surplus account or roughly 40% of total capital structure. \textit{See supra} note 23.
along with a detailed breakdown of all occupancy costs, especially land and building.\textsuperscript{60}

(4) Evidence of land ownership or commitment to lease or purchase.

(5) A detailed breakdown of furniture, fixtures and equipment expenditures.

In addition to these exhibits which relate to the factor of "need and convenience," other exhibits which relate to the other necessary factors\textsuperscript{61} must be included. These are: (1) financial statements, both balance sheets and profit and loss statements, for the first three years to the bank's operations; (2) a statement of proposed management's experience, age, abilities, and proposed salary; (3) a copy of the proposed subscription agreement that the proposed bank intends to use in connection with the sale of capital stock;\textsuperscript{62} and (4) copies of any contracts the incorporators have executed during the promotional period relating to the organization or operation, servicing, consulting, maintenance, etc. of the bank. Also, a statement of the number of shares, type of shares (common or preferred), duration of shares, and par and market values of those shares must be included.

One final factor requires that the proposed name of the bank not be "deceptively similar" to that of any other bank then doing business in the state.\textsuperscript{63} This factor is based, in part, on a trademark rationale and partially on the prohibition against branch banking in Illinois.\textsuperscript{64} As a general

\textsuperscript{60} Usually, copies of an option, lease, or deed will suffice.

\textsuperscript{61} IBA §§ 109 and 110 detail the information required and the factors the Commissioner's determination must take into account relative to the issuance of a permit to organize: "(1) That the proposed capital [at least] meets the [minimum] requirement[s] of this Act; (2) That the future earnings prospects are favorable; (3) That the general character of its proposed management is such as to assure reasonable promise of successful operation; and (4) That the name of the proposed bank is not the same as or deceptively similar to the name of any other bank operating in this state . . ." (These factors are in addition to the "needs and convenience" factor.) See Northtown Bank of Decatur v. Becker, 31 Ill. 2d 529, 202 N.E.2d 540 (1964).

\textsuperscript{62} Again, a parallel to the registration rationale of securities is relevant, even though bank securities are generally exempt from federal securities law and state "blue sky" laws. Since a subscription agreement is a contract to purchase as yet unissued shares, it should be based on access to all material facts. The Commissioner, in his role of protector of future depositors and shareholders, demands that these agreements clearly convey and represent these facts (especially when part of a prospectus) thereby protecting subscribers from fraudulent schemes while in their highly vulnerable, "limbo" state—i.e. greater than a mere creditor, but less than a full shareholder.

\textsuperscript{63} IBA § 110(4), motivated by a prevention of public confusion.

\textsuperscript{64} IBA § 106. See also Northtown Bank of Decatur v. Becker, supra note 61. Further, other unit bank states use the phrase "deceptively similar names." See Fla. Stat. § 659.03(2)(e) (1966).
proposition, the selection of a name for a bank is marketing consider-
ation. However, where that decision yields a name which could be con-
strued as deceptively similar, it is to be noted that, although “[i]t is
[a] well known [fact] that a broader latitude has been allowed in the
matter of similarity of names in banking institutions than perhaps in
ordinary commercial enterprises.”65 “[D]eceptively similar” applies to all
names unless they are generic or geographical.66 However, even these
exceptions do not apply where “estoppel, actual fraud or public misleading
results.”67

As a practical matter, upon the filing of an application for a permit to
organize, the Commissioner, if he finds a “deceptively similar” name, will
order an amendment to the application be made, changing the bank
name as a condition precedent to the granting of a permit. In addition,
after organization and issuance of a charter, the Commissioner will not
permit any charter amendments of the bank’s chartered name to one
which is deceptively similar to that of an existing other bank.68

With the completion of the exhibits bearing on these factors, all the
information required by the Commissioner of Banks and the FDIC is
complete. The applications are then filed with the respective agencies, who
are charged with the duty of investigating “the truth of the statements
therein”69 and “causing an investigation to be made and an examination
of the proposed bank conducted.”70 As a general proposition, this ex-
amination is jointly conducted by the Commissioner of Banks office, the
chartering agency, and the FDIC, the insuring agency. The examination
consists of examiners spending time in the community wherein the bank
seeks location, verification of all exhibits and statements made in the ap-
plications, interviews with competing institutions, local business and indus-
tries, character and credit investigations of the incorporators, manage-
ment and proposed directors, and inspection of the proposed bank site. At

change in name to “The Arizona Bank” was contested by the Southern Arizona
Bank and Trust Company, and held not to be deceptively similar.
Mo. App. 19, 172 S.W.2d 967 (1943). Examples of generic names are “state” and
“national,” “savings” and “trust.”
67. Id. at 970.
68. IBA § 117(1) provides: “Changes in Charter. By compliance with the
provisions of this Act a state bank may: (1) Change its name, provided that no
name shall be the same as or deceptively similar to the name of any other bank
then operating in this state. . . .”
69. IBA § 110.
70. Federal Deposit Insurance Corp. Rules and Regulations, 12 C.F.R. § 303.10
(a) (1967) [Hereinafter FDIC Rules & Regs.].
the conclusion of the examination, reports are written and recommendations made to the Commissioner of Banks, and the District Supervising Examiner and Board of Directors of the FDIC, for their determination.

