### Special Feature

### A PREVIEW OF DELAWARE'S FINANCIAL CENTER DEVELOPMENT ACT OF 1981

By William Prickett, David S. Swayze, and Dennis Spivack \*

#### I. Introduction and Overview

On February 18, 1981, Governor Pierre S. duPont, IV signed into law the Financial Center Development Act.¹ The FCDA embodies a comprehensive package of new initiatives designed to respond to the changing needs of and patterns for the conduct of business by banking and financial institutions. The modernization of Delaware's banking practices underscores the purpose of the FCDA; namely, that market forces rather than isolated state regulations should control the availability of credit. The FCDA recognizes that those state regulations which must exist should be vastly simplified; in line with this goal, the FCDA eliminates the morass of unnecessary distinctions among various forms of credit transactions.

By virtue of the enticing regulatory and tax provisions, the FCDA is designed to attract to Delaware the operations of out-of-state bank holding companies, affiliated finance companies, and other providers of credit. The legislation sets forth the criteria for establishing a banking subsidiary in Delaware. The FCDA grants banks wide latitude in credit transactions and establishes low tax and licensing provisions for banks and other finance companies which relocate in Delaware. At the same time, the FCDA seeks to protect the business of existing Delaware banks and permits these institutions to enjoy the benefits of the FCDA as well.

The clarity and flexibility of the new Delaware provisions governing the extension of credit take on heightened importance in light of a federal provision which allows a national bank to "export" the law of the state in which it operates to govern transactions with its

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<sup>1.</sup> Financial Center Development Act of 1981, 63 Del. Laws, ch. 2, §§ 2-23 [hereinafter cited as FCDA, §§ 2-23] (to be codified in Del. Cope Ann. tit. 5, §§ 801-1105 (Supp. 1982); tit. 6, §§ 4301-4343 (Supp. 1982); tit. 30, §§ 2101-6301 (Supp. 1982).).

out-of-state customers.2 The legality of applying the law of the "home" state on a national basis was recently decided, thus assuring that the FCDA will have national reach.8

#### II. BANK HOLDING COMPANIES

#### A. Eligibility

The Bank Holding Company Act of 1956 was intended to restrict the geographical expansion of bank holding companies.4 The Act prevented a bank holding company from purchasing more than five percent of the voting stock of a bank located in any state other than its "home" state (i.e., where its largest banking subsidiary was located) in the absence of specific legislative authorization by the "host" state to do so. In an effort to preserve the integrity of the existing Delaware banking community, an out-of-state bank holding company or any subsidiary thereof is still limited by the FCDA from acquiring more than five percent of the stock of an existing Delaware bank.<sup>6</sup> However, the FCDA grants the permission allowed by 12 U.S.C. section 1842 for an out-of-state bank holding company or any subsidiary thereof to acquire a newly chartered,7 single-office

<sup>2.</sup> National Bank Act of 1874, ch. 343, 18 Stat. 123, as amended by 12 U.S.C. § 85 (Supp. 1979).

<sup>3.</sup> Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299 (1978).

<sup>4.</sup> Bank Holding Company Act of 1956, ch. 240,  $\S$  3, 80 Stat. 237, 12 U.S.C.  $\S$  1842 (1976).

<sup>5.</sup> See FCDA, supro note 1, § 2 (to be codified in Del. Code Ann. tit. 5, § 801(f)). The term "subsidiary" means, with respect to an out-of-state bank holding company, (1) any company 25% or more of whose voting shares are directly or indirectly owned or controlled by such bank holding company, or are held by it with power to vote; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company.

<sup>6.</sup> FCDA, supra note 1, §2 (to be codified in Del. Code Ann. tit. 5, § 803).

<sup>6.</sup> FCDA, supra note 1, § 2 (to be codified in Del. Code Ann. tit. 5, § 803).

7. The new bank whose stock is to be acquired may be either a national or a state chartered bank. A national bank seeking a federal charter must obtain approval from the Office of the Comptroller of Currency, Department of the Treasury, pursuant to the National Bank Act of 1874, ch. 343, 18 Stat. 123, as amended by 12 U.S.C. §§ 21-27 (Supp. 1979), before filing an application pursuant to the FCDA. If the new bank seeks a state charter, it must first submit an application to the Delaware Bank Commissioner. Following approval of its state charter, the new bank may apply for membership in the Federal Reserve System pursuant to the Federal Reserve Act, 12 U.S.C. § 321 (1945). In the alternative, the new bank may seek only to become an insured bank by submitting an application pursuant to the Federal Deposit Insurance Act, 12 U.S.C. § 1815 (1976). At the present time, acquiring a national charter may be advantageous in an effort to minimize prospective litigation as to the national reach of the credit provisions of the FCDA. See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299 (1978). State-chartered federally insured banks may be able to justify the exportation of their interest rates in light of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1831(d) (1976).

bank which is open to the public in Delaware. The bank must commence operations with a minimum capital stock and paid-in surplus of \$10 million, and it must increase its capitalization to \$25 million within one year. It must also employ, within one year of the commencement of business operations, a minimum of 100 persons. In addition, the Delaware office must be operated in a manner and at a location which is unlikely to attract customers from the general public to the substantial detriment of local banks which existed prior to the effective date of the FCDA.<sup>8</sup>

The acquisition of voting stock in the Delaware bank must be approved in advance by the State Bank Commissioner.<sup>9</sup> The criteria which the Commissioner must consider are:

- (1) The financial and managerial resources of the out-of-state bank holding company or its subsidiary;
- (2) The future prospects of the out-of-state bank holding company and the bank whose assets or shares it will acquire or its subsidiary;
- (3) The financial history of the out-of-state bank holding company or its subsidiary;
- (4) Whether such acquisition or holding may result in undue concentration of resources or substantial lessening of competition in [Delaware]; and
- (5) The convenience and needs of the public of [Delaware].10

The out-of-state bank holding company or any subsidiary thereof may continue to operate its Delaware office only so long as it complies with the above conditions. Upon any violation of these conditions, the Commissioner may issue an order to remedy the violation.<sup>11</sup> In the event of continued noncompliance, the Commissioner may order a divestiture order within a two year period; however, such order is subject to a review *de novo* by the Delaware Court of Chancery.<sup>12</sup>

A companion bill <sup>18</sup> also amends Delaware's Corporation Law for State Banks and Trust Companies in order to ease the entry of a bank holding company or any subsidiary thereof into the Delaware banking community and to enable the newly created Delaware bank

<sup>8.</sup> FCDA, supra note 1, §2 (to be codified in Del. Code Ann. tit. 5, §803(a)-(d)).

<sup>9.</sup> FCDA, supra note 1, § 2 (to be codified in Del. Code Ann. tit. 5, § 803(e)). 10. FCDA, supra note 1, § 2 (to be codified in Del. Code Ann. tit. 5, § 804(b)).

<sup>11.</sup> FCDA, supra note 1, § 2 (to be codified in Del. Code Ann. tit. 5, § 807(a)).

<sup>12.</sup> FCDA, supra note 1, § 2 (to be codified in Del. Code Ann. tit. 5, § 807(d)).

<sup>13.</sup> See Delaware Act of Feb. 18, 1981, 63 Del. Laws, ch. 3, §§ 1-7 [hereinafter cited as H.B. 29, §§ 1-7] (to be codified in Del. Code Ann. tit. 5, §§ 722-71 (1981)).

to engage in modern banking practices such as international banking and revised hours and location of business by:

- (a) reducing the number of incorporators necessary to carry out the planned acquisition of stock in a bank located in Delaware from fifteen to three, two of whom must be citizens and residents of Delaware; 14
- (b) permitting the establishment of foreign branches or places of business by Delaware banks or trust companies with a minimum of \$1 million in paid-in capital; 15
- (c) permitting a bank to invest up to 50% of its capital in real estate suitable for the conduct of its business; 16
- (d) permitting the State Bank Commissioner to adopt rules governing the time required to start up a new bank or branch in Delaware; 17 and
- (e) clarifying that letters of credit and standby letters of credit issued by banks or trust companies are not to be be construed as guarantees. 18

#### B. Tax Benefits

The regressively graduated tax schedule for computation of the franchise tax is one of the principal inducements for a domestic or foreign institution to establish a Delaware subsidiary. The sliding scale would tax net income not in excess of \$20 million at the rate of 8.7%; net income over \$20 million, but not in excess of \$25 million, would be taxed at 6.7%; net income over \$25 million, but not in excess of \$30 million, would be taxed at 4.7%; and net income in excess of \$30 million would be taxed at 2.7%. 19

Prior to the enactment of the FCDA, the franchise tax was applied to the net income of banks, trust companies, and national banks located in Delaware. The definition of net income permitted the deduction of federal income taxes.<sup>20</sup> A bank's net earnings could be further reduced by interest income from obligations of the State of

<sup>14.</sup> H.B. 29, supra note 13, §1 (to be codified in Del. Code Ann. tit. 5, § 722).

