The Banking Law Journal

Established 1889

AN A.S. PRATT & SONS PUBLICATION FEBRUARY 2013

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It's About Time: Bringing Pennsylvania's Banking Law into the 21st Century

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The authors discuss the details and ramifications of three bills recently signed into law in Pennsylvania that will strengthen its bank regulatory scheme.

On October 24, 2012, Pennsylvania Governor Tom Corbett signed into law three bills that will strengthen the bank regulatory scheme in Pennsylvania. These bills, HB 2368, HB 2369, and HB 2370, dubbed the "banking modernization legislation," were initiated through a joint effort between the Pennsylvania Department of Banking and Securities (the "Department") and the Pennsylvania Bankers Association to streamline the regulatory scheme in Pennsylvania, improve Pennsylvania's competitiveness in the banking industry, and comply with the new federal Dodd-Frank Wall Street Reform and Consumer Financial Protection Act ("Dodd-Frank").[1]

Probably the most significant changes contained in the three bills are found in HB 2369 which amends the Department of Banking and Securi-

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Published by A.S. Pratt in the February 2013 issue of *The Banking Law Journal*.
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ties Code ("DOBS Code")[2] to enable the Department for the first time to impose meaningful civil money penalties against financial institutions, their officers, employees and directors. Also, in amending the Banking Code of 1965 ("Banking Code"),[3] HB 2368 modernizes and, where necessary, expands upon the legal authority of state banks as well as implementing where appropriate, the requirements of Dodd-Frank. Finally, HB 2370 amends the Loan Interest and Protection Law ("LIPL")[4] to eliminate variable rate disclosure requirements deemed to be duplicative of federal law. All three bills took effect on December 24, 2012, which was 60 days from the date the governor signed them into law. The following summary outlines in much more detail the specifics and ramifications of these bills.

AMENDMENTS TO THE DOBS CODE ("ADMINISTRATIVE AMENDMENTS")

Increased Enforcement Authority Over Institutions, Credit Unions and Licensees

Establishment of $25,000 civil money penalties against institutions

The DOBS Code defines the regulatory authority of the Department over the institutions it regulates and establishes the administrative procedures and powers of the Department. The former DOBS Code contained very few money penalties that the Department may impose on an institution for violations of Pennsylvania law.[5] Because of the fairly small monetary amounts provided in the statute, these penalties had not been viewed as adequate tools for the Department to ensure compliance by the institutions it regulates. The Administrative Amendments grant the Department the authority to impose a civil money penalty of up to $25,000 per violation against an institution, or any of its officers, employees, directors, or trustees for: (i) a violation of any law or Department order, (ii) engaging in any unsafe and unsound practice, or (iii) a breach of a fiduciary duty in conducting the institution's business. New Section 501(H) makes the civil money penalty of up to $25,000 for each violation the largest money penalty that the Department will be authorized to issue against an entity it regulates, eclipsing the $10,000 per violation

penalty permitted in both the Credit Union Code and Mortgage Licensing Act.[6] This enhanced enforcement tool should cause institutions to more seriously consider the consequences for non-compliance with Pennsylvania law.[7] In light of the budgetary pressure state agencies face, increased enforcement efforts with civil money penalties are quite possible.

Expanded visitorial power over national banks

Historically, national banks have generally been protected from enforcement actions brought by state entities including the attorneys general. "Visitorial powers" over national banks were limited to the Office of the Comptroller of the Currency (the "OCC") and premised on the concepts of preemption, where federal law has been held "supreme over state law with respect to national banking."[8] The reach of the OCC's visitorial powers under the National Bank Act[9] as well as OCC regulation[10] was considered in depth by the U.S. Supreme Court in 2009, in *Cuomo v. Clearing House Association*.[11] The Supreme Court opined that "'Visitorial powers' in the National Bank Act refers to a sovereign's supervisory powers over corporations" which is separate and distinct from a state's law enforcement powers.[12] The Court noted that the difference between visitation and law enforcement was clear and "[i]f a State chooses to pursue enforcement of its laws in court, then it is not exercising its power of visitation and will be treated like a litigant."[13] Further the court noted that discovery practice under New York law was more limited than "visitorial powers" which allows a visitor to "inspect books and records at any time for any or no reason."[14]

The issue before the Supreme Court was whether and to what extent the OCC's regulation on visitorial powers prevented state law enforcement authorities from enforcing non-preempted laws against national banks. The underlying facts are quite instructive as the case arose from New York state's attorney general seeking information from several national banks by letter request, "in lieu of subpoena," to determine if the responding national banks had violated New York's fair-lending laws. The OCC and a banking trade group brought suit to enjoin the information request, because they argued that the OCC's regulation prohibited that form of state law enforcement against national banks. The Supreme Court held that the New York attorney

general's law enforcement power, particularly with regard to non-preempted laws such as New York's fair lending law, is distinguishable from a sovereign's supervisory power over the affairs of a regulated entity, which is within the exclusive domain of the OCC in regard to national banks. The Court determined that the attorney general's threat to issue a subpoena if responses to the requests for information were not provided was not made utilizing its law enforcement powers, but rather the power of the attorney general to issue a subpoena "on his own authority under New York Executive law...."[15] Therefore, the *Cuomo* Court allowed the New York attorney general to bring judicial enforcement actions, but not executive subpoenas issued from the attorney general's office.

The *Cuomo* opinion has been codified in Section 1047 of Dodd-Frank. So, according to Dodd-Frank,[16] state attorneys general may initiate civil actions against national banks and federal savings associations in order to enforce regulations of the Consumer Financial Protection Bureau ("CFPB"), certain other applicable federal laws, and state laws not preempted by federal law. [17]

In Pennsylvania, new Section 506 of the DOBS Code reflects the codification of the *Cuomo* decision in Dodd-Frank. The DOBS Code now provides Pennsylvania's attorney general the authority to initiate a civil action against national banks and federal savings associations with respect to Pennsylvania's non-preempted laws as well as to enforce the Consumer Financial Protection Act of 2010 (Title X of Dodd-Frank) and any related regulation promulgated by the CFPB.[18] National banks need to be prepared to deal with those possible claims, especially with the political change that has occured in that office's leadership.[19] The Pennsylvania attorney general can also bring a civil action against state-chartered institutions with respect to Title X of Dodd-Frank as well as its implementing regulations.