The procedure followed by the FDIC in the examination, recommendation, and final determination process is, of course, uniform throughout the country since the FDIC is a national corporation. However, the examination, recommendation and final determination procedure followed by the states varies. Several states, Illinois and Florida included, followed by the process outlined above. Texas, however, follows a somewhat different, if not more effective and thorough process. This process requires the Texas Commissioner to report his findings to the State Banking Board which has the final discretion in the granting of a charter. The Board is a quasi-judicial administrative agency which is empowered to hold hearings on bank application. In addition, the Board has the power to consolidate competing applications. Finally, the Board is subject to the rules of due process and evidence. In any case, all three states, Illinois, Florida and Texas share the final, albeit impractical, step in the process; that is, the decisions of the Commissioners of Illinois and Florida and the State Banking Board of Texas are subject to judicial review.

One final practical note in regard to the examination, recommendation, final determination process: The Commissioner of Banks and FDIC, having concluded their individual reports and examinations, are jointly concerned with the proposed bank. This concern entails the sharing of information and recommendations and falls just short of a concert of decisions. This joint action is designed to bring greater scrutiny and expertise to bear upon the applications and prevent the embarrassing situation of a chartered bank denied deposit insurance or an insured "bank" denied a charter. Consequently, although the Commissioner grants a successful applicant an immediate permit to organize, the FDIC does not make an insurance commitment until a charter is imminent. Thus, neither agency makes its final commitment to the bank in organization until the organization process is complete; this is, until the stock is completely sold, a sub-

71. See FLA. STAT. § 659.03 (1966); see also National Bank of Tampa v. Green, 175 S.2d 545 (Fla. 1965).
74. Id.
76. "It does not follow that because the Director (Commissioner) may be of the opinion that a permit should issue that he be foreclosed of the right to refuse to issue a charter after compliance with the organization procedures outlined in the Act." Northtown Bank of Decatur v. Becker, 45 Ill. App. 2d 212, 195 N.E.2d 404, 409 (1964).
scriber-shareholder meeting held, directors and officers elected, by-laws adopted and the stock subscriptions completely collected in the name of the proposed bank.\textsuperscript{77}

It is this organization process which will now be examined.

**PERMIT TO ORGANIZE**

The granting of a permit to organize fulfills a primary function: it permits the proposed bank to seek subscriptions for its capital stock. Secondarily, the permit allows the bank, when the point of full subscription is reached, to call a subscriber's meeting for the purpose of electing directors.\textsuperscript{78}

In effect, a permit to organize is a temporary license, capable of renewal on good cause, allowing a non-corporate entity to solicit equity contributions. It is, in this regard, another protection device, insulating the community from fraudulent schemes and represents an anomaly in the field of corporate organization.

The vehicle for solicitation of capital contributions is the subscription agreement, discussed earlier.\textsuperscript{79} An additional vehicle for solicitation is the prospectus. In this regard, it is to be noted that the IBA contains no reference to use or requirements of a prospectus. Further, the Illinois "blue sky" law specifically exempts bank securities from registration.\textsuperscript{80} Finally, bank securities, unless subject to Section 12(g)(1) of the 1934 Securities Act,\textsuperscript{81} are exempt from the coverage of both the 1933 Securities

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\textsuperscript{77} IBA § 112 provides: "Organization. The directors so elected may proceed to organize in conformity with this act and as follows: (1) to qualify themselves as directors; (2) to elect one of their number as president; (3) to make and adopt by-laws for the government and operation of the bank; (4) to appoint such officers as the by-laws may provide, and fix the salaries of all officers; (5) to furnish to the Commissioner lists of the stockholders and copies of any other records the Commissioner may require; (6) to collect the subscriptions to the capital stock and to the preferred stock, if any, including the surplus and the reserves for operating expenses; (7) to report the organization to the Commissioner."

\textsuperscript{78} IBA § 111 provides: "Stock Subscription. As soon as may be after receipt of a permit to organize, books of subscription to the capital stock and to the preferred stock, if any, may be opened, and when the capital stock and preferred stock shall have been fully subscribed for, a meeting of the subscribers to the stock shall be called (each subscriber having had, or waived, at least three days' notice) for determination of the number and election of directors as herein provided to serve as directors for one year and until their successors are elected."

\textsuperscript{79} Supra note 62 and text.

\textsuperscript{80} Illinois Securities Act of 1953, ILL. REV. STAT. ch. 121\textfrac{1}{2}, § 137.1 et seq. (1969). [Hereinafter referred to as Illinois Securities Act of 1953].

\textsuperscript{81} Five hundred or more shareholders, and operating assets exceeding $1,000,000 subject the bank to registration with the FDIC. Securities Exchange Act of 1934, 15 U.S.C. § 78(1)(g)(1) (1964).
Act and the 1934 Securities Exchange Act.82 One important exception to the lack of coverage of the Federal securities law is found in the 1933 Securities Act83 which provides that banks and other exempt securities are not exempt from liability for fraudulent interstate transactions.84 Additionally, persons selling bank securities within Illinois (such that the Illinois Securities Act of 1953 applies) are subject to the violation section,85 the civil remedies section,86 and the penalties section.87

As a result of the applicability of the civil and criminal penalties and liabilities to the sale of bank securities, and due to the fact that no registration requirements apply,88 the sellers of the capital stock in the proposed bank should take great care to insulate themselves from possible charges or causes of action at a later date. This can be done by availing them-

