require liquor advertisements to include visual and verbal health warnings regarding areas such as alcohol addiction, risks to pregnant women, drunk driving, and underage drinking. The proposed warnings, which are similar to those required in cigarette advertisements, are expected to be opposed by the alcohol industry.

LITIGATION:

In *Outdoor Resorts/Palm Springs Owners' Ass'n v. Alcoholic Beverage Control Appeals Board*, No. E007958 (Oct. 11, 1990), the Fourth District Court of Appeal held that the holder of a club liquor license is not entitled to a duplicate on-sale general license for a separate clubhouse located on the same premises. Outdoor Resorts, a country club and recreational vehicle resort similar to a condominium project, is comprised of numerous lots, the owners of which all belong to an owners' association. The owners' association holds a club liquor license for a bar on its premises. The association applied to ABC for a duplicate license at a second resort clubhouse on the same premises and was rejected. In denying Outdoor Resorts' application, ABC relied on Business and Professions Code sections 23430 and 23355, which proscribe the issuance of more than one club license to any club. On appeal, the administrative law judge (ALJ) issued a proposed decision in favor of Outdoor Resorts' owners' association. Despite the apparent 30-day limitation in Government Code section 11517(b) for ABC review of the decision, ABC rejected the proposed decision of the ALJ seven weeks later. The Alcoholic Beverage Control Appeals Board affirmed the decision of the Department.

On appeal, the Fourth District narrowly interpreted the term "rights and privileges" in Business and Professions Code section 23355, and upheld the Board's denial of the requested duplicate club license. On the procedural issue, Outdoor Resorts asserted that the ALJ's proposed decision became final because ABC did not reject it within 30 days. In denying petitioners' writ, the Fourth District relied on Government Code section 11517(d), which provides that "[t]he proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency...," and found that ABC issued its decision within this 100-day period.

In *Williams v. Saga Enterprises, Inc.*, No. B043922 (Nov. 15, 1990), the Second District Court of Appeal held that a restaurant bartender's voluntary retention of a customer's car keys may have created a duty to protect third parties from that customer's drunk driving.

Lee Chandler, the drunken customer, frequented the Black Angus restaurant in question and made a practice of giving his car keys to the bartender on the understanding that the keys would be returned to him only if he were able to drive his car safely. Scott Williams sustained serious injuries in an automobile collision with a vehicle driven by Chandler; Chandler was intoxicated, having had several drinks at the restaurant earlier that evening. Williams sued Chandler and the restaurant owner, Saga Enterprises, Inc., claiming that a Saga employee had returned Chandler's car keys to him on the night of the accident even though he was intoxicated. The trial court granted Saga's motion for summary judgment. However, the Second District Court of Appeal reversed and remanded, finding that the bartender voluntarily assumed a duty to protect the public from Chandler's drunk driving, and that action created a triable issue as to whether this "good Samaritan" role exposed the restaurant to liability based on section 324A of the Second Restatement of Torts.

BANKING DEPARTMENT

Superintendent: James E. Gilleran
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Toll-Free Complaint Number:
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Pursuant to Financial Code section 200 *et seq.*, the State Banking Department (SBD) administers all laws applicable to corporations engaging in the commercial banking or trust business, including the establishment of state banks and trust companies; the establishment, operation, relocation, and discontinuance of various types of offices of these entities; and the establishment, operation, relocation, and discontinuance of various types of offices of foreign banks. The Department is authorized to adopt regulations, which are codified in Chapter 1, Title 10 of the California Code of Regulations (CCR).

The superintendent, the chief officer of the Department, is appointed by and holds office at the pleasure of the Governor. The superintendent approves applications for authority to organize and establish a corporation to engage in the commercial banking or trust business. In acting upon the application, the superintendent must consider:

(1) the character, reputation, and financial standing of the organizers or incorporators and their motives in seeking to organize the proposed bank or trust company;

(2) the need for banking or trust facilities in the proposed community;

(3) the ability of the community to support the proposed bank or trust company, considering the competition offered by existing banks or trust companies; the previous banking history of the community; opportunities for profitable use of bank funds as indicated by the average demand for credit; the number of potential depositors; the volume of bank transactions; and the stability, diversity, and size of the businesses and industries of the community. For trust companies, the opportunities for profitable employment of fiduciary services are also considered;

(4) the character, financial responsibility, banking or trust experience, and business qualifications of the proposed officers; and

(5) the character, financial responsibility, business experience and standing of the proposed stockholders and directors.