According to new Section 506(d), the Pennsylvania attorney general's enforcement actions under Title X of Dodd-Frank against institutions, credit unions, licensees, foreign financial institutions, national banks, federal savings associates or their subsidiaries will be initiated "only upon the request of, or with the approval of, the [Department of Banking and Securities]."[20] If the attorney general refuses to bring that action, Section 506 goes on to provide that the Office of General Counsel may initiate the

action on behalf of the commonwealth. Unlike the Office of the Attorney General, which is an independent law enforcement agency, the Office of General Counsel is the legal counsel for the governor and the administrative agencies under the governor's jurisdiction, including the Department.[21] Because Dodd-Frank only authorizes the Office of the Attorney General, *or the attorney general's equivalent* to initiate actions against national banks or federal savings associations, the question becomes whether the Office of General Counsel is the equivalent of the Office of Attorney General in Pennsylvania. [22]

The Commonwealth Attorneys Act sets forth the powers and duties of both the Office of General Counsel and the Office of the Attorney General.[23] The Office of the Attorney General is an independent agency vested with the authority to furnish legal advice upon the request of the governor or a commonwealth agency and to represent those parties in civil actions.[24] The Office of General Counsel is headed by a general counsel appointed by the governor to serve as his or her legal advisor.[25] The Office of General Counsel provides legal advice to commonwealth agencies under the Governor's jurisdiction.[26] In addition, the Office of the Attorney General is authorized to delegate back its enforcement authority to the Office of General Counsel if the attorney general determines that it is more efficient or is otherwise in the best interest of the commonwealth to do so.[27] In addition, the Office of General Counsel may initiate actions or defend the commonwealth if the proposed action has been referred to the attorney general and the attorney general refuses to initiate the action.[28]

The Department has stated that "[t]he primary purpose of [Section 506] is to ensure that the Department's expertise and industry knowledge is brought to bear whenever a state or local government entity seeks to enforce a civil law against a regulated institution, and to ensure that all financial institutions doing business in the Commonwealth are subject to a uniform set of laws, regulations and standards."[29] While it is true that the Department likely has more expertise in the banking regulatory universe than the Office of the Attorney General, the legislature has given the Department tremendous influence in shaping the environment for civil enforcement actions in the commonwealth.

Even though the Office of General Counsel may be vested with civil

enforcement authority, it is unclear if the Office of General Counsel is the equivalent of the Office of the Attorney General for the purposes of initiating enforcement actions against national banks or federal savings associations. This new Pennsylvania law provision may be overreaching Dodd-Frank's authority which will ultimately be determined by the courts.

Clarification of the Department's authority to issue "orders" pursuant to any statute under its purview

To be an effective regulatory agency and to protect consumers, the Department must be able to initiate administrative actions against licensed and unlicensed entities. Such actions take the form of cease and desist orders, orders to show cause, consent agreements and orders, and notices of fines. Such orders are enforceable in court and mandate corrective action, the cessation of conduct, or issue money penalties for violations of Pennsylvania laws.[30] In addition to the authority provided in the DOBS Code, the Department regulates various entities through the administration and enforcement of 12 separate statutes.[31] However, not all of these statutes provide the Department with the authority to issue "orders" to administer and enforce the provisions of those acts.[32] In addition, the previous language in Section 202.D of the DOBS Code provided the Department with the authority to issue statements of policy and interpretive letters as was necessary "to administer [the Code] or any other statute within the department's jurisdiction to administer or enforce." However, the former language did not authorize the issuance of "orders" for which penalties for non-compliance could be issued.[33] As a result, the Department needed to rely on the attorney general, district attorneys or other law enforcement authorities to initiate enforcement actions to enforce those statutes.

The Administrative Amendments changed Section 202.D of the DOBS Code to enable the Department to issue "orders" in addition to statements of policy and interpretive letters for any statute under the Department's jurisdiction. This amendment provides the enforcement authority so that the Department can better administer the statutes and rules under its jurisdiction and protect Pennsylvania consumers.

Express authority to publish orders and other information in the Department's possession related to financial institutions and credit unions

Section 302 of the DOBS Code is known as the Department's "confidentiality statute" and broadly prohibits employees of the Department from divulging information in the Department's possession related to institutions, credit unions or licensees, except in certain specifically enumerated exceptions. [34] Even Pennsylvania's open records law[35] does not override the confidentiality provisions of Section 302.[36] Any employee that violates Section 302 could be removed from office and willful violations of Section 302 are deemed misdemeanor offenses subject to imprisonment of up to one year, a fine of up to $1,000, or both.[37]

In 2008, in response to the perception that the confidentiality provisions of Section 302 were too limiting, the DOBS Code was amended to allow the Department to release to any person, including natural persons, the following specific information in its possession regarding licensees:

(1) the type of license held by the licensee;

(2) whether a license application has been denied;

(3) whether and for what time period a licensee's license is current, suspended or revoked;

(4) whether and for what time period an individual is or has been suspended or prohibited from working for or otherwise participating as a licensee or in any other capacity; and

(5) whether and to what extent a corporation, person or licensee is or has been subject to a fine, order or adjudication issued by the department.[38]

This 2008 amendment granted the Department the authority to publicly share certain information in its possession, such as its enforcement actions against licensees (which the Department posts on its website) and to respond to Right-to-Know law requests for licensee information contained in the enumerated list, while still maintaining the confidentiality of other information in the Department's possession.

New Section 302.A(5) enables the Department to share information in

its possession regarding institutions and credit unions in the same manner as it would share information regarding licensees. The Department is now permitted to disclose formal enforcement actions such as fines, orders, and adjudications against institutions and related individuals. This is akin to the actions of federal regulatory agencies (the Federal Deposit Insurance Corporation and the Federal Reserve Board) that publish orders issued against state-chartered institutions.[39] However, as with the publication of licensee enforcement orders, the Department will have the discretion not to publish enforcement orders should it choose to do so. In addition, all other information not specifically listed in Section 302 will remain confidential subject to the limited exceptions previously discussed. The Department has stated that it will now be "freely permitted to disclose formal enforcement actions such as fines, orders, and adjudications issued against institutions and institution-related individuals."[40]

In 2009 the Department issued a letter from the secretary of banking to all chief executive officers of Pennsylvania financial institutions and credit unions stating that the Department reports of examination of those entities were confidential and were not to be disclosed to third parties without the Department's permission.[41] Such third parties included certified public accountants, outside auditors, potential officers or directors, investment advisors or other consultants for those entities. The letter also provided that enforcement proceedings and Department-issued orders could not be disclosed by the institutions or credit unions. The 2009 letter provided that such enforcement actions could only be disclosed to the extent federal or state securities law required such disclosure as provided in Section 404 of the DOBS Code. Accordingly, the only way that such entities could disclose Departmental orders was through making a formal written request to the Department as provided in Section 404.B. Secretary Moyer stated in his testimony before the Pennsylvania House Commerce Committee that the inability to disclose the Department's orders caused "headaches" for those institutions.[42] Regulated institutions will now be permitted to disclose formal enforcement actions without needing to make a written request to the Department pursuant to Section 404.B.[43]

Strengthening of Department's Enforcement Authority

Removal authority

Under the former statutory scheme set out in Section 501.B, the Department had the authority to issue orders to remove an attorney, officer, employee, director, or trustee of an institution for *continued* violations of any law or if those individuals had *continued* to engage in unsafe or unsound practices in "conducting the business of such institution, but only *after having been warned* by the department to discontinue such violations of law or such unsafe or unsound practices...."[44] The language suggests that no matter how egregious a violation or how bad the conduct, the Department could not initiate an enforcement action without first providing a warning. This requirement hamstrung the Department's ability to protect consumers and financial institutions. The prior warning appears to have also allowed malefactors "one free bite at the apple" and to correct those violations without incurring any penalties.

