Part I
Financial Institutions, Commercial Law, and Corporations

Financial Institutions

Intergovernmental Information Sharing

Government agencies that regulate financial institutions have experienced a growing need to share information in order to prevent terrorist financing and money laundering. The federal USA PATRIOT Act provides financial institutions with a liability umbrella when they properly disclose private financial information to law enforcement agencies and to other financial institutions and encourages financial institutions to share information with each other if they suspect illegal activity. ***House Bill 417 (passed)*** allows the Commissioner of Financial Regulation to participate more fully in this information-sharing process by authorizing the commissioner to enter into cooperative and information-sharing agreements with any federal or State regulatory agency that has authority over financial institutions, provided the agreements prohibit the agency from disclosing shared information without the commissioner's prior written consent. The bill also authorizes the commissioner to share information about a financial institution, including information obtained during an examination, with any State or federal regulatory agency having authority over the financial institution.

Regulatory Reforms

State-chartered banking institutions often are subject to State law requirements and regulations that do not apply to their federal or out-of-state counterparts that do business in the State. ***House Bill 751 (Ch. 89)*** institutes several regulatory reforms to reduce unnecessary requirements that place State-chartered banking institutions at a competitive disadvantage with respect to out-of-state financial institutions. The deregulatory measures are intended to expedite installations of automated teller machines by banks and credit unions; streamline the procedures a bank must comply with to acquire or establish an affiliate or conduct a new activity at an affiliate; and relax requirements for filling vacancies on a bank's board of directors.

The Act also brings fingerprinting requirements as well as capital requirements into closer conformity with federal law, while increasing the penalty for banks that fail to meet reporting requirements. In addition, the Act streamlines the requirements for approving foreign

banking permits and requires banks to obtain sufficient financial information from a person in order to support an unsecured loan of $10,000 or more.

Assessments and Fees

House Bill 752 ***(passed)*** establishes the Banking Institution and Credit Union Regulation Fund to receive all fees, assessments, and revenues received for the chartering and regulation of banking institutions and credit unions in the State and to pay all costs and expenses incurred by the Commissioner of Financial Regulation related to the regulation of these institutions. The fund is established in response to the preference of banking institutions chartered in Maryland to have their State assessments used exclusively for the regulation and supervision of depository institutions. In addition, the commissioner has noted that the Division of Banking Regulation has been criticized by its accrediting body, the Conference of State Bank Supervisors, for not having control over funding issues should special needs or emergencies arise.

The bill also increases fees and establishes new fees and assessments for depository institutions chartered in the State.

Commercial Law – Credit Regulation

Mortgage Lending

Since 2007, changes in the real estate market and the economy in general have had a number of negative effects on lenders and borrowers, both nationwide and in Maryland. One of the most significant of these effects has been a marked increase in the number of foreclosures affecting homeowners and their mortgage lenders. Many such foreclosures have involved residential properties that were financed through sub-prime loans and nonbank loan originators, leading to increased concerns regarding the lending practices that surround these nontraditional financing methods. To address these and other issues relating to the mortgage foreclosure crisis, ***Senate Bill 270*** ***(Ch. 7)***/***House Bill 363*** ***(Ch. 8)*** make a number of substantive changes to the laws relating to mortgage lending and the regulation of mortgage lenders.

The Acts prohibit lenders from requiring or authorizing the imposition of penalties, fees, premiums, or other charges for a mortgage loan in the event the loan is prepaid in whole or in part, except for reverse mortgage loans. The Acts also raise the maximum amount of a commercial loan that may be assessed a prepayment charge or penalty on a prepayment of the unpaid principle balance from $5,000 to $15,000, and prohibit the imposition of any prepayment penalty on a loan to a consumer borrower.

For various types of mortgage loans, including both primary and secondary mortgage loans, the Acts modify the factors that a lender or credit grantor must consider when making the loans. The Acts require that due regard be given to the borrower's ability to repay a loan in accordance with its terms, including the fully indexed rate of the loan, if applicable, as well as property taxes and homeowner's insurance, regardless of whether an escrow account is

established for the collection and payment of these expenses. Due regard is required to include (1) consideration of the borrower's debt to income ratio; and (2) verification of the borrower's gross monthly income and assets by review of specified third-party documentation. The income and asset verification requirements do not apply to mortgage loans approved for government guaranty by the Federal Housing Administration, Veterans Administration, or Community Development Administration.