The superintendent may not approve any application unless he/she determines that the public convenience and advantage will be promoted by the establishment of the proposed bank or trust company; conditions in the locality of the proposed bank or trust company afford reasonable promise of successful operation; the bank is being formed for legitimate purposes; the proposed name does not so closely resemble as to cause confusion the name of any other bank or trust company transacting or which has previously transacted business in the state; and the applicant has complied with all applicable laws.

If the superintendent finds that the proposed bank or trust company has fulfilled all conditions precedent to commencing business, a certificate of authorization to transact business as a bank or trust company will be issued.

The superintendent must also approve all changes in the location of a head office, the establishment or relocation of branch offices and the establishment or relocation of other places of business. A foreign corporation must obtain a license from the superintendent to engage in the banking or trust business in this state. No one may receive money for transmission to foreign countries or issue travelers checks unless licensed. The superintendent also regulates the safe-deposit business.

The superintendent examines the condition of all licensees. However, as the result of the increasing number of banks and trust companies within the state and the reduced number of

examiners following passage of Proposition 13, the superintendent now conducts examinations only when necessary, but at least once every two years. The Department is coordinating its examinations with the FDIC so that every other year each agency examines certain licensees. New and problem banks and trust companies are examined each year by both agencies.

The superintendent licenses Business and Industrial Development Corporations which provide financial and management assistance to business firms in California.

Acting as Administrator of Local Agency Security, the superintendent oversees all deposits of money belonging to a local governmental agency in any state or national bank or savings and loan association. All such deposits must be secured by the depository.

MAJOR PROJECTS:

Superintendent Testifies on Foreign Bank Activity. On October 16, Superintendent of Banks James E. Gilleran, representing the Conference of State Bank Supervisors, testified at a hearing before the U.S. House of Representatives' Committee on Banking, Finance and Urban Affairs on the extent of supervision exercised by the various states in overseeing foreign corporations conducting a banking business in the United States pursuant to state authority. Gilleran stated that state banking departments are the primary supervisors of state-licensed foreign bank branches and agencies and opined that, at this time, there is no need to change the structure of the supervisory system for foreign bank branches and agencies. As primary supervisors, the state agencies perform the same regulatory review of foreign bank activity as they do for domestic state-chartered banks. The Superintendent further stated that—in addition to examinations and visitations by state regulators—the Federal Reserve, through section 7(c)(6) of the International Bank Act (IBA) of 1978, also has the authority to examine any foreign branch or agency, whether state or federally chartered, and to impose minimum reserve requirements on state and federal licensed branches and agencies.

Although not calling for any new federal legislation, the Superintendent made three recommendations on improving the regulation and examination of the foreign bank branches and agencies. First, Gilleran stated that the IBA-mandated consultation on major policy issues between the Federal Reserve and all state regulators should be more regular and formalized. Second, Gilleran suggested that a representative of the states be involved in international meetings, such as the Basle Committee, which impact the foreign bank branches or agencies regulated by the states. Finally, he called for an expansion of the federal criminal code to include crimes by employees of foreign bank branches or agencies.

FDIC Report. According to an FDIC study released in September, although the nation's banking system continues to slide downhill, the western states enjoyed stable profits and a declining number of delinquent real estate loans during the second quarter of 1990. Profits in the northeast plunged 63%, while rising 4% in the west. California generated second-quarter profits of $906 million, down 7% from $977 million in the year-ago period. Only 1.44% of real estate loans in California were listed as noncurrent on payment (overdue 90 days or more), compared to a national figure of 3.45%. However, federal officials see potential weaknesses for California, such as the high vacancy rates reported in some areas for office and commercial buildings.

LITIGATION:

In *Valley Bank of Nevada v. Plus System, Inc.*, No. 89-16287 (Sept. 11, 1990), the U.S. Ninth Circuit Court of Appeals ruled that a state law permitting banks to charge transaction fees for automatic teller machine (ATM) use by foreign cardholders does not violate the commerce clause of the U.S. Constitution. Plus System, Inc., operates a shared ATM network that permits account holders to use the ATM cards issued by their own banks to withdraw cash from ATMs of other banks. The network rules of Plus System barred the banks disbursing the money from charging foreign cardholders a separate transaction fee on withdrawals. Valley Bank of Nevada objected to this rule and filed an antitrust suit in federal court against Plus System.