New Section 501.B authorizes the Department to issue orders against an institution or an officer, employee, director, or trustee of an institution[45] as soon as a violation of law, unsafe or unsound practice, or breach of a fiduciary duty[46] has occurred in conducting the business of such institution.[47] While advance warning is no longer needed, there is still an opportunity to contest an order, such as a Cease and Desist Order, Notice of Fine, or Order to Show Cause through the administrative hearing process.[48] As a result, the process through which the Department can now bring an enforcement or removal action against an officer, employee, director, or trustee of an institution is much faster.

The Department must provide the appropriate federal supervisor notice of its removal action if the institution involved is a state member bank or a non-member bank with the FDIC as insurer. With the ability to impose civil money penalties of up to $25,000 for each violation, the increased penalty provisions for willful violations of the Banking Code,[49] and the Department's ability to initiate an enforcement action without first providing a warning the consequences for institutions, officers, directors and employees not complying with Pennsylvania law are much more severe.

Authority to immediately suspend an officer, employee, director or trustee of a financial institution

In addition to the power to commence enforcement actions without prior warning, the Department now has the authority to immediately suspend an officer, employee, director, or trustee of an institution from their positions and "from any further participation in the conduct of the institution" if, *in the opinion of the Department*, the institution, shareholders or depositors have suffered *or may suffer* any significant financial harm "or other prejudice" through the individual's continued involvement. This means that an individual can be immediately removed from his or her position. A post-removal due process hearing shall be held 30-60 days after removal of the individual, unless the individual requests an earlier hearing date.[50] This process is unlike the administrative hearing process for other administrative actions such as an Order to Show Cause or a Cease and Desist Order where the individual can remain in his or her position pending the outcome of the administrative hearing (as well as any appeals of the decision). The General Assembly was prudent in ensuring that such proceedings remain confidential given the seriousness of this type of action and the potential harm that can be done to the individual that is the subject of the order should the Department not prevail. Should the Department prevail in the administrative litigation process, it is likely that the final order removing the individual from office will be published on the Department's website. This is due to the fact that Section 302, as discussed in greater detail above, now provides that Department orders involving financial institutions may be published in the same manner as an order against a licensee. If the Department's removal action is upheld, the individual could be disqualified from working not only for the institution he or she was removed from, but working for *any* Pennsylvania institution, credit union or licensee, for a period of time to be determined by the Department.

The authority to immediately suspend an officer, employee, director or trustee is a powerful enforcement tool for the Department and is similar to the authority the Department already has to suspend officers, directors, committee members, employees, volunteers or agents pursuant to the Credit Union Code.[51] This authority is also similar to the authority that the Federal Deposit Insurance Act provides to the FDIC and the Federal Reserve.[52] The Department has stated that it will use this authority (as well as its new civil

money penalty authority discussed above) "only in rare circumstances" where the institution might suffer a substantial financial loss, the action of concern "is willful, flagrant, or otherwise evidences bad faith or where previous supervisory action has been ineffective in eliminating or deterring the problem."[53] Institutions, their officers, directors, trustees, and employees should take heed that the Department is prepared to use its new authority if it feels the situation is warranted.

The Department's Examination Authority

The Department and the CFPB may coordinate the sharing of information

The CFPB's ability to maintain the confidentiality of information in its possession has been called into question and, as a result, the CFPB published a final rule purporting to assure institutions and licensees that it will maintain the confidentiality of information in its possession.[54] New Section 506 grants the Department the authority to receive reports of examination conducted by the CFPB and to conduct coordinated examinations. Given the overlapping enforcement authority the CFPB will have over many of the entities the Department regulates, it appears that this amendment is intended to reassure entities regulated by the Department that information in the Department's possession that was obtained from the CFPB will remain confidential pursuant to Section 302 to the same extent as other information in the Department's possession. Confidentiality of examination information is a complicated issue, especially as applied to preserving privileged information.

Department's unambiguous authority to assess expenses to licensees

Previously, Section 204 of the DOBS Code provided the Department with the authority to assess the expenses incurred by the Department as a result of an investigation or examination and to assess penalties for failure to pay such expenses. New subpart C to Section 204 states that "[t]his section also applies to licensees."[55] There may have been doubt whether such expense assessment applied only to banking institutions and not licensees which prompted the inclusion of this provision in the Administrative Amendments. New subpart C makes it clear that licensees are responsible for paying De-

partment expenses incurred as a result of an examination or investigation of the licensee and that the licensee will be assessed penalties for failing to pay such expenses.

Department's authority over national bank subsidiaries

Section 402 of the DOBS Code has been amended to bring it into conformity with Sections 1044(e) and 1045 of Dodd-Frank. Prior to Dodd-Frank, the operating subsidiaries of national banks were outside the examination and supervisory authority of states by virtue of OCC regulatory rulings and the Supreme Court's decision in *Watters v. Wachovia*.[56] In *Watters*, the Supreme Court held that Michigan's attempt to supervise and regulate the activities of a national bank's real estate lending operating subsidiary was preempted by the National Bank Act and OCC regulations, since the operating subsidiary was exercising a power granted by that act, irrespective of the corporate structure under which it was held. Dodd-Frank overturned, in no uncertain terms, the *Watters* ruling. Sections 1044(e) and 1045 of Dodd-Frank provide that a state regulator may examine subsidiaries of national banks in order to enforce state consumer financial laws to the extent not otherwise preempted by federal law.

New Section 402 is consistent with Dodd-Frank in permitting the Department to exercise its visitorial powers over national bank subsidiaries. The Department now has the same authority as the OCC to supervise operating subsidiaries of national banks and federal savings associations, which would also encompass those subsidiaries' employees. Thus, to the extent such subsidiaries are doing business in Pennsylvania, they are subject to state and local laws and regulations only to the same extent as such laws and regulations apply to Pennsylvania state-chartered institutions. The subsidiaries of national banks and federal savings associations thus need to anticipate broad-focused exams of their operations by Pennsylvania examiners in addition to those examinations normally conducted by OCC examiners. Coordination of examinations among multiple examining authorities would be a desirable outcome.