83. § 17 of the Securities Act of 1933 provides: “Fraudulent Interstate Transactions: It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly: (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.”
84. § 17(c) of the 1933 Securities Act provides: “The exemptions provided in Section 3 (Exempted Securities) shall not apply to the provisions of this Section.”
85. Illinois Securities Act of 1953, § 137.12 is the violation section of the Illinois securities law and provides that any transaction, practice or course of business which tends to work a fraud or deceit, as well as the obtaining of money or property through the sale of securities by means of an untrue statement of a material fact or the omission of a material fact, shall be violations of the Act. Additionally, the Act is violated by the employment of any device, scheme or artifice to defraud, directly or indirectly, and that the engaging in any act, practice or course of business which is fraudulent, deceptive or manipulative is prohibited.
86. Illinois Securities Act of 1953, § 137.13 contains the civil remedies for violation of the Securities Act. Generally, all sales in violation of the Act are voidable at the election of the purchaser, the sellers of that security being jointly and severally liable for the full amount paid with interest and the attorney’s fees of the purchaser. It is to be noted that this section provides for a bar to the exercise of the civil remedy under the Act where the seller offers to repurchase the security for the full amount paid with interest. Any such repurchase offer must be in writing and shall continue in force for 15 days.
87. Illinois Securities Act of 1953, § 137.14 provides the penalties for violation of the Illinois Securities Act. Those so convicted for procedural violations are guilty of a misdemeanor and are subject to a $5,000 fine and/or up to one year imprisonment. Those convicted of the fraud and deceit provisions of the Act are guilty of a felony and are subject to a fine of $10,000 and/or up to three years imprisonment. Any second conviction for any offense prohibited by the Act carries a $25,000 fine and/or up to five years in jail.
88. Section 12(g)(1) of the 1934 Securities Exchange Act is an exception.
selves of the rationale of securities law that “[t]he essential purpose of the statute is to protect investors by requiring publication of certain information concerning securities before offered for sale.” As a consequence, a prospectus should conform with this rationale in every reasonable fashion. Finally, it would appear that the offering of new bank stock through an underwriter is prohibited in Illinois.

Upon completion of the marketing of the stock—the so-called point of “full subscription”—organizers are empowered to call a subscribers’ meeting, upon the giving of due notice, for the purpose of determining the number of directors and electing directors to serve for one year and until their successors are determined.

With the mailing of the notice of the subscribers’ meeting, organizers may also wish to solicit proxies from those subscribers unable to attend the meeting or desirous of having their shares voted by one or more persons, usually organizers, as their attorneys-in-fact.

As a general proposition, proxies must be in writing, executed by the subscriber or his attorney-in-fact, and are generally valid for eleven months. Additionally, proxies are revocable upon notification or attendance at the meeting, unless the proxy is one “with an interest” or “true security.” Furthermore, the proxy holder may not violate the terms of his agency, the contemplated limits of the proxy, i.e., the determination and election of directors.

Subscriptions held in the name of another corporation, estate, guardian, conservator, trustee, receiver with court authority, or pledges with title may be voted by that person or his proxy.

Upon a determination that a quorum of outstanding subscription-shares is present, either by proxy or in person, the meeting may be held

90. IBA § 113 provides (in part): “Commissioner may . . . withhold the issue of said charter when he has reason to believe . . . a commission or fee has been paid in connection with the sale of the stock of the bank.” However, the Commissioner’s office has verbally indicated that there has been (and is now) no situation in which this discretion would be exercised to allow commissions or fees. The rationale is a fear of capital impairment and a desire to distribute new bank stock in the community wherein it will be located. It is noteworthy to contrast new bank stock in this regard with existing bank stock which is freely traded on several exchanges and for which fees or commissions are charged.
91. IBA § 111.
92. IBA § 111.
93. IBA § 115(3).
94. HENN, supra note 17, at 383.
95. HENN, supra note 17, at 381.
96. IBA § 115(6).
97. A majority of the outstanding shares, IBA § 115(3).
and each subscriber shall have the right to cumulatively vote, in person or by proxy, on the number of directors to be elected and on the election of directors, who need not necessarily be incorporators. In addition, each stockholder has the right to nominate candidates for directors and, provided the minimum director stock ownership requirement is satisfied, to be elected to a directorship upon receipt of a majority of the votes representing shares present at the meeting.

Upon completion of the election of directors, the subscribers' meeting has fulfilled its purpose and the organization of the bank continues with the first directors' meeting thereafter.

ORGANIZATION: DIRECTORS' MEETING AND SUBSCRIPTION COLLECTION

Having been elected and qualified, the proposed bank's directors now meet to elect a president from their number, make and adopt by-laws, appoint officers and fix their salaries, compile and furnish the Commissioner of Banks with a shareholders' list, and such other documentation as he may require, collect the subscriptions for the bank's shares, and report the organization to the Commissioner. In addition to these items, the Commissioner and FDIC require that the directors each execute an agreement not to borrow from the new bank for five years without pledging adequate, negotiable collateral. As a Board, the directors are required to adopt a resolution wherein the bank agrees not to exercise trust powers without the prior consent of the FDIC. Resolutions author-

