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ROLL NUMBER

DESCRIPTION

2176

2007 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2176

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2176**

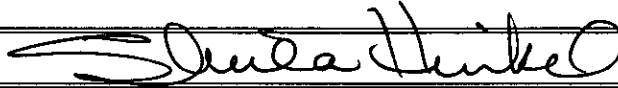
Senate Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: **January 23, 2007**

Recorder Job Number: **1631**

Committee Clerk Signature



Minutes:

Marilyn Foss – General Counsel for ND Bankers Association – In Favor

TESTIMONY # 1 [Testimony until 10:10m]

Explains how the needs are to be cleaned up. Local resolutions and ordinances. Regulation

will be a state function. Bill is protective of financial institutions and credit unions.

Sec. 2 & 3 speak of the wildcard statute for banks. [Explanation on 6:30m]

Wildcard statute in ND since 1985. Mechanism for banks and state banks to have same powers as national banks.

Sect. 3 suggested to remove language

S Potter: Can you give an example of what ordinance covers?

M Foss: Presented examples in CA; Talked about “fair lending issues.” Makes regulations clear.

S Klein: By allowing state banks to have same power at national level without having to come to the legislature.

M Foss: Yes

S Behm: What is a “wild card?”

M Foss: Name we attached to this, used for changes.

FAVOR?

Greg Tscheider – Mid America Credit Union Association - *In Favor*

He addressed S Potter. No written testimony presented. Gives suggestions of ordinances that are passed.

S Heitkamp: What about our local control? I understand the problem, what can we say to people to keep the power local?

G Tscheider – Financial institution. Such as Mandan and Bismarck might have different rates.

Tim Karsky – Dept. Financial Institutions - *In Favor*

Addressed S Heitamp, national banks use parity law.

Date: 1-23-07

Roll Call Vote: 1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2170

Senate INDUSTRY BUSINESS & LABOR Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Andrist Seconded By Heitkamp

Senators	Yes	No	Senators	Yes	No
Chairman Klein, Jerry	✓		Senator Behm, Arthur	✓	
Senator Hacker, Nick VC	✓		Senator Heitkamp, Joel	✓	
Senator Andrist, John	✓		Senator Potter, Tracy	✓	
Senator Wanzek, Terry	—				

Total Yes 6 No 0

Absent S. Wanzek

Floor Assignment Hacker

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 23, 2007 1:29 p.m.

Module No: SR-15-1045
Carrier: Hacker
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2176: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2176 was placed on the Eleventh order on the calendar.

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2176

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2176**

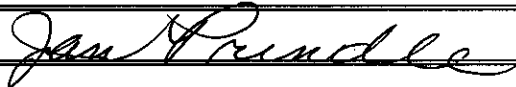
House Industry, Business and Labor

Check here for Conference Committee

Hearing Date: **5 March 2007**

Recorder Job Number: **4336**

Committee Clerk Signature



Minutes:

Chairman Kaiser opened the hearing of SB 2176.

Marilyn Foss, ND Bankers' Association, testified in favor of the bill. (Testimony Attached.)

Representative Amerman: What is this wild card statute?

Foss: It's the section of law that says if a national bank has the power to do something because national bank law or regulation has changed, a state bank can do it too. It keeps state banks and national banks competitively equals in their powers.

Representative Nottestad: So competitive equality then is the sole purpose of it?

Foss: Yes. Competitive equality is the sole purpose for the change to the wild card statute.

Representative Dosch: Does this pretty much then eliminate the powers of the state banking board?

Foss: Not in any way. The statute specifically provides that the state bank board has the continued ability to supervise and regulate the new powers as well.

Representative Dosch: Is the state going to be able to enforce them or if they are following federal is this going to be a federal issue to enforce?

Foss: This does not change the state banking board's oversight responsibility. This is a state law. The state law has directed that the state banking board and commissioner will receive

the implementation and compliance of banks with the state laws and applicable federal regulations and federal law. It is not, in my view, a change which is essentially federalized precedence. It does not make state law subordinate to federal law.