<sup>15.</sup> H.B. 29, supra note 13, § 7 (to be codified in Del. Code Ann. tit. 5, § 771).

<sup>16.</sup> H.B. 29, supra note 13, § 3 (to be codified in DEL. Code Ann. tit. 5, § 762).

<sup>17.</sup> H.B. 29, supra note 13, § 2 (to be codified in Del. Code Ann. tit. 5, §§ 734, 770(a)).

<sup>18.</sup> H.B. 29, supra note 13, §5 (to be codified in Del. Code Ann. tit. 5, §767(1)).

<sup>19.</sup> FCDA, supra note 1, § 7 (to be codified in Del. Code Ann. tit. 5, § 1105).

<sup>20.</sup> FCDA, supra note 1, §6 (to be codified in Del. Code Ann. tit. 5, §1101). This provision states that the net income on which the franchise tax is imposed "shall be that defined by the Federal Deposit Insurance Corporation (12 CFR 335) or other appropriate federal authority and reported to the State Bank Commissioner . . . ."

Delaware or any of its political subdivisions as well as by any dividends and contributions to net income from subsidiaries.<sup>21</sup> In the computation of net income, the FCDA permits the inclusion of an additional deduction. Taxable net income can now be reduced by the amount of net income earned by non-United States branches of a Delaware bank, provided that eighty percent of the foreign branches' gross income is from sources outside the United States.<sup>22</sup>

#### C. Credit Transaction Benefits

The thrust of the FCDA is to grant banks wide latitude in the extension of credit. First and foremost, the FCDA eliminates all interest rate ceilings. Furthermore, the FCDA sets forth no restrictions on the type of loan, the type of borrower, or loan limits. Consumer and commercial credit transactions are covered. Here, a special feature of the FCDA should be noted. The term "borrower" is used to denote any natural or juristic entity which might have occasion to borrow.<sup>28</sup> "Individual borrower" is separately defined as a natural person borrowing for personal, household, or family purposes.<sup>24</sup> This distinction permits the FCDA to provide some consumer oriented safeguards without imposing any similar restrictions on commercial credit transactions.

The FCDA makes it clear that, with respect to commercial loans (loans to non-individual borrowers), all terms are open and subject to negotiation between the borrower and the bank. Areas subject to negotiation include prepayment or refinancing charges, late charges, attorneys' fees, collection expenses, and the extension or deferment of any scheduled payment.<sup>25</sup>

Under the new statutory scheme, all bank credit is divided into two categories: (a) open-end or revolving credit, and (b) closed-end or installment credit. A revolving credit plan is defined as involving an extension of credit under an agreement between the bank and the borrower in which the bank permits the borrower, from time to time, to make purchases and/or to obtain loans by means of a credit device. Thus, a revolving credit plan is defined broadly to include credit card purchases, cash advances, check credit, and overdraft checking. Closed-end credit is defined as an extension of credit pursuant

<sup>21.</sup> Id.

<sup>22.</sup> Id.; see also I.R.C. § 862(a).

<sup>23.</sup> FCDA, supra note 1, § 23 (to be codified in Del. Code Ann. tit. 5, § 941(b)).

<sup>24.</sup> FCDA, supra note 1, § 23 (to be codified in Del. Code Ann. tit. 5, § 941(c)).

<sup>25.</sup> FCDA, supra note 1, § 5 (to be codified in Del. Code Ann. tit. 5, § 972).

<sup>26.</sup> FCDA, supra note 1, § 23 (to be codified in DEL. CODE ANN. tit. 5, § 941(d)).

to an arrangement or agreement which is not a revolving credit plan.<sup>27</sup> The term "loan" is defined as any single extension of closed-end credit.<sup>28</sup> The FCDA provisions dealing with the deregulation of credit transactions apply to both types of credit. They differ only with respect to the imposition of charges in addition to or in lieu of interest as a result of the distinctive nature of these two forms of lending.

#### 1. Variable Rate Loans

In light of the recent upward surge in interest rates, the most significant change may be that which permits all forms of bank credit to be granted on a variable rate basis. A variable rate loan is defined as one which, from time to time, may vary in accordance with a schedule or formula.29 The significance of this provision is that the newly imposed rate may be made applicable to all balances which are then outstanding including balances which arose prior to the variation in the rate. This provision will permit banks to continue to extend credit during periods of rising interest rates since banks will not have to be concerned about paying more for funds for their own use in the future than they will receive in interest for the use of their previously distributed funds. As with other businesses, banks are now in a position to pass on to borrowers the high cost of their product, i.e., credit. Finally, variable interest rate agreements may be offered in the context of installment loans only if the interest on the loan is not precomputed and taken in advance.30

#### 2. Change in Terms

If the agreement governing a revolving credit plan so provides, a bank may unilaterally amend the terms governing the plan including the rate of interest charged under the plan, by giving notice of such amendment and by deeming any further use of the account after a minimum fifteen day notice period to be an acceptance of the change. If the borrower decides to accept a change in terms by further use of the account by making additional purchases or cash advances, the change will apply to the entire balance outstanding in the borrower's account, including any portion of the balance representing transactions

<sup>27.</sup> FCDA, supra note 1, §5 (to be codified in DEL CODE ANN. tit. 5, §961(b)).

<sup>28.</sup> FCDA, supra note 1, § 5 (to be codified in Del. Code Ann. tit. 5, § 961(c)).

<sup>29.</sup> FCDA, supra note 1, § 4 (revolving credit), § 5 (installment credit) (to be codified in Del. Code Ann. tit. 5, §§ 944, 964).

<sup>30.</sup> FCDA, supra note 1, §5 (to be codified in DEL Code Ann. tit. 5, § 964).

which occurred prior to the change in terms. However, a borrower who does not accept the change must be afforded the opportunity of paying his outstanding balance pursuant to the terms of the unamended agreement.<sup>31</sup> These provisions apply specifically to consumer credit transactions. As previously noted for commercial accounts, the FCDA provides that changes in terms will be governed by the agreement between the bank and the borrower.<sup>32</sup>

#### 3. Skip-Payment Option

A bank may unilaterally offer a borrower the privilege of deferring periodic payments.<sup>33</sup> Such a provision is intended mainly to reflect the existing practice of many banks of extending a so-called "skip-payment option" during summer and holiday periods.

#### 4. Insurance and Collateral

In the case of an "individual borrower," a bank may request but not require a variety of credit insurance on the person or the property securing an indebtedness from an insurer acceptable to the bank. A bank may require such insurance from all other borrowers. In each instance, the offer and placement of insurance is subject to the restrictions imposed by the applicable provisions of the insurance laws.<sup>34</sup> A bank may also request such collateral as it deems acceptable in order to secure its loan.<sup>35</sup>

#### 5. Late and Default Charges

A bank is permitted to impose a penalty upon a defaulting borrower, either by charging a higher rate of interest on outstanding unpaid installments (except in the case of an "individual borrower") or by imposing a flat delinquency charge (which may be imposed even on an "individual borrower"), or both.<sup>36</sup>

<sup>31.</sup> FCDA, supra note 1, § 4 (to be codified in DEL. Code Ann. tit. 5, § 952).

<sup>32.</sup> FCDA, supra note 1, § 5 (to be codified in Del. Code Ann. tit. 5, § 972).

<sup>33.</sup> FCDA, supra note 1, § 4 (revolving credit), § 5 (installment credit) (to be codified in Del. Code Ann. tit. 5, §§ 948, 966).

<sup>34.</sup> FCDA, supra note 1, § 4 (revolving credit), § 5 (installment credit) (to be codified in Del. Code Ann. tit. 5, §§ 949, 967).

<sup>35.</sup> FCDA, supra note 1, § 4 (revolving credit), § 5 (installment credit) (to be codified in Del. Code Ann. tit. 5, §§ 942, 962).