98. "Not less than five nor more than twenty-five," IBA § 116(2).
99. IBA § 116(2). See also IBA § 111. One of the elected directors must serve as bank president, IBA § 116(7).
100. IBA § 116(4) provides that each director shall own $1,000 worth of par value stock, free of lien and encumbrance, which he shall deposit with the bank's cashier for the term of his directorship.
101. IBA § 116(4). Note that, by strict interpretation of the IBA in this regard, it is possible for an individual to be elected director without qualification since qualification is a requirement relating to the exercise of one's authority as a director, not election thereto. IBA § 112(1). Also, these shares may not be hypothecated or pledged in any way during the directorship, IBA § 116(3)d.
102. It is noteworthy that by-laws are adopted by directors, not shareholders, in Illinois. Thus, by-laws may be properly adopted without any shareholder discussion or knowledge of their provisions.
103. IBA § 112.
104. Although not specifically so provided in the IBA, this five year, "no borrow" provision is within the authority of Commissioner: § 112(5) of the IBA provides that organization of the new bank may include "copies of any other records the Commissioner may require."
105. Trust companies are separate entities which require independent incorporation procedure in Illinois. ILL. REV. STAT. ch. 32, §§ 287-304 (1969).
izing the establishment of correspondent bank account(s),\textsuperscript{106} authorizing the Cashier or some other trustee to invest subscription collections until they are fully collected and the bank chartered and opened for business, and authorizing the purchase of fidelity bond and liability insurance for the bank, are also executed. Each director is also required to take a fealty oath, whereby he swears to diligently and honestly perform his fiduciary duty to the bank, not knowingly violate the IBA, and preserve his qualifying shares from encumbrance during his directorship.\textsuperscript{107}

Other business which the first directors’ meeting should consider is the matter of directors’ fees, if any; and the election of a Chairman of the Board, Executive Committee, and Secretary of the bank.

As a final matter, the directors should ratify and adopt the organizational activities of the incorporators,\textsuperscript{108} particularly contracts for management and services,\textsuperscript{109} any deeds, leases, or options executed on behalf of the bank; as well as any and all other actions taken by the incorporators on the bank’s behalf, which, in the judgment of the directors, are properly the responsibility and obligation of the bank. Further, the directors may compensate the incorporator-promoters for the reasonable value of their services, as well as for their expenses, where no contract for these services and expenses has been executed and adopted on the bank’s behalf.\textsuperscript{110}

\textsuperscript{106} This account is for the depositing of subscription payments as they are collected and is in the nature of an escrow fund account—\textit{i.e.}, in the event the proposed bank were unable to sell its stock and be chartered, each subscriber would be returned his money with any interest so earned.

\textsuperscript{107} IBA § 116(3) provides: “(3) Each director upon original election to the board of directors, and upon each subsequent election where any period has elapsed in which he was not a director, shall take and subscribe to an oath of fealty to the bank (a) that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the bank, (b) that he will not knowingly violate or willingly permit to be violated any of the provisions of this Act, (c) that he is and will remain the owner in good faith and in his own right of the number of shares required by this Act, and (d) that the same is not, and will not be, hypothecated or in any way pledged as security for any loan or debt as long as he remains a director. Such oath subscribed by affiant shall be immediately transmitted to the Commissioner to be filed in his office.”

\textsuperscript{108} FDIC Rules and Regs., 12 C.F.R. § 304.3(c)(1967), requiring Form 82(a), a copy of the Board of Directors resolution approving the action of the incorporators in applying for deposit insurance, to be submitted.

\textsuperscript{109} FDIC Rules and Regs., 12 C.F.R. § 334 \textit{et seq.} (1963), implementing Bank Service Corporation Act § 5, 76 Stat. § 1132 (1962), provides that both the Board of Directors and the party performing services must agree to be subject to FDIC regulation and examination.

\textsuperscript{110} The newly-formed corporation may be bound to compensate the incorporator-promoters for their preincorporation services where the corporation so expressly provides or where the corporation may be said to have impliedly assumed this liability by acceptance of the benefits of those preincorporation services. \textsc{Henn}, \textit{supra} note 17, at 187.
Finally, the organization of the bank is to be reported to the Commissioner\textsuperscript{111} and, an agreement not to execute trust powers, an affidavit of the directors evidencing dedication of capital, the directors' fealty oaths, certified copies of the organization minutes of the shareholder and directors' meeting, and certified copies of the by-laws, must be submitted.\textsuperscript{112}

With the organization completed, the collection of subscriptions now commences. There are no statutory requirements in the IBA concerning the amount of time permitted for collection or requiring a notice period to be given; thus, the common law requirement of "reasonableness" in both the collection period and notice requirements are thought to be sufficient.\textsuperscript{113} Upon receipt of a call for payment, the subscriber is obligated to remit payment, his subscription amounting to an irrevocable offer to purchase, which is actionable and enforceable in Illinois, if in writing\textsuperscript{114} and absent fraud.\textsuperscript{115} As a practical matter, however, where a default on a subscription occurs, the proposed bank, through its collection agent,\textsuperscript{116} elects to treat that subscription as forfeit and endeavors to re-solicit subscription (and payment) for those shares from the other subscribers\textsuperscript{117} or third parties.