Representative Amerman: The part where the local governing body may not adopt ordinances, is that something that is happening and if they do implement an ordinance, would that override what's in state statute?

Foss: It has happened in other states. In those states there has been quite a bit of litigation and generally speaking, federal law has been determined in those states to preempt state and local ordinance so those ordinances don't apply to nationally chartered banks creating an issue of competitive equity. What this says is that state law would preempt those without the litigation.

Chairman Kaiser: Representative Nottestad is carrying this. I'm going to have him run this by Janet Burke and see what their take is on this and whether or not we're giving our sovereignty. If she voices some concern about it, we will then go to the attorney general and get an answer.

Representative Kasper: On the bottom of page 1, it talks about activities that a state bank can do that any national bank can do. Are there other activities, services or products right now that national banks can provide that state banks in ND cannot provide?

Foss: One comes to mind is health savings accounts. In the interim between sessions the state banking commission issued a wild card order to allow state banks to operate under the same rules that national banks did except for joint marketing. Subsequently this Legislative body endorsed that.

Chairman Kasper: It seems the banking commissioner has done things under the wild card statute that allow the state banks to do what they need to do to compete. Why is now

important that we change the law as opposed to having the approval of the banking commissioner?

Foss: That is a matter of competitive equity between banks and credit unions because that is the legislative approach that was taken for credit unions. This is narrower than the credit union law but that is where the concept came from.

Representative Johnson: Currently if a national bank offers a product that a state bank does not provide, does it now have a state chartered that would go to the bank commissioner and he could say yes or no on whether they can offer it.

Foss: It generally works that state banks sees that a national bank can do this and comes to the state banking board and applies for permission.

Representative Johnson: How long does that process take?

Foss: It can take months.

Chairman Kaiser: We did have a bill that grants the banking commissioner much more authority to make decisions without the banking board.

Foss: I think that bill gave more authority relating to interstate branching.

Tim Korsky, Commissioner for the Department of Financial Institutions, testified in favor of the bill. I would like to give you three examples. If the bill on branching passes, I will have the authority to approve a branch. Just this week we were going to approve a branch for a state bank in Fargo in Fergus Falls MN and we got some concerns from some bankers in the community there so now we are going to a full blown hearing and that state banking board is going to have to act on that application anyway. The main thing I like about this bill is that we are moving that wild card section to a section that most people can find. For security investments and securities, there are times when the state banking board has set bigger restrictions just because a national bank may be able to invest in some type of investment.

We didn't feel comfortable on the state level so we might have said that even though a national

bank might be able to invest 25%, we've limited it to 15%. At times we have put greater

restrictions on banks. A national bank has a wild card also. Our lending limit in ND is higher than what a national bank can lend to individuals so the LCC says these banks in ND can't be disadvantaged so they can they lend to what the states can and they set various rules and regulations. The bill has worked well in the past and I think our board is very conservative that we don't want banks out there doing things that we don't know about or can't control.

Representative Nottestad: In your estimation then this bill, if passed, would not weaken your office or weaken the state banking board?

Korsky: No, I don't think so.

Representative Dosch: So what you are saying is although there may be a national law out there that would pass, the state banking board still has authority to set stricter limits. They don't have to accept exactly what comes down at the national level.

Korsky: We could do that and the time frame from the start of the process could be 9 months to a year.

Chairman Kaiser: If you read this language it says if they do it, I get to do it and you can't regulate it. You can have oversight. It says the state bank has the same power as a national bank.

Korsky: Right out of the chute, they can probably do that; but it also says the authority is subject to regulation by the state banking board.

Chairman Kaiser: We can say that, but that's not what this says. This says "I get to do it."

Representative Kasper: Along the same lines, that sentence in line 23 "the authority granted by this section is subject to regulation by the state banking board." It does not say "or recision."

Korsky: Let's say the OCC could invest in some type of 3rd or 4th real estate mortgage securities and they are eking out the 2% of capital, I would think the state banking board could

say yes, you can do that but you're going up to a larger % of capital and we can make it very restrictive. I do believe that's what the law says.