<sup>36.</sup> FCDA, supra note 1, § 4 (revolving credit), § 5 (installment credit) (to be codified in Del. Code Ann. tit. 5, §§ 950, 968).

#### 6. Attorneys' Fees and Collection Costs

In the event of default and if the credit agreement so provides, a bank may refer the account to an attorney and hold the borrower liable for reasonable attorneys' fees. If it is necessary to file a collection action, the bank may also recover from the borrower all court and collection costs.<sup>37</sup>

#### 7. Other Charges

If the credit plan so provides, a bank may impose other charges in addition to or in lieu of interest. For revolving credit transactions, such additional charges may include a membership fee for the credit privileges made available to the borrower. Additionally, transaction charges for each separate loan transaction may be assessed, as well as a minimum periodic charge for any period during which some amount of credit is outstanding.<sup>38</sup> The additional charges applicable only to a closed-end loan would encompass loan fees, "points," finders' fees, and other front-end charges and, in addition, reasonable fees for actual expenses incurred or services rendered by the bank. In the case of a loan to an individual borrower, front-end or other charges are not collectible unless the loan agreement so provides.<sup>39</sup>

#### 8. Prepayment and Refinancing Charges

Banks frequently collect prepaid interest on an installment loan by way of discount, add-on, or other similar method; upon prepayment in full of such a loan, the borrower is entitled to a rebate of interest which has customarily been calculated in accordance with the "rule of 78's." Reflecting the growing unpopularity of this rule, the FCDA eliminates the rule of 78's and requires that the rebate be computed pursuant to the "actuarial method." <sup>40</sup> The "actuarial method" is one of allocating payments made on the loan between the outstanding balance of the loan and interest thereon pursuant to which a payment is applied first to the accumulated interest; the remainder is then subtracted from the outstanding balance of the loan. <sup>41</sup> By calculating the refund of unearned interest in this manner, the borrower is, in effect, given the benefit of the equivalent of a simple annual interest

<sup>37.</sup> FCDA, supra note 1, §4 (revolving credit), §5 (installment credit) (to be codified in Del. Code Ann. tit. 5, §§ 951, 971).

<sup>38.</sup> FCDA, supra note 1, § 4 (to be codified in Del. Code Ann. tit. 5, § 945).

<sup>39.</sup> FCDA, supra note 1, §5 (to be codified in Del. Code Ann. tit. 5, § 965).

<sup>40.</sup> FCDA, supra note 1, § 5 (to be codified in Del. Code Ann. tit. 5, § 969(b)).
41. FCDA, supra note 1, § 5 (to be codified in Del. Code Ann. tit. 5, § 969(c) (1)).

calculation. A bank may not impose any prepayment penalty on a consumer loan except in the case of a residential mortgage loan where the penalty or charge specified in the pertinent agreement, bond, or note will govern.<sup>42</sup> The bank must also refund any unearned insurance premium.<sup>43</sup> Finally, a bank may collect a charge in connection with the refinancing of a loan.<sup>44</sup>

#### III. Affiliated Finance Companies

The FCDA clarifies the status of an affiliated finance company as an entity set up to buy receivables or make loans to companies with which it is affiliated.<sup>45</sup> The importance of this definition is that the FCDA exempts an affiliated finance company from all state taxes. Instead, a flat licensing fee is imposed on the capital base of such a company ranging from \$10,000 on capital under \$100 million to \$50,000 on capital over \$750 million.<sup>48</sup> "Capital base" is defined as "capital, surplus and retained earnings or equivalent accounting terms, as set forth in the company's certified financial statement." <sup>47</sup>

#### IV. Application of FCDA's Liberal Credit Provisions to Other Classes of Loans

Effective June 1, 1981, provisions of the FCDA were activated which will govern small loans,<sup>48</sup> financing of motor vehicle purchases,<sup>49</sup> secondary mortgages,<sup>50</sup> and retail installment sales.<sup>51</sup> With regard to each class of loans, interest rate ceilings have been eliminated; interest may now be charged in accordance with the agreement governing each type of loan. Pursuant to the FCDA, interest may now be calculated and collected in advance on installment-type loans. In the event of prepayment in full of such loan, the borrower is entitled to an interest rebate calculated pursuant to the actuarial method. Furthermore, no prepayment or other penalty charge may be assessed.

<sup>42.</sup> FCDA, supra note 1, § 5 (to be codified in DEL CODE ANN. tit. 5, § 969(e)).

<sup>43.</sup> FCDA, supra note 1, § 5 (to be codified in Del. Code Ann. tit. 5, § 969(d)).

<sup>44.</sup> FCDA, supra note 1, §5 (to be codified in Del. Code Ann. tit. 5, § 970).

<sup>45.</sup> FCDA, supra note 1, § 23 (to be codified in Del. Code Ann. tit. 30, § 6301 (a)).

<sup>46.</sup> FCDA, supra note 1, § 23 (to be codified in Del. Code Ann. tit. 30, § 6303). 47. Id.

<sup>48.</sup> FCDA, supra note 1, §§ 8-10 (to be codified in Del. Code Ann. tit. 5,

<sup>§§ 2101-2115).

49.</sup> FCDA, supra note 1, §§ 11-13 (to be codified in Del. Cope Ann. tit. 5, §§ 2901-2912).

<sup>50.</sup> FCDA, supra note 1, §§ 14-15 (to be codified in Del. Code Ann. tit. 5, §§ 3101-3131).

<sup>51.</sup> FCDA, supra note 1, §§ 16-19 (to be codified in Del. Code Ann. tit. 6, §§ 4301-4343).

#### V. Conclusion

The Delaware Financial Center Development Act is to the banking and financial communities what the Delaware General Corporation Law has been to the corporate community. The FCDA simplifies both the classification and regulation of credit. It grants complete flexibility to banks in fixing and adjusting the costs charged for credit, unhampered by inconsistent and outdated state regulations, with regard to transactions throughout the United States. It should be noted that the new bank credit provisions set forth in the FCDA do not pre-empt their predecessor provisions; therefore, banks are free to extend credit in accordance with the new or former provisions or any combination thereof.

The FCDA complies with the federal guidelines concerning interstate bank ownership and thus offers bank holding companies an opportunity to set up a wholly-owned Delaware subsidiary. Such a bank would benefit from the regressive tax schedule.

The favorable tax and regulatory environment has not been lost on Chase Manhattan Corporation (Chase Manhattan Bank (U.S.A.), N.A.), J. P. Morgan and Co. (Morgan Bank (Delaware)), and Citicorp (Citibank (Delaware)), three of the nation's leading bank holding companies or First National Bank of Maryland (First Maryland Bancorp).<sup>52</sup> Each one has initiated proceedings to establish a major new subsidiary in Delaware. In conclusion, the credit provisions, when coupled with the tax benefits available to out-of-state and foreign bank holding companies and affiliated finance companies, make the FCDA a unique and far-reaching piece of legislation.

<sup>52.</sup> First National Bank of Maryland had announced its plan to move to Delaware as a result of the legislation but had not filed a formal application as of the date of this publication.

# HOUSE BILL NO. 28 AS AMENDED BY HOUSE AMENDMENT NOS. 1 AND 2 63 DEL. LAWS, C. 2.

An act to amend Title 5 and Title 6 of the Delaware Code by PROVIDING FOR THE ACQUISITION OF STOCK IN DELAWARE BANKS BY OUT-OF-STATE BANK HOLDING COMPANIES; BY PROVIDING FOR THE REGULATION OF BANK REVOLVING CREDIT AND CLOSED END CREDIT; BY PROVIDING RULES FOR THE TAXATION OF INCOME OF NON-UNITED STATES BRANCH OFFICES OF DELAWARE BANKS; BY ADOPTING NEW RATES FOR THE TAXATION OF NET INCOME OF BANKS IN EXCESS OF \$20 MILLION DOLLARS; BY ELIMINAT-ING CEILINGS ON INTEREST RATES WHICH MAY BE CHARGED IN RESPECT OF SMALL LOANS, SECONDARY MORTGAGE LOANS, MOTOR VEHICLE LOANS AND RETAIL INSTALLMENT SALES; BY PROVIDING FOR REFUNDS OF PRECOM-PUTED INTEREST CHARGES IN ACCORDANCE WITH THE ACTUARIAL METHOD; BY PROVIDING FOR THE ISSUANCE OF REGULATIONS BY THE BANK COMMIS-SIONER ESTABLISHING REASONABLE TIMES FOR THE OPENING OF A BRANCH OF A SAVINGS BANK; BY REGULATING THE MAKING OF LOANS DIRECTLY OR INDIRECTLY TO DIRECTORS AND EXECUTIVE OFFICERS OF BANKS; AND BY DELETING FROM THE CODE PREVIOUSLY REPEALED PROVISIONS RELATING TO THE COLLECTION, PAYMENT AND DISHONOR OF DEMAND ITEMS AND REVO-CATION OF LETTERS OF CREDIT; AND TO AMEND TITLE 30 TO PROVIDE FOR THE TAXATION OF AFFILIATED FINANCE COMPANIES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELA-WARE:

Section 1. This Act may be referred to as "The Financial Center Development Act." (63 Del. Laws, C. 2, § 1.)