While the action was pending, the state of Nevada enacted SB 404, which provides that a shared ATM network "may not prohibit, limit or restrict the right of a financial institution to charge a customer any fees allowed by state or federal law...." Accordingly, the district court granted Valley Bank's motion for summary judgment. Plus System appealed, arguing that the Nevada law violates the interstate commerce clause of the federal Constitution.

The Ninth Circuit affirmed, finding that the law does not directly regulate and discriminate in favor of Nevada and against interstate commerce simply because it applies to more out-of-state cardholders than in-state cardholders, and that the burden on interstate commerce is minimal.

In *Great Western Bank v. Office of Thrift Supervision*, No. 89-55823 (Oct. 18, 1990), the U.S. Ninth Circuit Court of Appeals affirmed the district court's judgment affirming the Federal Home Loan Bank Board's (FHLBB) decision denying Great Western Bank's (GW-California) application to merge with Great Western Bank, a savings bank (GW-Washington), thereby preventing GW-California from leaving the Federal Savings and Loan Insurance Corporation's (FSLIC) insurance fund in order to become insured by the Federal Deposit Insurance Corporation (FDIC).

In response to the failure of hundreds of FSLIC-insured savings and loan institutions in the mid-1980s, and the subsequent insolvency of the FSLIC, Congress passed the Competitive Equality Banking Act of 1987 (CEBA), which provided for a $10.8 billion recapitalization of the FSLIC Fund and blocked the ability of healthy S&Ls to leave the FSLIC in favor of the FDIC. Under section 306(h) of CEBA, institutions were not allowed to terminate their FSLIC-insured status during the year following CEBA's passage (August 10, 1987). However, one of CEBA's "grandfather" provisions provided that an institution was exempt from the moratorium if, on or before March 31, 1987, the institution had entered into a letter of intent or a written memorandum of understanding to merge with an institution whose deposits were insured by the FDIC. On March 30, 1987, GW-California entered into a memorandum of understanding to merge with Great Western Thrift and Loan (GW-Utah), whose deposit accounts were insured by the FDIC. Some time after July 1987, GW-California decided that a merger with FDIC-insured GW-Washington would be preferable to a combination with GW-Utah and, on June 7, 1988, entered into a memorandum of understanding contemplating the implementation of a plan of merger with GW-Washington. GW-California and GW-Washington then submitted applications to the FHLBB for permission to merge, with the merged entity to be a federally-chartered savings bank insured by the FDIC; the two banks relied on a March 16, 1988 FHLBB decision which allowed such a merger between two other institutions under similar circumstances (the *First Federal* decision). However, on May 22, 1989, the FHLBB rejected GW-California's merger application, concluding that it

was not "grandfathered from the CEBA Moratorium," and distinguishing its action in the First Federal case.

The U.S. District Court for the Central District of California found that the Bank Board's reason for denying the merger application was proper and that, therefore, the denial was neither arbitrary and capricious nor contrary to law. The district court made no finding as to the Bank Board's action in the *First Federal* case.

In affirming the district court's decision, the Ninth Circuit determined that FHLBB's action was proper, and that the *First Federal* decision did not establish a broad, binding rule. The court noted that "[w]hile the Bank Board may have wrongly decided *First Federal* based on a flawed interpretation of the statute..., and while it shirked its duty in not fully analyzing the statute in that case, it seems clear that it did not announce or even imply the *general* rule that appellants attribute to the *First Federal* case and on which appellants contend they have a right to rely." The court also relied heavily on the strong interest in applying a rule that corresponds to the plain language of the statute.

The insurance and banking industries are awaiting the Third District Court of Appeal's review of the Sacramento County Superior Court's decision in *Sanford v. Gillespie,* in which the lower court upheld banks' authority to sell insurance under Proposition 103. The insurance reform initiative, passed by the voters in 1988, repealed several provisions of the Insurance Code which prohibited banks from selling insurance, but neglected to repeal two similar provisions in the Financial Code. (See CRLR Vol. 9, No. 2 (Spring 1989) pp. 81 and 88 and Vol. 9, No. 1 (Winter 1989) p. 70 for background information.) The superior court followed the Insurance Commissioner's ruling that the Financial Code provisions were repealed by implication with the passage of Proposition 103.