The Department's authority to supervise, regulate, and examine of course extends to the subsidiaries of Pennsylvania state-chartered institutions. Entities should keep in mind that, even though Section 402 now provides the De-

partment with this "visitorial power" over subsidiaries, the ability to regulate certain activities may be limited by other statutory exemptions. For instance, the Mortgage Licensing Act provides that affiliates of banking institutions and subsidiaries and affiliates of federally chartered or state-chartered credit unions are not required to be licensed (although there are still some applicable recordkeeping and reporting requirements).[57]

Pennsylvania Consumer Financial Laws and Preemption

Determining whether a state law is preempted under Dodd-Frank

As stated previously, federal law has been held "supreme over state law with respect to national banking."[58] As such, when state and federal laws conflict, federal law generally overrides, or preempts, the state law that would otherwise be applicable to national banks transacting business in that state. Section 1044 of Dodd-Frank provides that state consumer financial laws are preempted only if: (1) the state consumer financial law would have a "discriminatory effect" on national banks; (2) the state consumer financial law "prevents or significantly interferes with the exercise by the national bank of its powers" in accordance with the Supreme Court decision in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et. al;*[59] or (3) the "State consumer financial law is preempted by a provision of Federal law other than [Title X of Dodd-Frank]."[60]

Dodd-Frank, at Section 1044(a), also codified the *Barnett* holding regarding court review for preemption and provides that the reviewing court shall assess the determinations of the OCC, the reasoning, the consistency with other determinations, and "other factors which the court finds persuasive and relevant to its decision."[61]

Applicability of Pennsylvania Laws

Consumer financial laws

Dodd-Frank defines a "State consumer financial law" as "a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to en-

gage in), or any account related thereto, with respect to a consumer."[62] New Section 506.I provides that Pennsylvania's consumer financial laws not otherwise preempted by federal law apply to national banks and federal savings associations and their subsidiaries as though they are state-chartered institutions. New Section 506.I acknowledges that the power of a national bank to act as a "most favored lender"[63] and to export interest rates is preserved as established by Section 1044 of Dodd-Frank and the National Bank Act.[64]

Section 506 also purports to apply "state consumer financial laws" to "foreign financial institutions." Section 506.K defines a "foreign financial institution" as not only a person registered or regulated by another state, but another country as well. The new provisions of Section 506 indicate that while Pennsylvania's consumer financial laws will apply to national banks and federal savings associations to the extent not otherwise preempted, Section 506.J does not have the same "to the extent not otherwise preempted" language. Thus, it appears that the Pennsylvania consumer financial laws clearly apply to foreign institutions. An international enforcement action is difficult to imagine, even though Pennsylvania's "long arm statute" provides jurisdiction for such actions,[65] yet new Section 506 contemplates such authority and it will be interesting to see how a court interprets this provision.

Department's Jurisdiction

New Section 506.G makes it clear that the Department's powers and responsibilities may not be exercised by any other Pennsylvania agency or political subdivision absent the request or authorization of the Department. In addition, those agencies, through new Section 506.F, are permitted to enforce a statute, regulation, order, ordinance, resolution or a federal law or regulation (to the extent authorized by federal law) against a state-chartered institution, credit union, licensee, national bank, federal savings association or foreign financial institution *so long as enforcement is not related to or incidental to the banking or financial activities*, or operations or conditions of such entities. The legislation provides that the Department shall have "*sole and exclusive jurisdiction* to initiate or participate in administrative proceedings or to request that the Attorney General initiate or participate in such proceedings" if the Department believes that an agency or political subdivision's en-

forcement action relates to banking activities.[66] The limitation on the ability of state and local agencies and political subdivisions to initiate proceedings based on banking or financial activities may prevent lawsuits similar to ones filed by the cities of Baltimore and Chicago against banks alleging abuses in the mortgage foreclosure process and interest rate fixing.

New Section 506.H provides that nothing limits or restricts the Pennsylvania attorney general or municipalities' law enforcement agencies from commencing criminal proceedings against financial institutions. This preserves the police powers of these entities and reinforces the fact that the Department does not have jurisdiction over criminal proceedings. However, as discussed above, the Department has tremendous authority over the civil enforcement actions against banking entities in Pennsylvania.

AMENDMENTS TO THE BANKING CODE (THE "BANKING CODE AMENDMENTS")

As stated previously, one of the main purposes of the "banking modernization legislation" is to streamline the regulatory scheme for financial entities conducting business in Pennsylvania. HB 2368 (a major 111 page bill) streamlined the Banking Code by eliminating provisions that are duplicative of federal law and incorporating certain provisions of Dodd-Frank. Mr. Dan Reisteter, vice president of government relations for the Pennsylvania Bankers Association, stated in his testimony before the Pennsylvania House Commerce Committee that the amendments to the Banking Code "preserve states' rights and maintain the long-standing expertise and regulatory oversight role over financial institutions which the Department of Banking is best suited for as the primary state banking regulator in this Commonwealth."[67] In 60 separate sections, the Banking Code Amendments streamline the statute and incorporate provisions to increase efficiencies for institutions conducting business in Pennsylvania.

Expansion of Authority to Conduct Business in Pennsylvania

The Banking Code Amendments make it easier for entities to conduct business in Pennsylvania. First, new Section 1012 authorizes a limited liabil-

ity company to conduct business as a bank, bank and trust company, trust company, or savings bank. Also, a limited liability company is included in the definition of an "incorporated institution" at Section 102(q).[68] Further, Sections 106(b) and (c), related to foreign fiduciaries, are amended to permit limited liability companies and federal savings banks to act as foreign fiduciaries in Pennsylvania. Section 106(c) makes it clear that national banks and federal savings banks can act as fiduciaries in Pennsylvania. Finally, money transmitters, which are separately licensed and regulated by the Department, are now included on the list of entities not deemed to be engaged in the banking business.

New Standard of Care for Directors and Officers of a Financial Institution

The Banking Code did not explicitly set forth a standard of care for directors of financial institutions. That was remedied with the enactment of a standard of care in new Section 1418, mimicking the standard in the Pennsylvania Corporations Code.[69] The new standard of care for both officers and directors will be to perform his or her duties "in good faith in a manner he [or she] reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances."[70] By codifying this standard of care, the Department has a more detailed basis to issue orders for the removal of directors or officers as well as to levy civil money penalties for violations of this enumerated standard of care.

Officers and directors will not be held strictly liable for actions taken in good faith in performing their duties at the institution. Rather, directors of an institution may rely in good faith on the information, opinions and reports provided by officers, employees, attorneys, accountants, or committees of the board.[71] In addition, an officer of an institution will not be held liable simply because that individual is an officer of the institution. [72] These provisions should allow officers and directors to function in their capacity as officers and directors without fear of repercussions for decisions made in good faith on behalf of the institution.

This adoption of the corporate standard of care for officers and directors

of institutions will require banking institutions to be aware of corporate rulings regarding these standards and how safety and soundness considerations are factored into the analysis. The OCC's publication on the responsibilities of national bank directors is worth reviewing.