Section 24. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable, except that the severability provision set forth in § 808 of Chapter 8 of Title 5 of the Delaware Code as set forth in Section 2 of this Act shall control as to the severability and continued effectiveness of the provisions of said Chapter 8 of Title 5 of the Delaware Code. (63 Del. Laws, C. 2, § 24.)

Section 25. Sections 1 through 7, inclusive, and 20 through 24, inclusive, of this Act shall take effect immediately upon its adoption. Sections 8 through 19, inclusive of this Act shall become effective on June 1, 1981. (The bill was adopted Feb. 18, 1981.)

### HOUSE BILL NO. 29 63 DEL. LAWS, C. 3.

An act to amend Chapter 7 of Title 5 of the Delaware Code by establishing the number and qualifications of persons required to form a bank or trust company controlled by an out-of-state bank holding company; by providing for the issuance of regulations by the Bank Commissioner establishing reasonable times for the startup of a bank or trust company or the opening of a branch; by amending the requirements regulating the percentage of a bank's capital, surplus and undivided profits which may be invested in real estate; by deleting from Section 764 (b) a reference which is no longer applicable; by providing that no letter of credit shall be construed as a guarantee; and by authorizing the establishment of branch offices without the State of Delaware.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELA-WARE, TWO-THIRDS OF ALL MEMBERS ELECTED TO EACH HOUSE THEREOF CONCURRING HEREIN:

Section 8. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable. (63 Del. Laws, C. 3, § 8.)

Section 9. This Act shall take effect immediately upon its adoption. (The effective date is Feb. 18, 1981.)

#### Synopsis of H. B. 29

1. Number of Qualifications of Incorporators.

Section 1 of the Bill amends present Section 722 of Title 5 of the Delaware Code by reducing to three the number of persons required to establish a bank or trust company which, in the opinion of the State Bank Commissioner, is formed after the effective date of this Bill as a part of a planned acquisition of stock in a Delaware bank by an out-of-state bank holding company.

2. Reasonable Time for Startup of a Bank or Trust Company or the Opening of a Branch.

Sections 2 and 6 together provide that a bank or trust company shall be allowed a "reasonable time," as determined by the State Bank Commissioner, for the startup of business or for the opening of a branch, in lieu of the 6 month period under present law, which time period may be extended by the Commissioner. The Commissioner shall by regulations prescribe the criteria for determining a reasonable time.

#### 3. Real Estate Owned by Banks.

Section 3 of the Bill provides that the percentage of capital which a bank or trust company may invest in real estate suitable for the conduct of its business is increased from 25 percent of its capital and surplus to 50 percent of its capital, surplus and undivided profit, and that mortgages on real estate owned by a bank shall not be included in computing this percentage.

#### 4. Deadwood Amendment.

Section 4 of the Bill removes an obsolete reference to the "Reconstruction Finance Corporation" contained in Section 764(b) of Title 5.

#### 5. Letters of Credit not to be Construed as Guarantees.

Section 5 of the Bill provides that letters of credit and standby letters of credit issued by banks or trust companies shall not be construed as guarantees.

#### 6. Foreign Branch Offices of Banks.

Section 7 of the Bill permits any bank or trust company to open branch offices outside the State of Delaware upon issuance of a certificate of authority by the State Bank Commissioner.

### TITLE 5 **BANKING**

### PART I State Banking Agencies

#### CHAPTER 1. STATE BANK COMMISSIONER

Subchapter I. General Provisions

Omitted.\*

<sup>\*</sup>The Financial Center Development Act(s) only amended certain parts, chapters and subchapters of Titles 5, 6 and 30. The current Del. Code Annotated is up to date with respect to those parts and chapters omitted from the text here.

#### PART II

#### Banks and Trust Companies

#### CHAPTER 7. CORPORATION LAW FOR STATE BANKS AND TRUST COMPANIES

Subchapter I. General Provisions

### § 701. Establishment of banks and trust companies; savings banks and national banks.

Banks and trust companies shall be established or created in this State under and in accordance with the provisions of this chapter. This chapter shall not, however, apply to corporations without capital stock doing a savings bank business, or to national banks. The terms "bank" or "banks," when used in this chapter, do not include such savings banks or national banks. (38 Del. Laws, c. 94, §§ 1, 2; Code 1935, §§ 2370, 2371; 5 Del. C. 1953, § 701.)

#### § 702. Applicability of other laws.

Every corporation created under this chapter shall be deemed and held to be subject to the provisions of this Code and any other general statutes of this State making provision for the regulation of banks and trust companies where the same are not inconsistent with the express provisions of this chapter. (38 Del. Laws, c. 94, § 32; Code 1935, § 2401; 5 Del. C. 1953, § 702.)

#### § 703. Taxation.

Every corporation created by or under this chapter, and every corporation whose charter or certificate of incorporation is amended under this chapter, shall be subject to the same taxation as shall be fixed by the laws of this State for banks and trust companies. (38 Del. Laws, c. 94, § 34; Code 1935, § 2403; 5 Del. C. 1953, § 703; 61 Del. Laws, c. 490, § 1.)

#### § 704. Reserved power of State to amend or repeal this chapter.

This chapter may be amended or repealed, at the pleasure of the General Assembly, but such amendment or repeal shall not take away or repeal any remedy against any corporation established under this chapter, or its officers, for any liability which shall have been previously incurred. (38 Del. Laws, c. 94, § 35; Code 1935, § 2404; 5 Del. C. 1953, § 704.)

#### § 705. Revocation for nonuse of charters granted prior to July 1, 1933.

Every charter authorizing the establishment of a bank or trust company in this State and which was granted or passed by the General As-

sembly of this State prior to the 1st day of July, 1933, shall be deemed and held to be revoked for nonuse of corporate franchise unless the corporation created or authorized by such charter was actively engaged in business in this State on December 31, 1933. (32 Del. Laws, c. 103, § 22; 38 Del. Laws, c. 93, § 1(8); Code 1935, § 2310; 5 Del. C. 1953, § 705.)

#### Subchapter II. Formation of Bank or Trust Company

### § 721. Restrictions on use of words "savings" or "trust" in corporate name.

No corporation established under this chapter shall have or use the word "savings" in its title or name, nor shall any corporation established under this chapter as a bank and not as a trust company have or use the word "trust" in its title or name. (38 Del. Laws, c. 94, § 27; Code 1935, § 2396; 5 Del. C. 1953, § 721.)

#### § 722. Incorporators; number and qualifications.\*\*

Fifteen or more persons being citizens of this State and of lawful age who associate themselves by a written agreement, hereinafter called 'articles of association,' for the purpose of forming a bank or trust company may, upon compliance with the provisions of this chapter, become a corporation, with the powers conferred by this chapter and subject to the regulations prescribed by this chapter and subject also to the regulations prescribed for banks and trust companies by any general statute of this State; provided, however, that the articles of association of any bank or trust company that, in the opinion of the Commissioner, is hereafter formed as a part of a planned acquisition of stock in a bank located in this State by an out-of-state bank holding company as defined in § 801 of this title shall require the association of only three persons, two of whom must be citizens and residents of this State. (38 Del. Laws, c. 94, § 4; Code 1935; 5 Del. C. 1953, § 722; 63 Del. Laws, c. 3, § 1.)

