

NEW YORK BANKERS ASSOCIATION

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“Where is the knowledge we have lost in informtion”

T.S. Elliot

■ Review and Outlook

After the November elections, one of NYBA's top federal goals – passage of terrorism insurance legislation – was achieved, though bankruptcy reform legislation failed to be enacted, due primarily to a lingering dispute over an abortion-related amendment. Additionally, during the past year, NYBA made significant progress on predatory lending and deposit insurance reform – two of NYBA's greatest priorities in 2002. While these issues will undoubtedly continue to be in play in the coming year, NYBA expects 2003 to also bring significant new challenges for banking, with the economy dictating substantial changes in government spending and tax policies. In addition, the industry expects to face a growing challenge at the local level from consumer groups on an array of issues. With the "wild card" law expiring in September, making it permanent or gaining the longest possible extension will also be a key NYBA priority, thus guaranteeing another busy and challenging year ahead.

As soon as it reached his desk in October, Governor Pataki signed the predatory lending bill into law as Chapter 626. Over the past year, NYBA worked with the State and consumer groups to try to achieve a bill balancing the overriding political desire to combat predatory practices while preserving the legitimate subprime lending market. The legislation signed by the Governor reflects many of the elements of those discussions; however, it does not include amendments passed by the Senate that would have addressed a number of lingering concerns. NYBA will continue to seek modifications before the bill's effective date next Spring, particularly with respect to discount points outside the points and fees threshold, the penalty provisions and a preemption provision, which would protect regulated entities from being subject to a patchwork of conflicting legislation at the local level.

In this regard, the New York City Council, on November 20, 2002, voted to override Mayor Bloomberg's veto of the City's predatory lending bill. The measure, which has a number of terms inconsistent with the State law, applies only to firms doing business with the City and takes effect 90 days after its passage. In his veto message, Mayor Bloomberg espoused a key argument raised in NYBA's prior testimony and correspondence to City officials on this issue – namely, that the City bill would result in a patchwork of inconsistent provisions in State and local law. The Mayor also stated that the City bill, Int. 67-A,

was an "indirect and incomplete" attempt to address lending practices which the Governor, in signing a state predatory lending bill, already had done in a "detailed and comprehensive manner."

Also on the State legislative front, the Governor, in October, signed identity theft legislation (Chapter 619) that was another NYBA-supported initiative. The law, which took effect November 1, criminalizes the theft of documents, financial instruments and other material for the purpose of assuming the identity of the owner. Prior to its passage, the bill was amended several times to eliminate provisions that could have inadvertently penalized financial institutions.

On the State regulatory front, NYBA continues to await action on several pending "wild card" petitions. The latest one was filed with the Banking Department's Board in May 2002. It seeks promulgation of a regulation permitting New York State-chartered banks to charge a daily fee on checking accounts that do not have overdraft protection privileges and yet have a negative balance. The OCC, through an interpretive ruling, already gave national banks the authority to charge such a fee.

At the Federal level, the 107th Congress adjourned after completing action on terrorism insurance legislation that was strongly supported by NYBA. The Terrorism Risk Protection Act will provide Federal government reinsurance of terrorism coverage in property and casualty insurance policies up to \$100 billion. Private insurers will provide the first \$10 billion in coverage. Also at the Federal level, the deposit insurance reform bill, which passed the House in May 2002, failed to be passed by the Senate during this session of Congress. That legislation included a provision expanding the coverage of municipal deposits, the result of NYBA's work on this issue. The provision broadened the coverage to \$130,000 plus 80% per depositor, capped at \$2 million. Although the cap was reduced from the \$5 million in the bill reported from the Financial Services Committee, the bill marked the first time that this coverage had been expanded since 1980. The likely incoming Chairman of the Senate Banking Committee, Richard Shelby, has indicated that he is not averse to moving the bill to the floor, although in the past he has been opposed to increasing coverage. In addition, the FDIC, at NYBA's request, is conducting a study of optional deposit insurance coverage for municipal deposits in excess of the statutory limits. ■

NYBA 2002 LEGISLATIVE AND REGULATORY PRIORITIES

Status Report - DECEMBER 2002

Issue	Bill Number	Committee	NYBA Position/Status
STATE ISSUES			
✓ Identity Theft	A.4939-E S.7697-A	Banks Consumer Protection	Oppose restrictive measures Support strong I.D. theft bill; Signed as Chapter 619
✓ Predatory Lending	A-11156 S.7840	Banks Rules	Seeking perfecting amend- ments; signed as Chapter 626
÷ Money Laundering	A.11408 S.6515/S.7631	Banks Rules	Support anti-money laundering and terrorist financing laws
÷ *Environmental Liability Relief for Trustees & Lenders	Budget	Finance Ways & Means	Support
÷ Fee and Services Restrictions	Numerous	Banks	Oppose
÷ *Trust Agenda			Support
• Perpetual trusts	S.794/A.7317	Judiciary	
• Tax relief	S.4781/A.8661	Finance/Ways & Means	
• Trustee Delegation	S.4783	Judiciary	
FEDERAL ISSUES			
⬆ Deposit Insurance Reform	S.1945 H.R.3717	Banking	Support higher municipal deposit coverage; bill passed House
÷ Bankruptcy Reform	S.420/H.R.333	Judiciary	Support; passed both Houses Conference report failed in House
÷ Regulatory Burden Relief *MMDA 24 transfers per month	S.229/S.601 H.R.974/H.R..1009	Banking	NYBA petition to Fed for 24 MMDA transfers denied; bill passed House
÷ Real Estate Brokerage & Management	S.1839 H.R.3424	Federal Reserve Board/ Treasury Department	Support - Comments filed; Oppose restrictive legislation Amendment passed House
✓ Terrorism Insurance	S.2600 H.R.3210	Banking Financial Services	Support H.R.3210 Signed into law November 26
⬆ CRA Regulations	Regulatory Proposal	OCC/FDIC/FED/OTS	Support flexible amendments to existing regs including increasing the streamlined exam to \$1 billion

✓ action completed ⬆ 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. ▼

NYBA 2003 LEGISLATIVE AND REGULATORY POLICY

On November 1, 2002, the Legislative and Regulatory Policy Committee of the New York Bankers Association met jointly with NYBA's Board of Directors to recommend the 2003 legislative and regulatory policy. Following are the recommendations which were then approved by the Board in executive session, along with subsequent developments:

Electronic Banking

In the past legislative session, bills were actively considered to require banks to retrofit their ATM machines with emergency 911 buttons, to provide ATMs that are more readily accessible to the visually handicapped and to otherwise regulate ATM fees and services. In addition, the ATM Safety Act needs a technical correction to its lighting provisions. To address these and other electronic banking issues, NYBA has formed an ATM and Electronic Banking Committee with representatives from the operational, legal and government relations areas of banks throughout the State. The Committee is conducting a survey of ATM safety issues and will seek to identify potential alternatives to overly burdensome legislative and regulatory proposals. NYBA will continue to oppose fee, safety and service restrictions on ATMs while developing solutions to meet the needs of ATM users.

Predatory Lending

2002 was a watershed year in the regulation of predatory lending in New York. NYBA spearheaded efforts in the legislature with the State enacting a far-reaching anti-predatory lending law. On a parallel track, the New York City Council passed a more stringent "doing business" ordinance that was vetoed by the Mayor. On November 20, 2002, however, the City Council overrode the Mayor's veto. The ordinance takes effect 90 days from the date of the override. These legislative efforts supplement the already effective Part 41 regulations of the Banking Department and Federal HOEPA regulations that address many of the legitimate concerns with regard to predatory practices. NYBA has been heavily engaged in efforts to eradicate predatory lending and negotiated at length with representatives of AARP, ACORN and other consumer groups. While the negotiations did not ultimately result in a consensus on State-wide legislation, the bill signed into law by Governor Pataki significantly improved many of the flaws identified in the bill that passed the Assembly last year. NYBA will continue to seek perfecting amendments to the State predatory lending law, but will strongly oppose local government regulation in this area. In anti-

patation of new efforts by local legislative bodies to develop bank regulatory ordinances, NYBA is forming a task force of New York City-based members to address NYBA's future role in this area.

Privacy

In each of the past two Legislatures, NYBA has successfully sought strong, effective privacy laws to protect vital consumer information. The Statewide "Do Not Call" list enacted in 2000 and legislation criminalizing identity theft passed this year were substantive privacy laws that neither targeted banking nor unduly restricted business operations. With the scheduled sunset at the end of 2003 of the Fair Credit Reporting Act's federal preemption of State legislation affecting the sharing of information with affiliates, and with likelihood of enactment of strong privacy legislation in such bellwether states as California, privacy is certain to be a major state and federal issue next year. NYBA will remain vigilant on this issue, supporting privacy legislation that protects customer rights without imposing inappropriate restrictions on business conduct. NYBA will continue to oppose bills that would prevent the free flow of information necessary to conduct banking transactions safely and soundly. NYBA will also revive its financial services privacy task force and initiate a dialogue with the national trade associations on a uniform standard.

"Wild Card" Extension

On September 10, 2003, the State's "wild card" law is scheduled to sunset. The law has served New York banking well, with the extension to State-chartered banks of the ability to sell insurance directly, flexibility in setting NSF fees, and a reduction from ten to six in the number of required annual board meetings all coming as a result of NYBA petitions to the Banking Board under the statute. Currently pending are additional association petitions to provide State banks with authority to underwrite revenue bonds, permission for boards of directors to act on unanimous written consent, authority to charge daily overdraft fees on accounts that maintain continuous negative balances and parity for State-chartered banks on real estate appraisal requirements. NYBA strongly supports making permanent the "wild card" statute or an extension for the longest possible period. However, NYBA opposes efforts to attach riders to an extension bill that could restrict the competitive flexibility of or impose new requirements on the State's banking industry. NYBA will also urge the Banking Department to complete action on pending

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■ State Legislative Developments

■ SUB-PRIME LENDING

The issue of predatory lending continued to resonate with legislators, regulators and consumer groups alike at the state and local levels throughout this legislative session.

After almost a year of NYBA discussions with the State and consumer groups to try to achieve a bill balancing the overriding political desire to combat predatory practices, while preserving the legitimate sub-prime lending market, the Governor signed a statewide high cost home lending law (Chapter 626 of the Laws of 2002) in early October. This legislation reflects many of the elements of our discussions and thus is much improved from the initial Assembly version. However, it does not include amendments passed by the Senate, which would have addressed a number of lingering concerns. The State law's enactment followed passage the week before by the New York City Council of an ordinance designed to prohibit financial firms that grant, underwrite or securitize certain loans deemed to be predatory from doing business with the City. Subsequently, Mayor Bloomberg vetoed this ordinance, but on November 20th the City Council voted to override this veto; consequently, the ordinance will become effective 90 days from the enactment date.

Since the year began, NYBA worked diligently to help craft a state-level high cost home lending bill that would strike the right balance between ensuring adequate housing credit availability and eliminating the predatory practices the association opposes. NYBA testified to the need to find this balance before the Senate Banks Committee in Albany in March and expressed its concerns with the Assembly version of the bill then under consideration.

Throughout the Spring, amidst a backdrop of demonstrations at City Hall, and protests staged for the media in front of the building housing NYBA's offices, NYBA and AARP met frequently to discuss this issue. Despite the constructive dialogue with AARP and a coalition of community groups, a final agreement on a State-wide bill was unattainable as consumer groups opted to have remaining issues resolved with the legislature. The most contentious issue was not a banking issue but dealt with the liability surrounding the sale of mortgage loans in the secondary market. The community groups wanted assignees to assume virtually all liability for the actions of lenders with respect to high cost home loans; the Bond Market Association, whose mem-

bers are more directly affected, objected strongly to AARP's position. NYBA agreed that such blanket liability could have a serious negative impact on the vitality of the secondary market.

Despite an inability to reach closure on all the bill's issues, the State bill which was ultimately signed into law is significantly improved, due in large part to NYBA's discussions with consumer groups, from the bill that passed the Assembly during the 2001 legislative session and which was in play for much of this session as well. That original bill contained significantly lower APR and points and fees thresholds, allowed for no financing of points and fees, would have required mandatory counseling and had broader liability for assignees. Even with these improvements, NYBA still believes that the legislation contains flaws that could impair the legitimate lending market, particularly because it fails to include amendments urged by NYBA and passed by the Senate, which would have addressed a number of lingering concerns. NYBA will continue to seek modifications before the bill's effective date next Spring, particularly with respect to discount points outside the points and fees threshold, the penalty provisions and a pre-emption or exemption provision, which would protect regulated entities from being subject to a patchwork of conflicting legislation at the local level.

While focusing much of its efforts at the State level, NYBA nevertheless was actively involved at the New York City level as well, urging the City Council not to pass Int. 67-A, its ordinance regarding high-cost home loans. On April 1, NYBA testified before the New York City Council's Committee on Consumer Affairs, stating that the interest rate thresholds used to define these loans were so low as to include many legitimate subprime loans. NYBA expressed its concerns with the proposal, while urging the Council to recognize the difficulties in complying with a patchwork of conflicting laws. At a second hearing in May which focused on an amended version of the bill, NYBA reiterated its concerns with the bill, but applauded the Committee on Consumer Affairs for its Res. 93, which called on the State legislature to pass a statewide high cost home lending bill. The Committee approved the resolution, giving NYBA the continuing opportunity to urge City Council members to ultimately opt for a statewide solution rather than final approval of the City ordinance. In this regard, NYBA sent a letter to Philip Reed, Chairman of the Committee on Consumer Affairs, urging that the

Council opt for a statewide solution. NYBA also wrote to Council Speaker Gifford Miller with the same message. Finally, NYBA called upon Mayor Bloomberg to veto passage of the ordinance in favor of a State law. While Mayor Bloomberg did, in fact, ultimately veto the ordinance, noting that it not only contradicted the terms of the "detailed and comprehensive" State law, but was also an "indirect and incomplete" attempt to address lending practices, this veto was overridden by the City Council on November 20.