Increased Penalties for Violations of Certain Provisions of the Banking Code

The penalties provided for in Section 2104 cover both natural persons and corporate entities. The penalty for willful violations of Sections 105 and 106 of the Banking Code by natural persons engaging in the business of a bank or as a fiduciary is changed from a misdemeanor punishable with imprisonment for up to one year, a fine of not more than $1,000, or both, to a felony punishable by up to two years imprisonment, a fine of not more than $10,000 per violation or both. For non-natural persons, the penalty for willful violation of the Banking Code has been increased from a fine of up to $5,000 to a fine of up to $500,000. The increased penalties reflect the seriousness that the Department views such activities and the Department's desire to ensure that no person or entity engages in such unauthorized activity.[73] In fact, the Department has stated that such unauthorized activity "is a serious crime that will compel criminal enforcement authorities to pursue such cases."[74]

Increased Investment Powers of Financial Institutions to Acquire Certain Real Property

Revised Section 202 of the Banking Code significantly increases the threshold limit required for Department approval for an institution and other entities to acquire and hold real property for the purpose of conducting business, providing parking facilities, or data processing centers. The threshold will now be 100 percent (rather than the previous threshold of 25 percent) of the aggregate of surplus, unallocated reserves, undivided profits and subordinated securities for mutual savings banks, or 100 percent of the aggregate of capital, surplus, undivided profits and capital securities for any other institution. As a result, institutions do not need the approval of the Department to purchase or other-

wise acquire such real property unless in doing so, it would cause the institution to incur obligations that exceed 100 percent of its aggregate capital, surplus or undivided profits. As noted by Secretary Moyer in his testimony before the House Commerce Committee, these amendments "will be especially important to national banks considering conversion to the state charter — they don't want to 'go backwards' in their ability to grow their institutions."[75]

Consolidated Consumer Lending Provisions into a Comprehensive New Section 303

The Banking Code had previously been comprised of different consumer lending empowerments enacted over many years. New Section 303 consolidated, repealed, and moved many of these sometimes competing credit and other lending sections (including Section 322, which contained the 1994 "Simplification and Availability of Bank Credit Act" (the "Simplification Act")) into new Section 303.[76]

New Section 303 of the Banking Code appears to be the new "one stop shop" for consumer lending law applicable to banks in Pennsylvania. As such, it borrows much of the permissive provisions of the former "Simplification Act" mentioned above but also expands its coverage. Here are some key observations about new Section 303.

First, new Section 303 includes the old Section 319 "parity provision," sometimes known as the "wild card" provision. Under new Section 303(b)(i), state banks are empowered to make loans at "such interest, finance charge, rate or terms" authorized to any other lender "regulated by any Federal or State supervisory authority on the specified class of loan." A Department interpretation from years ago confirmed that state banks using old Section 319 may achieve parity with federally chartered lenders such as federal credit unions. The legislature's retention of the substance of Section 319 may be helpful as a basis for state banks to obtain permissive legal authority for making consumer loans that other lenders enjoy.

Second, new Section 303 retains almost in its entirety the Simplification Act. The Simplification Act established a generally favorable and permissive environment for banks making consumer loans but it contains some requirements and limitations. For example, the Simplification Act requires a writ-

ten agreement with specified contents. Prepayment charges are prohibited. Readers should review the Simplification Act for a full picture of the requirements and limitations.

However, there are some changes made to the Simplification Act. Perhaps most significant, the scope of the Simplification Act is expanded to now include, for the first time: (i) first lien, purchase money residential loans; (ii) student loans guaranteed by Pennsylvania's Higher Education Assistance Agency; and (iii) a series of loans previously excluded because they were not subject to state usury law. For example, business loans are exempt from civil usury laws[77] and were thus not covered by the Simplification Act. Now, arguably, certain business loans are subject to Section 303 and can benefit from its favorable legal authority.[78] Another example involves unsecured consumer loans of over $35,000, which are exempt from civil usury law[79] and previously were not covered by the Simplification Act. New Section 303 may apply to them. Therefore, almost all closed and open-end consumer loans by banks are authorized under the Simplification Act in new Section 303, and that is generally good news for lenders.

Once covered by new Section 303, consumer loans (and certain business loans) must be the subject of a written agreement. Such loans are arguably free of a maximum rate limitation (subject to criminal usury laws); although the law does not expressly say that the rates may be established as agreed. Interestingly, a prior Simplification Act provision limiting variable rate loans to a maximum rate has been deleted, again suggesting that no maximum rate limitation exists. The maximum limitation on a delinquency charge (previously the higher of $20 or 10 percent) has also been deleted. Otherwise, the relatively permissive consumer lending provisions of the Simplification Act are retained.

Third, former Section 310 covered "real estate loans" and was deemed to be restrictive in its payment and loan-to-value ratio ("LTV") limitations. Section 310, however, has been repealed, its content has been moved to new Section 303 and its restrictions have been substantially liberalized. Banks now are generally authorized to make real estate loans for a term of up to 40 years and at an LTV of up to 90 percent. That section is shorn of its prior limitations, such as requiring loans to have "substantially equal payments." Even a 100 percent LTV ratio is permitted for loans less than $100,000, or for those with private mortgage insurance, subject to federal law LTV require-

ments. Section 310's coverage is expanded beyond first lien loans.

The prior Banking Code provisions applicable to consumer loans approximated a jig-saw puzzle. The more condensed approach of a fully contained new Section 303 should enable banks to at least find lending authority in one place.

New Derivatives Authorization

New Section 306 implements Section 611 of Dodd-Frank which provides that state banks may engage in derivative transactions only if the lending limit laws of their chartering states take credit exposure on derivate transactions into consideration. [80] By virtue of Section 306 including derivative transactions in the calculation under Pennsylvania law of the lending limit to one borrower, Pennsylvania-chartered banks will be able to continue to enter into interest rate swaps, options, and other derivative transactions. Absent Section 306's language, Pennsylvania banks would have been competitively disadvantaged as they could not have offered derivative transactions to their customers while national banks had no such restrictions.

Agents of Banks

The Banking Code Amendments made to Section 902 now allow affiliated banks that are subsidiary institutions of the same bank or financial holding company to engage in certain banking activities (such as accepting deposits and servicing loans) as an agent for the institution's affiliated entity. Thus, it permits inter-affiliate transactions as non-branching activities. This permits an out-of-state bank to engage in limited activity in Pennsylvania without Department approval. According to testimony before the House Commerce Committee, this provision was added for the convenience of Pennsylvania consumers[81] and allows a seamless customer relationship even across state lines.

Expanded Ability to Establish and Close Branches

Section 904(b) rescinds the prior requirement that, in order for a foreign bank to establish a branch in Pennsylvania, the state in which the for-

eign bank was chartered had to provide reciprocal rights for a Pennsylvania bank.[82] Such reciprocity provisions are no longer necessary because Section 613 of Dodd-Frank did away with the reciprocity requirement by amending the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.[83] In addition, Section 613 provides that a national bank or a state-insured bank can establish a branch wherever a state bank can have a branch.[84] Thus, institutions that want to establish branches in other states no longer need to worry about whether the foreign state has reciprocal banking laws.