The Acts further authorize the Commissioner of Financial Regulation to participate in the establishment and implementation of a multistate automated licensing system for mortgage lenders and mortgage originators, and to adopt regulations that waive or modify licensing requirements in order to facilitate implementation of the multistate system. The commissioner is required to conduct studies on (1) the feasibility of conducting examinations of mortgage lender licensees using a risk-based approach rather than a fixed schedule approach; and (2) the use of a call feature in loans that accelerate the indebtedness of a mortgage loan. Both reports are due by January 1, 2009, to the Senate Finance Committee and the House Economic Matters Committee.

The Acts also add to the statutorily required qualifications for obtaining a mortgage lender's license from the commissioner a requirement that an applicant for a mortgage broker license or current licensee maintain a minimum net worth ranging from $25,000 for an applicant or licensee that does not lend money to $100,000 for an applicant or licensee that has lent more than $5 million in the 12 months prior to the application or renewal. On January 1, 2009, the minimum net worth requirements increase to $250,000 for an applicant or licensee that has lent more than $10 million in the previous 12 months. The Acts also raise the amount of the surety bond required of applicants for both new mortgage lender licenses as well as license renewals.

With respect to mortgage originators, the Acts authorize the commissioner to adopt regulations defining the written test required of license applicants. For both mortgage lenders and mortgage originators, the Acts authorize the commissioner to set reasonable fees for licensing and investigations, and require the commissioner to deny an application or revoke the licenses of individuals or entities associated with individuals who have been convicted within the last 10 years, or while licensed, of a felony involving fraud, theft, or forgery.

The measures set forth in the Acts reflect recommendations made by the Legal and Regulatory Workgroup of the Homeownership Preservation Task Force established by the Governor in 2007. For a more detailed discussion of foreclosure-related issues, see the subpart "Real Property" within Part F – Courts and Civil Proceedings of this *90 Day Report*.

Loan Prepayment

On December 13, 2007, the Court of Appeals concluded in *Bednar v. Provident Bank of Maryland*, 402 Md. 532 (2007) that the practice of closing cost "recapture" violates the Maryland Credit Grantor law. Under a closing cost recapture plan, a lender pays the borrower's loan closing costs and agrees to defer collection of these costs from the borrower as long as the borrower keeps the loan open for a specified period of time. If the borrower keeps the loan open for the specified time, the lender forgives the closing costs, but if the borrower prepays and

closes the loan, the borrower is required to pay those costs to the lender. Closing cost recapture programs are a standard practice of lenders across the nation, offering an initial incentive to the borrower in exchange for an increased assurance that the borrower will not repay the loan before a certain time, as would occur if the borrower refinanced with another lender.

The Court in *Bednar*, however, concluded that a recapture charge is a prepayment penalty and, therefore, prohibited by statute. The Court's decision places Maryland-chartered banks, credit unions, and independent mortgage lenders at a competitive disadvantage compared to federally chartered financial institutions and their affiliated lenders because, due to federal preemption, the latter continue to be able to offer closing cost recapture programs to borrowers in Maryland.

In response to the Court's decision, the General Assembly passed ***Senate Bill 347 (Ch. 34)***/***House Bill 852 (Ch. 35)*** as emergency measures. The Acts alter the Maryland Credit Grantor law to provide that fees and charges permitted by statute with respect to unsecured open end and closed end credit plans may be imposed, charged, and collected at any time. The Acts thus allow State-chartered banks and independent mortgage lenders to continue the practice of "recapturing" loan closing costs, initially paid for by the lender, in the event that the borrower prepays the loan before a specified time.