■ PRIVACY

In New York, the legislative session resulted in no additional privacy restrictions for banks. In fact, the only significant privacy legislation passed by both the Senate and Assembly this session was a NYBA-supported bill criminalizing identity theft (Chapter 619). This legislation, which was signed by the Governor on October 2nd, criminalizes the theft of financial instruments for the purpose of misappropriating another's identity. Despite this successful legislative outcome, it should be noted that a number of privacy bills were considered this session, ranging from opt-in legislation, to restrictions on the use of social security numbers, to bills designed to restrict the flow of unsolicited e-mails and faxes. Thus, this topic continues to be one of great interest to the Senate and Assembly. Moreover, with the advent of a very strong consumer advocacy movement nationwide, it is anticipated that, as has already occurred in California (and in New York State with respect to the issue of predatory lending), localities throughout the State may begin to consider privacy restrictions of their own.

■ ATM FEES

(For background, please see the Dec. 17, 2001 *Banking Journal*.)

Due to a number of lawsuits filed in jurisdictions throughout the country, in which the banks have repeatedly prevailed, the specter of ATM fee ban prohibitions on the State and local levels has abated this session. NYBA continues to monitor these cases as they progress through the appeals process. The status of these cases is as follows:

In California, legislation arose out of the passage of ordinances in Santa Monica and San Francisco banning convenience fees on ATM use by non-customers. In response to those ordinances, Wells Fargo Bank and

the Bank of America (i) filed a suit in Federal court claiming that local ordinances are preempted as to national banks by Federal regulations, and (ii) cut off access to ATM machines to non-customers in Santa Monica. United States District Court Judge Vaughn Walker granted the banks a preliminary injunction in November 1999, which was upheld by the Ninth Circuit on March 31, 2000. In early July 2000, Judge Walker issued a ruling striking down the Santa Monica and San Francisco fee bans. Judge Walker ruled that only the Federal government could impose such restrictions on nationally-chartered banks and thrift institutions, citing the National Bank Act and the Home Owners Loan Act. Nevertheless, both Santa Monica and San Francisco filed notices of appeal on July 14, 2000 and filed their briefs on December 13, 2000. Oral arguments were heard and the Ninth Circuit affirmed on October 25, 2002. (Similar litigation arose in Woodbridge and Newark, NJ, but ended when both municipalities eliminated their ATM fee bans and acceded to a permanent injunction by the United States District Court in the Fall of 2000.)

Significantly, on April 24, 2000, the U. S. Supreme Court denied *certiorari* in an Iowa case, letting stand a decision by the United States Court of Appeals for the Eighth Circuit allowing national banks to operate ATMs in states where they do not have branches. While the decision does not mirror exactly the ATM fee ban issue, it does reinforce and clarify the rights of national banks with respect to their ATM policies and practices. Thus, it adds strength to the Federal preemption arguments first raised in the New Jersey and California fee ban cases.

Most recently, litigation was filed on April 12, 2001 in Iowa by five national banks, challenging a state statute which was interpreted by the state banking department and the attorney general to ban ATM fees. (*Metrobank, N.A. v. Foster* (D. Ia. No. 4-01-CV-80226)). The state filed a motion to dismiss the case as not ripe for adjudication, given that, to date, no bank is charging the ATM fees in question, and the state has therefore not threatened any enforcement action. This motion was denied in August 2001 and the court subsequently granted the bank's motion for summary judgement. The Superintendent of Banks has since announced that his rules against surcharges have been withdrawn and that he will not appeal the court's order.

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ATM & Electronic Banking Committee: Faced with a series of bills mandating ATM service restrictions, NYBA has formed an ATM & Electronic Banking Committee to address creatively some of the provisions of current legislation. One bill that was strongly urged by its sponsors this year was S.6096-A(Padavan)/A.1615-B (Stringer), legislation that requires all bank-owned ATM machines to be retrofitted with emergency 911 buttons that allow customers to be directly connected with 911 operators in case of an emergency. Working closely with bankers on the Committee, NYBA gathered data on the usage of such buttons in other jurisdictions, on ATM crimes and on customer reactions to such technology. NYBA expressed its belief that the buttons do not work effectively, are not used in emergency situations, are extremely expensive to retrofit and would cover only bank-owned ATMs. Moreover, law enforcement agencies encourage robbery victims to cooperate with attackers, rather than provoke them by attempting to contact authorities during an attack. Nevertheless, only extensive and frequent grass roots contacts by bankers throughout the State has thus far been successful in keeping this bill from coming to a vote in the Senate and it has passed the Assembly three times.

The Committee also reviewed proposed Federal guidelines for "talking ATMs" or ATMs that would be equipped with audio features that would allow them to communicate with visually impaired customers. NYBA will file comments on the guidelines during the comment period which the Department of Justice is expected to initiate later this year. NYBA is also developing amendments to a pending bill in Albany that would mandate "talking ATMs" in New York independent of the Federal guidelines. The bill, S.5004(Farley)/A. 5797(Weisenberg), would exceed current Federal guidelines by requiring that: 1) every ATM be equipped with special features to make them accessible to the visually impaired (rather than one at each location); 2) that all information that is available visually on the screen also be provided orally (current Federal rules may be satisfied by the use of Braille key boards and the proposed guidelines would define a limited range of information that must be available orally); 3) the legislation requires that all functions that can be performed at the ATM be available orally, while the Federal legislation would limit the range of functions that must be orally available, allowing additional experimentation; and 4) the bill does not address many privacy concerns raised by such machines.

NYBA's ATM Committee will also be reviewing ATM lighting standards, potential restrictions on ATM pricing and issues regarding charges for cash back using PIN numbers on debit and ATM cards.

■ BANK TAX REFORM

(For background, please see the Dec. 17, 2001 *Banking Journal*.)

Last year, when the Legislature reconvened on October 24-25, it reenacted the Bank Tax for two years, retroactive to its expiration on December 31, 2000. The new expiration date is therefore December 31, 2002. In addition, the Legislature extended for two years the expired provisions of the financial modernization moratorium that NYBA had negotiated in 2000, allowing the formation of financial holding companies that could continue to be taxed under the Article of New York Tax Law under which they had been paying tax prior to their formation. The Bank Tax, which had been set at 9% two years ago, is reduced from 8% to 7.5%, effective for tax years beginning after July 1, 2002. This reduction will save the State's banking industry more than \$150 million per year.

Last Fall, Governor Pataki indicated that all future reductions may be postponed due to the State's unexpected financial crisis caused by the September 11, 2001 events. However, when the Governor submitted his Executive Budget in January 2002, the third year of the Bank Tax Rate Reduction was included. The budget passed including the rate reduction. With the expiration of the Bank Tax on December 31, the Legislature will once more be required to extend the tax as part of next year's budget. NYBA supports making permanent the Bank Tax and the accompanying moratorium language.

■ UCC AMENDMENTS

(For background, please see the Dec. 17, 2001 *Banking Journal*.) The Governor signed legislation in 2001 amending the Uniform Commercial Code's Article 9, bringing New York's Article 9 into conformity with the Act adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute.

Senator James J. Lack (R-Suffolk) introduced legislation this session that would make technical revisions to the amended UCC Article 9 (S.7040). The proposed legislation also covered the Estates Powers & Trusts law, the General Business law, the General Obligation

law and the Vehicle and Traffic law to make conforming amendments to reflect changes in the new version of Article 9. No Assembly companion bill was introduced.

NYBA continues to support New York's adoption of Articles 3 and 4, although significant political problems remain preventing their passage, specifically the issue of check truncation. Senate Banks Committee Chairman Hugh T. Farley (R-Schenectady) has introduced legislation to adopt Articles 3 and 4 for several years (S.4437). While the Assembly has reviewed this issue, no legislation was introduced this session. Most recently, the NCCUSL embarked on a project to revise Articles 3 and 4 further, with the goal of bringing them up to date with current practices in the payment system. Amendments that were approved by the NCCUSL in 2002 were reviewed by a number of state bankers associations, including NYBA, and the American Bankers Association, and were determined to be unnecessary and in some instances problematic to the banking industry. As a result of this feedback, NCCUSL is not currently pursuing adoption of these amendments by state legislatures.

■ TRUST ISSUES

In one of the slowest sessions in years, both Houses of the State Legislature passed only a handful of bills affecting trusts and estates. However, NYBA continued to pursue its trust legislative agenda, gaining important support for several key bills.

NYBA TRUST LEGISLATIVE AGENDA

Fiduciary Income Tax Reform – NYBA identified fiduciary income tax reform as its principal objective in trusts and estates legislation. Working with the New York State Bar Association and the Association of the Bar of the City of New York, NYBA endorsed legislation that would result in New York resident trusts and estates being taxed at the same level as non-resident trusts and estates after a five-year phase-down period. Taxes would continue to be levied on New York source income. The explicit purpose of the bill, as described in the Sponsor's Memorandum, is to encourage the creation and retention of trusts in New York and the subsequent strengthening of New York's trust industry.

Senator James J. Lack (R-Suffolk), Chairman of the Senate Judiciary Committee, introduced the fiduciary income tax reform bill as S.4781, while Assembly Ways and Means Committee Chairman Herman D. (Denny) Farrell, Jr., joined by Judiciary Committee Chair Helene

Weinstein (D-Brooklyn) and Assemblywoman Ann Margaret Carrozza (D-Queens) introduced the bill as A.8661. This bill is currently pending in the Senate Investigations, Taxation and Government Finance and the Assembly Ways and Means Committees.

As NYBA has lobbied for fiduciary tax reform, members of the Legislature requested a white paper on the need for reform. NYBA prepared and forwarded the white paper to the Legislature in early December. At the request of the Chairman of the Surrogate's Court Advisory Committee, NYBA is preparing a presentation on fiduciary tax reform (as well as on conversion of common trust funds). Although the State's deep fiscal crisis appears to preclude the opportunity for tax reform in the immediate future, NYBA is continuing to present the economic development benefits of reform.

Perpetual Trust Legislation – Two bills were introduced to authorize perpetual trusts in New York. Both bills amend the Rule Against Perpetuities to permit grantors to establish trusts not subject to the Rule. In the Senate, Chairman Lack introduced S.794, that would simply make the Rule inapplicable to trusts characterized in their governing instruments as "perpetual" so long as the trustee or other party designated by the grantor is provided with authority to alienate the assets in the trust. This bill was reported from the Senate Judiciary Committee to the Rules Committee. In the Assembly, Chair of the EPTL Task Force Assemblywoman Ann Margaret Carrozza introduced A.7317, that suspends the Rule for perpetual trusts and contains a number of provisions designed both to ensure the alienability of property in the trust and to avoid inadvertent triggering of the so-called "Delaware tax trap," a provision of Federal tax law that would void some of the tax benefits of a perpetual trust if certain assets in the trust may never vest. This bill is pending in the Assembly Judiciary Committee. NYBA is working with the Legislature to resolve the differences between these two versions of perpetual trust legislation.

Environmental Liability Relief – During the Summer of 2002, Governor Pataki and Legislative leaders identified environmental law reform as one of their major legislative priorities. With NYBA's strong support, Senator Hillary Rodham Clinton (D-NY) also urged the Legislature to pass brownfields relief legislation and the expiration of the State's mini-Superfund law last year has brought strong pressure from environmental groups to reform and re-enact the State's environmental protec-

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tion laws. Moreover, in December New York City Mayor Michael Bloomberg expressed an interest in brownfields redevelopment as an important part of his plans for additional housing units in the City. NYBA has consistently urged legislative leaders to ensure that environmental liability relief for lenders and trustees remains among their priorities in environmental reform, and all current legislative efforts include some form of such relief. At their meetings in November, NYBA's Policy Committee and Board of Directors placed environmental liability relief among their 2003 priorities.

Interstate Trust Taxation - The advent of interstate banking and branching in 1997 created many opportunities for New York banks and trust companies to consolidate and convert their out-of-state affiliates into branches, saving materially on the expense and operational costs of maintaining separate corporate entities in multiple states. However, the provisions of the personal income tax law of the State of New York dealing with the taxation of resident and non-resident trusts were drafted at a time when interstate branching was not contemplated. As a result, the language of Section 605 of the Tax Law, setting forth the standards for the taxation of resident trusts, did not take into account the possibility that the branches of a New York bank or trust company in another state could be administering the trust of a New York grantor. Because New York Tax Law applies the State fiduciary income tax only when both the grantor and trustee are domiciled in New York, New York banks and trust companies need to ensure that trusts established by New York grantors in non-New York banks do not become subject to New York tax if those banks become branches of New York banks through acquisition or merger.

For the past several years, NYBA has been working with the Tax Department to address this issue through administrative action. In 1998, NYBA wrote the Department asking for interpretive or regulatory action to resolve this issue. Then Tax Commissioner Michael Urbach replied that he agreed with the concern of the Association and believed that the issue could be resolved without legislative action. However, in August 2002 the Tax Department determined that administrative action could not adequately address what is viewed as a statutory infirmity and invited NYBA to draft legislation, which the Department agreed to review, to remedy the concern.

NYBA submitted a legislative draft in September and has since made a change in the draft at the Department's suggestion. The Department has approved the draft as accomplishing the purpose NYBA has described, but has not yet taken a formal public policy position on the necessity or desirability of the amendment. The draft has also been shared with State Legislative and Executive branch leaders, and NYBA is urging its inclusion in the 2003 budget.

The language of the draft is designed to make clear that the mere conversion of the out-of-state affiliate of a New York bank into a branch will not result in subjecting trusts established in and managed by the affiliate to New York fiduciary income tax. Substantially, the same provisions would also be applicable to the New York City personal income tax law to conform to the State law. The draft would also make certain technical corrections in the Tax Law to accommodate past court decisions and regulatory interpretations. ▼

■ State Legislative Activity

NYBA's memorandums in support and opposition to various bills and the association's "best practices" recommendations can be found at www.nyba.com.

Note that all pending bills "die" Dec. 31, 2002.

