



NEW YORK BANKERS ASSOCIATION

NEW YORK STATE BANKING JOURNAL

VOLUME 12 NO. 1 / AUGUST 1, 2005

Review and Outlook	2
State Legislative Developments	3
NYBA Legislative & Regulatory Priorities	4
State Legislative Activity	12
State Regulatory Developments	22
NYBA in Court	24
Significant Legal Decisions	28
Federal Legislative Developments	30
Federal Regulatory Developments	35

REVIEW & OUTLOOK

The New York State Legislature adjourned on time for the first time in over twenty years, after one of the most active and productive sessions for banking. First, the industry aggressively and successfully opposed the establishment of a State-run short-term investment pool (STIP) and the loss of the favorable tax treatment of real estate investment trusts (REITS). A mutual fund bill for local governments was considered and dramatically altered to meet NYBA's objections and ultimately contained a proposal that will allow banks to pool collateral. NYBA has sought this collateral provision for over fifteen years.

Among the bills that passed was a breach of security notification bill, which contains many of the recommendations NYBA made when testifying twice on this subject before the New York State Legislature. The Legislature also extended for four years the commercial mortgage foreclosure statute, which was a NYBA initiative, and the Legislature failed to enact additional burdensome and harmful proposals on bank security, such as 911 buttons on ATMs. Thus, the session was truly a tribute to the grassroots efforts and the commitment of NYBA's member banks.

When the Governor released his Budget in January 2005, it contained two objectionable items in the municipal finance and tax areas. The Budget proposed the elimination of the dividends received deduction on REITS and the creation of a STIP for local government investments. NYBA's first legislative success of the session came when the Governor amended the Executive Budget to delete the STIP provision. NYBA conducted an extensive grassroots campaign against the STIP and met in Albany with the budget

Director and Governor's office successfully urging its deletion.

After the STIP victory, NYBA continued to press for deletion of the proposal that eliminated the current 60% dividends received deduction for dividends received from REITS. Due to a strong grassroots lobbying effort, NYBA was ultimately successful in the removal of this provision in the final Executive Budget, which had allocated \$50 million per year to the elimination of this tax exclusion.

The next challenge NYBA faced this year was securing a workable breach of security notification bill that was consistent with the federal guidelines on this issue. NYBA testified twice on this issue at the State level – first, before the Assembly Banks, Consumer Affairs and Protection, and Codes Committees, and later before the Senate Committee on Investigations & Government Operations and the Senate Committee on Consumer Protection. In both instances, NYBA President Michael P. Smith affirmed NYBA's support of the establishment of reasonable notification provisions, urging that any bill permit, even mandate, a delay in notification when requested by a federal or State law enforcement official. The bill that ultimately passed contained many of NYBA's recommendations, clarifying that businesses can take into account a list of factors in determining whether to provide notification, may delay notification at the request of law enforcement, and clarifying and narrowing the damage provision.

NYBA also strongly opposed legislation that would have authorized New York State and City to invest in highly-rated money market mutual funds. However, after NYBA pointed out that investments in money market mutual funds are inherently more risky than bank deposits,

which are fully collateralized, that funds so invested are not covered by CRA, and that the cost of maintaining and managing collateral makes it difficult for banks, in some interest rate environments, to compete, the legislation was dramatically altered. The final legislation allows the State and City of New York the authority to invest in mutual funds, but capped at \$250 million, less than 5% of the funds in this market, and importantly, does not affect local governments around the State. The legislation also now contains a provision that will allow banks to pool collateral, which will save banks and local governments money and eliminate wasteful administrative practices. Thus, the legislation went from a statewide, unlimited grant of authority to a narrow authorization for mutual funds along with providing a significant and statewide benefit to all NYBA members.

NYBA was also successful this year in its work with the New York State Banking Department on the methodology to be used for the Department's new assessment structure. For the first time this year, all regulated institutions – not just depositories – are being assessed for their share of the Department's operating costs. Also, for the first time, each entity is receiving one bill, which will include all operating costs, including the direct cost for examinations. Based on discussions with NYBA, as well as several other trade groups, the Department made several significant – and very positive – changes to its original methodology. First, the Department is now using current staffing information, rather than relying on a three-year historical average. Second, the Department has established a new

(Continued on next page)

category for institutions that are under continuous supervision. As a result of these methodology revisions, the total amount of depository institution assessments was reduced by approximately \$13,000,000.

More good legislative news came this year at the federal level with the passage of long-sought bankruptcy reform and class action reform legislation. The Bankruptcy Abuse Prevention and Consumer Protection Act becomes effective on October 17, 2005, and is intended to create a needs-based system of bankruptcy, requiring those who can pay back a portion of their unsecured debt to do so.

The Class Action Fairness Act of 2005 was signed by the President in February 2005 and is intended to reduce frivolous lawsuits and provide greater guidance about which suits can remain in state court and which are required to be heard in federal court. The legislation limits attorneys' fees, requires more complete notification of potential class members and imposes standards for court approval of settlements intended to assure that such settlements are "fair, reasonable and adequate."

Finally, NYBA's participation as *amicus curiae* in several court cases also has yielded positive results this year. The New York State Court of Appeals ruled in favor of JP Morgan Chase (Chase) in the case of *T/U/W Blanche Hunter f/b/o Pamela Creighton*. NYBA filed an *amicus curiae* brief in support of Chase, which challenged a Surrogate Court decision, in which the court distinguished between the duties of executors and trustees. The Surrogate's decision, if upheld, would have undermined the widely held belief that, when fiduciaries act as both executors and trustees, all issues pertaining to

acts or omissions during the estate administration are determined finally by the decree settling the estate and trust beneficiaries do not have the right to raise any of those issues in a trust accounting proceeding.

NYBA enjoyed a second *amicus curiae* victory, in the case of *Hans W. Flagg and Eileen S. Flagg, on behalf of themselves and all others similarly situated v. Yonkers Savings and Loan Association FA (a/k/a Yonkers Financial)*. In that case, NYBA supported Atlantic Bank of New York (Atlantic) in its efforts to affirm a U.S. District Court decision, which held that a New York law authorizing the payment of interest on mortgage escrow accounts was preempted. The plaintiffs had sought to recover interest on funds that they paid into a mortgage escrow account maintained by a federally chartered OTS-regulated thrift, which was later acquired by Atlantic, a New York-chartered FDIC-insured commercial bank. The Flaggs petitioned the United States Supreme Court for *certiorari* in this matter. That petition is still pending. ■

STATE LEGISLATIVE DEVELOPMENTS

Bank Security

While bank security remains an area of concern, a dramatic reduction in the bank robbery rate in New York City since the summer of 2003 has, to a large degree, diminished the intense focus on this issue, which began with a well-publicized increase in bank robberies in New York City in the first half of 2003. In fact, at NYBA's Financial Services Forum in March 2004, New York City Police Commissioner Ray Kelly praised the industry for its commitment to bank security and noted the marked improvement in the pace of bank robberies. 2005 also continued to maintain this marked reduction in the bank robbery rate.

As a result, to date, none of the problematic proposals, which have been introduced at the State and City levels over the last few years, have been enacted. In fact, a NYBA-opposed bill requiring that ATMs be equipped with emergency 911 buttons, S.2892-A(Padavan)/A.4571-A(Stringer), did not pass the Assembly this year, as it has in prior sessions, and also failed to gain support in the Senate. Similarly, while both the New York State legislature and New York City Council introduced proposals mandating that bandit barriers be installed at bank branches, (See A.9409 (Nolan) and proposed New York City Local Law 442), neither have been enacted. An additional New York City proposed ordinance, which requires banks to file written safety plans with the City Police Department for each branch they own or operate, was introduced in 2004 but has not been acted upon.

(Continued on page 4)

NYBA 2005 LEGISLATIVE AND REGULATORY PRIORITIES

Status Report - August 2005

Issue	Bill Number	Committee	NYBA Position/Status
STATE ISSUES			
✓ Budget & Taxes	Budget	Budget	Oppose elimination of REIT dividend deductability; oppose STIP; oppose Gift Card rules. All goals accomplished. Chapter Law 61
✓ *Municipal Finance	S.26-B/ A.3678-B	Local Government	Oppose Local Government Mutual Funds; urge limit on NYC investments; urge pooling of collateral. All goals accomplished.
⬆️ *State Bank Charter	S.5518/ A.8641	Banks	Streamline Wild Card process; urge Wild Card petitions; support Banking Department Budget Review/ bill introduced; Revenue Bond petition advanced; bank assessments reduced
⬆️ *Trust Reform			Appleseed report filed; LMDC recommendations expected
✓ Vicarious Liability	S.1410/ A.2620	Transportation	Support/ bill on Senate calendar, in Assembly Committee; Congress preempted in H.R. 3
✓ *Commercial Mortgage Foreclosure	S.4847-A/ A.7345-A	Judiciary	Support/Chapter Law 123
✓ Bank Security/ Security Breach Notifications	S.3492-A/ A.4254-A S.5827/ A.8937	Consumer Protection/ Government Operations	Did not object, as amended/passed both Houses
FEDERAL ISSUES			
⬆️ Credit Unions	H.R.2317	Financial Services	Oppose/In Committee
✓ Bankruptcy Reform	S.256	Judiciary	Support/enacted – P.L. 109-8
✓ Class Action Reform	S.5	Judiciary	Support/enacted – P.L. 109-2
⬆️ *Deposit Insurance Reform	H.R.1185/S.1562	Financial Services/ Banking	Support/passed House/increased municipal coverage included
➡️ Real Estate Brokerage	H.R.2660 S.98/ H.R.111	Financial Services	Support/In Committee Oppose/moratorium in effect
⬆️ Terrorism Risk Insurance Extension	H.R.1153/ S.467	Financial Services	In Committee/Treasury report filed
⬆️ Privacy	Numerous	Commerce/Banking Judiciary	In Committee/hearings held
⬆️ OCC Preemption			FDIC Rulemaking Deferred/ Litigation Proceeding

✓ action completed ⬆️ favorable action expected ➡️ action stalled *NYBA initiative

If you have any questions on these or other legislative issues, please contact Mike Smith at (212) 297-1699, msmith@nyba.com; Bill Bosies at (212) 297-1664, bbosies@nyba.com or Roberta Kotkin at (212) 297-1684, rkotkin@nyba.com. ▼

State Legislative Developments, continued from page 2

It is important to note, however, that New York City recently showed renewed interest in this matter. A newly revised proposed bandit barrier ordinance is currently under consideration in the New York City Council, which, although significantly narrower than the 2003 proposal on this topic, still seeks to mandate bank security practices in some instances. The proposal gives discretion to the Police Department to mandate that an individual bank comply with certain security measures, including the installation of bandit barriers, in the event that such bank refuses to comply with the Department's security recommendations. NYBA immediately began working with the City Council on this proposal, impressing upon the Council the success of cooperative efforts on bank robberies, which have been reduced by 45% since 2003. NYBA has since been informed that this bill has been set aside for now and interest is waning among Council members. NYBA will, however, continue to monitor this proposal.

This year there was also a renewed effort to amend the technical aspects of the lighting standards of the ATM Safety Act, with the Senate passing a bill (S.4677-A(Farley)). However, this bill did not progress in the Assembly. Importantly, the Superintendent of Banks adopted as final, in February 2005, amendments to Part 301.5 of the Superintendent's Regulations, which conform the mandated period for which banks are required to retain recordings made by surveillance cameras at their ATM facilities to a 2003 change in State law (Banking Law Section 75-c). The amendment

to Section 75-c extended the retention period from 30 to 45 days. The amendments to Part 301.5 also now effectively give a bank the option of using a digital surveillance system (in lieu of videotape technology) without requiring the approval of the Superintendent in each individual case.

For background on this issue see the December 2004 edition of *The Banking Journal* at www.nyba.com.

Tax and Budget Issues

NYBA's legislative year opened with a series of significant challenges as the Governor's Executive Budget, released early in January, contained a number of issues of importance to the banking industry. The two with the most potential impact were the proposed elimination of the dividends received deduction on real estate investment trusts (REITs) and the proposed creation of a State-run short-term investment pool (STIP) for local government investments. Fortunately, by the close of the session, these threats had been successfully diffused.

Under the REIT proposal, banks, insurance companies and general corporations would lose the right to deduct dividends received from REITs (the dividend paid deduction would continue to be available to REITs). Currently, banks taxed under Article 32 of the Tax Law are authorized to deduct 60% of the value of dividends received from REITs. The Governor's Budget characterized this amendment as a "loophole closer" and ascribed it as well to the New York City budget. The State budget assigned an annual revenue impact of \$50 million on the banking industry for the elimination of the REIT deduction, while the New York City budget expected the amendment to

raise \$10 million per year.

The STIP proposal authorized local governments of all sizes throughout the State to invest up to 25% of their excess funds in STIP. The STIP could invest in any obligations currently authorized for investment by the New York State Comptroller's Office. The proposal also authorized local governments to invest directly up to the lesser of \$250 million or 25% of their investment portfolios in bankers' acceptances, commercial paper or obligations of government sponsored enterprises such as Fannie Mae, Freddie Mac, the Federal Home Loan Banks and the U.S. Postal Service. NYBA commissioned a study by Cornell University setting forth arguments against this and other similar proposals.

These proposals would have been effective April 1, 2005 (the REIT change would apply to tax years beginning on or after January 1, 2005). NYBA strongly opposed both proposals and vigorously entered into the budget debate.

The Executive Budget also contained proposals to provide an additional \$2 million per year for the Low-Income Housing Tax Credit program; and to provide the Tax Department with authority to designate tax strategies as "tax shelters," requiring reporting and imposing increased penalties for tax underpayments.

In response to the budget release, NYBA's Legislative and Regulatory Policy Committee met by conference call to plan strategy. The Committee determined to address the two principal issues differently, with targeted meetings and contacts with the Governor and his staff designed to persuade policy makers to withdraw the STIP proposal, while a full-blown grassroots campaign for all

members of the Legislature would be used in an attempt to persuade leaders to drop the REIT provision.

In early February 2005, NYBA instituted a grassroots lobbying campaign urging Governor Pataki to delete from the budget the proposal to authorize local governments to invest in STIP and in bankers' acceptances, commercial paper and GSE securities. NYBA also met with the Governor and his staff on the proposal and released the just-completed study by Cornell University on the effects of municipal deposits on local communities in New York. Among the findings in the study was the fact that withdrawal of all of bank municipal deposits could result in a reduction in outstanding local loans of more than \$11 billion and the loss of more than 6,000 jobs in return for increased interest earnings for local governments that, in the current rate environment, would likely not exceed \$20 million.

As a result of the meetings, contacts and factual support provided by the Cornell study, Governor Pataki decided to delete the STIP proposal from the Executive Budget in the 30-day amendments submitted in mid-February. The 30-day amendments, however, retained authority for local governments to invest in bankers' acceptances, commercial paper, and certain GSE paper. In addition, the 30-day amendments raised another concern as they made clear that the REIT proposal would apply, not only to the Tax Law of the State of New York, but also to the New York City Bank and Corporation Tax Law.

In early March, Governor Pataki and legislative leaders reached agreement on the amount of revenue available for the State Budget in fiscal year 2006. The

unusually early agreement on the revenue number allowed budget discussions to proceed at a fast pace. NYBA broadcast a grassroots alert asking all member banks to urge their State Senators to vote to delete the REIT provision from the State budget and met with senior Senate staff to explain NYBA's position. NYBA also worked closely with IBANYS and CBANYS to coordinate strategy and tactics on the proposal.

In mid-March, with only two weeks until the constitutional budget deadline, the Senate passed a budget bill (S. 995-C) materially amended from the Governor's proposal. Most importantly, the Senate deleted the provision proposed by the Governor that would have eliminated the current 60% exclusion for dividends paid by a closely-held REIT to its affiliate. NYBA then shifted the focus of its grassroots campaign to the Governor's office.

However, the Senate budget contained three potentially significant provisions affecting banking. Most importantly, the Senate bill would have completely rewritten the gift card law passed last year, which is now serving as a model for gift card legislation throughout the nation. The Senate language prohibited expiration dates and any service fee, including a dormancy fee, that reduces the value of the gift certificate or gift card. It also included new record-keeping requirements with regard to the owner of a gift card or gift certificate and accelerated escheat requirements for gift cards and gift certificates from five years to three years. NYBA immediately contacted key Senators and staff in opposition to the gift card provisions.

The Senate bill also contained two amendments to the Bank Tax. The first amended section 1454 of the Tax Law to

apply single-factor sales apportionment to that portion of income derived from management-type services provided to an investment company. Although difficult to calculate, this provision did not appear to disadvantage any bank taxpayer. In addition, the Senate added a new amendment to section 1453 of the Tax Law requiring that entire net income be calculated without an exclusion or deduction for payments for the use, possession or occupancy of real property made to a closely-held REIT. This provision was far less costly to the industry than the originally proposed disallowance of the REIT deduction.

On March 25, in a joint Senate/Assembly conference committee, Senate Majority Leader Joseph L. Bruno and Assembly Speaker Sheldon Silver publicly announced their rejection of the REIT proposal. This agreement was incorporated in the State Budget that passed, on time, the following week, representing the first on-time budget adopted by the Legislature in 20 years. NYBA applauded the Legislature and all of the bankers who contacted their representatives on the REIT proposal. Also dropped from the final budget was the objectionable provision on gift cards and the required inclusion of entire net income of payments for real property made to a closely held REIT. In addition, when the New York City budget was approved, the REIT provision was also dropped, and local governments did not gain the authority to invest in bankers' acceptances, commercial paper or certain GSE obligations.