#### § 723. Articles of association; contents and execution.

- (a) The articles of association shall set forth that the subscribers thereto associate themselves with the intention of forming a corporation, and shall specifically state:
  - (1) The name by which the corporation shall be known;
  - (2) The purpose for which it is formed;
  - (3) The city or town where its place of business will be located;

<sup>\*\*</sup>Those sections of Del. Code Ann. tit. 5 that were amended or added by H.B. 29, 63 Del. Laws, c. 3, will be so marked.

- (4) The amount of its capital stock, and the number of shares into which it is to be divided;
  - (5) The number of its directors, which shall not be less than 5;
- (6) Whether or not the corporation is to have perpetual existence, and if not the time when its existence is to cease;
- (7) Whether the private property of the stockholders shall be subject to the payment of corporate debts, and if so, to what extent.
- (b) The articles of association may also contain other provisions defining, limiting and regulating the powers of the corporation, the powers and duties of the directors, and the powers of the stockholders, if such provisions are consonant with the object, purpose and provisions of this chapter and are not in conflict with the provisions of this Code or any other general statute of this State relating to banks and trust companies.
- (c) Each incorporator shall subscribe to the articles his name, residence, post-office address and the number of shares of stock which he agrees to take, and shall acknowledge the same to be his act and deed before some officer authorized by the laws of this State to take acknowledgments of deeds. (38 Del. Laws, c. 94, § 5; Code 1935, § 2374; 5 Del. C. 1953, § 723.)

#### § 724. Notice of intention to incorporate; publication.

Notice of the intention of the incorporators to form a bank or trust company shall be given to the State Bank Commissioner, and a notice in such form as the Commissioner shall approve shall be published at least once a week, for 3 successive weeks, in 1 or more newspapers designated by the Commissioner, at least 1 of which newspapers shall be published in the county where it is proposed to establish the bank or trust company. The published notice shall specify the names of all the associates, the name of the proposed corporation, the city or town where it is to be located, and the amount of its capital stock. (38 Del. Laws, c. 94, § 6; Code 1935, § 2375; 5 Del. C. 1953, § 724; 57 Del. Laws, c. 740, § 19A.)

### § 725. Application for a certificate of public convenience and advantage.

Within 60 days after the third publication of the notice of intention to incorporate but not before the expiration of 30 days from the date of the third publication, the incorporators shall apply to the State Bank Commissioner for a certificate that public convenience and advantage will be promoted by the establishment of the bank or trust company. (38 Del. Laws, c. 94, § 6; Code 1935, § 2375; 5 Del. C. 1953, § 725; 57 Del. Laws, c. 740, § 19A.)

#### § 726. Determination of public convenience.

Upon the application for a certificate that public convenience and advantage will be promoted by the establishment of the bank or trust company, the State Bank Commissioner shall consider and determine whether public convenience and advantage would be promoted by the establishment of the bank or trust company, and whether the terms and provisions of the articles of association are in compliance with this chapter and shall issue or refuse to issue a certificate in accordance with such determination. If the Commissioner refuses to issue a certificate, no further proceedings shall be had, but the application may be renewed after 1 year from the date of the refusal. If the Commissioner issues the certificate, the incorporators shall hold the first meeting and follow the procedure prescribed by § 727 of this title. (38 Del. Laws, c. 94, § 7; Code 1935, § 2376; 5 Del. C. 1953, § 726; 57 Del. Laws, c. 740, § 19A.)

#### § 727. Organization meeting of incorporators; notice; proceedings.

The first meeting of the incorporators shall be called by a notice signed either by the incorporator who is designated in the articles of association for the purpose, or by a majority of the incorporators. The notice shall state the time, place and purposes of the meeting. A copy of the notice shall, at least 7 days before the day appointed for the meeting, be given to each incorporator, or left at his residence or usual place of business, or deposited in the post office, postage prepaid, and addressed to him at his residence or usual place of business, and another copy thereof and an affidavit of 1 of the incorporators that the notice has been duly served shall be filed and recorded with the records of the corporation. If all the incorporators shall in writing, endorsed upon the articles of association, waive such notice and fix the time and place of the meeting, no notice shall be required.

At the first meeting, or at any adjournment thereof, the incorporators shall organize by the choice by ballot of a temporary secretary, by the adoption of bylaws and by the election in such manner as the bylaws may determine, of directors, a president, a secretary, and such other officers as the bylaws may prescribe. All the officers so elected shall be sworn to the faithful performance of their duties. The temporary secretary shall make and attest a record of the proceedings until the secretary has been chosen and sworn, including a record of such choice and qualification. (38 Del. Laws, c. 94, §8; Code 1935, §2377; 5 Del. C. 1953, §727.)

#### § 728. Articles of organization.

The president and a majority of the directors elected at the organization meeting of the incorporators shall make, sign and make oath to, a certificate (hereinafter called "articles of organization") setting forth: A true copy of the articles of association; the names of the subscribers thereto; the name, residence and post-office address of each of the officers of the corporation; and the date of the first meeting and the successive adjournments thereof, if any. (38 Del. Laws, c. 94, § 9; Code 1935, § 2378; 5 Del. C. 1953, § 728.)

#### § 729. Approval of articles of organization.

The articles of organization, together with the records of the proposed corporation, shall be submitted to the State Bank Commissioner. The Commissioner shall examine the same, and may require such amendment thereof or such additional information as it may consider proper or necessary. If the Commissioner finds that the provisions of law have been complied with, the Commissioner shall endorse its approval upon the articles of organization. (38 Del. Laws, c. 94, § 9; Code 1935, § 2378; 5 Del. C. 1953, § 729; 57 Del. Laws, c. 740, § 19A.)

#### § 730. Filing of articles of organization.

The articles of organization with the endorsement of the State Bank Commissioner shall, within 30 days after the date of the endorsement, be filed in the office of the Secretary of State. (38 Del. Laws, c. 94, § 9; Code 1935, § 2378; 5 Del. C. 1953, § 730; 57 Del. Laws, c. 740, § 19A.)

### § 731. Certificate of incorporation; issuance, form, recording and evidence.

(a) Upon the filing of the articles of organization as required by § 730 of this title, the Secretary of State shall issue a certificate of incorporation in the following form:

#### STATE OF DELAWARE

Be it known that whereas (the names of the incorporators) have associated themselves with the intention of forming a corporation under the name of (the name of the corporation), for the purpose (the purpose declared in the articles of association), with a capital stock of (the amount fixed in the articles of association), and having its place of business in (the city or town where its place of business will be located) and have complied with the statutes of this State in such case made and provided, as appears from the articles of organization of the corporation, duly approved by the State Bank Commissioner and on file in this office; now, therefore, I (the name of the Secretary of State), Secretary of the State of Delaware, do hereby certify that (the names of the incorporators), their associates and

successors, are legally organized and established as, and are hereby made, an existing corporation under the name of (name of the corporation), with the powers, rights and privileges, and subject to the limitations, duties and restrictions which by law appertain thereto.

Witness my official signature hereunto subscribed, and the great Seal of the State of Delaware hereunto affixed, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ (the date of the filing of the articles of organization).

- (b) The Secretary of State shall sign the certificate of incorporation and cause the Great Seal of the State to be thereto affixed and shall deliver the same to the corporation together with a certified copy of the articles of organization and the endorsement of the State Bank Commissioner thereon, upon payment of the costs and charges therefor. A certified copy of the certificate shall be kept on file in the office of the Secretary of State with the articles of organization, and the certificate together with the articles of organization and the endorsement thereon of the State Bank Commissioner shall be recorded in the office of the recorder of deeds for the county in which the place of business of the corporation is to be located.
- (c) The certificate or a copy thereof duly certified by the Secretary of State, together with a certified copy of the articles of organization and the endorsement thereon of the State Bank Commissioner, accompanied with the certificate of the recorder of deeds for the county wherein the same is recorded under his hand and the seal of his office, stating that the certificate and articles of organization have been recorded in the office of the recorder, or a copy of the record duly certified by the recorder, shall be evidence in all courts of this State. (38 Del. Laws, c. 94, § 9; Code 1935, § 2378; 5 Del. C. 1953, § 731; 57 Del. Laws, c. 740, § 19A.)