As stated above, payments for subscriptions are kept in escrow until full payment is achieved. At this point, upon receipt of notification of full payment, the Commissioner will initiate a "thorough examination . . . of the proposed bank"\textsuperscript{118} and:

\begin{enumerate}
\item IBA § 112(7).
\item COMMISSIONER OF BANKS AND TRUST COMPANIES, INSTRUCTIONS FOR ORGANIZING: PURPOSES & PRIVILEGES 4 (1970).
\item In this regard, the BCA may be used as a guide. BCA § 16 provides that the notice required for a call for payment of subscriptions shall be determined by the Board of Directors unless otherwise provided in the subscription agreement. Further, subscription agreements are irrevocable offers for six months unless otherwise provided or unless all subscribers agree to a revocation.
\item UNIFORM COMMERCIAL CODE § 8-319; ILL. REV. STAT. ch. 29, § 8-319 (1969) provides that: "A contract for the sale of securities is not enforceable unless: (a) there is some writing signed by the party against whom enforcement is sought. . . ."
\item HENN, supra note 17, at 310. Note, however, that the BCA § 16 provides that no penalty (including forfeiture) for nonpayment arises until twenty days after written notice and demand for payment has been made.
\item Usually the Cashier-Secretary.
\item In deference to any preferential rights which might be held. It is thought that, where subscribers are deemed to have the rights and liabilities of shareholders upon subscription (as in Illinois) preferential rights might indeed attach such that a waiver is required. Further, the IBA § 115(4) provides for the existence of such rights in bank shareholders of record whenever the stock of the same class is offered for sale. (A possible solution to this dilemma may be in definitions: \textit{i.e.}, although subscribers are deemed like shareholders for determining rights and liabilities, this status may not amount to that of a shareholder of record.)
\item IBA § 113.
\end{enumerate}
if satisfied that all the requirements of this Act have been complied with, and that no
intervening circumstance has occurred to change the Commissioner’s findings made
pursuant to Section 10 of this Act,119 upon payment into the Commissioner’s office of the reasonable expenses of such examination, as determined by the Commissioner,120 he shall issue a charter authorizing the bank to commence business as authorized in this Act.121

In addition to this action taken by the Commissioner, the FDIC, according to rules122 and by virtue of its relationship with the Commissioner’s office,123 will now notify the proposed bank of the disposition of its application for deposit insurance, although the insurance is not immediately effective.124

Finally, should a charter be denied improperly, judicial review is theoretically available.125 Where an application for deposit insurance is denied, the FDIC provides for an informal hearing or conference discussion for the presentation of evidence,126 although judicial review also lies.127

ISSUANCE OF CHARTER

The final act in the organization process is the recording of the charter with the Recorder of Deeds of the county wherein the bank is to be located.128 Further, “[u]pon the recording of said charter, the bank shall be deemed fully organized and may proceed to do business.”129 Also,

119. IBA § 110 provides for finding that minimum capital requirements are met; that future earnings prospects are favorable; that the bank’s name is not deceptively similar to any other, and that needs and convenience of the area are served. These factors must be reexamined because the application for a permit is subject to post-filing amendment.
120. $500.00.
121. IBA § 113.
122. FDIC Rules and Regs., 12 C.F.R. § 303.11 (1969) provides: “Notice of Disposition of Application. Prompt notice will be given of the grant or denial, in whole or in part, of any written application, petition, or other request of any interested person made in connection with any agency proceeding. In the case of a denial, except in affirming a prior denial, or where the same is self-explanatory, such notice will be accompanied by a simple statement of procedural or other grounds.”
123. See “Filing Applications with the Commissioner and the FDIC,” text supra.
124. The effective date of deposit insurance is the bank’s opening day. In this regard, it must be remembered that the FDIC insures only deposits and not capital. Hence, the need for insurance does not arise until opening day and deposits are first received.
125. Supra note 76 at 543, citing American Surety Co. v. Jones, 384 Ill. 222, 51 N.E.2d 122 (1943), holding that mandamus will lie to compel the Director (Commissioner) to do his statutory duty.
128. IBA § 113.
129. IBA § 113. However, note that the bank must commence business within
“the original [recorded charter] or certified copy thereof, shall be evidence in all courts and places of the existence and authority of the said bank to do business.”

Within thirty days after the issuance of the charter, the bank must provide the Commissioner with a certified list of the original shareholders of the bank, giving the number of shares held by each. Thus, this requirement implies that the shareholders of the bank have been issued certificates of stock subsequent to the granting of a charter, and that corporate books for this purpose have been established and are being maintained.

With the recording of its charter, the new state bank now gains all the duties, rights, powers, and limitations imposed on all its sisters in the State of Illinois. Among these powers and limitations are: (1) General corporate qualities, i.e., the power to be sued and to sue; to have a corporate seal; to make, alter and repeal by-laws; to appoint offices and fix their salaries; to adopt bonus, pension, profit-sharing, and other incentive plans; and to make charitable donations; (2) Basic banking powers, i.e., to borrow and pledge its assets; to secure deposits of public money of the State and United States; to hold title to real estate, personal property and stock in other corporations; to make loans and maintain and administer demand and time deposit accounts; and to lease real and personal property; (3) Special bank power, i.e., to maintain a “drive-in” facility other than the main banking facility, but no more than 1500 feet from the main facility, for the sole purpose of paying and receiving deposits.

one year from issuance of charter, or the Commissioner shall revoke the charter and order liquidation unless an extension is requested and approved by him. IBA § 113. Presumably, this year can be used for constructing, furnishing and equipping the bank’s facilities.

IBA § 113. By way of comparison, a charter and a certificate of authority to do business are not one and the same in Texas. In that state, a bank comes into existence only after the charter application is approved and certified copies of association are delivered to the incorporators. Thereafter, the bank may complete organization and recording, subsequent to which a certificate to do business is issued. This certificate is required to be kept posted in the bank’s lobby at all times. See T.R.S., art. 342-305 et seq. (1966); see also FDIC Act § 328.1(a) which is similar to this Texas posting provision in that it requires the insured bank to display signs stating their deposits are insured.