In addition to these major accomplishments in the tax bill, there were several other provisions affecting banking. The bill applied a new single-factor

(Continued on next page)

sales apportionment factor to Article 32 banking companies to that portion of income derived from management-type services provided to an investment company. The bill also established a new program to reduce tax avoidance by requiring all taxpayers, including banks, to file with the Tax Department copies of disclosures of tax avoidance programs required to be filed with the IRS or designated by the Tax Commissioner and establishing a voluntary tax compliance program. The bill completely revised and tightened the Empire Zone program and increased the special additional mortgage recording tax in counties that are part of the Metropolitan Commuter Transportation District from twenty-five cents to thirty cents.

On April 12, the 2005-2006 state budget was completed as the Governor and Legislative leaders reached agreement on two chapter law amendments clarifying provisions of the budget bills, including a clarification of the language applicable to the single-factor apportionment of the bank tax for income attributable to certain services supplied to an investment affiliate. The revenue bill in the budget was signed as Chapter 61 of the Laws of 2005.

Municipal Finance

With the proposal for a STIP dropped from the budget, NYBA's main municipal finance objective became the defeat of legislation to authorize local governments to invest in mutual funds, legislation which had been the impetus for the Cornell Study whose publication proved so useful in the debate on STIP. Before the session was even started, a bill (S. 26, Maziarz) was reintroduced in the Senate to authorize the governments of commu-

nities in excess of 300,000 population to invest in highly-rated money market mutual funds. The impact of the Cornell study, showing potential economic development losses of up to \$11 billion with potential local government revenue gains not exceeding \$20 million State-wide, was so profound that the sponsors of the mutual fund bill limited its reach to the excess funds of New York City and New York State. As the session progressed, NYBA continued to oppose the bill, but, with strong backing from New York City and the mutual fund industry, the bill began to move early in June. NYBA submitted a memorandum in opposition to the legislation but also provided amendments designed to restrict competitive disparities that could be caused by the bill (S. 26-A, Maziarz/A. 3678-A, DiNapoli). NYBA's memorandum pointed out that investments in money market mutual funds are inherently more risky than bank deposits, which are fully collateralized; that funds so invested are not covered by CRA; and that the cost of maintaining and managing collateral makes it difficult for banks, in some interest rate environments, to compete.

At the same time, NYBA's Municipal Finance and Legislative and Regulatory Policy Committees met by conference call to discuss possible amendments that would make the bill less objectionable. The principal goal of the amendments was to provide banks enhanced opportunities to compete. After lengthy discussions in Albany, the mutual fund bill, now S. 26-B (Maziarz)/A. 3678-B (DiNapoli), was amended at NYBA's request to limit authorized investments in money market mutual funds to \$250 million by New York State and New York City and,

for the first time, to permit banks state-wide to pool the collateral backing their local government deposits. The collateral pooling provision was first sought by NYBA more than fifteen years ago and will provide significant efficiencies in managing local government collateral.

Background: In 1992, section 10 of the General Municipal Law was amended by Chapter Law 708 to authorize banks to hold a greatly expanded list of collateral to back their municipal deposits. Among the items added to the authorized list were obligations of states and political subdivisions other than New York and its localities; highly rated corporate bonds, mortgage backed securities, commercial paper, bankers' acceptances, and certain derivatives therefrom; and substitutes for securities such as certain surety bonds and letters of credit.

Chapter Law 708 represented the culmination of a five-year effort by the New York Bankers Association to expand the list of collateral available to back municipal deposits. As part of that effort, NYBA sought authority for banks to pool the collateral backing local government obligations. However, at the insistence of then Ways and Means Committee Chairman (and now Speaker) Sheldon Silver, authorization for pooling was dropped from the final legislative package. As a result, each governmental entity seeking a depository was required to contract with a local bank or trust company to maintain specific collateral backing the government's deposits in excess of the deposit insurance limit. The collateral must be segregated on the books of the bank or trust company, and either be registered in the name of the municipality, delivered in a form suitable for transfer or with an assignment in

blank to the local government, or maintained on the books of a third-party custodian. Maintaining and managing segregated collateral for each municipal depositor consumes considerable time and effort both by municipal officials and by the bank or trust company holding the deposit.

New Key Provisions: Section 2 of the S. 26-B/A. 3678-B amends section 10 of the General Municipal Law in three respects. First, it permits officers making a pledge of collateral to accept a pledge of a prorated portion of a pool of eligible securities which have, in the aggregate, market value at least equal to the aggregate New York municipal deposits held in the bank or trust company receiving the deposit. **This language allows municipal depositories to accept a prorated share of pooled collateral and ensures that all authorized types of eligible securities may be used to comprise the pool.**

Second, the same section **repeals the requirement that the pledged collateral must be either inscribed in the name of the municipal depository or delivered in a form suitable for transfer or with an assignment in blank to the municipal depositor or its custodian.**

Third, section two also provides the municipal depositor with the **right to ensure that the security agreement contains all provisions necessary and sufficient to secure the local government's interest in its share of the collateral.** This provision is necessary to continue to assure that local government deposits remain fully secured by the prorated portion of the pool of collateral backing the deposits.

Other sections of Chapter Law 708 apply the local government deposit provisions of section 10 of the General Municipal Law to other political subdivisions of the State, such as counties, fire districts, school districts, cities, towns and villages.

Effective Date: S. 26-B/A. 3678-B becomes effective as soon as it is signed by Governor Pataki. However, section 44 of the General Municipal Law also contains a provision requiring the State Comptroller to adopt model security and custodial agreements for local governments under section 10 of the General Municipal Law. Although section 44 also states that local governments are not required to adopt such model agreements, it may be expected that many local governments will look to the State Comptroller's Office for guidance in interpreting the new collateral pooling provisions.

Enhancements to the State Charter

The question of preemption continues to be a topic of debate at the State level, in the wake of two regulations issued by the Office of the Comptroller of the Currency (OCC) at the beginning of 2004, and the subsequent conversion of two large multi-state banks from the State to the national charter. The first OCC regulation seeks to clarify the extent to which the operations of national banks are subject to state laws, and the second concerns the OCC's visitorial powers with respect to national banks. NYBA has consistently maintained a position, originally set forth in a comment letter to the OCC, in support of its regulations, which clarify existing federal law. At the same time, NYBA has consistently repeated its com-

mitment to the dual banking system.

In response to the concerns raised by State officials, including the Superintendent of Banks and the Attorney General, in reaction to the OCC's new regulations, coupled with the departure of two large multi-state banks from the State charter, NYBA formed a Task Force dedicated to finding ways to enhance the State charter. The Task Force developed a list of proposed enhancements, which NYBA has urged the Banking Superintendent to support. NYBA continues to work with the Banking Department, and leaders of the Executive and Legislative branches of New York government, on parallel tracks with this common goal.

In December 2004, in keeping with its goal of enhancing the State charter, the Department began circulating a new fee schedule developed after conducting a year-long analysis, which was designed to level the playing field between depository institutions and the other types of financial institutions that the Department regulates. Under the new schedule, budget planners, money transmitters, check cashers, mortgage brokers and other institutions, which previously had paid only exam and licensing fees, would now pay annual fees to the Department based on a formula that calculates the cost in hours of supervising them and their asset size. (The Department's plan also for the first time, provided for each entity receiving one bill, which would include all operating costs, including the direct costs for examinations.)

Later in December 2004, NYBA met with the Department, along with representatives of other entities regulated by the Department, to discuss the 2005 assessment schedule. NYBA expressed

(Continued on next page)

serious concerns regarding extraordinary increases in some banks' assessments. In response, at NYBA's January 2005 Annual Meeting and Bankers Day in Albany, Superintendent of Banks Diana Taylor stated her intention to redress some of the imbalances in the proposed reassessment plan. After additional discussions with NYBA, as well as several other trade groups, the Department did, in fact make several significant – and very positive changes to its original methodology. First, the Department amended its plan to now use current staffing information, rather than relying on a three-year historical average. Second, the Department established a new category for institutions that are under continuous supervision. **As a result of these revisions, the total amount of depository institution assessments was reduced by approximately \$13,000,000.**

At NYBA's 2005 Annual Meeting the Superintendent also announced a four-point plan to strengthen the New York State banking charter. She first stated her intent to advance a "super-wild card" that would automatically convey federal banking powers to State-chartered banks. She reserved the right to put conditions on such powers where she deemed necessary. Second, she proposed exploring the creation of a universal banking charter that would grant banks all of the powers of other types of depository institutions (and vice versa). Third, she stated her intent to explore legislation to turn the Banking Department into an independent agency with greater control of its resources and revenues. Finally, she stated that she would engage in an enhanced consumer protection and awareness program. Since that time NYBA has continued to work with the Department

on State charter enhancement initiatives.

In this regard, and addressing one of the issues on NYBA's list of desired charter enhancements, the Banking Department, in February 2005, issued an Industry Letter regarding compliance with Section 9-m of the Banking Law, in light of the passage of Check 21. Check 21 is a federal legislative initiative which became effective on October 28, 2004 and facilitates check truncation by creating a new negotiable instrument called a substitute check, which allows banks to process check information electronically. Section 9-m provides that banks that offer consumer checking accounts must offer at least one consumer account on which the cancelled checks are returned to the customer with his statement. To reconcile these two legislative mandates, the Department's industry letter states that banks that provide the customer with a check image (front and back), an original cancelled check, or a substitute check, will satisfy the requirement of Section 9-m.

In June 2005, legislation to streamline the wild card process was introduced in the State Legislature (S5518, Farley/A-8641, Nolan), at the request of Governor George Pataki. The legislation would provide that a notice by a State bank to the Banking Department of its intention to exercise any power or authority of a national bank would become effective in 45 days unless the Banking Superintendent disapproved, asked for more time, or imposed conditions on the exercise. Similar language would apply to State-chartered thrifts gaining federal thrift powers and State-chartered credit unions gaining federal credit union authority. While this legislative

initiative did not progress this year, NYBA believes that it helped to advance the debate on enhancing the State charter.

In another positive development, at its July 2005 meeting, the Banking Board voted to publish for public comment, a proposed regulation which would allow State-chartered banks to underwrite municipal revenue bonds. NYBA filed a "wild card" petition in 2000 seeking such a regulation, and has continued to urge its implementation since that time. Indeed, it is another of the recommended state charter enhancements submitted to the Department in late 2004.

While there is much left to do, NYBA is encouraged by the progress being made on State charter enhancements, and will continue to work with the Department on this issue.

Privacy

Privacy once again became a focus this year at the State and New York City levels, due to a number of high profile breaches in security of confidential information nationwide. NYBA testified twice at the State level and once before the New York City Council regarding appropriate standards for required notification of security breaches, and worked with legislators throughout the session on improving proposals, in order that they more closely mirror federal guidelines. Many of NYBA's recommendations are contained in the final State bill which passed both Houses and which the association views as workable. After NYBA testified before the New York City Council, regulated financial institutions were removed from the City's proposed ordinance on this topic.

NYBA first testified in April 2005 on

the issue of notification for security breaches before the Assembly Banks, Consumer Affairs and Protection, and Codes Committees. NYBA President Michael P. Smith, who discussed the efforts of the banking industry to ensure the security of customer records, was accompanied by federal privacy law expert Rick Fischer, of the law firm Morrison and Foerster, in reviewing the extensive network of existing State and federal laws and regulations that protect bank customer privacy. NYBA reviewed the leadership role it had taken in developing Best Practices Privacy principles at the federal and State levels and in supporting strong identity theft legislation in the State as well as the privacy mandate of the Gramm-Leach-Bliley Act, which assures that the banking industry is subject to more far-reaching privacy requirements than virtually any other group. NYBA indicated that it "would support the establishment of reasonable notification provisions" with regard to security breaches. NYBA also urged that any bill permit – even mandate – a delay in notification when requested by a federal or State law enforcement official.

In May 2005, NYBA President Michael P. Smith testified before the Senate Committees on Investigations and Government Operations and on Consumer Protection, once again accompanied by privacy expert Rick Fischer. At that time, NYBA reiterated its support of reasonable notification provisions. The State legislation that was ultimately enacted on this issue reflected many of NYBA's comments. Amendments made prior to passage clarified that businesses can take into account a list of factors in determining whether to

provide notification, and may delay notification at the request of law enforcement. The amendments also clarified that damages may be awarded to persons who were entitled to notification if notification was not given. Importantly, a provision calling for a private right of action was removed before passage. The bill also preempts all local ordinances on this subject.

Commercial Mortgage Foreclosure

In 1998, the State enacted, at NYBA's request, legislation to ease the process of commercial mortgage foreclosure by establishing, for the first time, a non-judicial foreclosure proceeding. After one previous extension, the law was scheduled to expire on July 1 of this year. NYBA established as one of its legislative priorities an extension of the law. After bills were introduced in both Houses, NYBA conducted a survey among banks that make the bulk of the State's commercial mortgage loans and was able to demonstrate to the Legislature that, although the law had been little used in foreclosures because the strength of the State's economy and real estate markets had minimized commercial foreclosures, the law was having its desired effect. Banks that had used the non-judicial foreclosure process found it faster and less expensive than judicial foreclosure and even those banks and borrowers that had not used it were able to negotiate more satisfactory terms and conditions because of the certainty offered by the law.

Both Houses passed the bill and - S. 4827-A (DeFrancisco)/A. 7345-A (Tokasz) - which extended Chapter 231 of the Laws of 1998 for four years, until July 1,

2009. NYBA wrote the Governor's Counsel urging that the Governor sign the bill. The bill also clarifies the notice provisions in the law. Governor Pataki signed the bill on June 30 as Chapter 123 of the Laws of 2005.

Vicarious Liability

For several years, NYBA has been an active member of a coalition attempting to reform New York's vicarious liability law for automobile leasing, the only remaining law in the nation that holds a lessor liable for accidents or negligence by a lessee, even when the lessee maintained an adequate level of liability insurance. A vicarious liability bill which NYBA strongly supported showed surprising strength in the Assembly near the end of session as the Assembly Transportation Committee was unable to muster the votes to kill the bill (S. 1410, Johnson, A. 2620, Canestrari). The bill would abolish New York's 70-year-old system of holding automobile lessors jointly liable for accidents committed by lessees, shifting liability to those who actually control the vehicles. The bill was reported from the Senate Transportation Committee to the Senate calendar, but did not finally pass.

In Washington, meanwhile, both Houses completed action on H.R. 3, the Transportation Equity Act. This long-awaited highway bill contained a little-noticed provision backed by NYBA that would preempt New York's vicarious liability law, freeing the owners and lessors of leased vehicles from liability for actions of lessees, so long as the lessor is in the business of leasing motor vehicles and is not itself negligent.

(Continued on next page)

NYBA was instrumental in gaining the support of the national banking trade groups for the bill, which will allow many lessors, including banks, which had exited the leasing business in the State to resume operations. The President is expected to sign the bill shortly. The preemption provision becomes effective for all litigation filed on or after the date of the President's signature, irrespective of when the underlying event that gave rise to the litigation occurred.

Fingerprinting of Employees

At the request of a member bank, NYBA initiated discussions with the Banking Department to permit banks to fingerprint applicants for employment and existing employees for compliance with provisions of the Federal Deposit Insurance Act. NYBA discovered a little-known opinion issued in 1999 by the New York State Department of Labor, which ruled that all "FDIC-insured institutions may lawfully require applicants for employment and current employees to be fingerprinted as a condition for hire or continuing employment." The letter ruling interprets the provisions of New York Labor Law section 201-a, which prohibits fingerprinting of employees "except as otherwise provided by law," and concludes that the requirements of the Federal Deposit Insurance Act and implementing FDIC examination procedures provide an exception to the Labor Law. NYBA has confirmed that the Labor Department ruling is still in effect.

Trust Issues

After pursuing an aggressive agenda in Albany for several years designed to enhance the competitive posture of the New York trust industry, it became clear that only fiduciary income tax reform could provide the State's banks and trust companies the extensive relief necessary to bring in significant new business. However, in the face of persistent and substantial State budget deficits, the revenue cost of tax reform was a significant impediment. Seeing the problem as an economic development issue, the Association last year wrote the then-President of the Lower Manhattan Development Corporation (LMDC), Kevin Rampe, asking for a State-funded study of the problems facing the industry. LMDC is a government-sponsored, non-partisan authority created in the wake of September 11 to make recommendations and coordinate economic development in Lower Manhattan.

LMDC, after reviewing NYBA's request and meeting with association representatives and leaders of the trust industry, agreed to perform the study and retained Appleseed, its consultant, to perform the industry analysis. After conducting an extensive survey of the trust industry, in which NYBA assisted, and interviewing scores of industry leaders and contributors, Appleseed provided its study and a list of recommendations to LMDC in February. The study's results agreed almost entirely with NYBA's analysis, finding that the vast majority of trust industry jobs were concentrated in Manhattan with most in Lower Manhattan (a key predicate for recommendations by LMDC), that jobs in the State's trust industry had declined by more than 20%

in the last few years alone, that each industry job brought in more than its value in State tax revenues and that the industry was steadily leaving New York, along with the revenue and expertise that accompanies it.

Among the key recommendations of the study were:

- Fiduciary Income Tax Reform, a long-time NYBA goal. The study agreed with NYBA's proposal to phase the fiduciary income tax on resident trusts and estates to the level of the tax on non-resident trusts and estates (essentially, on source income) over a period of five years in order to minimize the adverse revenue impact of the proposal.

- Perpetual Trust Legislation – New York continues to be uncompetitive in the market for perpetual trusts. The size of the perpetual trust business (estimated by a study released by Northwestern University School of Law in February at over \$100 billion) is simply too great for New York to ignore. The Appleseed study recommended reform of the State's Rule Against Perpetuities, either by repeal of the Rule for perpetual trusts or through a statute such as the 360-year revised perpetuities limit adopted by the State of Florida.

- Delegation – The study recommended that the ability to delegate accountability, as well as investment and ministerial decisions, is important for New York corporate trustees.

- Relaxation of Restrictions on the Ability to Invest in Other Financial Products sold by the same institution was also recommended by the study.