#### § 732. Commencement of corporate existence.

Upon the issuance of the certificate of incorporation by the Secretary of State and the recording of the certificate and articles of organization as provided in § 731 of this title, the persons named in the certificate, their successors and assigns shall from the date of the certificate be and constitute a body corporate, for the purposes and by the name set forth in the certificate, subject to dissolution or the revocation or forfeiture of the franchise under the provisions of this chapter or under the provisions of this Code or any other statute of this State relating to the dissolution of or to the revocation or forfeiture of the charter or franchise of banks or trust companies; but the corporation shall not have the right to do any business until it has secured from the State Bank Commissioner of this State the certificate provided for in § 733 of this title. (38 Del. Laws, c. 94, § 9; Code 1935, § 2378; 5 Del. C. 1953, § 732.)

#### § 733. Commencement of business; certificate authorizing.

A certified copy of the certificate of incorporation and of the articles of organization and the endorsement of the approval of the State Bank Commissioner shall be filed with the State Bank Commissioner; and when the whole capital stock has been issued, a list of the stockholders, with the name, residence and post-office address of each, and the number of shares held by each, shall be filed with the State Bank Commissioner, which list shall be certified by the president and the cashier or treasurer of the corporation. Upon receipt of the list the Commissioner shall cause an examination to be made of the method of payment of the capital stock and if, after such examination, it appears that the whole capital stock has been paid in cash, and that all requirements of this Code and any other law have been complied with, the Commissioner shall issue a certificate authorizing the corporation to begin the transaction of business. No corporation shall begin the transaction of business until a certificate has been granted. (38 Del. Laws, c. 94, § 10; Code 1935, § 2379; 5 Del. C. 1953, § 733; 57 Del. Laws, c. 740, § 19A.)

### § 734. Revocation of Charter for Failure to Commence Business within a Reasonable Time.\*\*

Every corporation created under this chapter shall, after the expiration of a reasonable time from the date of its incorporation, as determined by the State Bank Commissioner, be actively engaged in the business for which it was created or its certificate of incorporation and corporate franchise shall be deemed and held to be revoked. The Commissioner shall by regulations prescribe the criteria to be applied in determining what constitutes a reasonable period of time. (38 Del. Laws, c. 94, § 33; Code 1935, § 2402; 5 Del. C. 1953, § 734; 63 Del. Laws, c. 3, § 2.)

#### § 735. Fees of Secretary of State and Commissioner.

The following fees shall be collected by and paid to the Secretary of State, for the use of the State: For making and issuing the certificate of incorporation, \$10; for making the certified copy of the articles of association, \$10; for making the certified copy of the certificate of incorporation to be kept on file in the office of the Secretary of State and for filing and indexing the same and the articles of association in said office, \$5; for supplying any additional certified copy of the certificate of incorporation or articles of association requested by the corporation, \$5.

Before issuing the certificate authorizing the corporation to begin the transaction of business, the State Bank Commissioner shall collect from the corporation, for the use of the State, the sum of \$5,000. In addition the applicant shall pay an investigation fee of \$1,000 which shall not be refundable and shall be submitted with the application. (38 Del. Laws, c. 94, § 34; Code 1935, § 2403; 5 Del. C. 1953, § 735; 60 Del. Laws, c. 268, §§ 2, 3.)

# Subchapter III. Conduct of Internal Corporate Affairs Omitted.

#### Subchapter IV. Powers and Prohibitions

#### § 761. General powers of corporations organized under this chapter.

- (a) A corporation established under and in compliance with the provisions of this chapter shall have power to:
  - (1) Sue and be sued, complain and defend in any court of law or equity;
    - (2) Make and use a common seal and alter the same at pleasure;
  - (3) Hold, purchase, convey, mortgage or lease real and personal property;
    - (4) Borrow and lend money;
    - (5) Discount bills, promissory notes or other evidences of debt;
    - (6) Receive deposits of money either on time or demand;
  - (7) Buy and sell gold and silver bullion and foreign money and coin:
  - (8) Purchase securities for the investment of the funds under its control and sell the same;
  - (9) Take mortgages and obligations of all kinds for payment of money for the investment of funds under its control and sell the same;
  - (10) Receive for safekeeping securities and all types of choses in action and all kinds of personal property;
  - (11) Keep deposit boxes and rent them to customers or patrons; and
  - (12) Generally, use, exercise and enjoy all of the powers, rights, privileges and franchises incident to a banking corporation and, if established as a trust company, incident to a trust company, and which are necessary or proper for the transaction of the business of the corporation.
- (b) All powers conferred by this section are subject to and are to be construed as qualified by the limitations, restrictions, and regulations prescribed in other sections of this chapter or by this Code or any other statute of this State providing regulations for banks and trust companies. (38 Del. Laws, c. 94, § 15; Code 1935, § 2384; 5 Del. C. 1953, § 761.)

#### § 762. Ownership of real estate used for transaction of business.\*\*

A corporation established under this chapter may hold real estate suitable for the transaction of its business; but, if the aggregate amount invested and proposed to be invested therein, including the cost of alterations and additions in the nature of permanent fixtures, exceeds, directly or indirectly, 50 percent of its capital, surplus and undivided profit accounts, the excess investment shall be made only with the approval of the State Bank Commissioner. The amount of money invested by the corporation in the securities of any corporation, trust or other organization which holds real estate in whole or in part used for the transaction of the business of the corporation or intended for such use, shall be included in determining the amount of real estate that may be held by the corporation under this section. (38 Del. Laws, c. 94, § 19; Code 1935, § 2388; 5 Del. C. 1953, § 762; 63 Del. Laws, c. 3, § 3.)

#### § 763. Membership in Federal Reserve System.

- (a) Any bank or trust company incorporated under this Code or any other laws of this State may become a member of the Federal Reserve Bank, organized or to be organized in the Federal Reserve District in which such bank or trust company is located, under the provisions of the act of Congress known as the Federal Reserve Act [12 U. S. C. A., § 1 et seq.], approved December 23, 1913, and such bank or trust company may subscribe for, purchase, hold and surrender, from time to time, such amounts of the capital stock of such Federal Reserve Bank as the bank or trust company may deem advisable or as may be required under the Federal Reserve Act, or any amendment thereof, in order to obtain and continue such membership, and upon the purchase of such stock, to assume the liabilities and become entitled to the benefits recited in the Federal Reserve Act.
- (b) Any corporation which becomes a member of the Federal Reserve System may, while it continues as a member bank of the System, have and exercise any and all of the corporate powers and privileges which may be exercised by member banks of the System. (28 Del. Laws, c. 107, § 1; 38 Del. Laws, c. 94, § 21; Code 1935, §§ 2273, 2390; 5 Del. C. 1953, § 763.)

#### § 764. Capital notes or debentures.\*\*

(a) With the approval of the State Bank Commissioner, any bank or trust company in this State, whether or not organized under this chapter, may at any time through action of its board of directors and without requiring any action of its stockholders issue and sell its capital notes or debentures. The capital notes or debentures shall be subordinate and

subject to the claims of depositors and may be subordinated and subjected to the claims of other creditors.

- (b) The term "capital" as used in this Code and any other laws of this State relating to banking shall be construed to embrace the amount of outstanding capital notes and debentures legally issued by any bank or trust company in this State and sold by it. The capital stock of any bank or trust company may be deemed to be unimpaired when the amount of the capital notes and debentures as represented by cash or sound assets exceeds the impairment as found by the State Bank Commissioner. Before any capital notes or debentures are retired or paid by the bank or trust company, any existing deficiency of its capital (disregarding the notes or debentures to be retired) must be paid in cash, to the end that the sound capital assets shall at least equal the capital stock of the bank or trust company.
- (c) The capital notes or debentures shall in no case be subject to any assessment. The holders of capital notes or debentures shall not be held individually responsible as such holders for any debts, contracts, or engagements of the bank or trust company and shall not be held liable for assessments to restore impairments in the capital of the institution. (40 Del. Laws, c. 149, § 1; Code 1935, § 2407; 5 Del. C. 1953, § 764; 63 Del. Laws, c. 3, § 4.)

#### § 765. Power of trust company.

In the case of a corporation established as a trust company under this chapter, the powers conferred by § 761 of this title shall include the right or power to be appointed executor of a will, codicil or writing testamentary, administrator with the will annexed or administrator of the estate of any decedent, receiver, assignee, guardian, conservator or trustee by will or by any written instrument or other act of the parties, or by any court or official, under the same circumstances, in the same manner, and subject to the same control by the court having jurisdiction of the same, as a legally qualified individual. (38 Del. Laws, c. 94, § 22; Code 1935, § 2391; 5 Del. C. 1953, § 765.)