The Acts also create exceptions to penalty provisions that apply to a credit grantor that violates the laws governing open end and closed end credit plans. The exceptions apply to contracts entered into prior to the effective date of the Acts but do *not* apply to a case in which a final judgment has been rendered and for which all judicial appeals have been exhausted. Under the Acts, credit grantors that commit a violation are not restricted to collecting only the principal amount extended if the credit grantor (1) used a form or procedure that has been approved by the Commissioner of Financial Regulation; or (2) performed or omitted an act in conformity with or in reliance on a written opinion of the Attorney General of Maryland, a regulation adopted by the commissioner, a written opinion by the commissioner or deputy commissioner, or an interpretation by the commissioner in a written notice or examination report.

Debt Management Services

The debt management services industry has experienced significant nationwide growth since the early 1990s, and it received a boost in 2005 from amendments to the federal Bankruptcy Act which require most filers to receive credit counseling before filing for bankruptcy. ***Senate Bill 646***/***House Bill 947 (both passed)*** repeal the State law requirement that a licensed debt management services provider be a nonprofit entity, thus allowing a for-profit entity to become licensed in the State. Additional consumer protections also are provided under the Acts.

These protections include a requirement that a debt management services provider may not provide services to a consumer unless (1) the provider makes a determination based on analysis of information provided by the consumer that debt management services are suitable and that the consumer will be able to meet the payment obligations under the debt management

services agreement; (2) the provider gives the consumer a written summary of the counseling options and strategies for addressing the consumer's debt problems; (3) the consumer signs an acknowledgment stating that the consumer has reviewed the summary and has decided to proceed with entering into an agreement with the provider; and (4) the provider gives the consumer a notice stating that if the consumer files for bankruptcy, the consumer will be required under federal law to receive counseling from a nonprofit credit counseling agency. Under the bills, debt management counselors must receive comprehensive training in counseling skills, personal finance, budgeting, and credit and debt management before providing counseling to a consumer. The bills also require a licensee to include certain additional information in an annual report that must be submitted to the Commissioner of Financial Regulation.

Credit Cards – Marketing to Students

The General Assembly also approved a measure related to credit card marketing and merchandising activities conducted on campuses of institutions of higher education. For a more detailed discussion of ***House Bill 1210 (passed),*** see the subpart "Higher Education" within Part L – Education of this *90 Day Report*.

Commercial Law – Consumer Protection

Automotive Repair Facilities

Bailment is a typical common law situation in which a property owner (the "bailor") gives the property to another person (the "bailee") for a specific purpose. Most business activities involve some type of bailment, including automobile repairs where a customer-bailor gives his or her property to the shop-bailee in order to obtain services. The liability of the bailee for loss of or damage to the bailor's property varies depending on the specific type of bailment, but if the bailor can establish in court that the property was lost or damaged, the bailee generally must prove that the bailee maintained the applicable standard of care and was not negligent. ***House Bill 1057 (passed)*** requires a statement regarding the responsibility of an automotive repair facility for damage to a customer's vehicle to be included on an invoice, a written estimate for repairs, and a form for authorization of repairs. The bill requires that the statement say clearly that, while a customer's motor vehicle is on the premises of the repair facility, the repair facility may not be responsible for damage to the customer's vehicle under certain circumstances and that the customer should ask a representative of the facility about the extent of its responsibility.

Halal Food Products

"Halal" is an Arabic term that means "permissible," and in the English language it most frequently refers to food that is permissible according to Islamic law. ***House Bill 1079 (Ch. 112)*** prohibits the false representation of food as halal and requires the prominent and conspicuous display of a specific disclosure statement by establishments that publicly represent the service or

sale of halal food products. A violation of the Act's provisions is an unfair or deceptive trade practice under the Maryland Consumer Protection Act, subject to civil and criminal penalties.

Rebates

The Maryland Consumer Protection Act states that an unfair or deceptive trade practice includes any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. ***House Bill 1350*** ***(passed)*** specifically extends the scope of the Consumer Protection Act by requiring a merchant to disclose that a rebate is only available by mail in an advertisement for a rebate for consumer goods if the rebate is only available by mail.