Representative Kasper: I don't agree with your interpretation based on the language in the bill.

Korsky: I'm not an attorney, but I know we've acted that way in the past.

Chairman Kaiser: You understand that under the wild card system, you had the authority. As I read this. . . .

Greg Chider (sp? Did not sign in) representing Med America Credit Union League: We are principally interested in amendment #1. This is kind of the anti-San Francisco bill. The San Francisco city council has been very active in trying to control to businesses and financial institutions through city regulations. None of cities are close to their activity, but we certainly don't want to give the opportunity. It would be very difficult to operate in an environment where we have one rule in Bismarck and another rule in Mandan. Financial institutions go back and forth and it would be very difficult. It is the authority of Legislature and we would like to make sure that is not abrogated in any way, shape or form.

Representative Nottestad: Is this model of legislation being put in throughout the US or is it something unique to ND?

Chider: I honestly don't know. It was something we thought we needed to have because of the problems that were popping up in other states. We just knew this was something we didn't want to have to face.

Representative Zaiser: On the same lines, are there any other cities that you know of that are contemplating what San Francisco is doing.

Chider: I don't know. If they really excitable like with the ATM fees then it makes national news. That's what happened in San Francisco. Obviously a lot of these have been thrown out by courts but it causes real havoc between the time the bill is passed and then the

Supreme Court finally gets it; you could be dealing with two years away. And, who wants to pay attorneys?

Representative Amerman: On lines 16 and 17, I want to throw this out. Say the national comes down with a regulation then the local governing body would be the state. So shouldn't this say "political sub" or something like that instead of the "local governing body?"

Chider: That's an interesting intellectual concept. This is a state law so state law would define what local subdivision is. The fact of the matter is if the federal government says you do "A" we do "A" because under the interstate commerce provision of the US constitution the federal courts have always interpreted that the feds have priority over state law.

Chairman Kaiser closed the hearing of SB 2176.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No: **SB 2176**

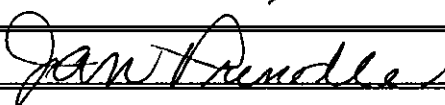
House Industry, Business and Labor

Check here for Conference Committee

Hearing Date: **5 March 2007 (#2)**

Recorder Job Number: **4340**

Committee Clerk Signature



Minutes:

Later on the same day Chairman Kaiser opened discussion of SB 2176.

Jennifer Clark: I understand you have some question regarding Section 2.

Chairman Kaiser: In current law they are using the wild card position which is if the feds do something a bank can go to the bank board and request a wild card to do something until the legislature meets again so they can match the feds. But this reads differently.

Clark: Under our current system the Department of Financial Institutions still has the ultimate decision on whether they are going to grant that or not. My initial reading of this is that you automatically can strap on to the feds. That's my reading. Notwithstanding any other provision you get to do what the feds get to do. In the background there is always that discussion of what they can do today and if it changes you don't get those new powers or different powers. You lock into what federal powers are today. That's arguable. My reading of that last sentence on lines 23 and 24 is the regulation of those financial institutions. I was paging through that chapter and it seems there are all kinds of regulatory powers that are distinguishable from national powers of financial institutions. The regulation and governance of the bank would still be valid. That's my reading.

Representative Johnson: One of the questions we had was under that (lines 23 & 24) are they subject to regulation by the state banking board but could this be a recision of that authority.

Clark: My initial reading is that the banking board can't detract from the powers of the feds. You cannot adopt rules that change the powers from the federal level. You can do other things. You can regulate the governance of the bank and that's different than the powers of the bank.

Representative Ruby: We heard in testimony this was on parity with the credit unions. How long have credit unions had this?

Clark: I don't know.

Representative Dosch: On line 20, what exactly does that mean when it says, "notwithstanding any state laws to the contrary." Does that mean that the federal government comes in and says they can now sell used cars and if we have a state law that says no you can't, would that mean they can't or does it mean follow federal law.