Previously, Section 905 of the Banking Code provided that prior to an institution ceasing operations at a branch location, the institution must obtain Department approval for the closure.[85] However, amended Section 905(e) provides that institutions are only required to provide notice to the Department of such branch closure. Secretary Moyer stated in his testimony before the House Commerce Committee that "branch closure is a business decision and should not require Departmental approval."[86]

Conversion to a State-chartered Institution

In order for a financial institution incorporated under the laws of another state or the United States to convert to a Pennsylvania state-chartered institution, the institution must meet certain minimum capital requirements. Former Section 1102(b) of the Banking Code set forth a table establishing the minimum capital requirements for an institution based on the population where the institution's principal place of business would be located. Amended Section 1102(b) repealed the minimum capital table and provides that the minimum capital requirements for an institution to convert shall be set by, and will be at the discretion of, the Department. In fact, the minimum capital amount could be significantly higher than the requirements established by the population table. Thus, the Department will not issue a certificate of authorization to do business as provided in Section 1010 until the converting institution meets the specific minimum capital requirements set by the Department. The new capital requirements are addressed with institutions as part of the chartering process. Thus, Pennsylvania institutions should submit reasonable capital plans with their applications based on the expectations set by the Department.

Clarifications on Mergers

The Banking Code Amendments include three provisions that clarify institution merger procedures in Pennsylvania. First, the ability to issue dividends based on the accumulated net earnings of merged institutions had previously been permitted through Department interpretation. Section 1302(a) was amended to codify and eliminate any ambiguity as to an institution's ability to pay dividend earnings "acquired as a result of a merger and transferred to surplus" so long as such earnings are used within seven years of the date of the merger.

Second, Section 1302 contained several holes as to the types of entities that could merge in Pennsylvania and whose net earnings prior to a merger were not transferred to capital or surplus of the resulting institution. Section 1302(c) was amended to include a federal savings bank on the list of entities whose earnings may be carried forward as accumulated net earnings.

Finally, Section 1602(a) expands the list of entities that may merge or consolidate into state-chartered institutions to include federal savings banks and nonbank subsidiaries in addition to permitting state and federal credit unions to convert to a Pennsylvania state-chartered mutual savings bank. All of these amendments combine to make Pennsylvania an even more desirable banking jurisdiction.

Technical Amendments

The Banking Code Amendments made a number of technical amendments as part of the goal of streamlining the regulatory requirements for financial institutions conducting business in Pennsylvania. Such amendments include:

- *Savings bank parity*. Sections 515 and 516 expand the powers of savings banks to put them on the same level playing field as banks regarding the pledge of deposits and limits on indebtedness of one customer. This amendment parallels the changes to the general powers of banks contained in new Section 303.
- *Trust beneficiaries.* The Banking Code Amendments provide at Section 605 that there can be an unlimited number of beneficiaries on trust de-

posit accounts. According to Secretary Moyer, this change was made in response to consumer demands to have the ability to list all of a family's children as beneficiaries on deposit accounts.[87]

- *Place of business.* The Banking Code Amendments require that an institution's principal place of business be located within the Commonwealth of Pennsylvania.
- *Conflicts of Interest.* In order to maintain objectivity in regulating institutions, the officials and employees of the Department are generally prohibited from engaging in any perceived conflicts of interest including accepting gifts from, holding positions at, or maintaining accounts with the institutions and individuals subject to regulation by the Department. The DOBS Code provides that officials and employees must only comply with the conflict of interest requirements of the Pennsylvania Securities Act and the statutes, regulations and statements of policy generally related to ethical conduct.[88] Amended Section 2004 clarifies that, notwithstanding that provision, Department employees are also subject to the conflict of interest provisions of the Banking Code. Such restrictions aid in maintaining the objectivity of a regulator in conducting an examination of the institution.
- *Savings bank audits.* The Banking Code Amendments require that audits of savings banks be conducted by certified public accountants pursuant to standards set forth by the Department in the same manner the Department requires for other regulated institutions.
- *National bank references.* All references to "national banks" have been removed from the Banking Code consistent with federal preemption and Dodd-Frank and to eliminate confusion for national banks and consumers.[89]
- *Corporate seal.* All requirements that banks use a corporate seal have also been removed.[90] According to Department Secretary Glenn Moyer's testimony before the House Commerce Committee, such seals are no longer used by financial institutions.[91]
- *Savings bank lending.* The definition of savings bank lending powers in Section 506 has also been streamlined.

As evidenced by the long list of technical and substantive amendments to the Banking Code, the Pennsylvania Legislature went to great lengths in order to revamp and revitalize the Banking Code to modernize the regulatory environment in which Pennsylvania financial institutions conduct business today. The changes appear to make Pennsylvania a more competitive place for banks to do business, while granting the Department the authority to ensure that entities and individuals involved in the banking industry conduct themselves with the highest degree of responsibility and integrity.

AMENDMENTS TO THE LOAN INTEREST AND PROTECTION LAW (THE "LIPL AMENDMENTS")

The shortest of the three bills, HB 2370, amended Pennsylvania's civil usury statute to remove provisions deemed to be duplicative of federal law. Section 301 of the LIPL, relating to residential mortgage interest rates, provided that variable interest rate transactions are permissible provided that the documents evidencing the debt comply with sets of variable rate limitations and disclosures. The LIPL Amendments delete several of these variable rate restrictions including the notice of rate change, a variable rate disclosure for the note and mortgage, and an application disclosure.

Federal Regulation Z,[92] the implementing regulation for the Truth-in-Lending Act, contains similar variable rate disclosure requirements.[93] In practice, many lenders had deemed all of these LIPL variable rate provisions to be of little relevance as other federal or Pennsylvania variable rate laws applied. The LIPL Amendments repealed provisions of Section 301(e) that were deemed duplicative of Regulation Z variable rate requirements.[94] Also, until 2008, the LIPL's coverage was limited to loans of up to $50,000. Now the LIPL covers mortgage loans of up to $234,692.[95] For state-chartered lenders and licensees still in the variable rate mortgage business, the remaining variable rate provisions of Section 301 may be worth another look.

Finally, a new "wildcard" usury provision appears in the LIPL. Previously, the LIPL empowered most state institutions (and now savings banks) to charge the rate of interest available to a national bank under 12 USC § 85.[96] Now, state institutions can charge rates as authorized by "other applicable Federal or State law." It will be interesting to see how the Department or a court views this new language.