Commercial Law – Generally

Musical Performances

Senate Bill 711 ***(passed)*** prohibits a person from advertising or conducting a live musical performance or production in the State through the use of a false, deceptive, or misleading affiliation, connection, or association between a performing group and a recording group. A "recording group" is defined as a vocal or instrumental group with at least one member who has previously released a commercial sound recording under that group's name and has a legal right to use the group's name without having abandoned the name or affiliation with the group. A "performing group" is defined as a vocal or instrumental group seeking to use the name of a recording group.

The bill's general prohibition against false, deceptive, or misleading advertisements and performances does not apply if (1) the performing group is the authorized registrant and owner of a service mark for that group that is registered with the U.S. Patent and Trademark Office; (2) at least one member of the performing group was a member of the recording group and the member has a legal right to the recording group name due to the member's use of or operation under the group name without having abandoned the recording group name or affiliation with the recording group; (3) the live musical performance or production is identified in all advertising and promotion as a salute, tribute, parody, or satire, and the performing group name is not so closely related or similar to that used by the recording group that it would tend to confuse or mislead the public; (4) the advertising does not relate to a live musical performance or production in the State; or (5) the performance or production is expressly authorized by the recording group.

The bill authorizes the Attorney General to seek an injunction prohibiting a person from engaging in a violation of the bill's provisions if the Attorney General believes that a person has engaged in or will engage in a violation and that an injunction would be in the public interest. A court, upon issuing a permanent injunction, may enter a judgment to restore to a person any money or real or personal property acquired from the person by means of a violation. In

addition, a violator is subject to a civil penalty of at least $5,000 but not more than $15,000 for each violation. Each performance or production in violation of the bill's provisions is considered a separate violation.

Corporations and Associations

Publicly Traded Corporations – Stock Appraisal Rights

Senate Bill 556 **/*House Bill 728*** ***(both passed)*** grant stock appraisal rights to the stockholders of a publicly traded corporation chartered in the State in the event of a merger, consolidation, or share exchange of the corporation under three scenarios:

- if, with respect to the merger, consolidation, or share exchange, stock of the corporation is required to be converted into or exchanged for anything of value *except* (1) stock of the corporation surviving or resulting from the transaction, or depository receipts for the stock; (2) stock of any other corporation, or depository receipts for the stock; (3) cash in lieu of fractional shares of the stock or depository receipts under items (1) or (2); or (4) any combination of the preceding items.

- if, the directors and executive officers of the corporation were the beneficial owners, in the aggregate, of 5 percent or more of the outstanding voting stock of the corporation at any time within the one-year period ending on either the day the stockholders voted on the transaction or, with respect to certain mergers of a subsidiary corporation with or into a parent corporation, the effective date of the merger.

- if, within the one-year period described above, and as part of or in connection with the merger, consolidation, or share exchange, any stock held by a director or executive officer of the corporation is converted into or exchanged for the stock of a person who is a party to the transaction, or an affiliate of the person, on terms that are not available to all holders of stock of the same class or series. However, appraisal rights do not apply in this scenario if the stock in question is held in accordance with a compensatory plan or arrangement approved by the board of directors of the corporation and the treatment of the stock in the merger, consolidation, or share exchange is approved by the board.

General Corporation Law

Senate Bill 696**/*House Bill 743*** ***(both passed)*** update and modernize the Maryland General Corporation Law. The bills alter various provisions of Maryland's corporation laws, including provisions relating to subscriptions for stock, the issuance of shares without stock certificates, director resignations, delegations of power to a committee of the board of directors, director and officer indemnification, stockholder quorum and voting requirements, and the contents of articles of consolidation, merger, or share exchange.

Subscriptions for Stock

The bills repeal the requirement that a corporation, in connection with a subscription for stock, give at least 10 days' written notice to each subscriber of the amount, time, and place of payment. The bills also repeal the requirement that any call made by the board of directors for payment on subscriptions for stock be uniform as to stock of the same class.

Shares Issued Without a Stock Certificate

The bills alter the requirement that a corporation, at the time of issue or transfer of shares without certificates, send the stockholder a written statement containing specified information about the corporation and the stock. The bills provide that this obligation is triggered only on the stockholder's request and require the corporation to send the information to the stockholder without charge.