ELECTRONIC BANKING LEGISLATION

■ **Unsolicited E-mail** - S.1452(Rath)/A.7762 (Schiminger) Restricts unsolicited E-mail. **(DID NOT OPPOSE)** This bill passed the Senate and was held in the Assembly Consumer Affairs and Protection Committee.

■ **ATM Safety Act Jurisdiction** - S.3816(Goodman)/A.172(Markey) Grants New York City concurrent jurisdiction with the Banking Department over violations of the ATM Safety Act within the City. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committee.

■ **“Talking” ATM Machines** - S.4963(Maziarz)/S.5004(Farley)/A.5797-A(Weisenberg) Requires “talking” ATM machines which may be accessed by blind consumers. **(OPPOSE)** NYBA filed a strong memorandum in opposition to the bill and is working to ensure that the bill is amended to follow the standards for audio signals being developed by the Access Board in Washington. This bill is pending in the Senate Banks Committee and passed the Assembly.

■ **911 Buttons and ATMs** - S.6096-A(Padavan)/A.1615-B(Stringer) Requires ATM machines to be equipped with emergency (E-911) buttons to contact the police. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Banks Committee. The Association formed an ATM Task Force to review this and other legislation affecting ATM machines. NYBA also filed a strong memorandum in opposition to the bill and spearheaded a grass roots lobbying campaign against the bill.

■ **ATM Surveillance Tapes** – S.6374(LaValle)/A.10059(Acampora) Requires that ATM Surveillance Tapes be maintained for 60 rather than 30 days. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

■ **ATM Lighting Standards** - S.7156(Farley) Clarifies the lighting standards in the ATM Safety Act; NYBA is working with the Banking Department and IBANYS in an effort to seek technical corrections that should facilitate compliance with and enforcement of the Act. **(SUPPORT)** The bill is pending in the Senate Banks Committee.

PRIVACY LEGISLATION

■ **Identity Theft** - S.218-D(Nozzolio)/A.3198-D(Canestrari) Penalizes identity theft and prohibits the use of social security numbers without affirmative consent and provides customers rights for credit reports. **(OPPOSE)** This bill was reported from the Senate Finance Committee to the Senate Rules Committee and is pending in the Assembly Consumer Affairs and Protection Committee.

■ **Identity Theft** - S.694-A(Goodman)/A.3648-A(Lentol) Imposes strong criminal penalties for identity theft. **(SUPPORT)** This bill is pending in the Senate and

Assembly Codes Committees.

■ **Opt Out** - S.1467(Veella)/A.288(Kaufman) Permits consumers to opt out of the sharing of information and preclude entirely the sharing of credit card information and preclude the sharing of certain credit card data, such as account numbers. **(OPPOSE)** This bill is pending in the Senate Consumer Protection Committee and is on the Assembly calendar.

■ **Personal I.D. Information** - S.1468(Vellela)/A.367(Kaufman) Prohibits any requirement that personal identification information be written on a credit card slip or any attachment thereto. **(OPPOSE)** This bill is pending in the Senate Consumer Protection Committee and passed the Assembly.

■ **Personal Privacy Act of 2002** - S.2330-A(Morahan)/A.4230-A(Kaufman) A broad-based bill that, among other things, regulates unsolicited electronic and other advertisements. **(OPPOSE)** This bill is pending in the Senate Codes and Assembly Governmental Operations Committees.

■ **Privacy** - S.4569(Saland)/A.7827(Tokasz) Prohibits the release of personal information for commercial purposes without customer consent. **(OPPOSE)** This bill is pending in the Senate Consumer Protection and Assembly Consumer Affairs & Protection Committees.

■ **Privacy**- S.4631(Farley) Provides for the privacy of financial information in language parallel to that of Title V of the Gramm-Leach-Bliley Act. **(SUPPORT)** After passing the Senate in 2001, this bill is pending in the Senate Banks Committee.

■ **Social Security Numbers** - S.4972-A(Nozzolio) Prohibits the sale, lease or trade of social security numbers without the informed written consent of individual account holders. **(OPPOSE)** This bill is pending in the Senate Consumer Protection Committee.

■ **Personal Financial Information** - S.5078 (Hannon) Prohibits the disclosure of personal financial information by banking organizations without providing notice to the consumer. **(OPPOSE)** This bill is pending in the Senate Banks Committee.

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■ **“Do Not Call” Fax Numbers** – S.6031(Alesi)/A.9660(Klein) Would expand the State’s “Do Not Call” Registry to include fax numbers. **(DO NOT OPPOSE)** This bill is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **Personal Privacy Protection** – S.6224(Rath)/A.10267(Lentol) This bill would create the Personal Privacy Protection Act, establishing a government agency and series of policies designed to protect personal privacy. **(SUPPORT)** It is pending in the Senate Finance and Assembly Government Operations Committee.

■ **Opt-In** - A.18(Greene) Requires opt-in for banks, securities firms and insurance companies and provides expansive prohibitions on the release of account numbers and certain other customer information. **(OPPOSE)** This bill is pending in the Assembly Banks Committee.

■ **Customer Opt-out** - A.7930(Greene) requires a customer opt-in before financial institutions can disseminate confidential customer information. **(OPPOSE)** This bill is an initiative of the Attorney General and is pending in the Assembly Banks Committee.

■ **Attorney General Privacy Package** - A.8329-8333 (Rules, Request of Pheffer or Markey) Five bills that comprise the Attorney General’s privacy package were introduced in the Assembly. The bills deal with Internet privacy, unsolicited e-mail, consumers’ rights under the Fair Credit Reporting Act, individual reference service providers and marketing list brokers, and telemarketing services. **(OPPOSE)** There are Senate companions to three of the bills, but only S. 5302-A (Maltese)/A. 8330-A (Rules, Request of Markey) has passed the Assembly. It would regulate the transmission of unsolicited electronic mail – to which NYBA does not object – and was pending on the Senate calendar at the end of session.

RETAIL LEGISLATION

■ **Social Security Check Cashing** - S.91(Maltese)/A.202(Markey) Requires banks to cash properly endorsed Social Security checks for non-customers. **(OPPOSE)** This bill is pending in the Senate Banks Com-

mittee and passed the Assembly.

■ **Dishonored Check Fees** - S.831(Monahan)/A.2561 (McLaughlin) Prohibits banks from charging a fee for the deposit of a check that is subsequently dishonored. **(OPPOSE)** This bill is pending in the Senate Banks Committee and was reported out of the Assembly Banks Committee to the Codes Committee.

■ **Credit Card Fees** - S.1059-A(Veella)/A.1870-A (Lentol) Prohibits credit or debit card issuers from charging interest or fees from card holders who pay off their balances each month. **(OPPOSE)** NYBA filed a memorandum in opposition to the bill and offered amendments to correspond to the sponsor’s stated intention that the bill applies only to the application of after-the-fact fees on existing cardholders. This bill is pending in the Senate Consumer Protection Committee and passed the Assembly.

■ **Credit Cards at CUNY and SUNY** - S.1232 (Maziarz)/A.6706(Gromack) Prohibits credit cards from being marketed on campuses of the City and State University Systems. **(OPPOSE)** This bill is pending in the Senate Higher Education Committee. This bill was held in the Assembly Higher Education Committee at the sponsor’s request. NYBA created a Task Force under the chairmanship of former NYBA Chairman R. Carlos Carballada, Chairman Emeritus of the New York State Board of Regents, to develop “best practices” guidelines for on-campus credit card marketing. The “best practices” guidelines were approved by NYBA’s Board of Directors in November 2001 and were submitted to Senator Maziarz and Assemblyman Gromack in advance of a public hearing in New York City that month.

■ **Totten Trusts for Securities** - S.1389-B(Lack)/A.7944-A(Weinstein) Enacts the Transfer-on-Death Securities Registration Act, similar to Totten trusts for bank deposits, that permits securities to be registered in a form to take effect on the death of the owner. **(SUPPORT)** This bill passed the Assembly and was reported out of the Senate Judiciary Committee. It is pending on the Senate calendar.

■ **Banks’ Right of Set-Off** - S.1676(Stachowski)/A.2746(Higgins) Limits banks’ right of set-off against accounts into which social security or supplemental

security income payments are deposited. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

■ **Day-of-deposit to Day-of-withdrawal Payment of Interest** - S.1817(Padavan)/A.829(Lafayette) Requires the payment of daily interest on certain savings accounts on a day-of-deposit to day-of-withdrawal basis. **(OPPOSE)** This bill is pending in the Senate Banks Committee and on the Assembly calendar.

■ **Passbook Savings Fees** - S.1819(Padavan)/A.2562(McLaughlin) Prohibits fees on passbook savings accounts. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

■ **NSF Fees** - S.1847(Maltese)/A.884(Seminario) Limits Non-Sufficient Funds (NSF) fees to \$7.50. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

■ **Leased Motor Vehicle Liability** - S.3155(Johnson)/A.6089(Canestrari) - Transfers the liability for loss or damage to a motor vehicle leased for one year or more to the lessee from the lessor, if conditions are met. **(SUPPORT)** NYBA filed a strong memorandum in support of the bill. This bill is pending on the Senate Calendar and in the Assembly Transportation Committee.

■ **Short-Form Power of Attorney** - S.3193(Trunzo)/A.5126(Levy) - Incorporates existing General Obligations Law provisions requiring banks to accept properly executed short-form powers of attorney into the Banking Law, further protecting banks from liability for honoring the form. **(SUPPORT)** The bill passed the Assembly and is pending in the Senate Banks Committee.

■ **Powers of Attorney** - S.4584(Saland)/A.226 (Kaufman) Imposes substantial penalties for the failure to honor short-form powers of attorney. **(OPPOSE)** The bill is pending in the Senate and Assembly Judiciary Committees.

■ **Credit Unions in Banking Development Districts** - S.4632(Farley)/A.966(Lafayette) Includes credit unions in banking development districts, provides them access to State and local deposits and permits any residents of such districts to be members of credit unions in the districts. **(OPPOSE)** This bill passed the Assembly

and is pending in the Senate Banks Committee.

■ **Credit Unions Tax Exempt Status**- S.4637 (Farley)/A.8539(Rules, Request of Greene) Broadens the tax exempt status of State-chartered credit unions to parallel that of Federal credit unions. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

■ **Credit Unions/Excelsior Linked Deposit Program** - S.4945-C(Marchi)/A.9809-B(Sweeney) Authorizes credit unions to participate in the Excelsior linked deposit program. **(OPPOSE)** NYBA filed a memorandum opposing this bill. The bill passed the Assembly and is pending in the Senate Rules Committee.

■ **Local Government Investments** -S.5243 (Maziarz/A.5642(DiNapoli) Authorizes local governments to invest in money market mutual funds. **(OPPOSE)** NYBA filed a memorandum strongly opposing this legislation, pointing out that money market mutual funds would not recycle the deposits in the form of local loans, have no Community Reinvestment Act obligations comparable to commercial banks, and do not provide additional services to local communities. This bill is pending in the Assembly Local Government Committee and was starred on the Senate calendar.

■ **Mailed Credit Card Application** - S.6060 (Morahan)/A.9584(Colman) Prohibits the mailing of credit card applications. **(OPPOSE)** NYBA filed a memorandum in opposition to this bill, which is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **Maturity of Excelsior Linked Deposits** - S.6367 (Saland)/A.9961(Schimminger) Extends from two years to four the maximum maturity of Excelsior linked deposits. The bill is intended to respond to the current interest rate environment in which shorter-maturity loans and deposits cannot take full advantage of the 200 basis point rate reduction available under the program. **(SUPPORT)** The bill was committed to the Senate Rules Committee and is pending in the Assembly Ways and Means Committee.

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■ **Sales and Use Taxes** – S.6385(Skelos)/A.10134 (Tokasz) Authorizes vendors extending credit under private label credit cards to file for refund of sales and use taxes on worthless credit accounts. **(SUPPORT)** This bill is pending in the Senate Investigations and Government Operations and the Assembly Ways and Means Committees.

■ **Credit Unions** - S.6408-B(Farley)/A.10256-B (Greene) Exempts State-chartered credit unions from sales and use taxes, beginning in 2004. Federal credit unions already enjoy such an exemption. **(OPPOSE)** The bill passed the Senate and is pending in the Assembly Ways and Means Committees

■ **Community Bank Deposit Program** – S.7175 (Farley)/A.9297-A(Rules, Request of Farrell) Authorizes thrift institutions to participate in the community bank deposit program **(OPPOSE)**. The bill passed the Assembly and is pending in the Senate Rules Committee.

■ **Military Decoration Abandonment** - S.7364 (Morahan)/A.11786(Rules, Request of Tocci) Prohibits the sale of military decorations found in abandoned safety deposit boxes. **(DID NOT OPPOSE)** This bill passed the Senate and is pending in the Assembly Banks Committee.

■ **Lienholder Rights** - S.7549(Johnson)/S.7737 (Johnson) - Protects the rights of lienholders in vessels, aircraft or vehicles seized for use in controlled substances crimes. **(SUPPORT)** S. 7737 passed the Senate and is pending in the Assembly Transportation Committee.

■ **Credit Card Rates and Fees** - S.1073-A(Fuschillo) Requires the Banking Department to publish on its web site information regarding credit card rates and fees provided by banks. Under the bill, banks will be required to provide a notice on their credit card statements of the availability of this information. **(DO NOT OPPOSE)** This bill is pending in the Senate Rules Committee.

■ **Banking Department Examinations** - S.2840 (Farley) Increases penalties for failure to permit Banking Department examinations. Increases daily fine levels

for the first time since 1930. **(DO NOT OPPOSE)** This bill passed the Senate, but has no Assembly companion.

■ **Fingerprinting Applicants for Bank Charters** - S.3788(Farley) Permits the Banking Department to submit routinely for processing the fingerprints of applicants for banking charters, licenses and changes in control; authorizes the Superintendent to waive the requirement for existing institutions. The bill was amended at NYBA's request to preserve the due process rights of bank applicants. **(SUPPORT)** This bill is pending in the Senate Banks Committee.