CONCLUSION

The stated intent of the three bill legislative package was to modernize and streamline the bank regulatory scheme in Pennsylvania, improve Pennsylvania's competiveness in the banking industry, and to comply with applicable provisions of Dodd-Frank. In many ways the legislative package achieves these goals. By repealing outdated provisions, increasing the Department's ability to levy civil money penalties, as well as expanding the scope of powers and entities that may conduct business in Pennsylvania, the commonwealth may become a more desirable location to conduct banking business while ensuring that the laws and regulations are enforced. Effective December 24, 2012, the banking regulatory scheme in Pennsylvania was strengthened and rejuvenated.

NOTES

[1] 12 USC 5301 *et seq*. *See* www.pabanker.com, Legislative Advocacy Center, June 7, 2012 testimony of Dan Reisteter, vice president of government relations before the Pennsylvania House Commerce Committee.

[2] 71 P.S. § 733-1 *et seq*.

[3] 7 P.S. § 101 *et seq*.

[4] 41 P.S. § 101 *et seq*.

[5] For instance, Section 204.B provided for a $150 penalty against an institution for failing to pay its assessment within sixty days and for each thirty-day period thereafter. 71 P.S. § 733-204.B. Section 403.E.(1) provided for a $100 penalty for every day that an institution does not file a report or furnish proof of publication as required by the Department. 71 P.S. § 733-403.E.(1).

[6] *See* 17 Pa C.S. § 503(a.1)(1) and 7 Pa. C.S. § 6140 respectively.

[7] In addition to the authority to issue civil money penalties, the Banking Code was amended to increase the penalty provisions for willful violations, which is discussed elsewhere in this summary.

[8] *Watters v. Wachovia*, 550 U.S. 1, 10 (2007) citing *McCulloch v. Maryland*, 17 U.S. 319 (1819).

[9] 12 U.S.C § 484(a).

[10] 12 C.F.R. § 7.4000.

[11] 129 S.Ct. 2710.

[12] 129 S.Ct. at 2721.

[13] *Id*. at 2718.
[14] *Id*. at 2719.
[15] *Id*. at 2721-2722.
[16] Particularly Sections 1042(a) and 1047.
[17] *See* Section 1042(a) and Section 1047(a)(i)(1) of Dodd-Frank. The enforcement authority granted to state attorneys general does not extend to enforcing Dodd-Frank itself.
[18] At the same time, the Department's visitorial authority, which is discussed in detail elsewhere in this summary, has been expanded to cover subsidiaries of national banks and federal savings associations.
[19] In January 2013, Kathleen Kane was sworn in as Pennsylvania's attorney general. She is not only the first Democrat to hold that position since the attorney general became an elected position in 1981, but she is also the first female elected attorney general in Pennsylvania. *See* http://www.attorneygeneral.gov/theoffice.aspx?id=170; http://articles.philly.com/2012-11-08/news/34974406_1_democrat-kathleen-kane-sandusky-case-district-attorney.
[20] In addition, Section 506.D prohibits all other commonwealth agencies or political subdivisions from exercising visitorial powers with respect to a national bank or federal savings association except as provided by federal law or on a case-by-case basis as authorized by the OCC.
[21] 71 P.S. § 732-301 and http://www.ogc.state.pa.us/portal/server.pt/community/about_the_office/3252/commonwealth_attorneys_act/425242.
[22] *See* Section 1042(a)(2)(B) of Dodd-Frank.
[23] 71 P.S. § 732-101 *et seq*.
[24] 71 P.S. §§ 732-201 and 732-204.
[25] 71 P.S. § 732-301.
[26] *Id*.
[27] 71 P.S. § 732-201(c).
[28] 71 P.S. § 732-301.
[29] *See* November 14, 2012 letter by Secretary of the Department Glenn Moyer. http://www.psc.state.pa.us.
[30] Examples of such administrative actions can be found on the Department's website, www.psc.state.pa.us.
[31] The Banking Code of 1965,7 P.S. § 101 *et seq*.; the Check Casher Licensing Act, 63 P.S. § 2301 *et seq*.; the Consumer Discount Company Act, 7 P.S. § 6201 *et seq*., the Credit Services Act, 73 P.S. § 2181 *et seq*., the Credit Union Code, 17 Pa. C.S. § 501 *et seq*., the Debt Management Services Act, 63 P.S. § 2401 *et seq.;* the Money Transmitter Act, 7 P.S. § 6101 *et seq*., the Mortgage Licensing Act, 7 Pa. C.S. § 6101 *et seq*.; the Motor Vehicle Sales Finance Act, 69 P.S. § 601 *et seq*.; the Pawnbrokers

License Act, 63 P.S. § 281-1 *et seq*.; the Savings Association Code of 1967, 7 P.S. § 6020-1 *et seq*., and the Loan Interest and Protection Law, 41 P.S. § 101 *et seq*.

[32] *See* The Check Casher Licensing Act, 63 P.S. § 2304; the Consumer Discount Company Act, 7 P.S. § 6212; the Credit Services Act, 73 P.S. § 2190; the Money Transmitter Act, 7 P.S. § 6110, and the Pawnbroker License Act, 63 P.S. § 281-8.

[33] 71 P.S. § 733-202.D.

[34] 71 P.S. § 733-302.A(1)-(2). The Department is permitted to share information with other state or federal law enforcement or regulatory agencies or through a court-issued subpoena. 71 P.S. § 733-302.A(3)-(7). In addition, Section 404 provides that the Department may divulge information in its possession through written consent of the institution, approval of the governor, by providing copies of the Department's examination report to the institution, and entering into information-sharing agreements with other state and federal agencies. 71 P.S. § 733-404.

[35] 65 P.S. § 67.101 *et seq*. (the "Right-to-Know Law").

[36] www.psc.state.pa.us. Pursuant to Sections 305(a)(3), 306 and 3101.1 of the RTKL, 65 P.S.§§ 67.305(a)(3), 67.306, and 67.3101.1 records in the possession of an agency are presumed to be open, unless there is another statute that prevents its release. The Office of Open Records has upheld Department denials of Right-to-Know Law requests based on Section 302. *See* OOR Final Determination AP 2011-0342.

[37] 71 P.S. § 733-302.B.

[38] 71 P.S. § 733-302.A(5).

[39] *See* November 14, 2012 letter by Secretary Glenn Moyer. http://www.psc.state.pa.us.

[40] *Id.*

[41] *See* April 24, 2009 letter from Secretary Steven Kaplan at www.psc.state.pa.us.

[42] *See* June 7, 2012 testimony of Secretary Glenn Moyer.

[43] 71 P.S. 733-404.B.

[44] 71 P.S. § 733-501.B (emphasis added).

[45] The Administrative Amendments remove attorneys from the list of individuals the Department has enforcement authority over. While no testimony or discussion regarding this deletion could be located, it is likely that attorneys were removed from the enumerated list of individuals subject to the Department's jurisdiction because attorneys are already subject to the jurisdiction of the Pennsylvania Supreme Court Disciplinary Board. http://www.padisciplinaryboard.org. 204 Pa. Code 81.1 *et seq.*

[46] The new fiduciary duty of officers and directors is discussed in detail in the Banking Code summary.