Resignation of a Director

Maryland's corporation laws do not specifically regulate the resignation of a corporate director. The bills address this area by specifying that a director's resignation given in writing or by electronic transmission may provide that (1) the resignation will be effective at a later time or on the occurrence of an event; (2) the resignation is irrevocable on the occurrence of the event; and (3) the resignation is irrevocable if it is effective on the failure of the director to receive a specified vote for reelection.

Committees of the Board of Directors

Except for certain enumerated powers that a board of directors may not delegate, a board is generally free to delegate its powers to a committee of the board. Included in the list of powers that a board may not delegate to a committee of the board is the power to recommend to the stockholders any action that requires stockholder approval. The bills alter this restriction by explicitly authorizing a board to delegate to a committee the power to recommend to the stockholders the election of directors. The bills also expand a committee's authority to authorize or fix certain terms of stock.

Indemnification of Directors and Officers

Generally, a corporation may indemnify any director made a party to any proceeding by reason of service as a director. For purposes of indemnification, "director" means any person who is or was a director of a corporation and any person who, while a corporate director, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, other enterprise, or employee benefit plan. The bills expand the indemnification provisions to include any person who, while serving as a corporate director, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of a limited liability company.

Annual Meetings

The bills alter the provisions governing the timing of an annual meeting of a corporation's stockholders to simply require that the annual meeting be held at the time or in the manner provided in the bylaws.

Informal Action by Stockholders

Maryland law provides that, if authorized by the corporate charter, common stockholders entitled to vote generally in the election of directors may take action or consent to any action by delivering a consent of at least the minimum number of votes that would be necessary to authorize or take the action at a stockholders meeting if the corporation gives notice of the action to each holder of the class of common stock no later than 10 days after the action's effective date. The bills require that the corporation also gives notice to each stockholder who, if the action had been taken at a meeting, would have been entitled to notice of the meeting.

Quorum and Voting Requirements

The bills establish new quorum rules for corporations that (1) have a class of equity securities registered under the Securities Exchange Act of 1934 and at least three directors who are not corporate officers or employees; or (2) are registered as an open-end investment company under the Investment Company Act of 1940 (commonly called mutual funds). Unless the corporation's charter or bylaws provide otherwise, at a meeting of stockholders of these corporations, the presence (in person or by proxy) of a majority of all votes entitled to be cast at the meeting constitutes a quorum. The bills also specify that a quorum provision in the bylaws of these corporations may not be less than one-third of the votes entitled to be cast at the meeting.

Contents of Charter Documents

Articles of consolidation, merger, or share exchange must contain (1) the terms and conditions of the transaction; and (2) the manner of carrying it into effect, including certain information regarding the transaction. The bills provide that these charter documents, in addition to containing the required information, may provide the number and names of those directors or trustees of the successor, or of persons acting in similar positions, who will hold those positions as of the effective date of the consolidation, merger, or share exchange if the persons serving in those positions will be changed as a result of the transaction. The articles of consolidation, merger, or share exchange also may provide the titles and names of one or more officers of the successor, or persons acting in similar positions, who will hold those positions as of the effective time of the consolidation, merger, or share exchange if the persons serving in those positions will be changed as a result of the transaction.

Real Estate Investment Trusts

A real estate investment trust (REIT) is an unincorporated trust or association in which property is acquired, held, managed, administered, controlled, invested, or disposed of for the

benefit and profit of any person who may become a shareholder. A share is a transferable unit of beneficial interest in a REIT. Unless the declaration of trust provides otherwise, the trustees of a REIT may authorize the issuance of some or all of the shares of any or all of its classes or series without certificates.

Senate Bill 548*/*House Bill 154* *(both passed) clarify the definition of REIT to mean an unincorporated *business* trust or association. The bills also repeal the requirement that a REIT send a written statement regarding the terms of shares issued or transferred without certificates at the time of issuance or transfer. Instead, the bills require that the written statement be sent on request of a shareholder and without any charge to the shareholder.