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New York State Makes Structural Changes to State Bank Regulatory System

Governor Andrew Cuomo and the New York State Legislature have consolidated the New York State Banking and Insurance Departments into the new Department of Financial Services, effective October 2011.

The new Financial Services Law ("FSL") is a portion of the New York State budget bill enacted upon the Governor's signature on March 31 intended to provide cost savings in the regulation of financial services.[1] The FSL consolidates the New York State Banking Department ("NYBD") and the New York State Insurance Department ("NYID") into a single, new Department of Financial Services ("DFS"). The DFS will be headed by the Superintendent of Financial Services (the "Superintendent") appointed by the Governor and consented to by the State Senate for an indefinite term. The DFS will be composed of a banking division and an insurance division, each led by a deputy superintendent appointed by the Superintendent, and a new unit that combines each existing Department's financial frauds investigative unit. The effective date of the combination is October 3, 2011.

In general, the substantive provisions of the existing Banking and Insurance Laws remain unchanged. Indeed, the FSL takes the form of a new chapter, Chapter 18-A, of the New York Consolidated Laws separate from the other two Laws. Accordingly, virtually all of the substantive law applicable to banks remains unchanged. However, the new Department's authority to investigate fraud is wider than the authority of the existing Departments. More importantly, the seeds are sown for further changes in structure and rearrangements of operations in the future.

Following is a summary of points of interest for New York-chartered banks and New York-licensed branches and agencies of foreign banks.

- The existing NYBD staff, procedures and policies generally remain unchanged.
  - The creation of a stand-alone division for the regulation of banks within the DFS will likely cause much of the existing structure of the NYBD to be maintained in the near term.

[1] 2011 N.Y. Laws, chapter 62, Part A (March 31, 2011) ("Part A").

- Accordingly, the substantive statutory and regulatory requirements applicable to New York banks and branches will remain in place. It appears likely that examination procedures and supervisory expectations will remain as they are.

- The Banking Board is abolished effective October 3.
  - The Banking Board consists of the current Superintendent of Banks plus 16 individuals appointed by the Governor, half of which must have banking experience, and meets monthly to approve charters for new banks and licenses for new branches of foreign banks and to approve various other matters. Authority to take these actions is transferred to the Superintendent effective October 3.[2]
  - A new charter advisory board will be appointed to include a consumer representative and eight representatives of the banking industry in order to provide advice to the Superintendent on encouraging use of a New York bank charter. The advisory board's existence will expire on October 3, 2016.[3]
- The functions conducted by the Criminal Investigations Bureau of the NYBD and the Insurance Frauds Bureau of the NYID are combined in a new Financial Frauds and Consumer Protection Unit ("Unit"), which has an expanded mandate.[4]
  - The current units are authorized to investigate possible violations of certain specified statutes, while the Unit is authorized to investigate a new class of possible violations: activities that may constitute "intentional fraud or intentional misrepresentation of a material fact with regard to any person offering to provide or providing financial products or services," or violation of State or Federal fair debt collection practices or fair lending laws.[5]
  - "Financial product or service" is defined to include any financial product or financial service offered or provided by any person regulated *or required to be regulated* under the banking law or the insurance law or any financial product or service offered or sold to consumers.[6] This allows the Unit to investigate entities not registered with the DFS, such as debt consolidation service providers.
    - There is no explicit definition of "fraud."
    - In order to avoid overlap, the definition excludes products or services regulated exclusively by a Federal agency, regulation of which is preempted by Federal law, or otherwise regulated by New York for consumer or investor protection, thereby avoiding the Unit's incursion into securities regulation, which is within the province of the Attorney General.

2 Part A at Sections 17 (repealing NYBL § 13), 90, 98 and 114(a).
3 Part A at Sections 1 (adding § 205-b of Chapter 18-A) and 114(e).
4 Part A at Sections 1 (adding Article 4 of Chapter 18-A), 2 and 3.
5 Part A at Section 1 (adding Sections 404 and 408 of Chapter 18-A).
6 Part A at Section 1 (adding Section 104(a)(2) of Chapter 18-A) (emphasis added). Non-bank entities regulated under the Banking Law include mortgage bankers and brokers, check cashers, money transmitters, sales finance companies and the like.

- The Superintendent may impose penalties for offenses resulting from the Unit's activities, after notice and hearing, of (i) $5,000 per offense for intentional fraud or misrepresentation, or violations of debt collection or fair lending laws, and (ii) $1,000 per offense for other offenses.[7]
- Another New York agency, the Consumer Protection Board, was to be combined with the Unit under an earlier version of the bill that became the FSL, but its functions, which basically apply to consumer protection for non-financial products and services, remain separate and will be housed within the Department of State.

- Assessments on New York banks and branches of foreign banks will likely change.
  - Currently the NYBD's budget is funded through assessments and fees imposed on its regulated entities, and the NYID is similarly funded by its insurance licensees. A major issue with combining the departments was the allocation of assessments to fund the DSF's combined operations.
  - Beginning in April 2012, the Superintendent is to assess persons regulated under the NYIL to cover operating expenses solely attributable to those persons, and to assess persons regulated under the NYBL for expenses solely attributable to regulation of those persons; assessments for other operating expenses are to be made on all such entities "in such proportions as the superintendent shall deem just and reasonable."[8]
  - The expenses incurred in conducting examinations of NYID-regulated entities will continue to be assessed against the particular entity based on actual expenses, and against NYBD-regulated entities only for special examinations.[9]
  - The "other" expenses will include the expenses of operating the Unit. In light of its expanded mandate, including investigations of entities not supervised by the DFS, these expenses may well be higher than those of the currently existing units.
    - Penalties collected by the Superintendent are to be applied to reduce assessments on banking and insurance entities covering the expenses of the Unit.[10]
- The new statute provides for the possibility of additional changes in the future.
  - By June 30, the Governor is to create a working group to examine ways to improve the efficiency and effectiveness of banking and insurance regulation, including opportunities to integrate activities prescribed by the NYBL and NYIL, and the Superintendent is to issue a report with the results of the group's review by January 1, 2012.[11]
  - Another Part of Chapter 62, Part E, entitled the Executive Reorganization Act of 2011, appears to provide an expedited means whereby the Governor may present a reorganization plan for almost any agency of State government, including the DFS, to the legislature for expedited consideration.[12]

[7] Part A at Section 1 (adding Section 408(a) of Chapter 18-A).
[8] Part A at Section 1 (adding Section 206 of Chapter 18-A). Mortgage brokers are exempt from assessment for the "other" expenses.
[9] Part A at Section 1 (adding Section 206(f) of Chapter 18-A).
[10] Part A at Section 1 (adding Section 408(b) of Chapter 18-A).
[11] Part A at Section 1 (adding Section 205-a of Chapter 18-A).

- Such a plan may provide for the transfer of functions from one agency to another, transfer of personnel among agencies, and mergers of agencies.
- This provision is effective immediately and is deemed repealed on May 31, 2014.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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