#### § 766. Power of trust company to act as agent, registrar, trustee, etc.

A trust company established under this chapter may act as agent for the purpose of issuing, registering or countersigning the certificates of stock, bonds, or other evidences of indebtedness of a corporation, association, municipal corporation, state or national government, on such terms as may be agreed upon, and may also act as trustee for the bondholders of a corporation, and for such purpose may receive transfers of real and personal property upon such terms as may be agreed upon. (38 Del. Laws, c. 94, § 25; Code 1935, § 2394; 5 Del. C. 1953, § 766.)

### § 767. Limitations on powers and activities of corporations organized under this chapter.\*\*

No corporation established under this chapter:

- (1) Shall have the power to guarantee the validity, performance or effectiveness of any contract or agreement and the fidelity of any person or persons holding places of responsibility or trust, to become surety for any person or persons for the faithful performance of any trust, office, public contract or agreement, either by itself or in conjunction with any other person or persons, corporation or corporations or become surety upon any bonds, recognizance, obligations, judgment, suit or decree entered in any court of record within the State, or elsewhere, or to become guarantor or surety for the debt or obligation of another; but nothing in this section shall apply to the case of the rediscounting of commercial paper, provided that no letter of credit as defined in section 5-103(1)(a) of title 6 and no standby letter of credit as defined herein shall be construed to fall within the prohibition of this section. As used herein, the term "standby letter of credit" includes every letter of credit (or similar arrangement however named or designated) which represents an obligation to the beneficiary on the part of the issuer (i) to repay money borrowed by or advanced to or for the account of the customer or, (ii) to make payment on account of any evidence of indebtedness undertaken by the customer, or (iii) to make payment on account of any default by the customer in performance of an obligation. The term "beneficiary," "issuer" and "customer" as used herein have the same meaning as in section 5-103(a) of title 6;
- (2) Shall engage in the business of buying and selling investments or securities for others, but may as merely incidental to its own business and when requested so to do by a customer, buy or sell for such customer securities or investments of any kind. Nothing in this paragraph shall limit the power of the corporation to buy or sell securities or investments for the purpose of or in connection with the investment of any funds under its control as a bank or trust company;
- (3) Shall engage in any business involving the warranting or guaranteeing the right or title to property, real or personal;
- (4) Shall do any business other than a banking business and/or trust company business. (38 Del. Laws, c. 94, §§ 16, 26; Code 1935, §§ 2385, 2395; 5 Del. C. 1953, § 767; 63 Del. Laws, c. 3, § 5.)

#### § 768. Loans on security of and purchase of its own capital stock.

No corporation established under this chapter shall directly or indirectly make a loan or discount on the security of the shares of its own

capital stock, nor be the purchaser or holder of such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. The stock so purchased or acquired shall, within 6 months after its purchase or acquisition, be sold or disposed of at public or private sale. (38 Del. Laws, c. 94, § 18; Code 1935, § 2387; 5 Del. C. 1953, § 768.)

#### § 769. Ownership of capital stock of another bank or trust company.

No bank or trust company shall hold more than 10 percent of the capital stock of any other bank or trust company. (32 Del. Laws, c. 103, § 21; 38 Del. Laws, c. 93, § 1(8); 38 Del. Laws, c. 94, § 29; Code 1935, §§ 2309, 2398; 5 Del. C. 1953, § 769.)

#### § 770. Branch office.\*\*

(a) Any bank or trust company, if authorized by its charter, may open a branch office or place of business, or branch offices or places of business in this State, upon application submitted to and approved by the State Bank Commissioner and upon the issuance of a certificate of authority of the State Bank Commissioner. The application shall state the exact location of the intended branch office and the necessity for its opening and the Commissioner shall inquire into the matter, and if he deems that the public convenience will be served thereby and that there is good and sufficient reason that the corporation shall have the branch office, the Commissioner shall issue its written permission for the opening of the branch office. No certificate of authority shall be issued by the Commissioner unless he shall be satisfied that the applicant has a paid-in capital stock of at least \$25,000 for each office or place of business then established by the applicant in this State and for each branch sought to be established and a surplus of at least \$25,000 for each office or place of business then established by the applicant in this State and for each branch sought to be established. Any certificate of authority issued by the Commissioner shall be void and of no effect if after the expiration of a reasonable period of time, as determined by the State Bank Commissioner, such branch is not actually opened for business. The Commissioner shall by regulations prescribe the criteria to be applied in determining what constitutes a reasonable period of time.

A fee of \$500 for every such certificate shall be required by the Commissioner before issuing the same. In addition, the applicant shall pay an investigation fee of \$500 which shall not be refundable and shall be submitted with the application.

(b) Nothing in this section contained shall deny any bank or trust company the right to continue a branch office or branch offices if such branch office or branch offices shall have been actually established prior to the 1st day of January, 1934, and business continuously conducted thereat since such establishment.

(c) Any bank, with the prior approval of the State Bank Commissioner, may install, maintain, operate or utilize for the benefit of its customers 1 or more electronic devices or machines at locations remote from its main office or any branch office, by which funds may be deposited into or withdrawn from established accounts, advances may be obtained against previously authorized lines of credit, transfers of funds between accounts may be made, loan payments may be made or cash may be received or dispensed. An off-premises facility as described herein shall be deemed to be a branch office except that it may be shared among banks. savings banks, national banks, savings and loan institutions and credit unions, and the Commissioner's approval need only be conditioned upon a determination that the facility will be an effective and efficient service consistent with sound banking practices. Such facilities may be manned by personnel of the bank, or may be unmanned or manned by a person under contract with, but not an officer or employee of, the operating bank. (32 Del. Laws, c. 103, § 4; 38 Del. Laws, c. 93, § 1(1); 38 Del. Laws, c. 94, § 20; Code 1935, §§ 2292, 2389; 46 Del. Laws, c. 251, §§ 1, 2; 5 Del. C. 1953, § 770; 49 Del. Laws, c. 127; 56 Del. Laws, c. 155; 57 Del. Laws, c. 740, § 19A; 60 Del. Laws, c. 268, §§ 5, 6; 62 Del. Laws, c. 245, § 1; 63 Del. Laws, c. 3, § 6.)

#### § 771. Foreign Branch Offices.\*\*

- (a) Any bank or trust company having a paid-in capital and surplus exceeding One Million Dollars (\$1,000,000) or more may open branch offices or places of business without the State of Delaware, in the United States of America, or its possessions or in foreign countries upon issuance of a certificate of authority by the State Bank Commissioner and upon such conditions and under such regulations as he may prescribe.
- (b) If any bank or trust company has opened and occupied a branch office in a foreign country pursuant to the provisions of paragraph (a) of this section, it may, unless otherwise advised by the State Bank Commissioner, open and occupy an additional branch office or branch offices in such country without having to apply for the approval of the Commissioner provided that it gives the Commissioner notice of at least thirty (30) days (or such shorter period as he in individual cases may approve) before opening and occupying any such additional branch office.
- (c) A fee of Five Hundred Dollars (\$500) for the issuance of each certificate contemplated by subsection (a) of this section shall be required by the State Bank Commissioner before issuance of such a certificate. (63 Del. Laws, c. 3, § 7.)

Subchapter V. Merger, Consolidation or Conversion of National, State Bank or Trust Company

Omitted.

## CHAPTER 8. ACQUISITION OF STOCK IN BANKS LOCATED IN THE STATE OF DELAWARE BY OUT-OF-STATE BANK HOLDING COMPANIES.°

§ 801. Definitions.\*

As used in this chapter:

- (a) "Bank" means a bank or trust company created under this title or a national banking association created under the National Bank Act, 12, U. S. C. §§ 21, et seq., after the effective date of this chapter.
- (b) "Out-of-state bank holding company" means a bank holding company as defined in the Bank Holding Company Act of 1956, as amended (12 U. S. C. §§ 1481 et seq.), with banking subsidiaries whose operations are principally conducted in a state other than Delaware. For the purposes of this chapter, the state in which the operations of a bank holding company's bank subsidiaries are principally conducted is that state in which the total deposits of all such banking subsidiaries are greatest.
- (c) "Commissioner" means the State Bank Commissioner of the State of Delaware.
- (d) "Divest" means to transfer all interest, legal or equitable, to a person or other entity in which the transferor has no interest, direct or indirect, or which has no interest, direct or indirect, in the transferor.
- (e) "Located in this State" means, with respect to state-chartered banks, banks created under the law of this State and, with respect to national banking associations, banks whose organization certificate identifies an address in this State as the place at which its discount and deposit operations are to be carried out.
- (f) "Subsidiary" means, with respect to an out-of-state bank holding company, (1) any company 25% or more of whose voting shares is directly or indirectly owned or controlled by such bank holding company, or is held by it with power to vote; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company. (63 Del. Laws, c. 2, § 2.)