■ **UCC 3 & 4** - S.4437(Farley) Updates articles 3 and 4 of the Uniform Commercial Code dealing with negotiable instruments and bank deposits and collections. **(SUPPORT)** This bill is pending in the Senate Judiciary Committee.

■ **NSF Fees** - S.4440(Vearella) Limits NSF fees to \$15. **(OPPOSE)** This bill is pending in the Senate Banks Committee.

■ **Annual Reporting Requirements** - S.4634-A (Farley) Reduces annual reporting requirements of the Banking Department. **(SUPPORT)** This bill passed the Senate.

■ **Expanding Credit Union's Common Bond** - S.4638(Farley) Permits State-chartered credit unions to add fields of members to their common bond without amending their bylaws or seeking the approval of the Banking Department. **(OPPOSE)** NYBA filed a memorandum strongly opposing this legislation that provides State credit unions with an advantage over Federal credit unions and enhances their competitive advantage over commercial banks. This bill was recommitted to the Senate Banks Committee with the enacting clause stricken.

■ **Unsolicited Checks** - S.4661(Padavan) - Prohibits credit card issuers from sending blank loan checks to card holders residing in the State. **(OPPOSE)** NYBA filed a memorandum opposing this legislation. This bill is pending in the Senate Consumer Protection Committee.

■ **Sale of Insurance** - S.5007(Farley) Imposes identical consumer protection requirements in the sale of insurance by licensed lenders, mortgage bankers and other types of lending institutions as currently apply to banks and thrifts. **(DO NOT OPPOSE)** This bill is pending in the Senate Banks Committee.

■ **Linked Deposit Program** - S.5249(Balboni) A Governor's Program Bill, it creates a linked deposit program for loans to eliminate environmental contamination. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Environmental Conservation Committee.

■ **Public Deposits for Thrifts** - A.5639(DiNapoli) Authorizes thrift institutions to compete for public deposits. **(OPPOSE)** NYBA filed a memorandum strongly opposing this measure, which is pending in the Local Governments Committee. There is no Senate companion.

TRUST LEGISLATION

■ **Fiduciaries' Commissions** - S.438(DeFrancisco)/A.212(Kaufman) Includes both real and personal property, other than specifically bequeathed or devised property, in the base on which all fiduciaries' commissions, other than trustees (such as executors), are computed. Currently, real property is not included in the commission base unless it is sold by the fiduciary. **(SUPPORT)** This bill passed the Senate and is pending in the Assembly Judiciary Committee.

■ **Attorney Compensation** - S.2938(Lack)/A.10737 (Weinstein) Authorizes attorneys in Surrogate's Court to receive certain "reasonable expenses necessarily and appropriately incurred" in addition to attorney's fees. **(DID NOT OPPOSE)** Governor Pataki vetoed this bill.

■ **Fiduciary Income Tax Reform** - S.4781(Lack)/A.8661(Rules, request of Farrell) Part of NYBA's trust agenda, this bill reforms the State's income tax on trusts and estates, eliminating the distinction between resident and non-resident trusts and estates over five years. **(SUPPORT)** This bill is pending in the Senate Investigations, Taxation and Government Finance and the Assembly Ways and Means Committees.

■ **Commissions on Charitable Trusts** - S.4782-A (Lack)/A.4447-A(Weinstein) Provides a paying commission to a trustee for distributing the remaining funds in the corpus of a charitable trust to the charity at the termination of the trust and allocates commissions on charitable trusts 1/3 against income and 2/3 against principal (as with other trusts). **(SUPPORT)** This bill passed the Assembly and is pending in the Senate Judiciary Committee.

■ **Perpetual Trusts** - S.794-A(Lack) Authorizes creation of perpetual trusts. **(SUPPORT)** This bill was reported from the Senate Judiciary Committee to the Rules Committee.

■ **Fiduciary Liability** - S.4783(Lack) This NYBA-initiated bill relieves individual trustees of fiduciary liability for trust decisions delegated to corporate and other trustees. **(SUPPORT)** This bill is pending in the Senate Judiciary Committee.

■ **Environmental Liability Relief** - S.4788 (Marcellino)/A.7498-A(Lopez) The "brownfields" coalition bill, which provides for environmental liability relief for lenders and trustees. **(SUPPORT)** This bill is pending in the Senate and Assembly Environmental Conservation Committees.

■ **Trial By Jury** – S.5461(Lack)/A.7791-A(Weinstein) Provides for a right to a jury trial in cases of disputes over revocable trusts and incorporates by reference provisions regarding wills into revocable trusts **(OPPOSE)** This bill is pending in the Senate and Assembly Judiciary Committees.

■ **Objections to Fiduciary Appointment** – S.6506 (Lack)/A.10661(Seddio) Authorizes objections to the appointment of fiduciaries under certain circumstances. **(SUPPORT)** This bill passed the Assembly and is pending in the Senate Judiciary Committee.

■ **Perpetual Trusts** - A.7317-A(Carrozza) A bill authorizing perpetual trusts in New York. **(SUPPORT)** This bill is pending in the Assembly Judiciary Committee.

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MORTGAGE LEGISLATION

- **Special Mortgage Recording Tax** - S.1246 (Skelos)/A.1539(Morelle) Permits mortgagors to pay the special mortgage recording tax now required to be paid by mortgagees **(SUPPORT)**. Governor Pataki vetoed this bill.

- **Mortgage Fees** - S.1816(Padavan)/A.2310 (McLaughlin) Prohibits mortgagees from charging fees for the issuance of a mortgage satisfaction. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Banks Committee.

- **Interest Payments** - S.1817(Padavan)/A.829 (Lafayette) Requires date-of-deposit to date-of-withdrawal interest payments for certain accounts **(OPPOSE)** This bill is pending on the Assembly calendar and in the Senate Banks Committee.

- **“Home Equity Fraud Act”** - S.1818-A(Padavan) A.3717-A(Clark) Limits practices that could be characterized as predatory lending. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

- **Private Mortgage Insurance** - S.4277(Verella)/A.4716(Grannis), Eliminates payments for private mortgage insurance, under certain circumstances, when the loan to value ratio falls below 75%. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Insurance Committee.

- **Environmental Liability Relief** - S.4788 (Marcellino)/A.7498-A(Lopez) The “brownfields” coalition bill, which provides for environmental liability relief for lenders and trustees. **(SUPPORT)** This bill is pending in the Senate and Assembly Environmental Conservation Committees.

- **High-Cost Home Loans** - S.5005(Farley)/A.7828-B (Greene) This is an earlier version of AARP-backed legislation that restricts high-cost home loans in New York. NYBA filed a strong memorandum in opposition to the bill and has had numerous meetings with legislative leaders on its provisions. In addition, NYBA met with AARP and other consumer and activist groups over many months in an attempt to work out a compromise on the bill. See A.11856. **(OPPOSE)** This bill

passed the Assembly and is pending in the Senate Banks Committee.

- **Third-Party Predatory Lending Practices** - S.5635(Smith)/A.9137(Rules, Request of Greene) Prohibits the State, public authorities and political subdivisions and districts from engaging in business with financial institutions that engage in predatory lending. **(OPPOSE)** The bill is pending in the Senate Finance and Assembly Ways and Means Committees.

- **Mortgage Recording Tax** - S.6055-A(Morahan)/A.4366-A(Seddio) Limits the mortgage recording tax to the amount due on any additional amount advanced in a mortgage refinancing. **(SUPPORT)** This legislation is pending in the Senate Committee on Investigations and Government Operations and the Assembly Ways and Means Committee.

- **Mortgage Recording Tax Suspension** - S.6219 (Marchi)/A.9598(Lavelle) Suspends the Mortgage Recording Tax on Refinancings for one year. **(SUPPORT)** This bill is pending in the Senate Investigations and Government Operations and the Assembly Ways and Means Committees.

- **SONYMAE Powers** - S.6554(Bonacic)/A.11543 (Rules, Request of Lopez) Extends the authority of the State of New York Mortgage Agency and expands its ability to purchase mortgages to include certain second mortgages. **(SUPPORT)** This bill passed the Assembly and is pending on the Senate calendar.

- **Mortgagee Penalty** - S.582(DeFrancisco) Imposes penalties on mortgagees for failing to provide a mortgage discharge in a timely fashion. **(OPPOSE)** This bill is pending in the Senate Judiciary Committee.

- **Referral Fees** - S.4431-A(Farley) Prohibits payment of referral fees or other compensation by banks and other lenders to a home improvement contractor unless the contractor is employed by the lender and certain other conditions are met. **(SUPPORT)** This bill is pending in the Senate Banks Committee.

- **Mortgage Fraud**- S.4640(Farley) Penalizes mortgage fraud; includes overly broad language penalizing lenders if their agents or employees participate in com-

mitting fraud. **(OPPOSE)** This bill was referred to the Senate Codes Committee.

■ **Mortgage Loan Payoffs** - S.4659(Padavan) Requires banks to accept payoffs of mortgage loans at any branch. **(OPPOSE)** This bill is pending in the Senate Banks Committee.

■ **Mortgage Broker Regulation** - S.5598(Farley) Expands the authority of the Banking Department over mortgage banking and brokerage practices, including policing for mortgage fraud. **(NO POSITION)** This bill is pending in the Senate Banks Committee.

■ **Appraisal Reports** – S.6356(Volker)/A.10091 (Wirth) Requires lenders to provide a copy of a real estate appraisal to any real estate loan applicants required to pay for the appraisal. **(OPPOSE)** This bill is pending in the Senate Judiciary and the Assembly Consumer Affairs and Protection Committees.

■ **Mortgage Assignment** – S.6363(Lack)/A.9989 (Brennan) – Allows a mortgagor to receive an assignment of mortgage in lieu of a discharge when the mortgagor is refinancing an existing loan. **(SUPPORT)** This bill is pending in the Senate and Assembly Judiciary Committees.

■ **Exemption from Environmental Liability** - S.6742 (Marcellino)/A.2134-A(Morello) Provides an exemption from environmental liability for lenders who have not contributed to the pollution of the property in which a security interest is taken. **(SUPPORT)** S.6743(Marcellino) would provide a similar exemption to trustees. These bills have been reported favorably by the Senate Environmental Conservation Committee and are pending in the Assembly Environmental Conservation Committee.

■ **Article 9** - S.7040(Lack) Makes technical corrections to the revision of Article 9 of the Uniform Commercial Code that was passed last year. **(No Position)** This bill is pending in the Senate Judiciary Committee.

■ **Mobile Home Loans** - S.7189(Farley) Clarifies procedures for mobile home loans. **(SUPPORT)** This bill is pending in the Senate Banks Committee.

■ **Line of Credit** - A.186-A(Christensen) Prohibits a home owner from accessing a line of credit secured by a jointly held home mortgage unless the document or device accessing the line is signed by all joint tenants. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Banks Committee.

■ **Debt Collecting Practices** - A.3781-A(Pheffer) Regulates debt collecting practices and requires additional notices to consumers by debt collectors and restrictions on the actions of “principal creditors.” **(OPPOSE)** This bill is pending on the Assembly Calendar.

■ **Discriminatory Practices** - A.4003(Lafayette) Prohibits banking organizations making loans secured by real estate from engaging in underwriting, appraisal or other practices that could have a “discriminatory effect” on any protected borrower class unless the practice is necessary for a legitimate banking purpose. This bill is very troubling because it could force banks to defend underwriting practices. **(OPPOSE)** This bill is pending in the Assembly Banks Committee.

■ **Liens During Foreclosure** - A.11113(Rules, Request of Gromack) Provides for the continued effectiveness of certain liens during the pendency of a mandatory stay on foreclosure under the Federal bankruptcy law. **(SUPPORT)** This bill is pending in the Assembly Judiciary Committee.

MISCELLANEOUS LEGISLATION

■ **Bankruptcy and Mutual Fund Shares** - S.1470 (Velella)/A.382 (Kaufman) Expands the cash exemption to the State’s bankruptcy law to include shares in a mutual fund. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Judiciary Committee.

■ **Bankruptcy and Credit Reports** - S.1530(Volker)/A.2390(Eve) Limits the time period for reporting organizations in bankruptcy on credit reports and prohibits credit reports of bankruptcies that do not identify the Chapter of bankruptcy under which the proceeding was brought. **(OPPOSE)** This bill is pending in the Senate Consumer Protection and Assembly Consumer Affairs and Protection Committees.

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■ **Foreign Banks' Personal Loan Limitations** - S.2839(Farley)/A.8609(Rules, request of Schimminger) Conforms foreign banks' personal loan limitations to those of domestic banks. **(SUPPORT)** This bill passed the Senate and is pending in the Assembly Banks Committee.

■ **Subordinate Liens** - S.3401(Johnson)/A.7052 (Schimminger) A bill to subordinate liens for the storage of motor vehicles, boats and aircraft to pre-existing liens unless there is a contract for storage of the items was introduced. **(SUPPORT)** This bill protects the rights of pre-existing lien-holders when vehicles are towed, impounded or otherwise put in involuntary storage. This bill is pending in the Senate and Assembly Judiciary Committees.

■ **Monthly Board Reports** - S.3790-A(Farley)/A.9147-A(Rules, Request of Greene) A Banking Department bill that repeals the requirement that banks must report financial transactions each month to their boards and reduces the number of directors of a banking institution who must be U.S. citizens. **(SUPPORT)** This bill is pending in the Senate Banks and Assembly Rules Committees.

■ **Banking Department Supervisory Powers** - S.3791-B(Farley)/A.9146-B(Rules, Request of Greene) Clarifies the supervisory authority of the Banking Department; NYBA sought amendments which have now been included to protect bank due process rights. **(SUPPORT)** This bill is pending in the Senate Rules and Assembly Banks Committees.

■ **New York City Mutual Fund Investments** - S.3814(Goodman)/A.7301-A(Farrell) Permits New York City to invest in certain mutual funds. **(OPPOSE)** This bill is pending in the Senate Cities Committee and in the Assembly Local Governments Committee.