Clark: In a broad sense "notwithstanding" means regardless of any other state law, it doesn't matter. I don't care what your state law is, this trumps it. So you get in to an interesting discussion. I can't speak with any certainty about how this would be interpreted.

Representative Kasper: Under current law, the banking board additional powers to the state banks. They could under state law say no. Is that correct?

Clark: I don't have a working knowledge of what they are doing at the Department of Financial Institutions, but I think under the current law the agency has the authority to make the determination. My reading is this removes that.

Chairman Kaiser: It would be an interesting scenario if this would pass and the feds said we're going to lift the cap on usury rates. The state banks would then be free to lift the caps as I read this.

Clark: It is limited to the powers we have today. That is what I think the Supreme Court does historically.

Representative Vigesaa: On line 24 where it says "subject to regulation" can regulation say "no"?

Clark: Had you not in the first sentence said "notwithstanding." That first sentence limits what the state agency can do.

Kasper: If we struck on page 1, line 20, "notwithstanding. . ." and just started on the next sentence. Then would we get to the point where we're not allowing federal law to trump state law?

Clark: I'm not exactly sure. You may have just muddied the waters then the question is what authority does the department have?

Representative Ruby: Then the agency would have the wild card authority only to the extent of what federal is at this time.

Clark: You need to understand that may not be how it is interpreted.

Chairman Kaiser: I would answer that, one of those interesting unintended consequences. If that is true, then they have also lost the wild card and the board can't change it.

Representative Dosch: I think part of their testimony was they are concerned about the local communities making different regulations. That seemed to be their issue, but the bill ties them to the federal. There seems to be two different things they are trying to accomplish. I don't know if they needed one to get to the other or is there some way that the local communities can't make up separate but . . . There are two different things here.

Chairman Kaiser: They are clearly dealing with two different things. They are concerned about the San Francisco things but on the other hand they want freedom on the other end.

Representative Nottestad: Marilyn made that clear.

Representative Kasper: I would suggest that we amend out Section 2 and go with Sections 1 and 3 of this bill.

Representative Johnson: I will go along with that but what I heard in testimony is that we have allowed credit unions so should we also level the playing field?

Representative Ruby: If we adopt the amendment suggested would we also to remove . . . ?

Chairman Kaiser: We would have to have Legislative Council work it up. We want them to maintain the wild card.

Representative Ruby: I didn't realize we had done that with the credit unions last session, but if we have we may have strapped them with regulations that were in effect as of last session.

Representative Johnson: That's only if somebody challenges it.

Representative Kasper: I make a motion that we delete Section 2 and amend the bill to conform to the deletion of Section 2.

Representative Ruby: I second.

Representative Johnson: I'm not sure I'm ready to do that yet.

A roll call vote was taken: Yes: 8, No: 6, Absent: 0

Representative Kasper: I move Do Pass as Amended.

Representative Ruby: I second.

Representative Johnson: Did we deal with the credit union part?

Chairman Kaiser: If the person moving and seconding will withdraw, we can entertain further amendments.

Representatives Kasper and Ruby withdrew their motion and second.

Representative Zaiser: I was out of the room, but I would not support the amendment to take this out. I move to reconsider the amendments

Representative Thorpe: I second.

A roll call vote was taken to reconsider the amendment: Yes: 8, No: 6, Absent: 0

Representative Amerman: Representative Johnson, your amendment—were you thinking of incorporate the credit unions? Is there something that needs to be drawn up for us to look at?

Representative Johnson: By removing this section you make it an unequal competition and banks. In my mind you are withdraw that permission from the credit unions. I don't have language and I'm sure how we should act on that. That's the concern I have.

Representative Ruby: I would say having some parity has some merit, but the reason I voted to remove this because I think it's more limited than what the current law is. I would be in favor of including the credit unions on this to give them that flexibility. By removing this and removing the similar language for credit unions gives both of them a better competitive edge in the long run. That's the way I'm reading it and Jennifer Clark has a similar thought on a previous bill that I had asked an opinion on. Language that seems to evolve with federal law really tends to limit them to what the law was at the time that we put that language in.