- Simplified Procedures for the Appointment and Resignation of Trustees – This was another area in which the study stated that New York has fallen behind

other trust states.

- **Simplified Accounting and Reporting Requirements** – This recommendation reflects a goal NYBA has pursued with the Attorney General's Office. However, NYBA believes that simplified accounting procedures would only be useful to the extent they provided a full discharge from liability for actions taken during periods accounted for.

The LMDC has had a change of leadership since the Appleseed study was completed. NYBA is working with the Governor's Office to identify the recommendations in the study as worthy of inclusion in the Governor's next budget. NYBA is also seeking the release of the study so that it may be shared with legislative leaders.

Another important item in NYBA's trust legislative agenda, which is in development, is an amendment to the State's statutory rate of interest. NYBA's Trust Division believes that, in the current climate, the 9% statutory rate is punitive. The Division takes the view that the rate should float, rather than being codified in statute, and should be reset annually. The Trust Investment Committee recommends that a short-term money market rate, such as the seven-day index of rates paid by money market mutual funds, would be an appropriate rate at which to peg the judgment interest rate. Such a rate would, on average, track the inflation rate, assuring that the value of any money judgment decreed would not diminish over time; would be beyond the control of any party and thus free of opportunities for manipulation; and would be publicly available for all parties to consult.

During the 2005 legislative session, the Legislature completed action on only

a handful of trust bills, with perhaps the most far-reaching being the creation of Transfer-on-Death Securities Registration in New York (A. 5770, Weinstein/S. 1396, DeFrancisco). The complete list may be found under the heading of "Trust Legislation" in the State Legislative Activity Report on pages 13 - 14. ▼

STATE LEGISLATIVE ACTIVITY

Electronic Banking Legislation

■ **Electronic Banking Legislation** **Electronic Document Charges** –

S. 902 (P. McGee)/A. 1940 (Glick) Prohibits the imposition of service charges for mailing of paper documents if no such charges are imposed when they are sent electronically **(OPPOSE)** This legislation is pending in the Banks Committees.

■ **"Do Not Call" Faxes** – S. 969 (Alesi)/A. 8047 (Weprin) Permits the recording of fax numbers on the State's "do not call" list. **(DO NOT OPPOSE)** The bill is pending in the Senate Consumer Protection and Assembly Consumer Affairs and Protection Committees.

■ **Direct Deposit** – S.977 (Maziarz)/A. 5802 (Hoyt) Authorizes the direct deposit of certain workers' compensation death benefits. **(Support)** This bill passed both Houses and was signed into law as Chapter 70 of the Laws of 2005 on May 31.

■ **Debits and Stop Payments** – S.2378 (Maziarz) Prohibits agreements for the electronic debit of funds from a

consumer account from authorizing a final payment after a consumer has filed a stop payment order. **(OPPOSE)** This bill is pending in the Senate Banks Committee.

■ **Commercial Spam** – S. 2901-A (Rath)/A. 227-A (Pheffer) Makes certain unsolicited commercial e-mails illegal. **(SEEKING AMENDMENTS)** This bill passed the Assembly, but was then starred on the Assembly calendar. It was also pending in the Senate Consumer Protection Committee.

■ **Emergency 911 Buttons** – S. 2991 (Padavan)/A. 5879 (Stringer) Requires banks to retrofit ATMs with emergency 911 buttons connected directly with 911 operators. **(STRONGLY OPPOSE)** The bill is pending in the Senate Banks Committee and on the Assembly calendar.

■ **"Do Not Call" List Amendments** – S. 4180 (Fuschillo)/A. 7710 (Pheffer) Repeals two existing exemptions to the State's "do not call" list, the existing business customer exemption and the exemption for sales that must be completed in person. **(DID NOT OPPOSE)** The bill is intended to conform the law to the federal "do not call" list. Governor Pataki signed it on July 13. At press time, the Chapter Law number had not yet been released.

■ **Non-Bank ATM Machines** – S. 4675 (Farley)/A. 7700 (Nolan) Regulates non-bank ATM machines and ATM networks, the bill is pending in the Senate and Assembly Banks Committees. **(OPPOSE, SEEKING AMENDMENTS).**

(Continued on next page)

■ **ATM Lighting** – S. 4677-A (Farley)/A. 9029 (Rules, Request of Nolan) Amends the ATM Safety Act to establish lighting standards that would be more in accord with industry norms. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Banks Committee.

■ **Private ATM machines** – S. 4858 (Balboni)/A. 7270-A (Bing) Regulates ATM machines owned by non-banks. **(SUPPORT)** The bill is pending on the Senate calendar and in the Assembly Banks Committee.

■ **Foreign ATM Surcharges** – S. 5082 (Farley) Permits New York banks to charge ATM surcharges on foreign customers. **(SUPPORT)** The bill is pending in the Senate Banks Committee.

■ **ATM Terminal Sharing** – A. 167 (Lafayette) Requires the sharing of point-of-sale terminals and ATMs. **(OPPOSE)** This bill is pending in the Assembly Banks Committee.

■ **Non-Bank ATM Machines** – A. 1360 (Nolan) Requires the registration and regulation of ATM machines owned or operated by persons other than banks and their affiliates. **(SUPPORT)** NYBA testified in favor of this legislation on April 7; it passed the Assembly on June 20.

■ **Talking ATM Machines** – A. 1362 (Nolan) Requires banking institutions to designate at least one ATM facility per county as accessible to the visually handicapped, including having an ATM machine that can print a receipt in Braille. **(OPPOSE)** This bill is pending

on the Assembly calendar.

■ **ATMs for the Visually Impaired** – A. 4082 (Weisenberg) Requires all ATMs to be retrofitted with an audio system that allows visually handicapped customers to perform all ATM functions. **(OPPOSE)** This bill passed the Assembly.

■ **Banking and Payroll Card Protection** – A. 5456 (Nolan) Imposes limits on payroll cards, restricting the issuer's ability to charge fees that would reduce the balance on the card, requiring access to free ATM withdrawals and mandating that employers cover the cost of the card. **(OPPOSE)** The bill passed the Assembly.

Privacy Legislation

■ **Financial Privacy Requirements** – S. 159 (Seward)/A. 4033 (Grannis), Establishes California-type privacy requirements, including opt-outs for information sharing with affiliates and opt-ins for information sharing with non-affiliates. **(OPPOSE)** The legislation is pending in the Senate Insurance and Assembly Codes Committees.

■ **Use of Social Security Numbers** – S. 1751-A (Nozzolio)/A. 5390 (Abbate) Limits business use of customer social security numbers. **(OPPOSE)** This bill was reported in the Senate, and is pending in the Assembly Consumer Affairs and Protection Committee.

■ **Privileged Information** – S. 2455 (Volker)/A. 4519 (Lentol) Requires disclosure of privileged information to the personal representative of a person under a disability. **(OPPOSE)** The bill is

pending in the Senate and Assembly Codes Committees.

■ **Security Freeze** – S. 2950-A (Saland)/A. 7165-A (Galef) Allows consumers to place a "security freeze" in the consumer's credit report that would preclude the report from being released without the specific consent of the consumer. **(DID NOT OPPOSE)** The bill is pending in the Senate Consumer Protection and Assembly Consumer Affairs and Protection Committees.

■ **Data Security Breaches** – (S. 3000-A (Spano)/A. 5487-B, (Brodsky) Requires businesses and government agencies to disclose any breaches in their data security and provides affected customers with a private right of action. **(OPPOSE)** The bill was reported in the Senate and is pending in the Assembly Codes Committee.

■ **Breaches of Security** – S. 3141 (Farley)/A. 1525 (Nolan) Requires that a financial institution that discovers a breach of the security of personal financial data notify customers whose data may have been affected. **(OPPOSE)** NYBA testified on April 7 on this and other privacy bills urging that any security breach disclosure legislation considered apply to all types of institutions and that only when a breach is believed to place sensitive customer data at serious risk of compromise would it need to be disclosed. The bill is pending in the Senate Banks and Assembly Codes Committees.

■ **Breaches of Security** – S. 3492-A (Fuschillo)/A. 4254-A (Brennan) Requires notification of security breaches

affecting confidential customer information. NYBA worked with the sponsors on acceptable language, and, ultimately, after the bill was amended and a chapter law amendment agreed to, NYBA removed its objections. **(DID NOT OPPOSE)** The bill was sent to the Governor for his consideration on July 28.

■ **Credit Card Privacy** – S. 4687 (Fuschillo) Prohibits credit card issuers from soliciting personal information on a card holder from a third party. **(OPPOSE)** The bill is pending in the Senate Consumer Protection Committee.

■ **Transaction Account I.D.** – S. 5066 (Balboni) Mandates the identification a bank may require to open a consumer transaction account. **(OPPOSE)** The bill is pending in the Senate Consumer Protection Committee.

■ **Customer Record Disposal** – S. 5178 (Fuschillo)/A. 8456 (Pheffer), Governs the disposal of records containing confidential customer information. **(DID NOT OPPOSE)** The bill passed the Senate and was pending in the Assembly Governmental Operations Committee.

■ **Security Breach Disclosure Chapter Law Amendment** – S. 5827 (Fuschillo)/A. 8937 (Rules, Request of Brennan) A chapter law amendment to S. 3492-A/A. 4254-A that clarifies the requirements to notify customers of security breaches. Among other provisions, it provides a list of factors that businesses can take into account in determining whether to provide notification, authorizes a delay in notification in response to a request from law enforcement, and clarifies that damages may be awarded to persons who

were entitled to notification if notification was not given. **(DID NOT OPPOSE)**. The bill was sent to the Governor for his consideration on July 28.

Retail Legislation

■ **Credit Life Insurance Underwriting** – S. 267 (Bonacic)/A. 2331 (Wirth), Eliminates age limits on credit life insurance. **(OPPOSE)** The bill is pending in the Senate and Assembly Insurance Committees.

■ **Social Security Checks** – S. 573 (Maltese)/A. 415 (Markey) Requires banks to cash Social Security checks for senior citizens who are not customers. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Banks Committee.

■ **Credit Card Late Fees** – S. 581 (Morahan)/A. 7458 (Abbate, Jr.) Prohibits credit card issuers from charging late fees that exceed the amount due in any month. **(OPPOSE)** This bill was reported from the Senate Consumer Protection Committee and is pending in the Assembly Consumer Affairs and Protection Committee.

■ **Gift Cards** – S. 995-C (Budget) In a move that was not matched by the Assembly, the Senate amended its version of the Governor's budget bill to reverse the decisions made last year on the appropriate regulation of gift cards, substituting new language that banned all expiration dates, prohibited issuers from imposing any fees that reduced the value of the cards, and required that unused balances on the cards escheat to the State after three years rather than

the current five. **(STRONGLY OPPOSE)** During final budget negotiations with the Assembly, this language was dropped from the budget bill, which was renumbered S. 3671 (Rules)/A. 6845 (Rules) and signed as Chapter 61 of the Laws of 2005 on April 12.

■ **Lessor Liability** – S.1410(Johnson)/A. 2620 (Canestrari) Relieves vehicle lessors of liability for vehicles leased for more than one year. **(SUPPORT)** This bill was reported to the Senate calendar by the Senate Transportation Committee and is pending in the Assembly Transportation Committee. Congress has now preempted New York's vicarious liability law. See Federal Legislative Update (H.R.3) page 32.

■ **Credit Protection** – S. 4225-A (Saland)/A.75-A (Pheffer) Regulates solicitations for credit protection services. **(OPPOSE)** The bill passed both Houses and was sent to the Governor for his consideration on July 28. NYBA opposed the bill and filed a memorandum with the Governor's Counsel urging that the Governor veto the bill. NYBA pointed out that it would apply only to New York issuers and that federally chartered entities were likely exempt. In addition, NYBA referenced the provisions of the FTC's regulations that already regulate such solicitations, but with time periods in direct conflict with those in the bill.

■ **Money Transmission** – S. 4680 (Farley)/A.6273 (Titus) Requires disclosure of fees charged for money transmission. **(NO POSITION)** This bill passed the Assembly and is pending in the Senate

(Continued on next page)

Banks Committee.

■ **Power of Attorney Revision** – S. 5151 (Volker) A wholesale revision of the State’s power of attorney law. **(OPPOSE)** It is pending in the Senate Judiciary Committee.

■ **Annual Credit Insurance Disclosure** – S. 5268 (Volker)/A. 7745 (Wirth) Requires issuers of credit cards to provide annual and periodic disclosures with regard to certain credit insurance products backing credit issued through the cards. **(OPPOSE)** This bill is pending in the Consumer Protection Committees.

■ **Charging for Choice** - S. 5736-A (Saland)/A. 8919 (Rules, Request of Pheffer) Prohibits creditors from charging consumers an additional fee for their choice of payment option. NYBA filed a memorandum in opposition to the bill, noting that it is in direct conflict with the federal E-Sign law, authorizing creditors to charge higher fees if consumers do not want to accept Internet billing. The sponsors have agreed to a chapter law amendment that would specifically authorize discounts for Internet billing and make reference to the preemptive effect of the E-Sign Law. **(OPPOSE)** The bill passed both Houses.

■ **Impoundment Notices** - A. 2156 (Lafayette)/S. 3206 (Larkin) Requires notice to an insurer of the impoundment of a stolen motor vehicle when the owner cannot be found. **(SUPPORT)** The bill passed both Houses, but was vetoed by Governor Pataki on August 2. In Veto Message 37, the Governor explained that the bill could have increased delays in returning impounded vehicles to their

owners and cited confusion among municipalities on the obligation for providing notice.

■ **Certificates of Deposit Notices** – A.163-A (Lafayette) Requires banks to send itemized notices of the maturity of CDs. **(OPPOSE)** This bill has passed the Assembly and is pending in the Senate Banks Committee.

■ **Bandit Barrier Requirements** – A. 1363 (Nolan) Requires bandit barriers using bullet-proof glass at teller windows **(OPPOSE)** This bill is pending in the Assembly Banks Committee.

■ **Lessor Liability Protection Fund** – A. 1575-A (Canestrari) Establishes limits on lessor liability for leased motor vehicles, but requiring the creation of a leasing liability fund. **(OPPOSE)** This legislation is pending in the Assembly Transportation Committee.

■ **Credit Card Fees** – A.3558 (Lentol) Prohibits credit card issuers from charging fees to their customers who pay off their balances during a card’s grace period. **(OPPOSE)** This bill passed the Assembly.

Trust Legislation

■ **Commissions of Executors** – S.41 (DeFrancisco) Authorizes commissions of executors and certain other fiduciaries to be computed on the basis of all real and personal property. This bill passed the Senate. **(SUPPORT)**

■ **Transfer-on-Death Security Registration** – S. 1396 (DeFrancisco)/A. 5770 (Weinstein) Enacts the Transfer-on-

Death securities registration act. Similar to “Totten Trusts” for bank deposit accounts, the act permits securities to be registered in the name of a death beneficiary, allowing them to pass outside of probate. The Governor signed the bill as Chapter Law 325 of the Laws of 2005 on July 26. **(SUPPORT)**

■ **Dispositions in Trust** – S. 3441 (DeFrancisco)/A. 7254 (O’Donnell) Clarifies the effect of dispositions in trust on existing or subsequent creditors for tax purposes. **(SUPPORT)** The bill passed both Houses and was signed by the Governor as Chapter 76 of the Laws of 2005 on May 31.

■ **Voiding Medicaid Trusts** – S. 3931 (Rath)/A. 1731 (Clark) Declares void as against public policy the creation of Medicaid trusts to shield assets of grantors/beneficiaries from the government. This legislation is pending in the Senate and Assembly Judiciary Committees.

■ **IRS Reg Conformity** – S. 4340 (DeFrancisco) Precludes trustees from using the power to adjust in a way that would threaten the tax status of a charitable remainder unitrust. **(SUPPORT)** NYBA wrote the IRS urging that this issue be dealt with through an amendment to the IRS regulations. The bill passed the Senate.

■ **Grantor Trusts and Powers of Appointment** – S. 4342 (DeFrancisco)/A. 6585 (Magnarelli) Clarifies the availability of property covered by powers of appointment for creditors. **(SUPPORT)** The bill passed both Houses, but has not yet been sent to the Governor.

■ **Small Estate Exemption** – S. 4587 (Leibell) Increases the small estate exemption from \$20,000 to \$50,000 **(SUPPORT)** The bill is pending in the Judiciary Committee.

■ **Testator Intent Modifications** – S. 4840 (DeFrancisco) Permits the modification of wills and trusts under certain circumstances to accomplish the testator's or donor's original intent. **(SUPPORT)** It is pending in the Senate Judiciary Committee.

■ **Perpetual Trusts** – S. 4841 (DeFrancisco) Enacts the Perpetual Trust Act. **(SUPPORT)** A NYBA initiative, it is pending in the Senate Judiciary Committee.

■ **P&I Act Technical Amendments** – S. 4845-B (DeFrancisco) Makes technical amendments to the Principal and Income Act. **(SUPPORT)** It is pending on the Senate calendar.

■ **Spousal Right of Election** – S. 4856 (DeFrancisco) Establishes a two-year statute of limitations on the exercise of the spousal elective share. **(NO POSITION)** This bill passed the Senate.

■ **Estate Tax Credit** – S. 4995 (Alesi)/A. 6685 (Schimminger) Increases the estate tax credit to \$1.5 million. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Ways and Means Committee.

■ **Fiduciary Compensation** – S. 5366 (Morahan)/A. 7297 (Zebrowski) Limits the compensation of fiduciaries under

wills to that provided for in the will.

(SUPPORT) The bill passed the Assembly and was pending in the Senate Judiciary Committee.

■ **Perpetual Trusts** – A.4924 (Carrozza) Authorizes the creation of perpetual trusts in New York. **(SUPPORT)** The bill is pending in the Assembly Judiciary Committee. It would implement one of the recommendations of the Appleseed Report.