■ **Payday Loans** - S.5008-B(Farley)/A.3645-C(Klein) Authorizes check cashers to make "payday loans" or deferred deposit agreements at annual percentage rates up to 180%. **(NO POSITION)** This bill is pending in the Senate and Assembly Banks Committees.

■ **Separate Municipal Bank Accounts** - S.6050 (Rath)/A.10502(Sweeney) Removes the requirement that moneys in certain reserve funds be kept in sepa-

rate bank accounts. **(SUPPORT)** This bill passed the Senate and is pending in the Assembly Education Committee.

■ **Anti-money Laundering** - S.6491(Brown)/A.10413 (Powell) This legislation parallels the USA PATRIOT Act's anti-money laundering language. **(POSITION UNDER REVIEW)** It is pending in the Senate and Assembly Banks Committee.

■ **Travelers Check/Money Order Escheat** – S.6723 (Skelos)/A.11304(Rules, Request of Klein) Reduces from 15 years and seven years respectively the length of time after which travelers checks and money orders are considered abandoned property to five years. **(OPPOSE)** This bill is pending in the Senate Finance and Assembly Judiciary Committees.

■ **Excelsior Small Business Loans** – S.7797(Rules, Request of Spano)/A.11362(Rules, Request of Rivera) A NYBA initiative, this bill would authorize Excelsior linked deposits and linked loans to be made to a series of businesses, so long as no individual loans exceeded \$50,000. **(SUPPORT)** The bill is pending in the Senate Rules and Assembly Small Business Committees.

■ **Background Checks and Fingerprint Requirements** - S.3788(Farley) A Banking Department bill that provides the Department expanded flexibility with regard to background checks and fingerprint requirements for banking applicants. The bill was amended at NYBA's request to ensure due process rights for bank applicants. **(SUPPORT)** The bill is pending in the Senate Banks Committee.

■ **Sentencing Crime Act of 2002** - S.3794-A(Volker) Modernizes criminal penalties for certain violations of the Banking Law, among others. **(DO NOT OPPOSE)** The bill passed the Senate and is pending in the Assembly Codes Committee.

■ **Champerty** – S.7609-A(Lack) Limits the ability to assert the champerty defense except with respect to indenture trustees. **(SUPPORT)** NYBA negotiated key amendments to protect the interests of the banking industry in this legislation. The bill is pending in the Senate Rules Committee.

■ **Money Laundering for Terrorism** – S.7631(Spano) Establishes the crime of money laundering for terrorism. **(SUPPORT)** This bill, a program bill of the Governor and Attorney General, passed the Senate and is pending in the Assembly Codes Committee. ▼

■ Chapter Law Summary

■ **Check Cashing Facilities** The State Legislature completed action on S.6294(Farley)/A.9892(Greene), a bill supported by NYBA that would impose a three-year sunset provision on Chapter Law 591 of 2001. Chapter 591 limited the check casher exemption for banks that operate separate check cashing facilities by imposing a 3/10s of a mile restriction on non-grandfathered facilities. The Governor signed the bill as Chapter 29 of the Laws of 2002 on April 9.

■ Legislation providing for **redistricting of Senate and Assembly** seats was signed by the Governor as Chapter Law 38 of the Laws of 2002.

■ **Charitable Trust Reporting Requirements** - S.5611-D(Stafford)/A.871-F(Morelle) Increases reporting requirements for charitable trusts. **(SUPPORT)** NYBA obtained amendments that minimize unnecessary new reporting burdens. Governor Pataki signed this bill as Chapter 43 of the Laws of 2002.

■ **Foreclosure Prohibition** - S.7318(Lack)/A.11200(Rules, Request of Weinstein) Prohibits foreclosure on the primary residence of a litigant in a matrimonial action to satisfy legal fees in connection with the action. **(SUPPORT)** This bill was signed as Chapter 71 of the Laws of 2002 on May 21.

■ **Annual Budget** - S.6260-B(Budget)/A.9762-B (Budget) and Various Other Budget Bills. The State Legislature completed action this year on the Annual Budget, preserving the third year of the Bank Tax rate reduction, which will reduce the State's bank tax rate to 7.5% for fiscal years beginning on or after July 1, 2002. The budget also expanded the Excelsior Linked Depos-

it Program by \$150 million. Credit unions were not included in the program as part of the budget, although separate bills are pending that would include them. The budget also increased penalties for violating the State's "do not call" list from \$2,000 to up to \$5,000 per violation. **(SUPPORT)** Governor Pataki signed this bill as Chapter 85 of the laws of 2002 on May 29.

■ **Credit Card Fee Payments** - S.7368(Trunzo)/A.11373(Rules, Request of Gantt) Extends from July 7, 2002 to July 7, 2006 the law that permits the payment of traffic fees and charges by credit card. **(SUPPORT)** Governor Pataki signed this bill as Chapter 108 of the Laws of 2002.

■ **New York City Investments** - S.7530(Padavan)/A.11552 (Farrell) Extends New York City authority to invest in certain mutual funds for three years. **(DID NOT OPPOSE)** Governor Pataki signed this bill as Chapter 124 of the Laws of 2002.

■ **Foreign Bank Bonding Obligations** - S.849 (Balboni)/A.8991(Rules, Request of Greene) Expands foreign bank bonding obligations to include Sallie Mae and Freddie Mac obligations. **(SUPPORT)** The Governor signed this bill as Chapter 131 of the Laws of New York.

■ **Trust Operations by Bank Branches** – S.2964-A (Farley)/A.8632-A(Rules, Request of Schimming) Clarifies that branch offices of national banks as well as national banks headquartered in the State are subject to certain provisions of the Banking Law. Among other provisions, the legislation states that national bank branches may exercise trust powers. **(SUPPORT)** NYBA wrote Governor Pataki urging that the bill be approved. The Governor signed this bill as Chapter 134 of the Laws of New York.

■ **Savings Banks Record Keeping** – S.7179(Farley)/A.11112(Rules, Request of Greene) Makes Record keeping requirements for savings banks and savings and loan associations consistent with those applicable to commercial banks. **(SUPPORT)** Governor Pataki signed this bill as Chapter 164 of the Laws of 2002.

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■ **Electronic Bill Paying** - S.3479(Stafford)/A.9260 (Rules, Request of Abbate) Authorizes the payment of money owed by the State through electronic transfers. **(SUPPORT)** Governor Pataki signed this bill as Chapter 204 of the Laws of 2002.

■ **Water and Sewer Charges** - S.6046(Rath)/A.10463(Sweeney) Establishes a procedure for local governments to contract with banks to collect water and sewer charges, real property taxes, special assessments and other fees and charges. **(SUPPORT)** Governor Pataki signed this bill as Chapter Law 217 of the Laws of 2002.

■ **Statute of Frauds** - S.5669-B(Lack)/A.11106-A (Rules, Request of Weinstein) Amends the Statute of Frauds to make oral trades in loan participations legally enforceable. **(SUPPORT)** Governor Pataki signed this bill as Chapter 286 of the Laws of 2002.

■ **Loan Checks** - S.7128-A(Fuschillo)/A. 9772-A (Davis) Establishes procedures for the reduction of fraud with regard to loan-checks. NYBA suggested amendments to this bill, which were adopted. **(SUPPORT)** Governor Pataki signed this bill as Chapter 309 of the Laws of 2002.

■ **Electronic Signatures** - S.7289-A(Hannon)/A.11628-A(Rules, Request of Destito) Promotes the use of electronic signatures and the acceptance of electronic records. **(SUPPORT)** Governor Pataki signed this bill as Chapter 314 of the Laws of 2002.

■ **Water Pollution Revolving Loans** – S.7180-A (Balboni)/A.11167-A(Rules, Request of DiNapoli) Expands the water pollution control revolving loan fund program to include Federal wet weather quality grants. **(SUPPORT)** Governor Pataki signed this bill as Chapter 410 of the Laws of 2002.

■ **Group Property/Casualty Insurance** – S.7519 (Velella)/A.11590(Rules, Request of Grannis) Extends until 2007 the expiration date for group property/casualty insurance plans based on credit cards, debit cards or checking accounts. **(SUPPORT)** The Governor signed this bill as Chapter 415 of the Laws of New York.

■ **Securities Employee Fingerprinting** – S.6741-A (Skelos)/A.11791(Rules, Request of Silver) Expands the list of employees of the securities industry subject to mandatory fingerprinting. **(NO POSITION)** Governor Pataki signed this bill as Chapter 453 of the Laws of 2002.

■ **Mandatory Fiduciary Accounting** - S.6934 (Lack)/A.10756(Weinstein) Provides for multiple relief against a fiduciary who fails to respond by appearing or filing a court-ordered accounting, including removal of the fiduciary. **(SUPPORT)** Governor Pataki signed this bill as Chapter Law 457 of the Laws of 2002.

■ **Debit Cards** - S.4697-C(Spano)/A.5973-B(Matusow) Provides the same protection for debit cards as credit cards by prohibiting the printing of debit card numbers on transaction forms. **(SUPPORT)** Governor Pataki signed this bill as Chapter 479 of the Laws of 2002.

■ **Small Business Incubators** – S.6017(Alesi)/A.8735(Rules, Request of Sweeney) Provides assistance to small businesses started by women, minorities and persons with disabilities including referral to small business incubation centers. **(SUPPORT)** Governor Pataki signed this bill as Chapter 485 of the Laws of 2002.

■ **Guardian Health Care Decisions** – S.4622-B (Hannon)/A.8466-D(Rules, Request of Luster) Enacts the “Health Care Decisions Act for Persons with Mental Retardation” to establish procedures under the Surrogate’s Court Procedure Act for determining, prior to the appointment of a guardian, whether a mentally retarded person has the ability to make his or her own decisions regarding health care. **(DID NOT OPPOSE)** The Governor signed this bill as Chapter 500 of the Laws of New York.

■ **Real Estate Taxes** - S.7150(Fuschillo)/A.11278 (Rules, Request of DiNapoli) Provides penalties when a mortgagee who closes an escrow account for the payment of real estate taxes fails to notify the mortgagor of the responsibility to pay the taxes. The requirement for notice has been a provision of the Real Property Taxation Law for years. **(DID NOT OPPOSE)** The Governor signed this bill as Chapter 520 of the Laws of New York.

■ State Regulatory Developments

■ **Private Mortgage Insurance** - S.5494(Seward)/A.9159(Rules, Request of Lafayette) Authorizes private mortgage insurance (PMI) up to 100% of the fair market value of real estate securing junior lien loans (PMI on first liens was increased to 100% in 1997). **(SUPPORT)** Governor Pataki signed this bill as Chapter 577 of the Laws of 2002.

■ **Letters of Credit as Collateral** - S.7160(Farley)/A.11555(Rules, Request of Farrell) NYBA-supported legislation that permits letters of credit from AAA-rated Federal Home Loan Banks to be accepted at 100% value as collateral for municipal deposits, rather than 140%. **(SUPPORT)** Governor Pataki signed this bill as Chapter 615 of the Laws of 2002.

■ **Identity Theft** – S.7697-A(Spano)/A.4939-E (Pheffer) After three-way negotiations involving the Governor and leaders of both Houses, this bill was amended to provide strong criminal identity theft protection without adversely affecting information sharing. **(SUPPORT)** It was a NYBA priority and was signed by Governor Pataki as Chapter 619 of the Laws of New York.

■ **Predatory Lending** - S.7717(Rules), S.7728-A(Farley), S.7811(Farley), S.7840(Farley)/A.11856 (Rules, Request of Greene) A series of bills designed to regulate predatory lending, they reflect the progressive efforts of NYBA to negotiate with AARP and other groups a high cost home loan lending bill that will eliminate predatory practices without adversely affecting legitimate sub-prime lenders. A.11856 passed both Houses, but the Senate passed an accompanying chapter amendment, S.7840, designed to correct a number of flaws with the bill. Governor Pataki signed this bill as Chapter 626 of the Laws of 2002. NYBA intends to seek perfecting amendments to correct the remaining flaws in the legislation.

■ **Budget Planners** – S.7133-B(Farley)/A.11596-A-E (Rules, Request of Greene) Imposes certain registration, qualification and regulatory requirements on budget planners, but does not affect banks. **(NO POSITION)** Governor Pataki signed this bill as Chapter 629 of the Laws of 2002. ▼

■ BANKING BOARD ACTIONS

1. **High Cost Home Loans** — At its April 17, 2002 meeting, the New York State Banking Department Board announced its plan to issue for public comment proposed amendments to Part 41. The amendments were published for public comment in the May 8th edition of *The New York State Register*. Perhaps, the most notable of these amendments is a ban on the financing of single premium credit insurance in connection with a high-cost home loan subject to Part 41, to which NYBA did not object. The amendments also contemplate the choice of two sources to be used when determining the applicable yield on U.S. Treasury securities. In its June 18, 2002 comment letter regarding these then-proposed amendments, NYBA urged the Banking Department to limit to one, the choice of sources to be used for the “interest rate” test. Specifically, NYBA suggested that the “Federal CFR” cite (as published in the Federal Reserve Statistical Release known as H-15 Selected Interest Rates) be the mandated source as it has more maturities than the proposed alternative – the Banking Department website. NYBA pointed out that the choice of a single source would both eliminate the ambiguous requirement contained in the proposed amendment that the lender uses its chosen yield “consistently” and would also eliminate the regulatory burden set forth in the proposal of having to make a note in each file as to what index was being utilized.

However, the amendments were adopted as proposed in September.

(For background on the ATM lighting issue, please see the Dec. 17, 2001 *Banking Journal*.)

2. **ATM Lighting Standards** — NYBA continues to engage in a dialogue with the New York Banking Department regarding its enforcement of the ATM Safety Act. Numerous NYBA members have expressed concern that they are often cited for violations of the 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. Superintendent of Banks Elizabeth McCaul has repeatedly stated that she has no discretion under the statute to provide flexibility in its administration or enforcement. Progress was made in this regard at the end of the 2000 legislative session, with both the Banking Department

(Continued on next page)

and NYBA supporting a technical correction to the ATM Safety Act designed to allow the Banking Department greater flexibility in its enforcement. Although this corrective legislation was debated in the final week of the session, an agreement could not be reached. No such legislation was introduced in the 2001 legislative session.