IBA § 115(8). Additionally, this section requires the bank to notify the Commissioner of any transfers in ownership of shares within 30 days of transfer.

IBA §§ 105(1)-105(6).

IBA §§ 105(7)-105(14).

IBA § 105(15). Other requirements of this provision allowing a drive-in facility within 1500 feet of the main bank building are that the facility be no closer than 600 feet to any other main banking facility without the consent of that other facility unless these facilities are located in a city with population greater than 500,000 or the facility is closer to its own main bank than to that of its competitor. Additionally, the drive-in facility must provide adequate “stacking” for waiting
(4) To refrain from branch banking;\(^{135}\) (5) To observe basic loan limits\(^{136}\) as well as limitations on investments; (6) To observe the requirements on loans to its officers, examiners and affiliates;\(^{137}\) (7) To permit no depletions of its capital;\(^{138}\) (8) To make quarterly reports on its condition to the Commissioner.\(^{139}\) For violations of the IBA, the Commissioner shall notify the bank's board of the deficiencies and allow them sixty days to correct them. In the event this is not accomplished to the satisfaction of the Commissioner, he shall have the power to take possession of the bank and its assets and appoint a receiver, reorganize, or liquidate the bank.\(^{140}\)

Having thus traced the legal mechanics by which a state bank is organized in Illinois, as variously compared with the mechanics used in Texas and Florida, it is now relevant to complete analysis of this process by formulating critical observations into functional conclusions.

CONCLUSION

In examining the above-described process, it is evident that entry into the banking industry is radically different from the non-regulated entry procedures of other industries. The reasons for the regulation are also

vehicles, other than the public street; and the facility must provide for reasonably adequate egress and ingress. Finally, the main bank may not establish or maintain any more than one such drive-in facility at any given time, unless such additional facilities are adjacent to and connected with the main bank facility.

135. IBA § 106.
136. IBA §§ 132-35.
137. IBA § 135.2, 137, and 140. As a general rule, these sections prohibit the bank from making loans to bank examiners under pain of criminal liability and require that loans over $5,000 to bank officers be approved by the bank's board of directors. Finally, it is not unlawful for a bank to make a loan on the security of its own shares or capital notes.
138. IBA § 141 provides: "Depletion of Capital. During the time that a state bank shall continue its banking business, it shall not withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. . . ."
139. IBA § 147.
140. IBA § 151 provides: "Capital Impairment, etc.; Correction. If the Director with respect to a state bank shall find: (1) Its capital is impaired or it is otherwise in an unsound condition; or (2) Its business is being conducted in an unlawful, including, without limitation, in violation of any provisions of this Act, or in a fraudulent or unsafe manner; or (3) It is unable to continue operations; or (4) Its examination has been obstructed or impeded; the Director may give notice to the board of directors of his finding or findings. If the situation so found by the Director shall not be corrected to his satisfaction within sixty days after receipt of such notice, the Director shall take possession and control of the bank and its assets as in this Act provided for the purpose of examination, reorganization or liquidation through receivership."

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equally evident: banking is a quasi-public industry, largely dependent on public confidence and publicly deposited money, for its survival. Furthermore, the economic structure as a whole rises or falls with the health of its financial institutions. Consequently, strict entry regulation is a necessity. Of equal necessity is the need of all economic sectors for the services which banks provide. Thus, the economy has a vested interest in seeing that banks are in sufficient supply to service these demands at a reasonable price.

As a result of the interaction of these two factors, i.e. public protection and economic demand, bank entry regulation has evolved into a governmentally-sanctioned franchising system, rather than a mere incorporation vehicle. Coupling this franchise-like system with the finite number of new bank opportunities and the valuable nature of a bank charter for profit generation, agencies charged with regulating bank entry find themselves in a difficult position:

The chartering of new banks represents, in many respects, the most delicate task which confronts the bank regulatory authorities. A new bank represents a new competitor, and a new competitor is hardly welcome in any industry. On the other hand, since bank charters are valuable because they are in limited supply, they are actively sought by competing applicants. The public authorities are thus subjected to intense pressures both from those who seek charters and those who would oppose them. Moreover, in reaching decisions on charter applications, there can be no absolute certainty of the fate that will befall new banks or their competitors.141

Given this "intense pressure," as well as the influencing factors of great economic demand, limited supply, and the public protections policy, it is the conclusion of the author that certain statutory inadequacies exist in Illinois and that the Illinois bank entry procedures could be reformed to effect a better balancing of all the competing interests involved in a new bank application for a permit to organize.

STATUTORY INADEQUACIES

Clearly, "the fair and natural assumption" in 1916, of the Adams State Bank case142 that the wealthier populace, the more able they are to support a bank, is still a viable proposition, even though "double shareholder liability" is no longer the law in Illinois. However, this nexus between population and bank, and, more particularly, between population and minimum capital structure, is no longer adequately reflected by Section 7 of the

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Rather, some statutory statement of current agencies' practice—i.e., certain minimum capital structures based on locale and proximity to Chicago and capital structure based on a percentage of projected deposits, subject to realistic minimums—should be substituted for Section 7, now obsolete and misleading.