Mortgage Legislation

■ **Refinancing** – S.42 (DeFrancisco) Allows a mortgagor to receive an assignment of mortgage in lieu of a discharge when refinancing an existing loan. **(SUPPORT)** The bill passed the Senate.

■ **Real Estate Brokers** – S.46 (DeFrancisco) Clarifies the definition of real estate broker and agent. This bill contains language worked out by NYBA that preserves all banking activities from any requirement that bankers be licensed as agents or brokers and clarifies the prohibition on banks paying referral fees to unlicensed agents or brokers. **(SUPPORT)** It is pending in the Senate Judiciary Committee.

■ **Certificates of Discharge** – S.48-B (DeFrancisco)/A. 4540-C (Nolan) Clarifies the penalties applicable to mortgage lenders that fail to present certificates of discharge for recordation in a timely fashion. **(DO NOT OPPOSE)** The bill was sent to the Governor for his consideration on July 28.

■ **Distressed Properties** – S.2353

(Larkin)/A. 6192 (Canestrari) Provides for the expedited foreclosure by local governments of substantially distressed properties. **(DO NOT OPPOSE)** The bill passed the Senate and is pending in the Assembly Real Property Taxation Committee.

■ **Lending Fraud** – S.2856 (Farley) Establishes new penalties for fraud in mortgage lending. **(DO NOT OPPOSE)** This bill passed the Senate.

■ **Bank Boards of Directors** – S.2857 (Farley) Provides increased flexibility for bank boards of directors in issuing capital notes and receiving pledges of mortgages. **(SUPPORT)** This bill passed the Senate.

■ **Mortgage Brokers** – S.2859 (Farley) Limits the current exemption from registration of mortgage brokers in the case of loans to family members. **(NO POSITION)** The bill passed the Senate.

■ **Mortgage Loan Pay-Offs** – S. 2910 (Winner)/A.516 (Pheffer) Requires mortgage lenders to pay off mortgage loans within five days of receiving final payment from a borrower. **(SEEKING AMENDMENTS)** This bill passed the Assembly and was pending on the Senate calendar. NYBA filed a memorandum in opposition.

■ **Brownfields Penalties** - S. 3044-A (Johnson)/A. 3109-A (Sweeney) Permits local governments to waive interest and penalties on taxes due on property subject to brownfields clean-up agreements. **(SUPPORT)** Governor Pataki signed the bill as Chapter 221 of the Laws of 2005 on July 12. (Continued on next page)

■ **Mortgage Rate Shopping Disclosure** – (S.3219, Spano / A. 6306, Bradley) Requires mortgage lenders to inform applicants of the potential adverse effect on the applicants' credit scores of mortgage rate shopping. **(OPPOSE)** This legislation is pending in the Senate Consumer Protection and Assembly Consumer Affairs and Protection Committees.

■ **Mortgage Rate Shopping Regulation** – S. 3220-B (Spano)/A. 6303-B (Bradley) Prohibits credit reporting agencies from taking rate shopping into account in determining consumer credit scores. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Consumer Protection Committee.

■ **Tax Pass-Through** – S. 3372 (Skelos)/A. 2951 (Morelle) Permits mortgage lenders to pass through the cost of the special additional mortgage recording tax to borrowers. **(SUPPORT)** The bill was pending on the Senate calendar and in the Assembly Ways and Means Committee.

■ **SONY Mae Expiration** - S. 4325 (Bonacic)/A. 8285 (Cymbrowitz) Extends the expiration date of the State of New York Mortgage Agency (SONY Mae) to July 16, 2005. **(SUPPORT)** On June 30, Governor Pataki signed it into law as Chapter 121 of the Laws of 2005.

■ **Commercial Mortgage Foreclosure** - S. 4847-A (DeFrancisco)/A. 7345-A (Tokasz) Extends the expiration date of the commercial mortgage foreclosure law enacted originally at NYBA's initiative in 1998 until July 1, 2009. The bill also clarifies the notice provisions of the

law, which enacted Article 14 of the Real Property Actions and Proceedings Law. **(SUPPORT)** The bill was signed by Governor Pataki on June 30 as Chapter 123 of the Laws of 2005.

■ **SONY Mae Second Mortgages** - S. 5471-B (Bonacic)/A. 8552-A (Lopez) Extends the provisions of law authorizing SONY Mae to purchase rehabilitation loans. **(SUPPORT)** Governor Pataki signed the bill on July 26 as Chapter 309 of the Laws of 2005.

■ **Foreclosure Proceedings** - S. 5584 (Volker)/A. 8762 (Rules, Request of Schimlinger) Authorizes successive notices of pendency to be served in judicial foreclosure actions, other than commercial mortgage foreclosures. **(SUPPORT)** Governor Pataki signed the bill on August 2 as Chapter 387 of the Laws of 2005.

■ **Uncapped Gas Wells** – A. 689 (Parment) Requires sellers to disclose the existence of uncapped gas wells on their property. NYBA is seeking an amendment to this bill which would exclude property acquired in foreclosure. This bill passed the Assembly. **(SEEKING AMENDMENT)**

■ **Real Property Proceedings** - A. 7293 (Destito)/S. 3343 (DeFrancisco) Clarifies procedures involving real property limited equity jurisdiction. **(DO NOT OPPOSE)** Governor Pataki signed the bill on July 26 as Chapter 337 of the Laws of 2005.

■ **Home Equity Theft Prevention** – A. 7667-A (Nolan) Enacts the Home Equity Theft Prevention Act, which is designed to protect against mortgage fraud and

foreclosure. However, the bill imposes unnecessarily burdensome additional requirements on traditional lenders. **(OPPOSE)** The bill passed the Assembly.

Miscellaneous Legislation

■ **Mutual Funds and Local Governments** – (S.26-B, Maziarz/A.3678-B, DiNapoli) As drafted, this legislation authorized local governments in communities with populations in excess of 300,000 to invest in money market mutual funds. After NYBA strongly opposed the bill, it was amended, first, to limit its applicability to New York State and New York City funds; second, to set a cap of \$250 million on aggregate investments in mutual funds by each; and, third, to authorize banks throughout the State to pool the collateral backing all of their local government deposits. **(DID NOT OPPOSE)** This bill passed both Houses but has not yet been sent to the Governor.

■ **Short Form Power of Attorney** – S.128 (Trunzo)/A. 411 (Lavelle) Duplicates in the Banking Law language currently in the General Obligations Law requiring all banks to accept the statutory short form power of attorney. **(DO NOT OPPOSE)** It passed the Assembly and was pending in the Senate Banks Committee.

■ **Money Order Escheat** – S. 982 (Skelos)/A. 2796 (Cymbrowitz) Reduces to five years the period after which money orders and travellers' checks are deemed abandoned. **(NO POSITION)** This bill is pending in the Senate Finance and Assembly Judiciary Commit-

tees.

■ **Short Term Investment Pools (STIP)** – (S.990-B, Budget/A.1920-A, Budget) Authorizes local governments to invest in a State-run pool and in bankers' acceptances, commercial paper, and GSE securities. **(STRONGLY OPPOSE)** NYBA launched a statewide grassroots campaign against this provision. Governor Pataki ultimately stripped this provision from his budget proposal.

■ **Financial Exploitation of the Elderly** – S. 1827 (Golden) Creates the new criminal offense of financial exploitation of the elderly. **(SUPPORT)** This bill passed the Senate.

■ **Short Form Power of Attorney** – S. 2148 (DeFrancisco) Amends the short form power of attorney, establishes the federal gift tax exclusion amount (rather than the current \$10,000) as the level at which gifts can be given under a general power and expands to securities brokers and dealers the current requirement, applicable to banks and other financial institutions, that they honor the statutory short form power. **(SUPPORT)** This bill passed the Senate.

■ **Holocaust Claims** – S. 2477 (Saland)/ A. 1912 (Nolan) Requires banking institutions to notify their customers in writing about the existence of the Holocaust claims processing office in the State Banking Department. **(POSITION UNDER REVIEW)** This bill passed the Assembly and was pending in the Senate Banks Committee.

■ **Credit Unions and Excelsior** – (S. 2849 (Marchi)/A. 4970 (Sweeney) Authorizes credit unions to participate in

the Excelsior Linked Deposit Program. **(OPPOSE)** The bill passed the Assembly and is pending in the Senate Finance Committee.

■ **State Banking Department** – S. 2856-2857, S. 2859-2860 (Farley) A series of bills which expand and clarify the enforcement authority of the Banking Department. **(SUPPORT)** Although they all passed the Senate, they have no Assembly counterparts.

■ **Crime of Bank Robbery** – S. 3142, (Farley)/ A. 1549 (Nolan) Creates the specific crime of bank robbery. A NYBA initiative, this bill passed the Senate and is pending in the Assembly Codes Committee. **(SUPPORT)**

■ **Credit Unions & Banking Development Districts** – S. 3143 (Farley)/ A. 166 (Lafayette) Allows credit unions to participate in the banking development district program. **(OPPOSE)** The legislation passed the Assembly and is pending in the Senate Banks Committee.

■ **Tax Refund Anticipation Loans** – S.3198 (Fuschillo)/A. 6880 (Nolan) Regulates tax refund anticipation loans. **(AMENDMENTS BEING SOUGHT)** This bill was reported to the Senate floor and is pending in the Assembly Consumer Affairs and Protection Committee.

■ **Real Estate Investment Trusts (REITs)** – S. 3671 (Rules)/A. 6845 (Rules) The 2005-2006 Executive Budget proposed that the tax treatment of real estate investment trusts (REITs) be amended to conform to the federal tax treatment of REITs. Under New York State and New York City Tax Law current-

ly, banks that own more than 50% of the voting stock of a REIT are entitled to deduct 60% of the dividend income received from the REIT, while general corporations and insurance companies are entitled to deduct 100%. Under the REIT proposal, banks, insurance companies and general corporations would have lost the right to deduct dividends received from REITs (the dividend paid deduction would continue to be available to REITs). Similar treatment would have applied to dividends received from closely held regulated investment companies (RICs) and from any holding companies that owned a REIT or a RIC. The amendment would have been effective for tax years beginning on or after January 1, 2005. **(STRONGLY OPPOSE)** The Governor's Budget anticipated that the REIT provision would raise \$50 million in revenue from the banking industry. NYBA began a grassroots campaign and argued that the industry was already paying its fair share of taxes and that the REIT provision, far from being a loophole, was part of a negotiated change to the Bank Tax enacted in 1985. The Senate version of the State Budget, passed in March, did not include a provision that would tax the dividends received from real estate investment trusts. The final budget agreed to between the Senate and Assembly and passed March 31 also failed to contain the REIT language. Governor Pataki signed the bill as Chapter 61 of the Laws of 2005 on April 12.

■ **Information Subpoenas** – S. 3824-A (Volker)/A. 7368-A (Lentol) A NYBA initiative that would allow banks and other parties served with an information

(Continued on next page)

subpoena to charge \$10 to comply.

(SUPPORT) The bill was pending on the Senate Calendar and in the Assembly Judiciary Committee.

■ **Title Insurance** – S. 4006 (Marchi)/A. 5596 (Lavelle) Requires that only New York attorneys may conduct title searches or collect premiums on title insurance policies. **(OPPOSE)** The bill is pending in the Judiciary Committees.

■ **Foreign Branch “Wild Card”** – S. 4038 (Farley) Authorizes foreign branches of New York banks to exercise the same powers as foreign banks in the countries in which the branches are located. **(SUPPORT)** The bill is pending in the Senate Banks Committee.

■ **Trust Powers** – S. 4047 (Farley)/A. 8468 (Bing) Clarifies the authority of out-of-state trust companies to operate in New York and New York trustees to sell their portfolios. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Banks Committee.

■ **Money Transmitter Agents** - S. 4048 (Farley)/A. 8474 (Nolan) Prohibits the use of subagents by money transmitters. **(DO NOT OPPOSE)** The Governor signed the bill as Chapter Law 232 on July 19.

■ **Check Cashing Applications** - S. 4050 (Farley)/A. 8472 (Nolan) Clarifies the applicability of the geographic restrictions in the check cashers law to existing licensed check cashers. **(Oppose)** The Governor signed the bill as Chapter Law 233 on July 19.

■ **Examination Intervals** – S. 4195 (Farley) Authorizes the Superintendent to modify examination intervals for supervised institutions. **(SUPPORT)** A Banking Department bill, it passed the Senate.

■ **Thrift and CU Municipal Deposits** – S. 4197 (Farley)/A. 6637 (Nolan) Authorizes thrift institutions and credit unions to accept municipal deposits. **(OPPOSE)** The bill is pending in the Senate and Assembly Banks Committees.

■ **Budget Chapter Law** - S. 4271 (Budget)/A. 7298 (Budget), a chapter law amendment to Chapter 61, the bill makes technical amendments to various provisions of the revenue budget, including the single-factor apportionment provision. **(SUPPORT)** It was signed as Chapter 63 of the Laws of 2005 on April 13.

■ **LLC Chapter Law** - S. 4361 (Skelos)/A. 7509 (DiNapoli) Corrects a chapter law of 2004 to make clear that a limited liability company that may register as an investment company may exercise no additional powers under the Banking Law without the express approval of the Banking Superintendent. **(SUPPORT)** The bill was sent to the Governor for his consideration on July 21.

■ **UCC Articles 3 and 4** – S. 4384 (Farley) Enacts revised Articles 3 (Commercial Paper) and 4 (Bank Deposits and Collections) of the Uniform Commercial Code in New York, the only State which has not yet done so. **(SUPPORT)** The bill is pending in the Senate Judiciary Committee.

■ **Tax Refund Loan Regulation** – S. 4387 (Farley)/A. 1366 (Nolan) Regulates tax refund anticipation loans and their providers. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

■ **Loan Fee Extension** - S. 4388-A (Farley)/A. 8209-A (Nolan) Extends until 2007 expiring provisions of the Banking Law authorizing certain loan fees. **(SUPPORT)** Governor Pataki signed it as Chapter Law 122 on June 30.

■ **Light Pollution** – S. 4474 (Marcellino)/A. 7404 (Grannis) Regulates light pollution for which NYBA has gotten agreement to include an exemption for lighting installed to comply with the ATM Safety Act. **(DO NOT OPPOSE)** This bill passed the Assembly and is pending in the Senate Rules Committee to which it was reported from the Environmental Conservation Committee.

■ **Banking Law Corrections** – S. 4522 (Farley)/A. 7388 (Nolan) Makes corrections to the Banking Law. **(SUPPORT)** The bill passed both Houses and was signed by Governor Pataki on June 7 as Chapter Law 82.

■ **Check Forgery Notices** – S. 4580 (Fuschillo)/A. 6808-A (Nolan) Requires check cashers to post notices of the criminal penalties associated with cashing forged checks. **(DO NOT OPPOSE)** The bill passed both Houses and was signed as Chapter 268 of the Laws of 2005 on July 19.

■ **Homestead Exemption** - S. 4582 (Leibell)/A. 8479 (Canestrari) Increases

the value of the homestead exemption from civil judgments from \$10,000 to \$50,000. **(OPPOSE)** The bill passed both Houses.

■ **Credit Card College Payments** - S. 4652 (LaValle)/A. 8405 (Magee) Authorizes community colleges to accept payments by credit card. **(SUPPORT)** The bill passed both Houses.

■ **Second BDD Branch** - S. 4679 (Farley)/A. 5243 (Nolan) Authorizes the establishment of a second bank branch in a banking development district. **(SUPPORT)** The bill is pending in the Senate and Assembly Banks Committees.

■ **Money Transmission Fee Disclosure** - S. 4680 (Farley)/A. 6273 (Titus) Imposes disclosure requirements on money transmitters. **(DID NOT OPPOSE)** The bill passed the Assembly and is pending in the Senate Banks Committee.

■ **Outsourcing Repayment** - S. 4750 (Spano)/A. 1213 (Brotsky) Requires repayment of State financial assistance by companies that outsource jobs from the State. **(OPPOSE)** This bill is pending in the Senate Corporations, Authorities and Commissions Committee and the Assembly Economic Development Committee.

■ **Federal Home Loan Bank LOCs** - S. 4755 (Farley)/A. 8064 (Nolan) Authorizes the State to accept Federal Home Loan Bank letters of credit as collateral for State deposits. **(SUPPORT)** NYBA has written Governor Pataki in support of the bill, reasoning that local governments in New York have been able to

accept FHLB LOCs since 2002 and they have proven a safe and cost-effective alternative to certain forms of collateral. Governor Pataki signed the bill on July 26 as Chapter 345 of the Laws of 2005.

■ **Home Office Protection Repeal** - S. 4883 (Marcellino) Repeals the home office protection provisions of the State's intrastate branching law. **(NO POSITION)** The bill is pending in the Senate Banks Committee.

■ **Excelsior Loan Maturities** - S. 5078 (Alesi)/A. 7991 (Koon) Makes clear that loans in existence at the time the maturity for Excelsior linked loans was extended may be renewed. **(SUPPORT)** The bill was sent to the Governor for his consideration on July 28.

■ **State Bank Charter Deposit Program** - S. 5081 (Farley)/A. 8227 (Nolan) Creates the State Charter Deposit Program, a bill to which NYBA objected. The Program, which replaces the Community Bank Deposit Program, passed in 2001 but was never implemented. It authorizes, but does not require, the State Comptroller and Commissioner of Taxation and Finance each to deposit up to \$100 million, in the aggregate, in State-chartered banks and thrifts that are rated at least satisfactory on their most recent CRA examination. **(OPPOSE)** Among other concerns, NYBA believes the Program discriminates against national banks and is opposed to using the Community Reinvestment Act as a rating program. The bill passed both Houses, but has not yet been sent to the Governor.

■ **Tax Department Investments** - S. 5181 (Johnson)/A. 8738 (Farrell) Expands

the investment authority of the Commissioner of Taxation and Finance to include the investment authority of the State Comptroller's Office. **(DO NOT OPPOSE)** The bill passed both Houses and was signed into law as Chapter 326 of the Laws of 2005 on July 19.