Representative Amerman: If we would have removed this, banks would not have to go to the wild card anymore, they could just do whatever the federal, is that correct?

Representative Kaiser: They could until challenged.

Representative Amerman: But the credit unions would still have to go to the financial gurus and get a wild card?

Representative Boe: If they were challenged in the future, then they would back up to today's date for the regulation at today not what they had changed to in the future.

Representative Dosch: If you amend that section out, then you basically throw the bill in to a conference committee and you get some time to answer some of those other questions.

Chairman Kaiser: We could hold it now if people would like a chance to talk. You could go to the Attorney General and then that becomes a formal thing. I don't think it's constitutional unless you interpret it to limiting it to the powers that exist today.

Representative Dosch: Then they are really not accomplishing what they want to because a month from now if something changes federally; they go back to this day.

Chairman Kaiser: They have a wild card now with permission. They would like to have a wild card without permission. That's what they attempted to do. This doesn't do that.

Representative Zaiser: I move to further amend by bringing that language back.

Representative Thorpe: I second.

A voice vote was taken. The amendment was accepted.

Chairman Kaiser: Now we have SB 2176 in its virgin form.

Discussion Closed.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2176

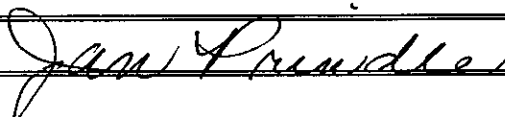
House Industry, Business and Labor

Check here for Conference Committee

Hearing Date: 5 March 2007

Recorder Job Number: 4344

Committee Clerk Signature



Minutes:

Subcommittee on SB 2176.

Chairman Kaiser: We don't have an Attorney General's opinion. The "notwithstanding any state law to the contrary" is clear and convincing evidence that precludes anything else that happens even though it refers to some authority to regulate at the end of the chapter. If we do that and if it's challenged, the court's position will be, "well you can say that but all it gives them authority to do is enact legislation or rules or programs or in this case, powers that were available at the time the bill was passed and because we took away the wild card you would be locked in at where you are today.

Marilyn Foss: At the time the bill was passed exists under the current law today. I think everybody that looked at it thinks that that issue does exist.

Chairman Kaiser: We understand it's in the credit union. One of our decisions was to consider amending that portion out of the credit union to level the playing field and leave both parties with wild card capacity. You would have to go to the board to get approval for the wild card.

Foss: That would be okay with me. We have not had trouble with going to the banking board. If we are going to have to go back to the banking board then one of the things that we would like to be clear is that can approve a wild card activity and I'm sure the credit union

board wouldn't want the same as the credit union regulators but they didn't have to do it by rule. They can do it by order. It is not going and talking to the banking board or even their regulation that is issue to us. The issue to us really was "wait a minute; the credit union has got a section that they can engage in any activity in which they couldn't engage in if they are federally chartered." So the premise is you have the power if there are safety and soundness issues that come up to it. That's where the supervision of the banking board comes in is when what is the level. If the federal law says you can invest in one of these new GO bonds that small communities are going to issue with no limit of up to 100% of your capital, up to 200% of your capital with nothing. Then the idea is that the state banking board was not to say was it a wise thing to invest in the instrument but is there a safety and soundness limit that should apply. That's where the regulation comes. If there is a better way to do that, that's what we are trying to achieve. The premise from which we are starting from is federally chartered banks have this power and state chartered bank would have the power or can easily get the power. We are looking for the same kind of regulation scheme that applies.

Chairman Kaiser: We want to make it the same for both industries.

Foss: That would part of premise too—the framework for regulation should be the same. I'm not sure banks have a problem convincing the state banking board that we should be able to do it. It should apply across the board to the credit unions.

Chairman Kaiser: It would have to go through the courts to make a final determination.

Foss: We don't litigate that much.