In this same vein, the current capital allocations set out in Section 7 should be updated to reflect the minimum standards realistically demanded by the FDIC and Commissioner of Banks. Again, obsolescence and misrepresentation have precipitated this need for change.

The adoption of by-laws is now the province of the directors. It is the considered opinion of the author that shareholders, not directors, ought to be the adoptive vehicle. "By-laws are the rules and regulations . . . [which] regulate, govern and control . . . [the] actions . . ." of the corporation and, as such, ought to emanate from the shareholders. Further, since by-laws contain requirements directly related to control and management of the corporation, adoption, as well as creation, of by-laws by the directors in control creates a self-perpetuating oligarchy. By requiring shareholders to adopt by-laws, management and directors will be called upon to justify and explain the by-laws to those to whom they owe a fiduciary duty, and investors will be thus properly educated.

At the present time, the IBA is silent as regards the notice and time requirements for payment of subscriptions. It is suggested that a provision similar to Section 16 of the BCA be enacted to fill this void.

As with every statute, areas other than those mentioned above are cloudy and obsolete. The fact that the Commissioner has discretion in the matter of commissions and fees charged in connection with the sale of new banks' stock and the lack of statutory definition given the role of the subscriber are other examples of statutory inadequacy in the IBA new bank organization sections. It is the feeling of the author that these statutory inadequacies are, in part, the result of the procedural system necessary to amend the IBA; that is, statewide popular referendum, not mere legislative act, is the means of an Illinois Banking Act change. A change in the change

See "Initial Considerations: Capital Requirements," text supra. Note that a clarification of this section would in turn, clarify Section 8, discussed, supra note 44, supra note 44.

Supra note 44.

IBA § 112(3).

HENN, supra note 17, at 233.

See "Organization: Directors' Meeting and Subscription Collection," text supra.

ILL. CONST. art. 11, § 5 (1870).
process from referendum to bill\textsuperscript{149} would insure a statutory responsiveness to the changing financial realities of the economy and people of the State of Illinois.

\textbf{REGULATORY REFORM}

Although correction of the statutory inadequacies would constitute a good beginning, no effective and consistent application of the public policies underlying bank entry regulation is possible without concomitant reform of the system responsible for the implementation of the Banking Act. This system, as it currently exists in Illinois, does indeed subject its administrators to the "intense pressure" described by Comptroller Saxon and fosters a belief in the economic and financial communities that bank entry is simply another species of political animal.\textsuperscript{150} This belief, if at all founded, represents, at best, a general weakening of the public trust upon which the banking industry is so dependent; and at worst, betrayal of the public right to the most qualified financial services possible. In this regard, it is essential to observe that the actual existence or non-existence of politics in bank entry regulation is somewhat immaterial; rather, the proximate cause of harm is a system of regulation which does not thwart this political propensity at every opportunity.

To maintain that a system can be structured which will eradicate any political influence or opportunity would be scholastic naiveté; however, a system of bank entry regulation does exist which exhibits the qualities necessary for minimization of political influence and maximization of the underlying public policy rationales. It is the opinion of the author that such a system exists in the State of Texas.

Basically, the system of regulation of bank entry utilized by Texas is vir-

\textsuperscript{149} A possible exception to amendment of the IBA by legislative bill might be carved out for the removal of the branch banking prohibition.

\textsuperscript{150} This belief is nurtured by the wide, if not absolute discretion, given the Commissioner of Banks in the matter of bank entry and bank entry regulation. Further, the paucity of successful reversals of alleged wrongful exercise of this discretion by judicial review lends further credence to this political image. \textit{See} Skokie Federal Savings and Loan Association \textit{v.} Becker, 26 Ill. 2d 76, 82, 185 N.E.2d 861, 867 (1962) where the court said: "It should be noted that the findings required by the statute and made by the Director are not simple findings of readily ascertainable facts, but represent the application of expert administrative judgment to the evidentiary facts. Such terms as 'need,' 'public convenience,' 'reasonable probability of success'... are not facts that are susceptible to precise proof or measurement by any satisfactory judicial yardstick. They involve matters of judgment and policy. Under such circumstances, a court may not substitute its judgment for that of the administrative agency... unless without substantial support on the record." (emphasis author's).
tually identical to those used by other unit banking states, such as Illinois and Florida, and this paper has demonstrated several of the major points of similarity. By way of repetition, the systems used by the three states vary little in such requirements as number of incorporators, data and factors required in an application for a charter, and examination of applications. Differences such as minimum capitalization and allocation, determination and voting for directors, and unique corporate powers are minor and attributable to local custom, economic necessity, and the financial histories of the states. It is at a point after the examination of the application by the regulatory agency of the state that the Texas and Illinois systems differ.

In Texas, the Commissioner of Banks and Trust Companies has essentially an investigatory, fact-finding responsibility in the area of new bank applications. He reports these findings to the State Banking Board and the decision regarding the disposition of the application rests with the Board. This Board is a quasi-judicial administrative body with the power to consolidate competing applications and review those of its decisions which it does not deem final. The Board is charged with holding hearings to determine the merits of applications, and has the power to issue a conditional charter subject to revocation if the deficiencies are not satisfied. These merits are evaluated by statutory factors, much like those found in Section 10 of the Illinois Banking Act.

Where the Board is satisfied with the meritorious nature of an application, articles of association are granted but not delivered until the payment of subscriptions has been received in full. After such receipt, the articles are delivered and recorded, thereby empowering the bank to organize—i.e., elect directors, officers, adopt by-laws, etc. Subsequent to a proper organization, the Commissioner is authorized to issue a certificate of authority to do business and the bank may begin to accept deposits and carry on a general banking business.