■ **Credit Disclosure** - S. 5268 (Volker)/A. 7745 (Wirth) Requires annual disclosure of credit-related insurance information to credit card holders. **(OPPOSE)** The bill is pending in the Senate and Assembly Consumer Protection Committees

■ **NYC Investment Authority** - S. 5382 (Padavan)/A. 8779 (Rules, Request of Farrell) Extends the authority of the City of New York to invest in bankers' acceptances and commercial paper until July 1, 2008. **(SUPPORT)** It became law when signed by Governor Pataki on June 30 as Chapter Law 128.

■ **Outsourcing Limitation** - S. 5427 (Maziarz)/A. 8669 (Rules, Request of John) Requires all services contracted for by the State of New York to be performed within the United States unless the State Commissioner of Labor certified that there was no one available in the country to perform the work. **(OPPOSE)** The bill was pending on the Senate and Assembly calendars.

■ **Streamlined "Wild Card"** - S. 5518 (Farley)/A. 8641 (Nolan), which was introduced at the request of Governor Pataki, provides that a notice by a State bank to the Banking Department of its intention to exercise any power or authority of a national bank would become

(Continued on next page)

effective in 45 days unless the Banking Superintendent disapproved, asked for more time, or imposed conditions on the exercise. Similar language would apply to State-chartered thrifts gaining federal thrift powers and State-chartered credit unions gaining federal credit union authority. **(SUPPORT)** The bill is pending in the Senate and Assembly Rules Committees.

■ **Credit Union Sales Taxes** – S. 5618 (Farley)/A. 8830 (Rules, Request of Nolan) Exempts State-chartered credit unions from sales and use taxes beginning in 2008. Federal credit unions (which already enjoy such an exemption) that convert to State charter beginning in 2006 may take advantage of this provision as soon as they convert. **(OPPOSE)** The bill passed both Houses but has not yet been sent to the Governor.

■ **Universal Default** – S. 5665-A (Fuschillo)/A. 809-A (P. Rivera) Prohibits “universal default,” the practice by a credit card issuer of increasing a card holder’s interest rate or fees because of delayed or missed payments to other creditors, even though the credit card account is up to date. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Rules Committee.

■ **New York City Tax Rate** – S. 5706 (Krueger)/A. 8899 (Rules, Request of O’Donnell) Reduces the New York City income tax rate for banks from 9.0% to 8.55%. It would also reduce other business tax rates by a similar percentage. **(SUPPORT)** The bill is pending in the Senate Rules and Assembly Ways and Means Committees.

■ **Lower Manhattan REAP** - S. 5930 (Rules)/A. 9010 (Rules) Provides a package of incentives for businesses to relocate to or remain in Lower Manhattan, including limited exemptions from the commercial rent tax and certain sales and use taxes and an expansion of the Relocation and Employment Assistance Program (REAP). **(SUPPORT)** The bill passed both Houses.

■ **Holocaust Office** - A. 1911 (Nolan)/S. 2479 (Saland) Requires the Banking Superintendent to report annually to the Legislature on the Holocaust Claims Processing Office. **(SUPPORT)** The Governor signed the bill on July 19 as Chapter 249 of the Laws of 2005.

■ **Small Claims Judgments** - A. 4320 (Seddio)/S. 5514 (DeFrancisco) Provides that small claims court judgments and local commercial claims are *res judicata*, but do not have collateral estoppel effect. **(DO NOT OBJECT)** The bill passed both Houses and was sent to the Governor for his consideration on July 28.

■ **Bank Technical Corrections** - A. 7388 (Nolan)/S. 4522 (Farley) Makes certain technical corrections to the Banking Law. **(SUPPORT)** Governor Pataki signed the bill as Chapter Law 82 of the Laws of 2005 on June 7.

■ **Credit Card Court Fees** - A. 7561-A (A. Cohen)/S. 5744 (DeFrancisco) Authorizes the use of credit cards to pay court fines, costs and surcharges. **(SUPPORT)** The bill passed both Houses and was sent to the Governor for his consideration on July 28.

■ **Caller I.D. Fraud** - A. 7925-A (Lafayette)/S. 1075-A (Alesi) Prohibits persons from fraudulently impersonating others on caller i.d. systems. **(SUPPORT)** The bill passed both Houses and was sent to the Governor for his consideration on July 28.

■ **Security Guard Tax Credit** - A. 8410 (Espaillat)/S. 5431 (Spano) Provides a \$3,000 per security guard annual tax credit for security guards that meet certain training and compensation requirements at certain commercial and residential buildings. **(DO NOT OPPOSE)** The bill passed both Houses and was sent to the Governor for his consideration on August 4.

■ **Merchant Discount Disclosure** – A. 165 (Lafayette) Mandates the disclosure of the merchant discount paid to credit card companies. **(OPPOSE)** This bill is pending in the Assembly Banks Committee.

■ **Debt Collection** – A. 614 (Pheffer) Requires customer notifications of their rights under the debt collection law. **(OPPOSE)** This bill was reported from the Assembly Consumer Affairs and Protection Committee to the Codes Committee and then to the floor.

■ **Customer Call Centers** – A. 1364 (Nolan) Requires bank employees answering customer service calls to identify their location by city and state or, if international, by city and country. **(OPPOSE)** The bill is pending in the Assembly Banks Committee

■ **Credit Union Sales and Use Tax**

Exemption A. 1523 (Nolan) Provides an exemption for State-chartered credit unions from the State sales and use tax. **(OPPOSE)** The bill was reported from the Assembly Banks Committee to the Ways and Means Committee.

■ **Tax Refund Loan Regulation –**

A. 1971-C (Nolan) Requires disclosure and regulation of tax refund anticipation loans. **(OPPOSE)** This bill was reported from the Assembly Ways and Means to the Codes Committee.

■ **Check Forgery Penalties – A. 6879 (Nolan)** Criminalizes check forgery and cashing forged checks. **(SUPPORT)** The bill is pending in the Assembly Codes Committee.

■ **Excelsior Micro Loans – A. 6923 (P. Rivera)** A NYBA initiative that authorizes linked deposits and accompanying loans to be made in amounts less than \$50,000 so long as the aggregate exceeds \$50,000. **(SUPPORT)** The bill is pending in the Small Business Committee.

■ **Military Borrowing – A. 7288 (Nolan)** Limits the activities of licensed lenders and payday lenders with regard to military borrowers and their families. **(DID NOT OPPOSE)** The bill passed the Assembly.

■ **BDD Applications – A. 7699 (Nolan)** Requires copies of applications for banking development districts to be filed with the Leadership of the Legislature. **(SUPPORT)** The Governor vetoed the bill on July 26, citing, in Veto Message 30, the risk that confidential information con-

tained in a banking development district application could become public.

■ **Merger Notification – A. 7813-A (N. Rivera)** Requires financial institutions to provide customers individual notice of mergers and acquisitions. **(OPPOSE)** The bill passed the Assembly.

■ **Banking Development Districts – A. 8235, 8236 (both Nolan)** Bills that revise the regulations governing banking development districts, requiring the Banking Department to hold public hearings on local government applications to establish such districts and each branch in a banking development district to report annually on its activities. NYBA testified on the bills before the Assembly Banks Committee, strongly supporting the BDD program but urging that no legislation be passed that would impede its flexibility and attractiveness. The bills passed the Assembly. ▼

STATE REGULATORY DEVELOPMENTS

Banking Board Actions

1. Checking Account Fees – On May 13, 2002, NYBA petitioned the Banking Department to promulgate a regulation that would permit New York State-chartered banks to have the authority to charge a daily fee to checking accounts that do not have overdraft protection privileges and yet have a negative balance. The Office of the Comptroller of the Currency (OCC), through an interpretive ruling set forth at 12 C.F.R. 7.4002, has already given national banks the authority to charge such a fee. This NYBA petition

is consistent with its goal of obtaining parity between State-chartered and national banks.

Since that time, NYBA has met on a number of occasions with Superintendent of Banks Diana L. Taylor to discuss this issue. The Superintendent has expressed her desire to preserve parity between national and State-chartered banks, and has agreed to work with NYBA to explore the most appropriate way to address this issue. In the discussions, the Banking Department expressed concern regarding the proliferation of bounce protection programs. While NYBA has been able to draw a distinction between such programs and the daily overdraft fee, it is clear that such programs are being carefully evaluated by the Department.

NYBA's discussions with the Department culminated in the receipt of a 2004 letter from the Superintendent that outlined a potential regulation addressing NYBA's request. Importantly, this proposal included a complete exemption for businesses from any limitations on overdraft fees that may be charged to consumers. The Banking Department forwarded its proposed regulation to the Governor's Office of Regulatory Reform.

In February 2005, the OCC and other federal financial regulators issued a final joint guidance relating to the responsible disclosure and administration of overdraft protection services, which NYBA believes will help to clarify several issues of concern.

Most recently, the Department, in the July 6, 2005 edition of the *New York State Register*, listed as part of its agenda for the second half of 2005 its plan to seek comments on an amendment to Part 32,

(Continued on next page)

“regarding the ability of certain banking institutions to charge daily fees in connection with the payment of a check drawn upon insufficient funds in the absence of a prior written agreement to do so.” (See Federal Regulatory Developments, page 34).

2. ATM Lighting Standards — For years, numerous NYBA members have expressed concern that they are often cited for violations of the ATM Safety Act lighting standards, despite their best efforts at compliance and their belief that some of the requirements are disturbing to neighbors and, in fact, may violate local codes. In an ongoing dialogue with former Superintendent of Banks Elizabeth McCaul, she repeatedly stated that she had no discretion under the statute to provide flexibility in its administration or enforcement.

After assuming the role of Superintendent of Banks, Diana Taylor continued this dialogue with NYBA. At the end of the 2004 legislative session, the New York State Legislature passed legislation amending the ATM Safety Act with the goal of addressing the problem with the Act. However, a technical drafting error was introduced into the bill that could have caused some existing bank lighting to fail the new standards. As a result, Governor Pataki ultimately vetoed the bill. The Governor did commend the sponsors for their attempt to correct the lighting standards, but stated that the new bill could “result in ATM facilities being out of compliance with the new, supposedly less rigorous test, even though those same facilities are in compliance with current law.” During the 2005 Legislative session, NYBA engaged in additional discussions with the Bank-

ing Department, legislative leaders and other trade groups to correct the bill. However, no such legislation was ultimately enacted this session.

(For background on the ATM lighting issue, please see previous issues of the *Banking Journal* at www.nyba.com.)

3. Wild Card Petition: Underwriting of Municipal Revenue Bonds — In response to a wild card petition filed by NYBA in 2000, the Banking Board has authorized the issuance for public comment of a proposal (new Part 6.7 of the General Regulations of the Banking Board), which would give New York banks and trust companies parity with national banks in underwriting, dealing in and investing in municipal revenue bonds and certain other government securities.

In January 2004, the Department had issued an Industry Letter interpreting the Banking Law to permit New York banks to underwrite municipal revenue bonds in an amount which, combined with any loans to the same obligor, did not exceed the applicable lending limit. The Gramm-Leach-Bliley Act, however, removed all quantitative restrictions on underwriting of municipal revenue bonds by well-capitalized national banks. Thus, even after issuance of the Industry Letter, national banks remained with broader underwriting authority than New York banks. The proposed rule seeks to remedy this disparity. The new rule, however, would make clear that only “well capitalized” New York banks will be able to underwrite municipal revenue bonds without limitation as to capital. The rule also is not intended to alter the requirement that banks and trust companies adhere to safe and sound lending practices in conducting their underwriting, dealing and invest-

ment activities. Comments on the proposal are due by September 10, 2005.

4. Mobile Homes — On July 30, 1999, NYBA asked the Banking Department to issue an interpretive letter, designed to expand the permissible terms of loans on mobile homes. Currently, mobile home loans are statutorily limited (under Section 105(5-a) of the Banking Law) to 240 months. NYBA asked that, notwithstanding this term limitation, Section 108(4)(b), which sets no term limits on personal loans in excess of \$1,200 with interest rates below 16%, now be construed to include mobile home loans in its purview. NYBA continues to await a response from the Banking Department.

5. Wild Card Petition: Appraisal Requirements — In late March 1999, NYBA received a response from the Banking Department to its July 28, 1998 “Wild Card” petition seeking amendments to Banking Board regulations pertaining to appraisal requirements for loans secured by real estate made by State-chartered entities. In its response, the Department stated its belief that a “Wild Card” amendment was not required. The Department proposed making regulatory amendments that would eliminate any reference to appraisals in the relevant Banking Board regulations (specifically Parts 80, 82 and 84), and issuing an interpretive letter stating that the requirement found in Section 103(4) of the Banking Law for a “signed certificate of an appraiser appointed by the board of directors” would be satisfied by a written “evaluation of real property collateral that is consistent with safe and sound banking practices.” While NYBA believes that this proposal is a signifi-

cant improvement over current regulatory requirements, on April 7, 1999, NYBA submitted additional comments which, if adopted, would result in greater parity between national and State-chartered banks. To date, NYBA's requested amendments have not been submitted to the Banking Board for approval or for public comment. ▼

NYBA IN COURT

In the Matter of the Judicial Settlement of the Second Intermediary Account of Chase Manhattan Bank, as Trustee of the Testamentary Trust established under will of Charles G. Dumont

Recent Developments: The Surrogate's Court, Monroe County, issued a decision in June 2004 awarding surcharge damages of nearly \$21 million against JPMorgan Chase Bank in the above referenced case. Chase has filed a notice of appeal to the Appellate Division, Fourth Department, and the objectants have filed a notice of cross-appeal. NYBA filed a motion for leave to submit an *amicus curiae* brief, which most unusually was denied by the Appellate Division, Fourth Department.

KEY POINT: This case is important for several reasons. In calculating damages, the Surrogate cited the Court of Appeals and Appellate Division decisions in a key precedential decision, *In re Janes*, but the Surrogate's calculation departed from the method utilized in *Janes*. The award in *Janes* included compound interest on the damages, but deducted dividends and sale proceeds as and when

they were received. In this case, however, the Court compounded the interest throughout the nearly 30-year accounting period, but deducted the dividends and sale proceeds only at the end of the period, dramatically increasing the effect of the compounding. If this decision is affirmed, it could have a significant impact on the amount of damage awards. The outcome of this case is also important, in that it examines whether provisions in the governing instrument, which allow for non-diversification of trust assets and provide that the trustees are not to be liable for such non-diversification, violates the standard of prudence set forth in EPTL Section 11-1.7. While the Surrogate found that the clause in question in this case did not violate EPTL Section 11-1.7, if the Appellate Division were to disagree it could nullify the intent of grantors and create unanticipated liability for trustees.

Background: The Dumont Will included a clause which acknowledged that the estate would consist primarily of Eastman Kodak Company stock, and providing that "neither my executors nor my said trustee shall dispose of such stock for the purpose of diversification of investment and neither they or it shall be held liable for any diminution in the value of such stock." Relying on the language of the will, the Trustee did not diversify the assets in the trust until late in the 30 years of the accounting period. The Trustee did not sell the stock despite a significant decrease in the price of Kodak stock in the 1970s, because it concluded that Kodak remained a sound investment and that the income was more than adequate for the needs of the beneficiary. The Trustee contended that it was essentially prohibited from selling the Kodak

stock under those circumstances, because to do so would have been diversification, which was prohibited under the terms of the will. The Trustee sold the stock in 2001 and 2002 when it determined that developments in technology and the global economy were bringing about a substantial change in Kodak's business. The Surrogate disagreed, finding that notwithstanding the language in the will, Chase should have sold the stock on January 31, 1974, focusing largely on the decline in the stock price and what it characterized as a "lack of viable hope of long-term gain.." When assessing damages in this matter, the court agreed that the proper calculation of damages must take into account capital gains taxes which would have been incurred in 1974 had the stock been sold at that time. The Surrogate then imposed statutory interest, compounded throughout the nearly 30-year accounting period. The Surrogate, however, deducted the dividends and sale proceeds only at the end of the period, thus dramatically increasing the effect of the compounding.

Outlook: Briefs have been completed in this appeal. Oral arguments are scheduled for September 14, 2005.

T/U/W Blanche Hunter f/b/o Pamela Creighton

Recent Developments: In March 2005, the New York State Court of Appeals affirmed the Appellate Division, Second Judicial Department's May 2004 holding in this case. In this important decision, the Court found "that the beneficiary of a separate testamentary trust managed by the same bank is precluded

(Continued on next page)

from raising objections to the fiduciary's actions that could have been raised in prior proceedings." The Appellate Division decision reversed the decision of the Westchester Surrogate, which distinguishes between the duties of executors and trustees. The Court of Appeals has now remanded the case back to the Westchester Surrogate for proceedings consistent with its ruling.

KEY POINT: Contrary to the Surrogate's decision in this case, it is currently widely believed that when fiduciaries act as both executors and trustees, all issues pertaining to acts or omissions during the estate administration are determined finally by the decree settling the estate, and trust beneficiaries who are made parties to the estate accounting do not have the right to raise any of those issues in a trust accounting proceeding. Therefore, if the Appellate Division had been reversed and the Surrogate's decision allowed to prevail, it could have had a significant impact on the practices of the fiduciary industry and the scope of fiduciary liability.

Background: This proceeding involved an intermediate accounting by Chase as testamentary co-trustee. Chase and the co-trustee were also the co-executors of the estate of Mrs. Hunter, who died in December 1972. The Surrogate entered a decree in 1977 judicially settling the account of the co-executors. The beneficiaries of the testamentary trusts were named as parties in that proceeding, as provided in Section 2210(10) of the Surrogate's Court Procedure Act.