In 2002, Senator Hugh Farley introduced S.7156, which seeks to make corrections to the ATM Safety Act, aimed at addressing technical flaws in the language of the existing statute. However, no companion bill was introduced in the Assembly.

3. Checking Account Fee — 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 which do not have overdraft protection privileges and yet have a negative balance. The 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 and national banks. NYBA is awaiting action by the Banking Department.

4. Board Members Written Consent — NYBA has petitioned the Banking Department to promulgate a regulation permitting boards of directors of New York State banks (as well as committees of such boards) to act without a meeting if all members of the board or committee consent to the action in writing. Section 7008(3) of the Banking Law specifically states that the Superintendent shall have the power to determine by regulation the circumstances under which an action required or permitted to be taken at any board meeting, may be taken by unanimous written consent. To date, however, no such regulation has been promulgated. This NYBA request is consistent with the association's goal of ensuring parity between State and nationally-chartered banks, as the OCC, by regulation, already permits boards of national banks (and committees thereto) to take action by unanimous written consent.

5. Wild Card Petition: Underwriting of Municipal Revenue Bonds

On March 16, 2000, NYBA filed a "wild card" petition with the New York State Banking Department requesting that State banks be provided the authority to underwrite municipal revenue bonds given to national banks by the Gramm-Leach-Bliley Act (GLBA). The petition cites Section 151 of the GLBA, which provides the municipal revenue bond underwriting authority for national banks as the basis to trigger the applicability of the "wild card" statute. The petition notes that, in the absence of comparable authority for State-chartered banks and trust companies, national banks will have a distinct competitive advantage not only in the competition for underwriting revenue bonds, but also in their ability to compete for all municipal deposits, loans, underwritings and services. To date, the Department has not submitted NYBA's petition to the Banking Board for approval or for public comment.

6. 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.

7. 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 which 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 consis-

tent with safe and sound banking practices.” While NYBA believes that this proposal is a significant 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.

■ CHARITABLE TRUST REPORTING REGS

After enactment of Chapter Law 43 this spring, the Attorney General’s Charities Bureau published a proposed regulation to implement the reporting requirements of the new law. The proposal, which was published in the April 17, 2002 State Register, sets forth registration and reporting requirements for charitable entities and fund-raising professionals. NYBA filed comments that were generally supportive of the proposal, but suggested a number of areas in which amendments would make the proposal more workable and reduce burdens on charitable trusts. NYBA suggested that exemptions where the charitable interest is deferred or contingent, such as charitable remainder trusts, be detailed. NYBA also urged that certain detailed materials required to be filed with annual reports of charitable trusts be simplified and that the current \$25,000 combined income and assets exemption from reporting be increased to \$50,000. Importantly, NYBA noted that banks are required to follow regulatory reporting requirements rather than generally accepted accounting principles in compiling annual financial statements and urged that the regulation recognize such reporting requirements.

In late September, the Charities Bureau published revised proposed regulations that incorporated many of the changes that NYBA recommended. However, the proposal failed to include important changes on generally accepted accounting principles and on reducing certain reporting requirements. NYBA re-filed its comment letter, urging the Bureau to ensure that any additional reporting burden serve the needs of the charitable beneficiaries of trusts, rather than merely create additional paperwork. The Bureau is expected to release temporary final regulations in the near future and to request additional comment thereon.

■ NON-NEW YORK TRUST FILING

In mid-April the State Department of Taxation and Finance sent out thousands of notices to bank trust departments requesting documentation that trusts whose tax returns filed with the Internal Revenue Service listing a New York State address were not required to pay New York fiduciary income tax. NYBA’s Trust and Estate Tax Committee, chaired by John Reale, Vice President, The Bank of New York, coordinated a response among New York trust departments and companies and NYBA hosted a meeting with Tax Department staff seeking an alternative to the extensive document searches that would have been necessary in response to the notices. The Department agreed to work with NYBA to establish a system of testing a relatively small number of returns from each affected bank to determine if the returns are required to be filed under New York law. NYBA submitted to the Tax Department the names of key contacts at each bank that received the notices to coordinate the sampling process.

After its meeting with NYBA, the Department began mailing out samples of the trust tax notices it had developed. It agreed to sample no more than 10% of each bank’s non-New York accounts and to provide banks with additional time in which to respond to the samples. The Department is also using the procedure developed with NYBA on partnership tax returns that have a New York mailing address on Federal returns but have not made a New York filing. NYBA is continuing to discuss with the Tax Department ways to minimize the burden of these notices for banks. ▼



“These are Slugger’s favorite trophies -- his product endorsement contracts.”

■ NYBA in Court

■ BLUEBIRD PARTNERS L.P. VS. FIRST FIDELITY BANK

Recent Developments: On March 26, 2002 the Court of Appeals reversed the Appellate Division decision in this case, and held, instead, that under New York's General Obligations Law, the plaintiff "vulture fund" which had purchased corporate debt of Continental Airlines in the secondary market after Continental's bankruptcy, acquired the claims of the original debt holders when it acquired the debt. Thus, the Court held that the plaintiff succeeded to the claim against the indenture trustee that the original holders would have had.

The Court of Appeals declined to address the trustees assertions that (i) GOL Section 13-101 directs that GOL Section 13-107 be interpreted to conform to the Trust Indenture Act (TIA), and thereby reflect federal "public policy" that claims remain with the bond seller; and (ii) TIA preempts GOL Section 13-107. Rather, the Court of Appeals remanded to the Appellate Division for consideration of those two issues. On August 15, 2002, the Appellate Division ruled that the TIA did not preempt State law. On August 29, 2002, the indenture trustee filed a motion for leave to appeal to the New York Court of Appeals.

KEY POINT: This decision is somewhat troubling because it raises the specter of the collection of double (or even multiple) damages, as the original bondholders arguably have a federal claim under the Trust Indenture Act (a claim that does not transfer to successors) for the very same act that allegedly forms the basis for plaintiff's state law claims.

Background: In March 1987, Continental Airlines and four defendant trustees entered into a Secured Equipment Indenture and Lease Agreement, pursuant to which Continental issued a \$350 million debt offering secured by collateral in the form of jet aircraft and space engines. In December 1990, Continental filed for Chapter 11 bankruptcy protection. In December 1991, Gabriel Capital, the predecessor to plaintiff Bluebird Partners, began accumulating Continental's first series certificates. In January 1994, Gabriel formed Bluebird and transferred to it all of the Continental first series certificates.

Between January 1994 and June 1996, Bluebird purchased an additional \$301 million worth of Continental second series certificates. Continental paid only \$664,625 for these certificates.

In February 1994, Bluebird commenced the first of several actions in the United States District Court for the Southern District of New York, alleging that the trustees had breached their fiduciary duty under State law and under the Trust Indenture Act (TIA) by failing to protect the value of the collateral during the bankruptcy proceedings. The Court dismissed the complaint, ruling that with respect to the TIA claims, a bond transfer does not carry with it the rights of the transferor. The court ruled that Bluebird lacked standing to sue because having acquired the bonds at a reduced price after the bankruptcy and alleged breach, it was not injured. The court refused to exercise pendent jurisdiction over the plaintiff's state law claims.

In March 1997, Bluebird commenced a lawsuit in New York State Supreme Court against the trustees and their respective law firms, asserting that the trustees delay in moving for adequate protection and in failing to move to lift the automatic stay amounted to fiduciary dereliction. The New York State Supreme Court denied the trustees' motions for summary judgment, allowing Bluebird to pursue its claim that the trustees had violated their fiduciary obligations. This decision was reversed by the Appellate Division which ruled that because General Obligations Law Section 13-107 requires that a transferee demonstrate its own injury in order to recover damages and because Bluebird failed to do so, it could not sue the trustees. Bluebird appealed that decision, and on January 25, 2002 NYBA and the American Bankers Association filed an amici curiae brief in support of the indenture trustee, arguing that the original bondholders would have a claim under TIA, for the same acts that formed the basis of Bluebird's state claims, and that therefore if Bluebird prevailed, the trustee could be subject to double liability. Such an outcome would violate clear federal policy that limits trustee liability to actual damages, and thus would be preempted by TIA.

The Court of Appeals reversed the decision of the Appellate Division on March 26, 2002. It ruled that nothing in GOL Section 13-107 requires that a transferee demonstrate its own injury in order to bring a claim for damages. Rather, it stated that the wording

of that statute makes it clear that the buyer of a bond receives exactly the same claims as the seller held before the transfer. The Court, however, remanded to the Appellate Division consideration of whether TIA preempted New York law.

Outlook: If the Court of Appeals ultimately finds that TIA does not preempt state law, this decision could have far reaching effects on indenture trustees, who could find themselves facing multiple claims from original bondholders and from transferees, even when such transferees have suffered no actual damages.

■ VISA CHECK/MASTERMONEY ANTITRUST LITIGATION

Recent Developments: On June 10, 2002, the U.S. Supreme Court denied *certiorari*, thus leaving stand the lower court's decision granting class status to a broad array of merchant plaintiffs. Trial is scheduled to begin on April 28, 2003. However, on Dec. 13, 2002, in a supplemental brief, MasterCard asked the court to dismiss the suit because they believe that the merchants' claims are legally and factually deficient.

KEY POINT: With the Supreme Court's denial of *certiorari*, the issue of whether the card associations' pricing of their debit card products violated Federal antitrust laws has become the focus of this litigation. Until now the issue has been the appropriateness and legality of certifying a class of virtually every retailer in the nation. The class action suit will potentially seek a multi billion dollar damage award against two bank card associations that play key roles in administering payment systems through which approximately \$1 trillion in transactions are conducted annually. Given the interrelation of the components of the payment system, upholding the class certification may have a significant impact on the banking industry and the overall economy. There is concern, too, that upholding the class certification may coerce the defendants into a settlement long before the merits of the case are tested. The effect of this decision as a precedent could also make it easier for other plaintiff classes to win certification against financial institutions that are often targets of class action litigation.

Background: In this case, several of the nation's largest retailers, including Wal Mart Stores, Sears Roebuck, Safeway and Circuit City, along with a num-

ber of smaller merchants and three retail associations, have challenged rules issued by Visa and MasterCard that require stores accepting their credit cards to also accept their debit cards. The plaintiffs allege that this is a tying arrangement and that the defendants have attempted and conspired to monopolize the debit card market, all in violation of the Sherman Antitrust Act.

Plaintiffs moved for certification of their case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, with the proposed class being comprised of all individuals and businesses that have accepted Visa and/or MasterCard credit cards, and have therefore been required to accept the debit cards, within the statute of limitations period. The class includes approximately four million merchants. The district court granted class certification on Feb. 22, 2000, rejecting the defendants' argument that plaintiffs' expert testimony regarding the appropriateness of class certification was inadmissible. He also rejected defendants' claim that class certification was inappropriate because members of the proposed class would not be able to show injury and because the injuries of others would vary in ways not "susceptible to resolution by a class wide formula."

The bank card associations appealed this decision to the Second Circuit Court of Appeals and NYBA filed a motion along with the American Bankers Association (ABA), the Consumer Bankers Association and the Financial Services Roundtable, seeking leave to file an *amicus curiae* brief with respect to the issue of class certification. While plaintiffs filed a motion in opposition to this filing, NYBA's motion was granted on Aug. 24, 2000. Oral arguments took place on Feb. 5, 2001.

In its *amicus curiae* brief to the Second Circuit Court of Appeals, NYBA challenged whether the court engaged in the "rigorous analysis" necessary to ensure that the requirements of Rule 23 allowing class certification were met. NYBA stated that the court wrongly failed to address any conflicts posed by the opposing parties' experts and also failed to consider the issue of manageability, noting that the court wrongly put off for another day the question of whether the damages issues in this case could end up requiring four million individual trials to resolve the question of damages.

On Oct. 17, 2001, the Second Circuit affirmed the District Court's decision, holding that at this stage, the

(Continued on next page)

■ Significant Legal Decisions

District Court should not engage in a battle of experts and that the class allegations should be taken to be true for purposes of the certification issue unless the defendant could show that the expert testimony is fatally flawed and would not be admissible as a matter of law. Therefore, the Second Circuit affirmed the District Court's decision to grant class status to the plaintiffs. The Second Circuit stated that the question for the District Court at the class certification stage with respect to expert testimony is whether plaintiffs' expert evidence "is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive." Thus, it upheld the District Court's rejection of defendants' claim that plaintiffs' expert testimony regarding the appropriateness of class certification was inadmissible. The Second Circuit also affirmed the lower Court's determination that the existence of injury and causation can be proven on a class-wide basis and also found that the District Court's conclusion that the action will be manageable as a class action did not constitute an abuse of its discretion. Visa and MasterCard filed a Petition for Rehearing and Rehearing *en banc* on Oct. 31, 2001 which was denied. A petition for a writ of *certiorari* was filed with the U.S. Supreme Court on April 3, 2002 and NYBA filed a supporting *amicus* brief on May 3.

Outlook: The Supreme Court's denial of *certiorari* means that the plaintiff class will proceed with its substantive claims. Because of the significant dollar amount in question, it is possible that defendants may feel the need to contemplate an early settlement, although currently a trial is scheduled for April 28, 2003.



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■ USE OF SOCIAL SECURITY BENEFITS

Lopez v. Washington Mutual Bank:

Recent Developments: On March 14, 2002, the Ninth Circuit Court of Appeals ruled that the use of Social Security and Supplemental Security Income (SSI) benefit funds directly deposited into a customer's account to clear overdraft balances violated 42 U.S.C. 407(a) and 1383(d), provisions which protect Social Security and SSI benefits from "execution, levy, attachment, garnishment, or other legal process" of creditors. The bank petitioned for rehearing *en banc*, which petition the panel granted on August 6, 2002. At that time, the panel also withdrew its original opinion, and issued an "amended opinion" in which it held that the plaintiffs had acted in such a manner as to have granted adequate consent to the application of their benefits to cover overdrafts and fees. As a result, the panel concluded that the bank's actions did not violate the law.