It is the belief of the author that such a system minimizes pressure on the regulatory process by dividing this function between two entities—

151. TEX. REV. STAT. article 342-305.
152. TEX. REV. STAT. art. 342-305.
153. 8 TEX. JUR. 2d § 61.
154. 8 TEX. JUR. 2d § 61.
156. TEX. REV. STAT. art. 304-07 (1966).
157. 8 TEX. JUR. 2d § 67 states: "Certificate of Authority to do Business. A state bank may not do business until it receives a certificate of authority from the commissioner. The certificate may not be delivered until the bank has elected the officers and directors named in the charter application, or other officers and directors approved by the commissioner, and has adopted by-laws approved by him and complied with all other requirements of the banking statutes relative to the incorporation of state banks."
the Commissioner as fact-finder, and the Board as judge of the merits; minimizes political influence by requiring a decision to be based on the results of an open quasi-judicial hearing on the merits;\textsuperscript{158} guarantees, through the Board's power to consolidate applications, that a particular area's need for banking facilities will be fulfilled; and through the granting of articles of association, delivery of articles, recordation, and granting of a certificate of authority to do business, insures that, at all times during the organization period, the double scrutiny of the Commissioner and State Board is brought to bear, thus double protecting the shareholders and future depositors.

In view of these clear benefits of the Texas Board system, it is not surprising to learn that the Illinois Banking Act also provides for a Board of Banks and Trust Companies, even though in an advisory capacity to the Commissioner of\textsuperscript{159} Banks. This Board is composed of two classes of members: (a) four public members, who own less than 5\% of the stock of any bank and are not officers or directors of any bank; and (b) six banking members, who are required to have ten years bank experience and be executive officers of banks in the state. Of the six banking members, two must be from banks less than $10,000,000 in assets; two from banks of $10 to $100,000,000 in assets; and two from banks of over $100,000,000 in assets.\textsuperscript{160} It is the function of this Board to meet at least quarterly and advise the Commissioner and Governor in the matters of banking regulation and banking reform.\textsuperscript{161} Membership on the Board is by gubernatorial appointment, with the advice and consent of the State Senate, and is for terms varying in length from one to three years.\textsuperscript{162} No compensation is provided.\textsuperscript{163} Of particular note is the first statutory power held by this advisory Board:

(a) To make, alter and amend rules and regulations proposed for adoption by the Commissioner with respect to the following matters:

(i) The scope and nature of showing to be furnished and evidence to be presented in connection with the granting of charters for new banks.\textsuperscript{164}

\textsuperscript{158} The FDIC also permits an informal hearing for applicants or opponents. FDIC Rule and Regs., 12 C.F.R. § 303.10(e) (19\textsuperscript{19} ).
\textsuperscript{159} IBA §§ 178-80.
\textsuperscript{160} IBA at § 178.
\textsuperscript{161} Some examples of banking regulation and reform upon which the Board is to give the Commissioner advice are the evidence necessary in connection with the granting of charters, approvals of mergers, consolidations, or conversions; content and nature of reports required to be made to the Commissioner; to recommend changes in the IBA or its administration; and "to review, consider, and make recommendations to the Commissioner upon any banking matters." IBA § 180.
\textsuperscript{162} IBA §§ 178-79.
\textsuperscript{163} IBA § 181.
\textsuperscript{164} IBA § 180(a).
At the present time, no such rules and regulations exist.

On the basis of the advantages of Bank Board System, as variously acknowledged by the Texas and Illinois Banking Acts, and on the basis that the spirit, if not the letter, of the Illinois Act calls for implementation of the conclusions of this Board, it is proposed that: (1) the Illinois Bank Board cease its advisory capacity and be enacted as a body similar in scope, function and final authority to that of the Texas State Banking Board; (2) the Commissioner of Banks and Trust Companies restrict his duties in the matter of new bank applications to that of a fact-finding, advisory entity; (3) the newly-empowered Illinois Bank Board, as its first order of business, propose and adopt rules and regulations designed to clarify, update and standardize the organization process for new state banks in Illinois, in much the same way as the Rules and Regulations of the Securities and Exchange Commission and FDIC serve the Acts to which they refer, and allow those agencies to enforce consistent and relevant regulations; and, (4) the Illinois Bank Board consider additional rules and regulations designed to permit dynamism in new and innovative bank services and structures so that the needs of a rapidly growing state are consistently and efficiently met.

In summary, the above four proposals, as well as the suggested corrections of statutory inadequacies, epitomize the transitional and evolutionary trends prevalent in the Illinois banking industry. As one of the most important commercial, industrial and financial states in the Union, Illinois is not only denied branch banking, but also all the lesser forms of legal alliances banks in other similarly-situated states now enjoy. Thus, Illinois faces a possible decline in this leadership position as it faces the twenty-first century's economy with the nineteenth century's banking restrictions.

However, this comment is not primarily intended as an argument for branch banking in Illinois; rather, it is simply dedicated to the proposition that, given the current refusal of the people of Illinois to permit branching, the bank entry laws and regulatory procedures must “rise to the occasion” so that the new bank entities that are being permitted in Illinois, protect and satisfy “the needs and convenience” of the people in the most professional and efficient manner possible under the current circumstances.

James M. Lyons