Chase filed an intermediate accounting of the trust following the death of the individual co-trustee in 1996. The life beneficiary filed objections on a number

of grounds, including the alleged failure of the Bank to compel itself as executor either to distribute assets from the estate sooner or to change the investments in the trust, as well as the failure of the trustee to object to the executors' accounting. Chase moved to dismiss those objections on the ground they are barred by the decree settling the executors' account, in the proceeding to which the beneficiary was a party.

On December 31, 2002, the Surrogate's Court in Westchester County issued a Decision and Order in which the court distinguished between the duties of executors and trustees, and therefore refused to dismiss the life beneficiary's objections. On January 16, 2003, Chase filed a notice of appeal to the Appellate Division, Second Department. NYBA filed an *amicus curiae* brief in support of Chase in June 2003.

On March 29, 2004, the Appellate Division, Second Judicial Department reversed the decision of the Westchester Surrogate, ruling that a "fiduciary who petitions the Surrogate's Court for a final judicial settlement of its account, who properly serves citations on all interested parties as defined in the governing statutes, who otherwise follows the procedure prescribed by law, and who obtains a decree finally settling its account is fully entitled to the protection" of a decree discharging it from future liability. The court stated that if the Westchester Surrogate's position was upheld, it would mean that fiduciaries who serve in multiple capacities would "never have the ability to obtain judgments that have fully preclusive effect." On May 12, 2004 the Estate of Pamela Creighton filed a motion for permission to appeal to the Court of Appeals, which motion was granted.

NYBA then filed an *amicus brief* motion for leave to file this brief on October 29, 2004. The court granted NYBA's motion on November 18, 2004 and NYBA then filed its *amicus curiae* brief.

Outlook: The Court of Appeals decision was a very positive one for the trust industry. If the Appellate Division had been reversed, and the Surrogate's ruling reinstated, it would have had a significant impact on the roles of executors and trustees in New York. In fact, because the Surrogate's position would likely have undermined the finality of numerous accounting decrees where a fiduciary has acted in a dual capacity, the Court of Appeals has assured the continued reliability of final accounting decrees.

Hans W. Flagg and Eileen S. Flagg on behalf of themselves and all others similarly situated, v. Yonkers Savings and Loan Association FA (a/k/a Yonkers Financial) (District Court Docket #03 Civ. 5133 (WCC) Second Circuit Docket #04-1948-CV

Recent Developments: In January 2005, the United States Court of Appeals for the Second Circuit reached a favorable outcome for the banking industry in this preemption case by affirming the United States District Court, Southern District's decision, which dismissed the above-referenced action. In May 2005, the Flaggs petitioned the United States Supreme Court for *certiorari*. That petition is still pending.

KEY POINT: This case examines whether regulations promulgated by the Office of Thrift Supervision (OTS) applicable to federally-chartered thrifts pre-empt various New York statutes requiring the pay-

ment of interest on mortgage escrow balances. If the District Court's decision is overturned, it could have a significant impact on all federally-chartered thrifts originating or servicing loans in New York as well as on other financial institutions that have purchased such thrifts. The case also examines whether the governing law provision in a standard FNMA/FHLMC mortgage document causes a lender to be contractually bound to comply with state legal requirements that have been pre-empted by federal law. If this standard choice of law language is transformed into an express written agreement between a lender and borrower to adapt state law, it could impact an enormous number of mortgages throughout the country.

Background: The Flaggs commenced a putative class action in federal court against Yonkers Savings and Loan Association, F.A. (Yonkers), a federally-chartered OTS-regulated thrift that was acquired by Atlantic Bank of New York (Atlantic), a New York State-chartered FDIC insured commercial bank, in 2002, concerning a residential mortgage loan that Yonkers originated. The Fannie Mae-Freddie Mac uniform mortgage instrument at issue provided that the lender will not pay interest unless the lender and borrower "agree in writing" that the lender will pay interest or "the law requires," and further provided that the governing law was "federal law and the law of the place where the Property is located." Yonkers did not pay interest on escrow account balances in reliance on applicable OTS regulations and interpretations thereof. Atlantic began paying interest on escrow account balances in accordance with New York law following its acquisition of Yonkers.

The Flaggs sought to recover interest on funds that they paid into an escrow account maintained by Yonkers for the purpose of paying certain items such as real estate taxes and insurance premiums. The Flaggs alleged that Yonkers' failure to pay interest was a violation of New York State statutes requiring the payment of interest on escrow accounts, as well as a deceptive trade practice, a breach of contract and conduct that gives rise to a claim of unjust enrichment. The Flaggs also alleged that if the Home Owners Loan Act (HOLA) regulations preempt state laws purporting to govern escrow accounts, Yonkers' failure to pay interest in reliance on the HOLA regulations constitutes a "taking" of their property for which they are entitled to compensation under the Fifth Amendment to the United States Constitution.

Atlantic moved to dismiss the complaint on the grounds that the HOLA Regulations explicitly preempt state laws purporting to govern escrow accounts unless the parties to the mortgage agree in writing that the lender will pay interest. The District Court agreed that the HOLA regulations preempt New York's escrow statutes. HOLA itself leaves any obligation to pay interest to the contract between the parties. The Court ruled that the choice-of-law language of the pre-printed Fannie Mae-Freddie mortgage contract did not incorporate the New York escrow statutes as contract terms. The Court also rejected the plaintiffs' contention that the payment of interest on escrow funds was a "settlement practice" under the Real Estate Settlement Procedures Act and therefore state escrow statutes were not preempted under RESPA's "savings" clause, which provides that state laws are not preempted to

the extent they provide greater protection to the consumer. Finally, the District Court agreed that the plaintiffs could not assert a constitutional "taking" claim against the federal thrift because it was not a state actor but, rather, a private federally-chartered savings and loan association.

The District court dismissed the Flaggs' complaint without leave to replead, and declined to address their motion for class certification as moot. The Flaggs filed a Notice of Appeal to the Second Circuit. NYBA filed an *amicus curiae* brief with the U.S. Court of Appeals in support of Atlantic Bank.

Outlook: If the District Court and Appellate Court's decisions are overturned by the United States Supreme Court, it could have a significant impact on the lending industry.

Dutch Hill Realty Corp. v. Madeline Minetto, et al, Superior Court of New Jersey, Appellate Division Docket No. A-2036-04T3

Recent Developments: On November 30, 2004 a final judgment was entered in favor of the defendants in this mortgage foreclosure action after a non-jury trial in New Jersey Superior Court of New Jersey, Chancery Division, Bergen County, General Equity Part. In its decision, the Court discharged a number of Union State Bank (USB) mortgages and ordered the cancellation of same. The Court also declared void the absolute, unlimited and continuing guarantees executed by the late Joseph Minetto (Minetto). By stipulation, the parties agreed that the obligations of the Execu-

(Continued on next page)

trix of the Estate of Joseph Minetto would be tried before the Court and that New York substantive law would apply to all claims and defenses. The case is now on appeal to the Appellate Division of the Superior Court of New Jersey, where the briefing process remains ongoing. NYBA has filed an *amicus curiae* brief in this case in support of USB.

Key Point: The New York issues in question concern the enforceability under New York law of seven separate absolute and unconditional personal guarantees of payment. If the Court finds that these unconditional personal guarantees are unenforceable, it could have a significant, negative impact on the ability of consumers to obtain loans from financial institutions.

Background: The personal guarantees in question in this case were executed by Minetto, in consideration for a series of loans from USB to 28 Associates, a limited liability company owned by Minetto and his partner Robert Adamo. Between 1997 and 1999, 28 Associates borrowed almost \$26,000,000 from USB to finance the acquisition, rehabilitation and construction of a condominium complex in Piermont, New York. During the construction of the project, a USB loan officer in charge of the 28 Associates account, permitted the release of a number of individual units from the liens of USB's mortgages as those units were sold, without requiring 28 Associates to pay USB the percentage or release prices called for in the loan documents from the sales proceeds. These "free releases" were granted by the loan officer without the knowledge of his superiors at USB, but were expressly authorized by the

Minetto guarantees, which permitted USB to release, in whole or in part, the collateral securing the indebtedness without discharging the guarantees. The evidence at trial indicated that the proceeds from "free releases" were deposited to the 28 Associates account and used to complete the project.

28 Associates subsequently defaulted in payment of its outstanding loans, and USB declared the then outstanding loans in default. USB subsequently assigned the relevant notes, mortgages and guarantees to Dutch Hill Realty (DHR) which ultimately filed the litigation against Minetto's executrix and others. The defendants asserted counterclaims against DHR, and filed a third party complaint against USB, alleging that they were the victims of fraud. The total guarantee liability of the Executrix to DHR as of June 30, 2004 was \$14,019,048, plus a total *per diem* thereafter of \$1,725.04.

Outlook: It is too early to determine the final outcome of this case. However, the lower court's decision in this case effectively negates the value of the guarantees and sets a dangerous precedent for the future enforceability of all personal guarantees. This decision, unless reversed, may have a chilling effect on the continued use and acceptance of personal guarantees in the banking industry.

Regatos v. North Fork Bank (New York Court of Appeals) Docket No.: 039024

Recent Developments: The federal District Court in which this case originated (the Southern District of New York) issued an opinion that limited the freedom of contract that generally prevails under the Uniform Commercial Code

(UCC), precluding commercial banks from agreeing with their customers that the customer must provide notice of objections to an account statement within a period shorter than one year. The lower Court decision was appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit certified the state law question to the New York Court of Appeals.

Key Point: This case involves the time period in which a bank customer must object to any electronic funds transfer and examines whether a bank and a customer may vary the one-year period set forth in Article 4A of the UCC by agreement. The case also examines whether, in the absence of agreement, Article 4A requires actual, rather than merely constructive notice. The outcome of this case could have a significant impact in the way that banks do business, as well as on the allocation of responsibility for inaccuracies in bank statements.

Background: Plaintiff Regatos sued the Commercial Bank of New York and its successor in interest North Fork Bank (hereinafter "Bank"), in federal District Court seeking reimbursement of \$600,000 plus interest, which allegedly had been removed without authorization from Regatos' commercial account in the Bank in two wire transfers in March and April 2001. Because the account was business-related, the claim implicated Article 4A of the New York UCC, which governs commercial wire transfers. The claim was based on Section 204 of Article 4A which establishes the bank's obligation to refund to commercial customers unauthorized payments under certain

circumstances.

The Bank moved for summary judgment on the ground that Regatos failed to timely contest the transfers as required by his account agreement. That agreement provided that he must notify the bank of any irregularity within 15 days. The agreement also said that when the depositor had authorized the Bank to hold his correspondence (which Regatos had, in fact, done), the 15 day time-frame would apply as if the depositor had received such statement on the date shown on the statement. Regatos did not review his March and April 2001 statements until August 2001, at which point he informed the bank – within 15 days of his statement review - that he did not authorize the two transfers.

The District Court denied summary judgment, finding that because the account was “purely commercial” the claim regarding the wire transfer was governed by Article 4A which provides a one year time-frame for notification to the Bank of objections to wire transfers. The Court found the 15-day time limitation in the agreement with the Bank to be unenforceable, because the language in section 204 of Article 4A may not be varied by agreement. The Court also found that even if the period in which to object could be altered by agreement, section 505 of Article 4A also required actual notice. The Court held that Regatos’ objections were therefore timely made because they came within fifteen days of actual notice. The case proceeded to trial and verdict and judgment in favor of Regatos. The Bank appealed the summary judgment ruling and the Second Circuit issued an opinion certifying the two legal questions to the New York State Court of Appeals. NYBA has filed an *amicus curiae* brief in this

appeal.

Outlook: Briefs are still being submitted in this case. Thus, it is too early to predict an outcome. ▼

SIGNIFICANT LEGAL DECISIONS

Wells Fargo Bank, N.A. v. Boutris (E.D. Cal. Civil Action No. CIV. S-03-0157)

Recent Developments: On January 27, 2003, Wells Fargo Bank sued the Commissioner of the California Department of Corporations (the “Commissioner”), to enjoin the investigation and enforcement of a California *per diem* interest statute, which prohibits the charging of interest on residential first mortgages more than one day prior to the recording of a mortgage deed, even though the borrowed funds may have long since been disbursed. The complaint alleged that only the Comptroller of the Currency has the authority to exercise visitorial powers over national banks and their separately incorporated operating subsidiaries. The complaint also alleged that this statutory prohibition was preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA). On February 4, 2003, the Commissioner instituted administrative procedures to revoke the license of the bank’s operating subsidiary, Wells Fargo Home Mortgage, Inc. (WFHMI). On March 10, 2003, the court entered a preliminary injunction enjoining the Commissioner from exercising visitorial powers over the plaintiffs. However, the plaintiffs were unsuccessful in seeking to

enjoin the license revocation proceedings. On May 9, 2003, the court granted summary judgment to Wells Fargo Bank, ruling that the Comptroller of the Currency has exclusive “visitorial” powers over national banks and their nonbank operating subsidiaries. The Court also ruled that DIDMCA preempted the *per diem* prohibition.

The Department of Corporations appealed this ruling and final briefs were filed on January 16, 2004 with the Ninth Circuit. The OCC was granted leave to participate in the appeal as an amicus. The case was argued before the Ninth Circuit on November 4, 2004, and the parties are awaiting a decision.

Key Point: This case is yet another example of the interplay between state and federal regulation of national banks and their subsidiaries. This issue has taken center stage in the last two years since the OCC preempted Georgia’s high-cost home lending law with respect to national banks and their subsidiaries, and also adopted new regulations that would clarify what types of state law apply to national banks. (See Federal Regulatory Developments, page 36). As the debate between state and federal regulators proceeds, court decisions will no doubt continue to be used to bolster (or contradict) their positions.

Background: Wells Fargo is a federally-chartered national banking association, whose wholly-owned subsidiary, WFHMI, is a state-chartered corporation that makes more than \$1 million in first-lien residential mortgages in California each year. Between 1996 and 2003 WFHMI held licenses to engage in real estate

(Continued on next page)

lending activities pursuant to the provisions of the California Residential Mortgage Lending Act (CRMLA) and the California Finance Lenders Law (CFLL). In August 2001 and at subsequent times, the Commissioner instituted regulatory exams of WFHMI pursuant to the terms of the CFLL.

In December 2002, the Commissioner demanded that WFHMI conduct an audit of mortgage loans made during 2001 and 2002, in order to identify any loans where WFHMI may have charged *per diem* interest in violation of California law. WFHMI objected to this request, stating that it is subject to the OCC's exclusive regulatory authority. In January 2003, Wells Fargo and WFHMI filed this federal lawsuit, after which the Commissioner instituted administrative proceedings to revoke WFHMI's licenses under CRMLA and CFLL. Plaintiffs unsuccessfully sought to enjoin the revocation proceedings; however they were successful in obtaining a preliminary injunction preventing the Commissioner from exercising visitatorial powers over plaintiffs or from otherwise preventing WFHMI from conducting its mortgage lending business in California.

The Commissioner argued that notwithstanding his revocation of WFHMI's California licenses for its mortgage lending business in California, he is still authorized to exercise visitatorial powers over WFHMI. While the Commissioner conceded that the OCC has exclusive visitatorial power over national banks, he challenged the notion that the OCC has similar exclusive visitatorial authority over operating subsidiaries of national banks. Wells Fargo argued that because the OCC is exercising federal visitatorial powers over WFHMI, the Commissioner is pre-

empted from exercising the same regulatory authority over WFHMI. The court agreed with the Plaintiffs, holding that the Commissioner has no visitatorial powers over WFHMI, and further agreed with the plaintiffs' contention that California's *per diem* statutes cannot be enforced against WFHMI as DIDMCA expressly preempts them.

Outlook: This issue continues to have traction nationwide. In fact, in April 2003, similar litigation was filed in Connecticut (Wachovia Bank, N.A. v. Burke (D. Conn. No. 3:03 CV 0738 JCH)). In that case, Wachovia challenged Connecticut's requirement that a state-chartered non-bank mortgage subsidiary of a national bank be licensed under rules applicable to other mortgage lenders.

In May 2004 the United States District Court for the District of Connecticut ruled in favor of Wachovia, thereby preventing the Connecticut State Banking Commissioner from applying state licensing requirements to Wachovia Mortgage.

In July 2005, the U.S. Second Circuit Court of Appeals upheld the District Court, ruling that state banking officials cannot regulate the operating subsidiaries of national banks, and that the National Bank Act (Act) frees national banks from state visitatorial powers. The Court, however, rejected the bank's view that Wachovia had an enforceable private right to be free from state regulation. Instead, the Court ruled that the Act does not give national banks a federal right to bring suits under 42 USC Section 1983, the Civil Rights Act.

Office of the Comptroller of the Currency v. Eliot Spitzer, No. 1:05-cv-056360-SHS (Southern District of New York); **The Clearing House Associa-**

tion, LLC. v. Eliot Spitzer, Attorney General of the State of New York, No. 1:05-cv-05629-SHS (Southern District of New York).

Recent Developments: These two related cases were filed in June 2005 in the United States District Court for the Southern District of New York. At issue is the exclusive nature of the OCC's visitatorial powers over national banks and their operating subsidiaries pursuant to 12 U.S.C. Section 484. Currently the parties in both cases are briefing the issue of whether the judge should issue a preliminary injunction.

Key Point: This case is important in that its outcome will determine the scope of a state attorney general's power to examine national banks and their operating subsidiaries, particularly with respect to issues of consumer protection.

Background: New York Attorney General Eliot Spitzer sent document requests to a number of national banks seeking HMDA information. In connection with at least one request, the Attorney General threatened the issuance of a formal subpoena or the initiation of enforcement proceedings if information was not forthcoming.

The OCC and the Clearinghouse Association filed separate suits to enjoin the Attorney General from examining the banks/operating subsidiaries in question. The suits allege that the Attorney General lacks the authority to enforce the provisions of the Equal Credit Opportunity Act or other laws that concern the banking activities of national banks and/or their operating subsidiaries, except as specifically authorized by federal law.