KEY POINT: This case is quite significant, in that if the original Ninth Circuit decision had remained unamended, it could have resulted in precluding financial institutions from offering overdraft protection to customers who have Social Security/SSI benefits deposited into their accounts, as these institutions would have no way to protect themselves from liability for overdrafts of their customers. Moreover, the need to identify and segregate those deposit accounts that contain federal benefit funds could have created significant administrative challenges.

Background: In this case, the plaintiffs each had an account with Washington Mutual Bank, to which their Social Security and/or SSI benefits were directly deposited. When opening their accounts, the plaintiffs agreed in writing that, in the event of an overdraft they would deposit funds to clear the overdraft balance, including any associated fees. The plaintiffs overdrew their accounts. As plaintiffs' next deposits were directly deposited SSI and/or Social Security benefits, these were credited against the overdraft balances in their accounts. Plaintiffs claimed that this overdraft practice was violative of 42 U.S.C. 407(a) and 1383(d)(1).

The District Court granted Washington Mutual's motion for summary judgment, stating that the bank's overdraft practice did not constitute "other legal process" in violation of Section 407, as the practice did not

involve any coercion of the benefits recipient. The Ninth Circuit reversed, holding that the setoff of the benefit funds did in fact constitute "other legal process". The bank filed a petition for rehearing *en banc*. The U.S. Treasury, Social Security Administration and Office of Thrift Supervision also filed briefs supporting a rehearing. The court then directed the plaintiffs to file a response to the petition, which was done on May 31.

Outlook: As the Ninth Circuit ruling was amended, it has forestalled what could have been a significant disruptive impact on normal bank operations relative to Social Security/SSI accounts, at least to those institutions within that Circuit's jurisdiction.

■ ATM SURCHARGE FEES

Bank of America, et al. v. City and County of San Francisco, et al. (No. C 99 4817 VRW)

Recent Developments: In July 2000, the United States District Court for the Northern District of California issued a ruling that struck down ATM surcharge bans in Santa Monica and San Francisco. U.S. District Court Judge Vaughn Walker ruled that only the Federal government could impose such restrictions on nationally chartered banks and thrift institutions, citing the National Bank Act and Home Owners Loan Act. Both Santa Monica and San Francisco filed notices of appeal on July 14, 2000. The banks filed their briefs in this matter on Dec. 13, 2000. Oral arguments were held on Jan. 17, 2002. On October 25, 2002, the Ninth Circuit affirmed the lower court's decision ruling that the Home Owners Loan Act and the National Bank Act preempted the localities' surcharge bans and rejecting the argument that the ordinances were saved from preemption the Electronic Funds Transfer Act.

KEY POINT: This case has provided red letter law with respect to the question of whether and to what extent a state regulatory body has enforcement powers over a national bank, at least with respect to the bank's ability to set fees. As more and more municipalities and state governments question the appropriateness of banks' array of fees, and the amount of those fees, the decision, finding that Federal law preempts state governmental regulation with respect to national banks, may be pivotal in maintaining a deregulated competitive pricing environment.

Background: On Oct. 12, 1999 the citizenry of the City of Santa Monica voted to adopt section 4.32.040 of the Municipal Code, thereby banning (effective Nov. 11, 1999), the imposition by banks of ATM convenience fees by use of ATM machines by non-customers. The voters of the City and County of San Francisco, California, on Nov. 2, 1999 approved Proposition F, an ordinance also banning ATM convenience fees. (The San Francisco ordinance was scheduled to become effective on or about Dec. 1, 1999.) On Nov. 3, 1999, the plaintiffs in this matter filed suit in the United States District Court for the Northern District of California, seeking declaratory and injunctive relief, preventing implementation of the fee bans. The banks claimed that the San Francisco and Santa Monica ordinances are preempted by the National Bank Act, 12 U.S.C. Section 21 *et seq.*, as well as regulations adopted by the Office of the Comptroller of the Currency.

In its Nov. 15, 1999 ruling, (which was reaffirmed and clarified on Nov. 24, 1999), the court granted the preliminary injunction based on its assessment that the ordinances were likely preempted by federal law as to the national bank plaintiffs and the provisions applicable to state-chartered banks non severable and thus also invalid. While enjoining the defendants from enforcing the disputed ordinance, the court also required plaintiffs to escrow any fees whose collection would otherwise violate the ordinances pending the outcome of the litigation, and to post \$50,000 bond. In its Nov. 24, 1999 ruling the Court further prohibited the City of San Francisco from certifying its referendum results and barred residents in Santa Monica, which had already enacted its ordinance, from suing banks over the issue.

On March 31, 2000, the Ninth Circuit upheld the granting of the preliminary injunction by the United States District Court enjoining the defendants from enforcing these disputed city ordinances.

Outlook: This decision, which has clearly ruled that national banks cannot be subjected to ATM fee bans imposed on them by local governments, coupled with similarly favorable recent decisions in other cases addressing this issue nationwide, will hopefully quell the interest of local governments in pursuing ATM fee bans.

■ PREDATORY LENDING

National Minority Mortgage Brokers Association v. Department of Banking and Finance (Fulton Co. (GA) Super. Ct. No. 2002 CV 60063).

Recent Developments: On October 16, 2002, a trade association for mortgage brokers as well as a number of consumers seeking home lending opportunities filed suit in the Superior Court of Fulton County, Georgia seeking injunctive relief and a declaratory judgment that the recently enacted Georgia Fair Lending Act (GAFLA) is unconstitutional and preempted by federal law. Plaintiffs' complaint alleges that GAFLA "has created an inequitable, anti-competitive and discriminatory marketplace; a threat to the continued viability and maintenance of the Georgia mortgage industry, and a severe reduction in the availability of credit to the public, particularly low and moderate income households."

KEY POINT: Over the last several years, there has been a tremendous effort by consumer groups and legislatures to impose restrictions on high cost home lending practices. A number of states –including New York - have recently enacted legislative initiatives, which restrict or prohibit some lending practices for loans which exceed rate and points and fees thresholds set statutorily. While these legislative initiatives are designed to eradicate predatory lending, many lenders and bank trade associations – including NYBA – have urged that such legislation not be so restrictive as to inadvertently reduce access to credit for low and moderate income consumers (see discussion on page 4). Ironically, the Georgia statute was supported by consumer advocacy groups and pointed to by them as an example of effective high cost home lending legislation. This suit would appear, however, to validate the concerns expressed by the lending industry that there could be serious unintended consequences to overly restrictive legislation. Significantly, too, as this complaint alleges federal preemption, it may further broaden the national debate on the current spate of state high cost home lending statutes.

Background: GAFLA, which became effective on October 1, 2002, imposes restrictions and prohibitions on certain lending practices when loans exceed the statutorily prescribed thresholds. Among the restrictions impacting loans that exceed certain man-

dated thresholds are limitations on prepayment penalties, a prohibition on the financing of credit insurance, a prohibition on balloon payments, a prohibition on mandatory arbitration, and a requirement that a "reasonable creditor" believe that the borrower has an ability to repay the loan. The statute also creates a private right of action for damages, a five year right of rescission for certain statutory violations, and subjects assignees to all affirmative claims and any defenses that the borrower could assert against the original lender.

In their complaint, plaintiffs allege that as a result of the terms of the statute, at least 14 national lenders have announced that they will not purchase "covered" and "high cost" loans (as those loans are statutorily defined) in Georgia. They state that legitimate mortgage brokers are being eliminated from the subprime high-cost home loan industry because of GAFLA's "ambiguous language, potential arbitrary application and severe cumulative civil and criminal penalties" and state that GAFLA has caused a reduction in the availability of loan financing to low- and moderate-income consumers deemed to be high risk. Plaintiffs argue that the terms of the statute are vague and indefinite, and as such violate the due process clauses of the United States and Georgia Constitutions. Plaintiffs also allege that many of the provisions of GAFLA are preempted by the Alternative Mortgage Transaction Parity Act of 1982.

Outlook: As this lawsuit has only just begun, it is too early to tell what, if any, impact it will have on current state predatory lending laws already in existence and on the ongoing efforts of consumer groups that, to date, continue to lobby for additional legislative initiatives regulating high cost home lending. ▼



"With all I've learned this year, establishing who's naughty and who's nice is not as simple as it used to be."

■ Federal Legislative Developments

■ DEPOSIT INSURANCE REFORM

(For background, please see the July 26, 2002 issue of the *Banking Journal*.)

Despite House passage of a strong, positive deposit insurance reform bill, Congress adjourned for the year without completing action on NYBA's top Federal priority. Nevertheless, enhanced municipal deposit coverage moved closer to reality with a substantial increase in coverage in H.R.3717 and an FDIC study, at NYBA's request, of the feasibility of providing optional deposit insurance coverage for municipal deposits in excess of the deposit insurance limits.

After House passage of H.R.3717 in May, debate among members of the Senate Banking Committee began. Although several Democrats on the Committee favored the bill, including New York's Senator Charles Schumer, Chairman Paul Sarbanes (D-MD) remained noncommittal and ranking Republican Phil Gramm (TX) was strongly opposed to any increase in coverage. As the election approached, deposit insurance reform even became a political issue in the race of the chief Senate sponsor of the bill, Senator Tim Johnson (D-SD). Treasury Undersecretary Peter Fisher announced in mid-September the Treasury's support for deposit insurance reform, but only if no coverage increase is included. In response, FDIC Chairman Don Powell stated his view that FDIC reform legislation remains possible if all parties are willing to compromise on the coverage issue. The following week House Financial Services Committee Chairman Michael Oxley (R-OH) said that he would not object to striking from the House deposit insurance reform bill the provision that raises the coverage limit by 30% as a matter of compromise, but that, at a minimum, coverage should be indexed to inflation. Nevertheless, the Senate took no action on deposit insurance reform legislation and the Congress adjourned without further action.

At their November meetings, NYBA's Legislative and Regulatory Policy Committee and Board of Directors ratified their current position on deposit insurance reform including higher deposit insurance coverage for municipal deposits. The Policy Committee and Board also ratified NYBA's agreement with CBANYS, in conjunction with IBANYS, to seek parity for municipal deposit taking in the context of deposit insurance reform legislation in Washington.

At the same time as the legislative process slowed, NYBA requested that the FDIC independently conduct

a study of optional deposit insurance coverage for municipal deposits in excess of any limits that should be Congressionally enacted. At NYBA's July Washington visit, Chairman Powell agreed to conduct the study. The FDIC staff has been engaged in the study since then. NYBA has submitted considerable material to the Corporation on the value of higher coverage. A report is expected from FDIC later this year or early next.

NYBA's current policy on deposit insurance reform and a summary of H.R.3717, which should become the basis of deposit insurance reform legislative discussions next year, follow:

DEPOSIT INSURANCE COVERAGE POLICY

NYBA, by vote of its Board of Directors, has adopted the following policy recommendation with regard to deposit insurance coverage by the Federal Deposit Insurance Corporation:

1. NYBA supports full coverage of public deposits as a top priority. The elimination of collateral requirements for municipal deposits will relieve banks of all sizes of a significant expense and create increased opportunities for banks to compete for deposits that may have moved to public or private investment vehicles. At the same time, NYBA recognizes that permitting unlimited insured deposits in any single bank could create a moral hazard and would support appropriate safeguards.
2. NYBA also strongly supports the indexation of coverage by the deposit insurance fund sufficient to adjust for inflation. The increase in coverage could be phased in, perhaps over three years, subject to semi-annual review by the FDIC. The Corporation should have the authority to defer the phase-in at any point that it threatens to reduce the deposit insurance required reserve below 1.25% of insured deposits. NYBA would also support the merger of BIF and SAIF.
3. Newly-chartered banks and those that enjoy a dramatic increase in insured deposits should be required to pay an entrance fee sufficient to cover the manageable cost of insuring fully public deposits and of compensating for future increases in inflation.

SUMMARY OF H.R.3717, AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES

On Tuesday, May 21, 2002, the United States House of Representatives passed, by a vote of 408-18, H.R.3717, the Federal Deposit Insurance Reform Act of

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2002. All members of the New York Congressional delegation voted for the bill. The bill includes the following provisions:

- Merger of the Bank Insurance Fund (BIF) and the Savings Association Insurance Fund (SAIF) into a newly created Deposit Insurance Fund (DIF).
- Increases in deposit insurance coverage, including:
 - a general coverage increase for all deposit accounts from \$100,000 to \$130,000;
 - providing pass-through deposit insurance coverage for employee benefit plans, but prohibiting institutions that are not well-capitalized from accepting such plans;
 - increase in insurance for retirement plans, including IRAs, 401(k)s and Keogh plans, to \$230,000;
 - indexing the new \$130,000 standard maximum insurance limit every 5 years to inflation, rounded to the nearest \$10,000 and beginning January 1, 2005; and
 - increasing coverage for public depositors, including state and local governments, to the new standard maximum insurance limit plus 80% of the amount in each depositor's account up to \$2 million.
- Preemption on State restrictions on the ability of insured depository institutions (defined as commercial and savings banks) to accept public deposits and on State restrictions on the ability of public depositors to make such deposits.
- Expansion of the investment authority for the deposit insurance fund beyond U.S. government obligations.
- Authority for the FDIC to set deposit insurance assessments at whatever level is necessary or appropriate to maintain the designated reserve ratio, eliminating the current requirement of 23 basis point assessments under certain circumstances, and repealing the limitation on the FDIC charging premiums to the best-managed, best capitalized institutions so long as the deposit insurance reserve ratio remains above 1.25%; however, the highest rated institutions could not be charged a premium in excess of 1 basis point unless the ratio falls below 1.15%.
- Replacement of the current 1.25% mandatory designated reserve ratio (DRR) with a new DRR range of 1.15% to 1.40% with the FDIC Board having discretion to adopt a DRR within this range based on (1) present and future risk of losses to the DIF; (2) economic conditions; and (3) any other factors the Board considers appropriate. All changes to the range are subject to notice and comment.
- Establishment of a system of dividends and credits

from the DIF, including:

- a requirement that dividends be paid comprised of all amounts in excess of that necessary to maintain the DRR when the reserve ratio equals or exceeds 1.40% of estimated insured deposits;
- a requirement that dividends equal to 50% of assessment income be paid whenever the reserve ratio equals or exceeds 1.35% and is less than 1.40%;
- authority for the FDIC to pay dividends whenever the reserve ratio equals or exceeds 1.30% and the Board has set the DRR below 1.30%;
- a transitional credit of 12 basis points of the total assessment base as of December 31, 2001 (equaling approximately \$5.4 billion) for insured depository institutions based on their percentage of total industry insured deposits as of December 31, 1996; and
- modification in the definition of the DIF reserve ratio to add back any reserves the FDIC has set aside from the reserve fund for anticipated losses from failed institutions.