<sup>\*</sup>Those sections or chapters of Del. Code Ann. titles 5, 6 and 30 that were amended, added or repealed by H.B. 28, 63 Del. Laws, c. 2, will be so marked.

#### § 802. Purpose.\*

This chapter deals with conditions under which out-of-state bank holding companies or subsidiaries thereof may acquire and hold shares of voting stock in banks located in this State; it shall not be construed to limit the powers granted to any bank in this State to conduct its business. (63 Del. Laws, c. 2, § 2.)

#### § 803. Acquisitions.\*

Except as provided in § 1842 of Title 12 of the United States Code and as provided herein, no out-of-state bank holding company or any subsidiary thereof may acquire or hold, directly or indirectly, more than 5% of any voting shares of, interest in, or all or substantially all of the assets of any bank located in this State. Notwithstanding the foregoing, an out-of-state bank holding company or any subsidiary thereof may acquire and hold all or substantially all of the voting shares of a single bank located in this State when and for so long as the following conditions are satisfied:

- (a) The bank whose stock is to be acquired is a newly established bank that has or will have when chartered no more than a single office located in this State open to the public for the conduct of banking business;
- (b) The bank whose stock is to be acquired has or will have on the date of commencement of banking business in this State a minimum capital stock and paid-in surplus of 10 million dollars and will have within one year of the date of its commencement of banking business in this State a minimum capital stock and paid-in surplus of 25 million dollars;
- (c) The bank whose stock is to be acquired employs on the date of commencement of its banking business in this State or will employ within one year of such date not less than 100 persons in this State in its business;
- (d) The bank whose stock is to be acquired is operated in a manner and at a location that is not likely to attract customers from the general public in this State to the substantial detriment of existing banking institutions located in this State; provided that such bank may be operated in a manner likely to attract and retain customers with whom that bank, the out-of-state holding company or such holding company's bank or non-banking subsidiaries have or have had business relations; and
- (e) Such acquisition has received the prior approval of the Commissioner. (63 Del. Laws, c. 2, § 2.)

#### § 804. Approval by the Commissioner.\*

- (a) Any out-of-state bank holding company or subsidiary thereof proposing an acquisition pursuant to § 803 of this chapter shall file an application with the Commissioner for approval to make such acquisition. Such application shall contain such information as the Commissioner may by regulation require, and shall specifically acknowledge applicant's agreement to be bound by the conditions set forth in § 803 of this chapter. In addition, such application shall designate a resident of this State as applicant's agent for the service of any paper, notice or legal process upon applicant in connection with matters arising out of this chapter and shall be accompanied by a filing fee in the amount of five thousand dollars for the use of the State.
- (b) In determining whether to approve an acquisition by an out-ofstate bank holding company or any subsidiary thereof of any voting stock of a bank located in this State, the Commissioner shall consider:
  - (1) The financial and managerial resources of the out-of-state bank holding company or its subsidiary;
  - (2) The future prospects of the out-of-state bank holding company and the bank whose assets or shares it will acquire or its subsidiary;
  - (3) The financial history of the out-of-state bank holding company or its subsidiary;
  - (4) Whether such acquisition or holding may result in undue concentration of resources or substantial lessening of competition in this State; and
  - (5) The convenience and needs of the public of this State. (63 Del. Laws, c. 2, § 2.)

#### § 805. Required Reports.\*

An out-of-state bank holding company that directly or indirectly through any subsidiary, acquires voting stock of a bank pursuant to this chapter shall file with the Commissioner copies of all regular and periodic reports which such bank holding company is required to file under §§ 13 or 15(d) of the Securities and Exchange Act of 1934, as amended, but excluding any portion not available to the public. (63 Del. Laws, c. 2, § 2.)

#### § 806. Rules, Regulations and Orders.\*

The Commissioner may adopt rules and regulations and issue Orders under this chapter for the following purposes:

- (a) To prescribe information or forms required in connection with an application pursuant to § 804(a);
- (b) To establish procedures in connection with approvals pursuant to § 804(b) and the filing of required reports pursuant to § 805;
- (c) To issue orders under § 807 and establish procedures governing such issuances. (63 Del. Laws, c. 2, § 2.)

#### § 807. Divestiture.\*

- (a) Upon his determination that any out-of-state bank holding company or subsidiary thereof is holding stock in a bank located in this State in violation of the conditions set forth in § 803 or of its agreement pursuant to § 804(a) of this chapter the Commissioner may order such out-of-state holding company or subsidiary thereof to take steps to remedy such violation by a date certain.
- (b) The Commissioner shall have the authority to order an out-of-state bank holding company or subsidiary thereof to divest any shares of a bank that it has acquired under the provisions of this chapter upon his determination that such holding company or subsidiary continues to own shares of stock of a bank located in this State in violation of the conditions contained in § 803 or of its agreement pursuant to § 804(a) of this chapter after the date fixed for compliance by any Order issued under subparagraph (a) of this § 807.
- (c) An out-of-state bank holding company or subsidiary thereof shall divest any shares of a bank that it has acquired under the provisions of this chapter within two years of the date an Order issued under subparagraph (b) of this § 807 becomes final and subject to no further judicial review; provided that the Commissioner may extend such two-year period for a further period or periods upon his determination that such an extension would not be detrimental to the public interest.
- (d) The Court of Chancery of the State of Delaware will have exclusive original jurisdiction of any judicial review of an Order issued under subsection (b) of this section, any other provision of law notwithstanding. Such review may be sought by the out-of-state bank holding company or subsidiary thereof that is the subject of such divestiture order at any time within one year of the date of such Order. Review of a divestiture order shall be de novo and such order will be specifically enforced by the Court of Chancery upon a final determination that at the time of its issuance, the divestiture order was valid in all respects. An Order issued under subsection (a) of this section shall not be subject to judicial review. (63 Del. Laws, c. 2, § 2.)

#### § 808. Severability.\*

If any provision of this chapter is held invalid, such invalidity shall not affect any other provisions or applications of this chapter which can be given effect without the invalid provision, except that if any two provisions of § 803 are for any reason held invalid as conditions of the statutory grant contemplated by this chapter and unenforceable as terms of an agreement under § 804(a) of this chapter, in final orders subject to no further judicial review, entered by Courts of competent jurisdiction of this State or of the United States, no out-of-state bank holding company or any subsidiary thereof may thereafter acquire shares of a bank located in this State pursuant to this chapter. (63 Del. Laws, c. 2, § 2.)

#### CHAPTER 9. REGULATIONS GOVERNING BUSINESS OF BANKS AND TRUST COMPANIES

#### Subchapter I. General Provisions\*

§ 901. Corporate charter to do business as bank or trust company.

No banking business or the business of a trust company shall be conducted within this State except under a corporate charter valid in this State authorizing the conduct of such business in this State. (32 Del. Laws, c. 103, § 2; Code 1935, § 2290; 5 Del. C. 1953, § 901.)

### § 902. Certificate required to transact business or open place of business.

No bank or trust company not actively engaged in business in this State prior to January 1, 1933, shall transact any business in this State or open a place of business in this State without having first secured from the State Bank Commissioner a certificate authorizing it to begin the transaction of business and to open a place of business in this State. (32 Del. Laws, c. 103, §§ 3, 22; 38 Del. Laws, c. 93, § 1(8); Code 1935, §§ 2291, 2310; 5 Del. C. 1953, § 902.)

#### § 903. Issuance of certificate to transact business.

- (a) The Commissioner shall not give any certificate required by § 902 of this title until satisfied by proper evidence that all the requirements of the charter of the corporation applying for the certificate and all the requirements of this Code and any other laws of this State applicable to such a case have been complied with and that the whole capital stock has been fully paid in cash, unless the charter shall expressly provide otherwise.
- (b) No certificate shall be issued until the corporation has filed with the Commissioner a duly certified copy of its charter and all amendments