The Clearinghouse Association requested the immediate entry of a temporary restraining order (TRO) against the Attorney General. A hearing was held on June 20, 2005 where the judge declined to issue a TRO. The judge made clear, however, that he would revisit the issue if the Attorney General took action to upset the status quo between the parties. The Attorney General, in a June 21, 2005 letter, requested the right to engage in discovery. On July 28, 2005, the court denied this request saying that in light of the fact that these actions turn on purely legal issues, their resolution will not be assisted by the requested discovery.

Outlook: These cases are in their preliminary stages so it is too early to predict their outcome. ▼

FEDERAL LEGISLATIVE DEVELOPMENTS

The First Session of the 109th Congress opened in January 2005 with Republicans holding increased majorities in both Houses. In an effort to break the stalemate that had stalled major legislation in past Congresses, the leadership decided to originate such controversial bills as class action reform and bankruptcy reform legislation in the Senate. The result was early passage of substantive new business-friendly enactments.

Class Action Reform

One of the first bills introduced in the new Congress was S. 5, the Class Action Fairness Act of 2005. On February 3, the Senate Judiciary Committee, by a vote of 13-5, reported the bill out without amendment. S. 5 was supported by all the national banking trade groups. The bill is

intended to reduce the proliferation of frivolous lawsuits and would provide greater guidance about which class action suits could remain in state court and which are required to be heard in federal court. It would limit attorneys' fees, require more complete notification of potential class members and impose standards for court approval of class action settlements intended to assure that such settlements are "fair, reasonable and adequate." S. 5 had 28 co-sponsors, including Senator Charles Schumer (D-NY). At the same time, the sponsors of a similar class action reform bill in the House (H.R. 516) stated that they would accept S. 5 if it was not amended.

On February 10, by a vote of 72-26, the United State Senate passed the class-action reform bill without amendment, with Senator Schumer voting in favor while Senator Hillary Rodham Clinton (D-NY) opposed. The bill went directly to the floor of the House of Representatives the following week where it passed by a much narrower vote of 279-149. In contrast to the Senate's strong bipartisan vote, only Reps. Brian Higgins (D-Erie) and Greg Meeks (D-Queens) joined all of the State's Republicans in voting for the bill. President Bush signed the bill as Public Law 109-002 on February 18.

A summary of the bill prepared by the Congressional Research Service follows:

Congressional Research Service Summary of S. 5, the Class Action Fairness Act of 2005, as passed by both Houses of Congress.

The Class Action Fairness Act of

2005 - (Sec. 3) Amends the Federal judicial code to specify the calculation of contingent and other attorney's fees in proposed class action settlements that provide for the award of coupons to class members.

Prohibits a Federal district court from approving: (1) a proposed coupon settlement absent a finding that the settlement is fair, reasonable, and adequate; (2) a proposed settlement involving payments to class counsel that would result in a net monetary loss to class members, absent a finding that the loss is substantially outweighed by non-monetary benefits; or (3) a proposed settlement that provides greater sums to some class members solely because they are closer geographically to the court.

Specifies requirements for serving notices of proposed settlements on appropriate State and Federal officials. Prohibits issuance of an order giving final approval to a proposed settlement earlier than 90 days after such service. Allows class members to refuse compliance with settlement agreements or consent decrees absent notice.

(Sec. 4) Grants district courts original jurisdiction of any civil action in which the matter in controversy exceeds \$5 million, exclusive of interest and costs, and that is between citizens of different States, or citizens of a State and a foreign State or its citizens or subjects.

Lists those factors pursuant to which a district court may, in the interests of justice and based on the totality of the circumstances, decline to exercise jurisdiction over a class action in which more than one-third but less than two-

(Continued on next page)

thirds of the members of the proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed, based on consideration of whether: (1) the claims involve matters of national or interstate interest; (2) the claims will be governed by laws of the State where the action was originally filed or by the laws of other States; (3) the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (4) the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (5) the number of citizens of the State of original filing in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State and the citizenship of other proposed class members is dispersed; and (6) during the three-year period preceding filing, one or more other class actions asserting the same or similar claims on behalf of the same persons have been filed.

Specifies those circumstances in which a district court must decline jurisdiction, including those class actions in which: (1) more than two-thirds of the members of the proposed plaintiff classes in the aggregate are citizens of the State where the action was originally filed, at least one defendant is a defendant from whom significant relief is sought, whose alleged conduct forms a significant basis for the claims asserted, and who is a citizen of the State where the action was originally filed, and principal injuries resulting from the alleged or related conduct were incurred in such State; and (2) during the three-year period preceding filing, no other class action has been filed asserting the same or

similar factual allegations against any of the defendants on behalf of the same or other persons; or (3) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State where the action was originally filed.

Makes provisions of this Act concerning the application of Federal diversity jurisdiction applicable to any class action before or after entry of a class certification order.

(Sec. 5) Sets forth provisions governing the removal of interstate class actions to Federal district court and the review on appeal of remand orders.

(Sec. 6) Directs the Judicial Conference of the United States to report on class action settlements, incorporating recommendations for best court practices to ensure fairness for class members and appropriate fees for counsel.

(Sec. 7) States that amendments to Federal Rule of Civil Procedure 23 (governing class actions) set forth in the Supreme Court order entered on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003, whichever occurs first.

(Sec. 8) Retains the authority of the Supreme Court and Judicial Conference to propose and prescribe general rules of practice and procedure.

Bankruptcy Reform

(For background, see previous issues of the *Banking Journal* at www.nyba.com.)

One of NYBA's long-term goals was realized early this year as the 109th Congress also passed a bankruptcy reform bill that has been in the works for more than seven years. Background on the long debate on bankruptcy reform may

be found in previous issues of the *Banking Journal*.

Introduced on February 1, S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, was reported from the Senate Judiciary Committee on February 17 by a vote of 12-5 after only a handful of amendments were adopted. The bill remained essentially identical to that passed by the House overwhelmingly in 2003. NYBA joined other state bankers associations with members on the Senate Judiciary Committee writing in strong support of the bill. More than 80 amendments were filed for consideration during markup of the bill, but most were not offered or withdrawn. NYBA and the other trade groups urged that the bill be adopted without amendment.

On March 10, after the defeat of numerous amendments designed to weaken the bill, and limiting debate on the bill through passage of a cloture petition, the Senate passed the bill by a vote of 74 to 25. Senator Schumer voted against the bill and Senator Clinton was absent. The bill imposes income limitations on the ability of consumers to file for a Chapter 7 discharge in bankruptcy (rather than a chapter 13 reorganization plan). During debate, which lasted most of two weeks, very few amendments were adopted. Among those adopted were amendments requiring triennial inflation adjustments, limiting fraudulent involuntary bankruptcy petitions, providing for credit counseling in certain circumstances, providing greater protection for disabled veterans, and penalizing corporate fraud.

The following week, the House Judiciary Committee approved S. 256 without amendment on a largely party-line vote. On April 14, the House of Representa-

tives passed the bill by a vote of 302-126. New York Democrats Joe Crowley (Queens), Brian Higgins (Erie), Steve Israel (Suffolk), Carolyn McCarthy (Nassau) and Greg Meeks (Queens) joined all New York Republicans in supporting the bill.

President Bush signed S. 256 as Public Law 109-008 on April 20. The new law becomes effective 180 days from the date of enactment, October 17. The law is intended to create a needs-based system of bankruptcy, requiring those who can pay back a portion of their unsecured debt to do so. A summary of the law prepared by the Congressional Research Service may be found at www.NYBA.com.

Deposit Insurance Reform

(For background, see previous issues of the *Banking Journal* at www.nyba.com.)

The deposit insurance reform debate is continuing in the Congress. On March 9, H.R. 1185, the Federal Deposit Insurance Reform Act, was introduced by the Chairmen and Ranking Members of the House Financial Services Committee and its Financial Institutions Subcommittee. The bill was identical to H.R. 522, which passed the full House in 2003 by a vote of 411-11. Negotiations began immediately between the staff of the Senate Banking Committee and House Financial Services Committee on an agreed-upon bill.

On April 29, in the absence of agreement with the Senate, the House Financial Services Committee proceeded to approve, by voice vote, the NYBA-supported legislation to reform the Federal Deposit Insurance Corporation. NYBA wrote all members of the Committee prior to the vote strongly supporting the

bill.

H.R. 1185, the Federal Deposit Insurance Reform Act, would increase coverage for municipal deposits by providing coverage up to the lesser of \$2,000,000 or the standard coverage level (which is increased in the bill to \$130,000) plus 80% of the funds on deposit in an account. NYBA worked closely with the Ohio Bankers Association in achieving the higher coverage limits for municipal deposits. The bill would also index the new general coverage limit, merge the Bank Insurance Fund (BIF) and the Savings Association Insurance Fund (SAIF), provide greater flexibility for the FDIC in setting premiums and determining the appropriate level of the designated reserve ratio and establish an enhanced system of credits and rebates to ensure that newly chartered and fast-growing institutions that have paid no deposit insurance premiums pay into the fund before banks and thrifts that refinanced BIF and SAIF in the early 1990's are required to pay more. The bill also pre-empts New York State's limits on the authority for thrift institutions to accept municipal deposits, in the context of broader coverage for municipal deposits. The thrift provision is the result of a compromise among NYBA, IBANYS and CBANYS. NYBA's letter in support urged approval of the bill and pointed to the benefits to municipalities, taxpayers and financial institutions from increasing deposit insurance limits on local government deposits.

The following week, the House of Representatives overwhelmingly passed H.R. 1185. With the unanimous support of the New York delegation, the Federal Deposit Insurance Reform Act passed by a vote of 413-10.

In the Senate, a bi-partisan deposit insurance reform bill, S. 1562, was introduced with four original co-sponsors on July 29. The bill meets many of NYBA's goals for deposit insurance reform legislation, including indexing of the general coverage limit beginning in 2010, increasing coverage on retirement accounts to \$250,000, and providing effective rebates (from an initial pool of \$3.9 billion) to be distributed to depository institutions that provided the funding to rebuild the FDIC's reserve in the early 1990's. The bill would also merge the deposit insurance funds, eliminate the 23 basis point required deposit insurance premium when the funds dip below 1.25% of insured deposits, and authorize the FDIC to establish the designated reserve ratio between 1.00 and 1.50%. However, the bill contains no coverage increase for municipal deposits beyond the general indexing of coverage. NYBA will continue to work with the New York Delegation and the Ohio Bankers Association to achieve the highest coverage level increase possible.

Real Estate Brokerage & Management

(For background, see previous issues of the *Banking Journal* at www.nyba.com.)

As the new Congress opened, the real estate brokerage industry continued its assault on the ability of banks to engage in real estate brokerage and management. Legislation was introduced in both Houses (H.R. 111, S. 98) to prohibit the Treasury Department and Federal Reserve Board from approving regulations issued in proposed form five years ago to authorize financial holding com-

(Continued on next page)

panies and national banks to engage in these activities. At the same time, the real estate agents continued to pursue the appropriations process to deny funding for this rule-making, attempting to extend or make permanent the moratorium currently scheduled to expire September 30, 2005.

In June, the House Financial Services Committee held a hearing on H.R. 2660, the Fair Choice and Competition in Real Estate Act of 2005, a bill endorsed by NYBA that would authorize financial holding companies and national banks to engage in real estate brokerage and management. The bill's sponsors are the Chairman and Ranking Member of the Committee, Reps. Michael Oxley (R-OH) and Barney Frank (D-MA). NYBA contacted all members of the Committee from New York, urging that they support the bill. At the same time, however, the Transportation Subcommittee of the House Appropriations Committee voted to extend the moratorium on national banks and financial holding companies entering the real estate brokerage business for an additional fiscal year (until September 30, 2006).

On June 30, the full House passed the appropriations bill to fund the Transportation, Treasury and certain other Departments of the Federal Government (H.R. 3058). The bill contains the NYBA-opposed provision (section 818) that would extend for an additional year (until September 30, 2006) the current moratorium on the Treasury and Federal Reserve Board approving regulations to authorize financial holding companies and national banks to engage in real estate brokerage. During debate on the bill, a provision that had been added during Committee consideration was

dropped that would have prohibited the practice of "universal default," by which a credit card company increases a customer's rates or fees as a result of defaults or delinquencies on other obligations, even though the customer remains current on the company's card. The Senate Appropriations Committee, as it did last year, reported the bill on July 26, with an amendment that would permanently ban the real estate brokerage regulation from being adopted by the Treasury and Federal Reserve. The bill should be considered by the full Senate in the near future.

The "universal default" issue also remains active as a bill (H.R. 3492) was introduced in the House on July 27 to limit the ability of credit card issuers to engage in the practice. It is not considered likely to pass.

Small Business Administration (SBA)

(For background, see previous issues of the *Banking Journal* at www.nyba.com.)

Since October 2004, the Small Business Administration's 7(a) guaranteed loan program has been on a pay-as-you-go basis with no government subsidy and with fees and interest rates paid by borrowers and lenders fully funding the program. The result has been a significant cost increase for many small business borrowers. NYBA's position has been that borrowers should not be subject to increased costs for the program, and the Association has been working with key members of the New York Congressional delegation, including House Small Business Committee Ranking Member Nydia Velazquez (D-Brooklyn), to restore the traditional funding.

In June, an amendment offered by Congresswoman Nydia Velazquez (D-Brooklyn) to restore the funding for the SBA 7(a) guaranteed loan program passed by a vote of 234-189 with all New York Democrats and Representatives Sue Kelly (R-Westchester), Peter King (R-Nassau), and Randy Kuhl, Jr. (R-Steuben) voting in favor. NYBA will continue to work to preserve this amendment as the appropriations bills go to conference.

Miscellaneous

- In late June, Congress passed the Junk Fax Prevention Act, S. 714, which exempts businesses from the Federal Communications Commission regulations, now due to take effect on January 9, 2006, which bars unsolicited faxes. The President has signed this legislation. The law allows businesses to send unsolicited faxes to customers with whom they already have an established business relationship. However, the bill requires a "clear and conspicuous notice on the first page" explaining how the customers can remove themselves from a distribution list. The removal process must be accessible "at any time, on any day of the week and must be at no cost to the fax recipient."

- Before adjourning for its August recess at the end of July, both Houses of Congress completed action on H.R. 3, the Transportation Equity Act. This long-awaited highway bill contains a NYBA-backed provision that would preempt New York's vicarious liability law, freeing the owners and lessors of leased vehicles from liability for actions of lessees, so long as the lessor is in the business of leasing motor vehicles and is not itself

negligent. The President is expected to sign the bill shortly. The preemption provision becomes effective for all litigation filed on or after the date of the President's signature, irrespective of when the underlying event that gave rise to the litigation occurred.

- In May, the House of Representatives passed H.R. 1224, the Business Checking Freedom Act, with only a single dissenting vote. The bill provides for an immediate increase in the number of allowable transfers from a money market deposit account to twenty-four per month and interest on sterile reserves. It also repeals the prohibition on the payment of interest on demand deposits that has been in place since the Depression, effective two years from date of enactment. In a compromise, the bill allows only those industrial loan companies that are owned by holding companies, 85% of whose activities are financial in nature, to provide interest-bearing checking accounts. NYBA opposes interest on business checking accounts.

In the Senate, a similar bill, S. 1586, the Interest on Business Checking Act of 2005, was introduced on July 29. The bill would immediately authorize up to 24 transfers per month from a money market deposit account and the Fed to pay interest on sterile reserves, and would repeal the prohibition on the payment of interest on demand deposits in two years. Virtually identical legislation was introduced in the last Congress, but not taken up by the Senate Banking Committee.

- Also in May, the House Financial Services Committee approved H.R. 1461, the Federal Housing Finance Reform Act

of 2005, by a strong, bipartisan vote, with all New York members of the Committee voting in favor. The bill creates a new independent federal regulatory agency for the housing-related government-sponsored enterprises (GSEs - Fannie Mae, Freddie Mac, and the Federal Home Loan Banks). The new regulator will be responsible for approving the mission, products and services, and safety and soundness standards of the GSEs. It will have authority to place a GSE in liquidation and, although there are no specific portfolio limits in the bill, the agency is given authority to adopt such limits, if appropriate. NYBA supports the legislation and specifically urged the inclusion of the Home Loan Banks in the bill.

On July 28, the Senate Banking, Housing and Urban Affairs Committee approved a bill (S. 190) to reform the regulation of the Housing Government-Sponsored Enterprises (GSEs) – Fannie Mae, Freddie Mac and the Federal Home Loan Banks. NYBA had urged that any legislation to create a new GSE regulator include the Federal Home Loan Banks. During markup, an amendment was adopted to make the affordable housing goals of the GSEs consistent with CRA. The bill was approved on a party-line vote. No action on the Senate floor has been scheduled.

- Legislation that would authorize credit unions to increase their business lending to 20% of assets and reduce credit union capital requirements was reintroduced in Congress. The bill, H.R. 2317, would also exclude all loans under \$100,000 from the business lending cap and was co-sponsored by 18 Members of the House, of whom three are New Yorkers, Reps. Sherwood Boehlert (R-Utica),

Randy Kuhl (R-Corning) and Carolyn Maloney (D-Manhattan). NYBA wrote to all members of the New York Congressional delegation urging that they not co-sponsor the bill and shortly afterward sent out a grassroots "Call to Action," urging all member banks to send letters in opposition. The Association's letter noted that New York banks had paid over \$40 billion in federal and State income taxes over the past five years while the State's credit unions had paid nothing. NYBA also pointed out that, in some areas, such as Rochester, there is no locally headquartered bank or thrift as large as the multi-billion credit unions and urged that Congress not exacerbate the current competitive inequity. There is currently no Senate equivalent and no House action is scheduled.