Chairman Kaiser. But some body could. Wouldn't it terrible if we passed a law and then go on for two years that took away your wild card status and tied you to whatever was there today regardless of what the feds did.

Foss: That's the effect of it now.

Jennifer Clark: The Department of Financial Institutions still has regulatory authority over the banks even if we've given them a wild card? Do they have ongoing regulations to revoke the wild card at any time?

Foss: No he doesn't have the authority. The statute doesn't say. What the statute says now is that the state banking board has the power to authorize state banks to have engaged in activities and whatever. I would note this "notwithstanding any restriction elsewhere in this code" is in current law.

Chairman Kaiser: That's okay. That's different than saying notwithstanding what any other government entity does outside of state of ND. We have that all the time in code— notwithstanding any other exceptions, this bill applies.

Foss: It says, "In addition, the state banking board has the power to authorize state banks to engage directly or indirectly in any activities in which such banks could engage were they operated as national banks at the time the authority is granted notwithstanding any restriction elsewhere contained in this code." This code is not a change in law. We weren't trying to change any laws in drafting it. We were simply trying to move ourselves to same as the credit unions.

Chairman Kaiser: We want to honor the intent and are just nervous about it may not do what we think it does. We asked Jennifer (Clark) to come down and read this. Jennifer, maybe you could review this from your perspective what has happened in the past.

Clark: It doesn't happen that often. We usually talk about it more in academic sense. If push comes to shove and you get into a situation here is how the court decision will probably fall. I think that's the case here. You have taken away the department of financial institutions ability to have anything less than the federal. Under my quick reading of what we have right now it says that our department of financial institutions may grant it. It's there prerogative.

Foss: I think that's true. It's not very likely but I think it's true.

Clark: But you get the benefit then of saying I give this bank the authority to do what the feds are doing and I'm watching what the feds are doing and if they ever do something I don't like, I can take it away versus if we do it in code here you don't have the ability to take it away. You have lost it.

Chairman Kaiser: That's our fear we may or may not lock it in but if we do lock it in and that's the way the courts rule we have lost the wild card and we're back at the date that law was passed—that's the only power you have.

Gary Tschider: There's been a lot of talk about credit unions. The credit union law says credit unions may engage in any activity in which they could engage if they were federally chartered subject to rules of the state credit union board shall adopt.

Chairman Kaiser: That's a good one; I don't have a problem with that. This language is not that. I think we could defend that.

Foss: I'm willing to go to that.

Tim Korsky: We talked about this. I talked originally that I liked the ability of the board to approve that but we just redid all the rules on the credit union side and we did make a lot of stuff more restrictive. That's what I thought this language would do. If it doesn't, then I would be more for the other.

Foss: I don't object to going to language that takes the credit union language except that suggests that the credit union board can't do it by any way other than adopting regulations. We have not experienced resistance with the requests that have been made by the banking board in terms of willingness. They have done regulations too and we want the ability to get it by order.

Korsky: Ten to fifteen years ago we were under the impression that, especially on the credit union side, that even though a federal credit union could do something it was the interpretation that until the board adopted the rule you couldn't do it. Then we found out about two or four

years ago that we were wrong so we started this revision of the credit union rules and there it

says you SHALL not. Sometimes we adopt by rule but it's better to have it in law. I don't

mind that but sometimes I just don't like the idea of always having to adopt rules.

Chairman Kaiser: That's what Marilyn is saying.

Foss: It's expensive and when there's an order the interested party actually thought it was controversial.

Tschider: There are incidental ones where if we determined something that was an incidental power the board could do it. Some of these are probably the more power things.

Chairman Kaiser: Do you think that Jennifer should craft the language that might give you that flexibility for incidental stuff.

Tschider: We just want this work. We don't want to advance it and then find out we may have made a mistake.

Chairman Kaiser: I think the key is if you want to get it through the Committee is going to be there are some things that should be through rule.

Representative Zaiser: It's good to make it clear in the rewrite.

(Unstructured discussion.)

End.