[47] *See* HB 2369, § 5.

[48] *See* 1 Pa. Code § 31.1 *et seq.*

[49] The increased penalties in the Banking Code are discussed in more detail elsewhere

in this summary.
[50] Hearings are conducted pursuant to the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 31.1 *et seq.*
[51] 17 Pa. C.S. § 503(a.1)(2).
[52] 12 U.S.C. § 1818(e), 12 U.S.C. § 1813(u).
[53] *See* November 14, 2012 letter by Secretary Glenn Moyer. http://www.psc.state.pa.us.
[54] http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-adopts-rule-for-the-protection-of-privileged-information/. On December 11, 2012, the U.S. Senate approved a bill codifying this CFPB rule. *See* S. 3394. The bill now waits for the president's signature. The House had approved a similar bill on March 26, 2012, H.R. 4014.
[55] 71 P.S. § 733-204.C.
[56] 550 U.S. 1 (2007).
[57] 7 Pa. C.S. § 6112(7).
[58] *Watters v. Wachovia*, 550 U.S. 1, 10 (2007).
[59] 517 U.S. 25 (1996). The issue before the Supreme Court in *Barnett* was whether a 1916 federal law that permitted national banks to sell insurance in small towns preempted a 1974 Florida law prohibiting banks from selling most kinds of insurance. 517 U.S. at 28. In 1993, Barnett Bank, a national bank, purchased a Florida-licensed insurance agency. The Florida Insurance Commissioner ordered Barnett Bank to stop selling insurance as prohibited by the Florida law. *Id*. at 29.

The key question in determining whether a state law is preempted, is whether Congress intended "to exercise its constitutionally delegated authority to set aside the laws of a state" when it enacted the federal law. *Id*. at 30. In determining whether the specific federal law at issue in *Barnett* preempted Florida law, the Supreme Court first examined the specific language of the two statutes to determine whether they were in conflict. If the state statute prevented the accomplishment of the purpose of the federal law, then the state statute would be preempted. *Id*. at 31. In addition, the Supreme Court examined the statutory history and background surrounding the enactment of the federal law as well as other cases involving preemption issues. Finally, the Supreme Court examined a special anti-preemption rule in the McCarran Ferguson Act which provided that courts were not to "invalidate, impair, or supersede" a state statute. *Id*. at 37, *citing* 15 U.S.C. § 1012(b). However, an exception in the McCarran Ferguson Act provided that it did not apply when the conflicting federal statute "specifically relates to the business of insurance." *Id*. The Court held that the federal statute at issue specifically referenced the business of insurance and thus the McCarran Ferguson anti preemption provision did not apply. *Id*. at 39, 41. Given this analysis, the Supreme Court held that Congress intended to preempt the Florida

statute and that the anti-preemption provision in McCarran Ferguson did not apply. *Id*. at 37, 41.

[60] Section 1044(a) of Dodd-Frank.

[61] *Id.*

[62] *Id*.

[63] Discussed elsewhere in this summary.

[64] 12 U.S.C. § 85.

[65] 42 Pa. C.S. § 5322.

[66] Emphasis added.

[67] *See* Reisteter June 7, 2012 testimony.

[68] Limited liability companies are organized pursuant to the Business Corporation Law in Pennsylvania. 13 Pa. C.S. ch 89. The Banking Code Amendments provide that should there ever be a conflict between the Banking Code and the Business Corporation Law, the Banking Code will control.

[69] *See* 15 Pa. C.S. § 512.

[70] 15 Pa. C.S. § 512(a) and (c).

[71] 15 Pa. C.S. § 512(a).

[72] 15 Pa. C.S. § 513(c).

[73] Increasing the penalties for willful violations is likely to discourage individuals and entities like Whalebones Café Bank in Pittsburgh from engaging in the business of a bank or fiduciary without the approval of the Department. http://online.wsj.com/article/SB10000872396390444335045776499713264329 62.html.

[74] *See* November 14, 2012 letter by Secretary of the Department, Glenn Moyer. http://www.psc.state.pa.us.

[75] *See* June 7, 2012 testimony of Department Secretary Moyer.

[76] The following sections of the Banking Code were repealed by the enactment of HB 2368:

Section 112.1	Prohibition against certain acquisitions
Section 309	Installment loans
Section 310	Real Estate Loans
Section 316	Authorizing certain loans for commercial, business, professional, agricultural or non-profit purposes
Section 317	Monthly interest loans for individuals, partnerships and other unincorporated entities
Section 318	Alternate basis for interest charges by institutions
Section 319	Charging interest at rates permitted competing lenders
Section 321	Authorization of fees for revolving credit plans
Section 322	Extensions of credit to individuals, partnerships, and unincorporated associations

Section 505 Real Estate loans

[77] 41 P.S. § 201(b)(iii).

[78] Business and agricultural loans to individuals, a partnership, a limited liability company or an unincorporated association are explicitly subject to the Simplification Act. Such lenders need to review these provisions.

[79] 41 P.S. § 201(b)(ii).

[80] *See* Section 611(a) of Dodd-Frank which provides that states must implement these lending limit requirements by January 13, 2013.

[81] *See* Secretary Moyer June 7, 2012 testimony.

[82] Furthermore, the Banking Code Amendments repealed the Section 904(c) requirement that savings banks receive the Department's prior written approval in order to establish branches. This is because savings banks are now included in the definition of an institution as provided in Section 102 of the Banking Code and thus, are included in the branch approval provisions of Section 904(a).

[83] Codified at 12 U.S.C. § 36(g)(1)(A).

[84] *See* Section 613 of Dodd-Frank.

[85] 7 P.S. § 905(e).

[86] *See* Secretary Moyer June 7, 2012 testimony.

[87] *Id.*

[88] 71 P.S. § 733-1114-A.

[89] *See* Sections 108, 111, 112, 113, 601, 1601, and 1610(g). *See* Secretary Moyer June 7, 2012 testimony.

[90] *See* Sections 205(b), 1202, 1205(b), 1306(b), 1504, 1603, 1704, 1802, 1804, and 1806.

[91] *See* Secretary Moyer June 7, 2012 testimony.

[92] 12 C.F.R. § 1026.1 *et seq*.

[93] *See* 12 C.F.R. §§ 1026.19(b) and 1026.20(c).

[94] *See* June 7, 2012 testimony of Secretary Moyer.

[95] 41 P.S. § 101. This is the amount for calendar year 2013 as published in the November 3, 2012, *Pennsylvania Bulletin*, 42 Pa. B. 6899.

[96] This federal law, known properly as the "most favored lender" usury provision, generally allows national banks to charge an interest rate allowed by the state where the bank is located.