No less than four banks in California have acquired insurance agencies and are offering the full range of insurance products, including commercial insurance. Most of the licensed banks began the licensing process within the last year, and a large number of banks currently have insurance license applications pending. Because annuities achieve attractive fee income through a relatively simple product, they constitute the major insurance product being sold by California banks at this time. Property, casualty, life, and health insurance products are among other services banks are now offering.

DEPARTMENT OF CORPORATIONS

Commissioner: Christine W. Bender
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The Department of Corporations is a part of the cabinet-level Business and Transportation Agency and is empowered under section 25600 of the California Code of Corporations. The Commissioner of Corporations, appointed by the Governor, oversees and administers the duties and responsibilities of the Department. The rules promulgated by the Department are set forth in Chapter 3, Title 10 of the California Code of Regulations (CCR).

The Department administers several major statutes. The most important is the Corporate Securities Act of 1968, which requires the "qualification" of all securities sold in California. "Securities" are defined quite broadly, and may include business opportunities in addition to the traditional stocks and bonds. Many securities may be "qualified" through compliance with the Federal Securities Acts of 1933, 1934, and 1940. If the securities are not under federal qualification, the commissioner must issue a "permit" for their sale in California.

The commissioner may issue a "stop order" regarding sales or revoke or suspend permits if in the "public interest" or if the plan of business underlying the securities is not "fair, just or equitable."

The commissioner may refuse to grant a permit unless the securities are properly and publicly offered under the federal securities statutes. A suspension or stop order gives rise to Administrative Procedure Act notice and hearing rights. The commissioner may require that records be kept by all securities issuers, may inspect those records, and may require that a prospectus or proxy statement be given to each potential buyer unless the seller is proceeding under federal law.

The commissioner also licenses agents, broker-dealers, and investment advisors. Those brokers and advisors without a place of business in the state and operating under federal law are exempt. Deception, fraud, or violation of any regulation of the commissioner is cause for license suspension of up to one year or revocation.

The commissioner also has the authority to suspend trading in any securities by summary proceeding and to require securities distributors or underwriters to file all advertising for sale of securities with the Department before publication. The commissioner has particularly broad civil investigative discovery powers; he/she can compel the deposition of witnesses and require production of documents. Witnesses so compelled may be granted automatic immunity from criminal prosecution.

The commissioner can also issue "desist and refrain" orders to halt unlicensed activity or the improper sale of securities. A willful violation of the securities law is a felony, as is securities fraud. These criminal violations are referred by the Department to local district attorneys for prosecution.

The commissioner also enforces a group of more specific statutes involving similar kinds of powers: Franchise Investment Statute, Credit Union Statute, Industrial Loan Law, Personal Property Brokers Law, Health Care Service Plan Law, Escrow Law, Check Sellers and Cashiers Law, Securities Depositor Law, California Finance Lenders Law, and Security Owners Protection Law.

A Consumer Lenders Advising Committee advises the commissioner on policy matters affecting regulation of consumer lending companies licensed by the Department of Corporations. The committee is composed of leading executives, attorneys, and accountants in consumer finance.

MAJOR PROJECTS:

Proposed Regulatory Action Under the Credit Union Law. On November 23, the Department published notice of its intent to amend section 976 of its regulations, which concerns loans secured by real property. The proposed changes would:

-clarify that a credit union may make a loan secured only by real property owned by the member-borrower which is unimproved or improved, has or will have not more than four residential units, and is or will be the principal or second residence of the member-borrower; one other parcel which is unimproved or improved, has or will have not more than four residential units, and will not be a residence of the member-borrower; or agriculturally zoned;

-clarify that a loan secured by real property can be by a first or second lien which shall not, together with any loan secured by a prior encumbrance, exceed 80% of the appraised value of the property, with certain exceptions for loans insured by an instrumentality of the federal government or by a policy of private insurance written by an insurance company admitted in California. The term of the loan may not exceed 40 years if the loan is secured by a first lien, or 30 years if the loan is secured by a second lien;