- The House in April passed H.R. 749, the Expanded Access to Financial Services Act, which authorizes federal credit unions to sell travelers checks and money orders to, and to cash checks and receive and send international and domestic electronic fund transfers on behalf of non-members who are in the credit unions' field of membership. There is no Senate equivalent.

- The House of Representatives passed a bill (H.R. 8) to make permanent the repeal of the estate tax. The bill faces an uncertain future in the Senate.

- The House also passed H.R. 1025, a bill that would ease notice requirements under the Fair Debt Collection Practices Act for first mortgages in default that are transferred for collection.

(Continued on next page)

- Other bills approved by the House Financial Services Committee include legislation to protect members of the armed forces and their families from abusive and misleading practices in the sale of insurance and other financial services products (H.R. 485); and legislation to exclude money received in payment of a claim under a flood insurance policy from being considered income by any federal agency other than the IRS (H.R. 804).

- In the House, a bill was introduced to place rural bank lenders on similar competitive footing with the Farm Credit System. The bill, H.R. 399, would make interest income on farm real estate and certain rural housing loans tax exempt.

- A comprehensive predatory lending bill was introduced in the House of Representatives with significant bi-partisan sponsorship. The bill, H.R. 1295, the Responsible Lending Act, would preempt most state predatory lending laws and create a uniform national standard to address abusive mortgage lending. Among the co-sponsors are Reps. Greg Meeks (D-Queens) and Joe Crowley (D-Queens).

- Sen. Charles Schumer was an original sponsor of S. 768, a bill designed to prevent identity theft. It would provide additional authority to the Federal Trade Commission, regulate data merchants, require additional customer disclosure and notification of data security breaches, and provide protection for social security numbers.

On July 27, the Senate Commerce Committee approved by voice vote the first in what is expected to be a series of

bills with regard to identity theft. Because of jurisdictional conflicts, similar bills are pending in several other Senate and House Committees (Banking or Financial Services, Judiciary, etc.). The Commerce Committee-approved bill, S. 1408 (the Identity Theft Protection Act), contains provisions on security breach notification which are supported by the national banking trade groups, although other sections of the bill dealing with social security number protection and the ability of consumers to place security freezes on their credit files remain problematic. The bill would preempt state laws and preclude state attorneys general from enforcement. Other Senate and House Committees are expected to act on the issue when Congress returns from its August recess.

- New York Representatives Peter King (R-Nassau) and Ed Towns (D-Brooklyn) joined in co-sponsoring a bill, H.R. 3206, the Credit Union Charter Choice Act, to restrict the NCUA's ability to prevent credit unions from converting to mutual savings banks. New York passed a law last year, with NYBA's support, to ease such conversions.

Personnel

- Newly elected Representative Brian Higgins (D-27th) was named to the House Transportation and Infrastructure and Government Reform Committees. Newly elected Representative Randy Kuhl (R-29th) was named to the Agriculture, Education and the Workforce, and Transportation and Infrastructure Committees. He is the only New Yorker serving on the Agriculture Committee. The Washington telephone numbers for the new Repre-

sentatives are the same as those of their predecessors: Higgins – 202-225-3306; Kuhl – 202-225-3161.

- The House Financial Services Committee continues to have New Yorkers in key leadership positions. Rep. Sue Kelly (R-Westchester) remains Chair of the Oversight and Investigations Subcommittee and Rep. Carolyn Maloney (D-New York) remains Ranking Member of the Domestic and International Monetary Policy, Trade and Technology Subcommittee. Rep. Peter King (R-Nassau), who had chaired the monetary policy Subcommittee, stepped down in order to chair a Homeland Security Committee Subcommittee. He is prominently mentioned as a possible successor to Homeland Security full Committee Chair Chris Cox (R-CA) who has been confirmed by President Bush as Chairman of the Securities and Exchange Commission. ▼

FEDERAL REGULATORY DEVELOPMENTS

Overdraft Protection

At the federal level, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System, the FDIC, the Office of Thrift Supervision (OTS), and the National Credit Union Administration have announced a final joint guidance relating to the responsible disclosure and administration of overdraft protection services. The guidance contains three primary sections: safety and soundness considerations; legal risks; and best practices. The safety and soundness discussion seeks to ensure that financial institutions offering

overdraft protection programs adopt adequate policies and procedures to address credit, operational and other associated risks. The legal risk discussion alerts institutions to the need to comply with all applicable federal and state laws, and advises banks to have their overdraft protection programs reviewed by legal counsel prior to implementation. The “best practices” section addresses the marketing and communications that accompany the offering of overdraft protection programs as well as the disclosure and operation of these programs.

The final guidance reflects an extension of the charge-off requirement in the Safety and Soundness section from the 30-day period originally set forth in the proposed guidance to 60 days. The final guidance also highlights that, currently, fees for paying overdraft items are not considered finance charges under Regulation Z, if the institution has not agreed in writing to pay overdrafts. (Traditional lines of credit, which generally are subject to a written agreement, do not fall under this exception.)

The Federal Reserve Board subsequently enhanced the guidance through a revision of Regulation DD, interpreting the Truth-in-Savings Act. The final rule prohibits misleading advertising that encourages customers to overdraw accounts or that implies that overdraft protection is guaranteed. The rule also contains additional disclosure requirements for marketing materials and advertisements that concern overdrafts. The rule took effect on July 1.

Community Reinvestment Act (CRA) Regulations

(For Background see the December 31, 2003 *Banking Journal* at www.nyba.com.)

In February 2005, the Fed, FDIC and the OCC agreed to publish for public comment a compromise on the question of streamlined CRA examinations for small and midsize banks. The compromise sought to balance bankers’ concerns about regulatory burden with the concerns of consumer advocates over the integrity of CRA. The proposal raises the threshold for the small-bank streamlined CRA exam from \$250 million to \$1 billion, without regard to holding company affiliation. The proposal also imposes a community development test – consideration of a bank’s community development lending, services and investments – to the small bank exam standard for institutions between \$250 million and \$1 billion. An expanded community development definition includes affordable housing in underserved rural areas and designated disaster areas. The proposed rule also grants equal weight to the lending test and the community development test, and requires that banks achieve at least a satisfactory rating on each test and the community development test, to receive an overall satisfactory rating.

On May 10, 2005, NYBA filed comments with the bank regulatory agencies (OCC, Fed, FDIC) strongly supporting their proposal to increase from \$250 million to \$1 billion the size bank eligible for the streamlined CRA examination, irrespective of holding company size. The comments emphasized that the proposal “is **not** an exemption from CRA, but simply relief from overly bur-

densome regulatory requirements.” NYBA also urged that the newly created “community development” test apply only to banks with assets between \$500 million and \$1 billion and not receive equal weight with the lending test. NYBA supported including community development and lending activities in rural areas in the CRA exam. NYBA first proposed increasing the streamlined CRA examination threshold to \$1 billion in 2001. OTS adopted the \$1 billion threshold for thrift institutions prior to action by the bank regulators.

On July 19, 2005 all three bank regulatory agencies completed adoption in final form of a regulation increasing the size bank eligible for the streamlined CRA examination from \$250 million to \$1 billion irrespective of holding company size. Banks in the \$250 million-\$1 billion size range will no longer be required to collect and report CRA loan data. Banks in this range will also be subject to a new community development test designed to flexibly evaluate the community development loans, investments, and services of each bank in light of the community’s needs and the bank’s capabilities. The new rules also expand the definition of community development for all banks to include activities that assist designated disaster areas, and distressed or underserved rural areas. NYBA filed comments on three occasions with the regulatory agencies urging the increase in asset size for the streamlined examination. The new rules take effect September 1, 2005.

(Continued on next page)

Bank Secrecy Act/ Anti-Money Laundering Enforcement

The enforcement of the Bank Secrecy Act and anti-money laundering regulations by the bank regulatory agencies has become one of the most consistently objectionable activities in bank regulation. Many bankers believe that federal regulators are overly cautious in requiring banks to file suspicious activity reports by volume rather than content. In addition, specific practices in regulation have raised serious concerns with regard to the effect of regulations on the banking industry and the economy.

The issue of money transmitters received significant attention in Albany and Washington during the spring. Since several large, nationwide banks announced they were withdrawing from the business of supporting money transmitters, attention focused on the guidelines issued by FinCen and the federal banking agencies which forced banks to take extreme actions to ensure that their customers are complying with anti-money laundering rules. Some examiners have even suggested that banks had to act as regulators of their customers. In mid-March, New York State and City officials wrote William Fox, FinCen Director, urging that he clarify compliance rules governing bank support for money transmitter services. NYBA polled its members to find their level of support for money services businesses and found that, while many banks continue to offer money transmission services for their own customers, few were supporting third-party money transmitters and even fewer were accepting new customers. On March 30, 2005, NYBA met with Assemblywoman

Nolan and discussed the issue and the Assemblywoman expressed the view that the banks were placed in a very difficult position by federal regulators. She believed that they were doing all they could on the issue. At the same time, FinCen issued a new directive, in conjunction with all of the bank regulatory agencies, expressly stating that banks are not expected to serve as *de facto* regulators of the money services industry. They stated that further explicit guidance on compliance expectations for account relationships of banks with money services businesses would be issued shortly. The Assembly unanimously adopted a resolution (L483) calling on FinCen to provide clear, well-defined rules for banks and money services businesses for complying with antiterrorism and other money laundering requirements.

FinCen and the federal banking agencies in late April released another statement on the relationship between banks and money services businesses, such as check cashers and money transmitters. The statement was in response to a letter sent by the American Bankers Association and state bankers associations, including NYBA, in January, calling attention to the inconsistency and lack of examination oversight in the anti-money laundering effort. In response, the agencies wrote that the approach of the agencies is not one of "zero tolerance" and emphasized the availability of procedures for review of examiner findings. They also stated that they were developing "interagency BSA/AML examination procedures to help reduce the potential for inconsistent examination approaches."

A new examination manual was released on June 30 and is intended to address many of the concerns raised by

bankers, not only about money transmitters, but also about overly restrictive interpretations of laws and regulations by bank examiners. The Treasury and Justice Departments and all of the financial institution regulatory agencies have signed off on the new manual. They are introducing it over the course of the summer in a series of in-person, telephone, and Web-based conferences.

Miscellaneous

- The federal banking agencies issued new interagency final rules – mandated by the 2003 Fair and Accurate Credit Transactions Act – that require financial institutions to adopt measures for properly disposing of consumer information derived from credit reports. Current law requires financial institutions to protect customer information by implementing information security programs. The final rules require institutions to make modest adjustments to their information security programs, including measures for the proper disposal of consumer information. They also add a new definition of "consumer information." The final rules took effect on July 1, 2005.

- The FDIC announced that it would follow the Security and Exchange Commission's lead by allowing financial institutions subject to Part 363 of its regulations to take up to 120 days after the end of their fiscal years to submit both the management and independent auditor internal-control assessments required in their Part 363 annual reports. The SEC and the Public Company Accounting Oversight Board on Nov. 30, 2004 extended the deadline for filing management reports and auditor attestations on inter-

nal controls mandated by the Sarbanes-Oxley Act's Section 404.

- The Federal Trade Commission issued a final rule under the Fair and Accurate Credit Transactions Act designed to improve notices of consumers' opt-out rights with respect to prescreened solicitations for credit or insurance. The final regulation will require marketers to include a "layered" notice in all prescreened solicitations, such as pre-approved credit card offers. It will consist of a short prominent notice informing consumers that they have the right to opt out – along with a toll-free telephone number – and a longer notice informing them of additional related rights.

- The OCC issued guidelines concerning the residential mortgage lending practices of national banks and their operating subsidiaries. They identify practices "inconsistent with sound residential mortgage lending practices" such as equity stripping, fee packing, and loan flipping. They also describe other terms and practices that may be conducive to predatory or deceptive lending practices, depending on the circumstances. Such terms and practices include balloon payments in short-term transactions, mandatory arbitration clauses or agreements, particularly if the eligibility of the loan for purchase in the secondary market is thereby impaired, and payment schedules that consolidate more than two periodic payments and pay them in advance from the loan proceeds. The Guidelines further set forth steps that banks should take to mitigate risks associated with their purchase of residential mortgage loans and the use of mortgage brokers to originate loans. The Guidelines became effective

in April 2005.

- In February 2005, the Federal Communications Commission announced updates to its rules for the Do-Not-Call Registry, that will loosen some restrictions on banks, mortgage companies and credit card companies. One change will allow banking companies to market products by telephone to customers whose accounts have been idle for 18 months or longer. Banking companies will also be able to market to ex-customers for 18 months after they have closed an account.

- In March 2005, the Securities and Exchange Commission extended until September 30, 2005 the deadline for compliance with the push-out provisions of Regulation B, implementing the provisions of Title II of the Gramm-Leach Bliley Act. Title II repealed the complete exemption from the securities laws previously enjoyed by banks and trust companies, replacing it with a series of targeted exemptions for specific banking and trust activities. However, the SEC has never completed action on Regulation B and announced its intention to rewrite the regulation over the next six months. Fourteen members of the Senate Banking Committee, including New York Senator Charles Schumer, wrote to the SEC expressing "very serious concerns" with the currently proposed version of Regulation B. "The proposed regulation is fundamentally inconsistent with Congressional intent and would impose burdensome and wholly unjustifiable compliance costs on the entire banking industry," stated the letter.

Even though the SEC set September 30, 2005 as the compliance deadline for

Regulation B, the Commission has not completed action on the revised regulatory proposal which it promised in its March release. With a new Chairman and two new Commissioners (see personnel), further Commission action on Regulation B is expected to be delayed. In addition, the Commission promised institutions subject to Regulation B adequate lead time before the regulation takes effect. The September 30 deadline is therefore inoperative.

- Federal bank regulators issued guidance in March 2005 on programs that banks should establish to respond to breaches of security involving customer personal information. Although the agencies did not establish an effective date for the guidance, they expect that financial institutions will implement it "as soon as possible." Components of a response program should include, at a minimum: 1) assessing the nature and scope of an incident, including identifying the types of customer information accessed or misused; 2) notifying federal regulators as soon as possible when an institution becomes aware of an incident; 3) notifying appropriate law enforcement agencies, including filing suspicious activity reports as warranted; 4) taking appropriate steps to contain and control the incident; and 5) notifying customers when warranted. Because the agencies consider the guidance an interpretation of already effective rules involving the protection of sensitive customer information, they will begin examining for compliance immediately.

- The federal banking regulatory agencies have released interim final rules

(Continued on next page)

that put into effect the medical privacy provisions of the Fair and Accurate Credit Transactions Act's Section 411. The rules create exceptions to the general prohibition against creditors obtaining or using medical information in connection with credit determinations. Those exceptions, among other things, generally cover financial medical information; medical accommodations; power of attorney or legal representative; and fraud prevention. The interim final rules also address sharing medically related information among affiliates. There was a 30-day comment period following the rules' publication in the *Federal Register*, which expired July 11. The agencies are reviewing the comments they received. They become effective March 7, 2006.

- In June 2005, the Financial Accounting Standards Board (FASB) withdrew its proposal to change the accounting treatment of securities that are subject to other than temporary impairment. The proposal (FASB Staff Position 03-1-a) was put forward by FASB's emerging issues task force and would have required a permanent markdown of "available for sale" securities in response to certain interest rate fluctuations. NYBA wrote FASB and supported an ABA-originated grassroots campaign in opposition to the proposal. FASB is now expected to issue a final staff position that codifies existing accounting practice.

- On July 19, 2005, the FDIC Board proposed an amendment to its annual audit and reporting requirements to raise from \$500 million to \$1 billion the asset-size threshold for banks 1) required to maintain internal control assessments by management and attestations by external

auditors and 2) to have outside directors on the audit committee independent of management. These institutions would remain subject to the requirement that their financial statements be subject to annual audit. Comments are due 45 days after the proposal is published in the *Federal Register*. The proposal would become effective December 31.

- At the same meeting, the FDIC Board also withdrew a former proposal and proposed a new rule on the insurability of funds subject to transfer or withdrawal through the use of stored value cards and other nontraditional access devices, such as computers. The proposal will be published for a 90-day comment period.

- The FDIC Board also voted to table further consideration of a proposal to preempt State laws for State-chartered banks that operate across State lines. The Board directed the Corporation's General Counsel to review the legal basis for the proposal, which was developed as a result of a petition by the Financial Services Roundtable.

Personnel

- In February 2005, President Bush nominated prominent Washington banking attorney John Dugan of Covington & Burling, where he specializes in banking and financial institution regulation, to the post of Comptroller of the Currency. During the administration of President George W. Bush, Mr. Dugan served as Treasury assistant secretary for domestic finance. On July 26, 2005, Mr. Dugan received a confirmation hearing before the Senate Banking Committee during which many of the questions concerned

the OCC's preemption regulations and the agency's effectiveness in enforcing existing money laundering and consumer laws. Mr. Dugan stated his support for the OCC preemption policy and expressed a strong commitment to law enforcement. The Senate approved Mr. Dugan's appointment on July 29.

Also before adjourning for its August recess on July 29, the Senate confirmed several additional key appointees to the bank regulatory agencies. John Reich, who had been serving as FDIC Vice Chairman, was confirmed as Director of the Office of Thrift Supervision. Martin Gruenberg was confirmed as Vice Chairman of the Federal Deposit Insurance Corporation. Rep. Chris Cox (R-CA) was confirmed as Chairman of the SEC. Rep. Cox's confirmation and resignation from Congress clears the way for the selection of a new Chairman of the House Homeland Security Committee, one of the leading candidates for which is Rep. Peter King (R-Nassau). Selection of the Chairman is likely to occur shortly after Congress returns in September. Two other Commissioners were also confirmed for the SEC, Roel Campos and Annette Nazareth. ▼

**Save the dates of
January 9-10, 2006 for
NYBA's Annual Meeting
and Bankers Day in Albany
at the Crowne Plaza Hotel.
We look forward to seeing
you there to kick off
another State legislative
session!**