The FDIC is required to adopt regulations within 270 days after date of enactment of the bill prescribing the DRR, implementing increases in deposit insurance coverage, implementing the dividend requirements and assessment credit and providing for premium assessments.

In addition, the bill mandates several studies including studies of the feasibility of a voluntary system of deposits in excess of the maximum amounts in the bill and of the feasibility of privatizing deposit insurance. The bill also provides parity for credit unions on all coverage increases.

■ PRIVACY

Congress adjourned without enacting any legislation placing further restrictions on banks' use of consumer and customer information. During the session, however, the focus of federal legislative interest remained on measures designed to address identity theft – with particular interest in limiting the use of social security numbers. In this regard, The Social Security Number Privacy and Identity Theft Prevention Act of 2001 (H.R.2036) introduced by Rep. E. Clay Shaw, Jr. (R-FL) and a companion bill, the Social Security Number Misuse Prevention Act of 2001 (S.848), introduced by Senators Dianne Feinstein (D-CA) and Judd Gregg (R-NH) – had some traction. S.848 was reported by the Senate Judiciary Committee on May 16, 2002 and the Senate Finance

Social Security - Family Policy Subcommittee held a hearing on the bill in early July. It is likely that this bill -- or one similar to it -- will be re-introduced in the next Congress. Moreover, it is expected that privacy will be a key focus of the next Congress, as the likely incoming Senate Banking Committee Chairman Richard Shelby (R-AL) has already expressed his interest in this issue, as well as his view that he would only consider giving financial companies a federal preemption from state privacy laws if national restrictions included an "opt in" requirement for information sharing. This is particularly relevant as the Fair Credit Reporting Act provision, which preempts the states' ability to mandate additional restrictions on information sharing between affiliates, if not made permanent or extended, will expire on January 1, 2004.

■ BANKRUPTCY REFORM

(For background, see the July 26, 2002 *Banking Journal*.)

Immediately prior to the August recess, House and Senate conferees reached agreement on landmark bankruptcy reform legislation that the lending industry has been seeking for six years. However, legislation that had passed both Houses of Congress by overwhelming majorities was once more torpedoed at the last minute. In 2000, President Clinton vetoed reform legislation that reached his desk after expressing concern about its potential effect on single mothers and lower-income persons. This year, the bankruptcy reform conference report that President Bush had already agreed to sign was defeated during the "lame duck" session of Congress following the election, over language that engendered opposition from both pro-life groups and unions. Many proponents of bankruptcy reform have expressed concern that reform may never be enacted in the current legislative climate, but others are committed to starting the legislative process anew in the 108th Congress.

NYBA strongly supported bankruptcy reform and urged all members of the New York delegation to vote in favor of it. The bill, as approved by the Conference Committee, would have eliminated many of the abuses that have allowed higher income filers to avoid paying their creditors. By establishing a needs-based system of bankruptcy, the bill would also have encouraged those who can afford to pay back some of their unsecured loans to do so. Bankruptcy reform would also

assist in limiting the burden of unpaid credit on consumers who pay their bills on time and in full. In addition, the bill would protect the most vulnerable, by sheltering all filers that earn less than the median income from its more restrictive provisions and by providing a new priority in bankruptcy for child support and alimony payments. In fact, child support advocates have said that the bill will "enhance substantially" the enforcement of support obligations against debtors in bankruptcy.

There follows a summary of the conference report which will be the starting point for reform discussions next year:

BANKRUPTCY REFORM LEGISLATION SUMMARY

House and Senate Conferees agreed on bankruptcy reform legislation, which was expected to be considered when Congress returned from its August recess after Labor Day. However, concerns raised by pro-life organizations with regard to limits on bankruptcy for violent anti-abortion protesters deferred consideration of the bill until the "lame duck" session after the election. When House leaders sought to bring the bill to a vote in November, however, the rule that would have allowed consideration of the bill was unexpectedly defeated when the pro-life lobby was joined in opposition by many union groups concerned that the language of the Schumer-Hyde amendment (see below) could restrict union picketing activities.

The Conference reported bill is H.R.333, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2002." The House originally passed H.R.333 in early 2001, by a vote of 306-108 with a solid majority of New York Representatives voting in favor of the bill. Both New York Senators voted for S.420, the Bankruptcy Reform Act of 2001, which passed the Senate by a vote of 83-15. The compromise bill is intended to move towards a needs-based system of bankruptcy, encouraging those who can pay a portion of their unsecured debt to do so. In addition to provisions affecting consumer bankruptcies (Chapters 7 and 13), the bill would also amend Chapter 11 with regard to businesses and Chapter 12 on agricultural bankruptcies. This summary will focus on the major provisions of the H.R.333. The President Bush indicated that he would sign the bill, if it reached his desk.

I. Needs-Based Bankruptcy – The bill creates an objective, needs-based test for determining whether a consumer is abusing a Chapter 7 bankruptcy filing (permitting discharge of debts), but the test is applicable

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only to consumers with income in excess of the state median income level. Provisions are included to protect low-income filers, single parents, children and others in need. The bill creates a presumption of abuse of Chapter 7 if a debtor with more than 150% of the median income fails the needs-based test.

II. Limits of Discharge – Categories of non-dischargeable debt are increased, including cash advances and charges for “luxury goods and services” and debts incurred to pay state or local taxes. The period for non-discharge prior to filing is increased from 60 to 90 days. In a crucial compromise, limits are placed on the ability to shelter real estate from bankruptcy with debtors prohibited from sheltering more than \$125,000 when they move into a State within 40 months of filing for bankruptcy or if they are convicted felons or owe debts for violations of certain Federal or State laws. In addition, in the so-called Schumer-Hyde amendment, a compromise was reached between Senator Charles Schumer (D-NY), sponsor of an amendment to the Senate-passed version of bankruptcy reform that would have precluded groups that were held liable for damages for restricting access to abortion clinics from seeking bankruptcy relief, and Rep. Henry Hyde (R-Ill), former Chairman of the House Judiciary Committee and one of the leading pro-life members of Congress. Under the compromise, bankruptcy protection could be denied any group or organization that was held liable for damages for denying access to providers of legal goods and services.

III. Debtor Requirements – Conditions consumer eligibility for bankruptcy on completion of credit counseling and financial education; requires debtors to submit tax returns, available to creditors on request; increases the length of Chapter 13 repayment plans to five years.

IV. Creditor Requirements – Consumer lenders are required to make extensive new disclosures regarding minimum payments, “teaser rates,” late payment deadlines and fees, the tax consequences of home equity loans, and, for lenders over \$250 million in assets, additional information through an “800” number. Standardized disclosures and explanations must be used to obtain valid reaffirmations. In addition, any purchaser through a bankruptcy sale of an interest in a consumer transaction subject to the Truth in Lending Act or in a consumer credit contract will remain subject to all claims and defenses on such assets to the same

extent as if the sale did not occur through bankruptcy. Additional retirement programs and education IRAs and tuition program credits are sheltered from creditors. Limits are placed on the use of non-public customer information purchased from a bankrupt debtor.

V. Secured Loans – Secured creditors gain additional protection with debtors filing for Chapter 13 plans required to continue making payments on secured loans while approval of the repayment plan is pending. “Cramdowns” of debt secured by personal motor vehicles are prohibited if the vehicle was purchased within two years of the filing. A secured creditor under Chapter 13 retains its lien until a debt is repaid or a debtor discharged. And the value of claims secured by personal property is specified as replacement value, without deduction for marketing or sales costs, with Chapter 7 filers required to reaffirm or redeem a loan within 45 days or surrender the property.

VI. Commercial and Administrative Provisions – The bill establishes an expedited form of Chapter 11 reorganization for businesses with less than \$2 million in outstanding debts; allows creditors to be represented by non-attorneys at the first creditor’s meeting; lengthens the permissible time periods between prior bankruptcy discharges and new Chapter 7 or 13 filings; and allows direct appeals of bankruptcy court rulings to the U.S. Court of Appeals under certain circumstances.

A more extensive summary of H.R. 333, along with a copy of the bill itself, may be obtained from the House Judiciary Committee website.

■ REAL ESTATE BROKERAGE & MANAGEMENT

In January 2001, the Board of Governors of the Federal Reserve System, in consultation with the Treasury Department, published for public comment a proposal to authorize financial holding companies and the financial subsidiaries of national banks to engage in real estate brokerage and management activities. The proposal was in response to a petition from the ABA urging that these activities be considered “financial in nature or incidental to a financial activity” under the provision of the Gramm-Leach-Bliley Act that authorizes financial holding companies and national bank financial subsidiaries to engage in any such activities.

NYBA filed a comment letter in April 2001 strongly supporting the proposal. NYBA noted that their home is the largest single financial asset owned by most Americans and their mortgage the largest financial

commitment. One of the definitions adopted by Congress for activities that are financial in nature is “arranging, effecting or facilitating financial transactions for the account of third parties,” a definition within which brokering a transaction in real estate or managing real estate comfortably fits. Moreover, NYBA also pointed out that real estate brokerage and management are certainly incidental to the financial activity of investing in real estate through the purchase or lease of a real estate asset. NYBA’s comments also noted the ability of many real estate brokerage companies to offer “one-stop shopping” for their customers by combining brokerage of real estate with mortgage lending, and argued the need for banks to remain competitive by being able to engage in similar transactions.

With the release of the Fed/Treasury proposal, national trade groups representing the real estate brokerage industry began a grass roots campaign to persuade the regulators not to approve real estate brokerage and management as financial activities or as incidental to banking. In addition, they are urging Congress to preclude the regulators from making such a determination. While the banking industry filed several hundred letters in support of real estate brokerage and management authority with the Fed and Treasury prior to the expiration of the comment period, the real estate brokerage industry filed more than 40,000 in opposition. Moreover, the Realtors inundated Congress with more than 100,000 letters, while bankers sent far fewer.

Arguments in favor of Congress remaining uninvolved in the Fed/Treasury decision with regard to real estate brokerage and management include:

- Congress established the Fed/Treasury regulatory mechanism as a means at arriving at an expert determination on issues of financial competition. To override that provision at this early stage would invite financial participants to involve Congress in every competitive dispute in the future.
- Consumers who employ a bank-affiliated real estate broker or manager will be fully protected, not only under all Federal, state and local laws that apply to brokers and managers of real estate, but also under additional banking regulations, such as the anti-tying provisions of the Bank Holding Company Act of 1956.
- Real estate brokerage and management present no significant safety and soundness concerns, requiring only a small investment of bank capital and virtually no

risk to bank profitability. The activities are closely related to functions, such as real estate lending and appraisal, that banks already perform.

- Technological and competitive changes in the real estate brokerage marketplace, including on-line brokerage services, the spread of multiple listing services and the availability of nationwide networks of brokers and managers, have already substantially increased competition for Realtors. The advent of financial holding company and subsidiary competition will not have a material impact on competition, as demonstrated by the fact that thrift institutions nationwide and State-chartered banks in many states already have real estate brokerage authority.

In late 2001, Realtors were successful in having legislation introduced in both Houses of Congress that would preclude the Federal Reserve Board and Treasury from approving any regulation authorizing financial holding companies or national banks from engaging in real estate brokerage and management. To date, the House bill, H.R.3424, has more than 240 co-sponsors, including 18 from New York, while the Senate bill, S.1839, has 15, including Senator Clinton. The Federal Reserve Board and Treasury Department have announced that they will not consider the real estate brokerage regulation prior to 2003. Nevertheless, the Realtors have moved to attach their legislation as an amendment to pending appropriations bills. On July 11, the House Appropriations Committee added an amendment that prohibits the Treasury Department from using any appropriated funds to approve or enforce the regulation authorizing real estate brokerage. The full House passed the bill the following week, without separate consideration of the real estate brokerage language. The Senate failed to consider a Treasury-General Government Appropriations bill, and appropriations were ultimately provided the Treasury Department and related agencies in a long-term continuing resolution passed during the “lame duck session” which did not include restrictions on real estate activities. The issue is expected to be further considered when Congress returns in January. NYBA has written all members of the New York Congressional delegation urging that they not co-sponsor the Realtors’ legislation.

■ EXPANDED MMDA and INTEREST ON

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BUSINESS CHECKING

For the past six years, NYBA has been alone among state bankers associations in opposing legislation calling for the immediate or short-term repeal of the prohibition on the payment of interest on demand deposits. The practical effect of repeal of the prohibition would be to permit interest on corporate checking accounts, since all other types of account holders are eligible for NOW accounts. NYBA has twice unsuccessfully petitioned the Board of Governors of the Federal Reserve System to use its regulatory authority to increase from six to 24 per month the number of authorized withdrawals from a money market deposit account, an amendment that would, in effect, permit daily payment of interest on idle transaction account balances.

In April 2001, the House of Representatives passed H.R.974, the Small Business Interest Checking Act of 2001, sponsored by Representative Sue Kelly (R-Westchester) by voice vote. Congresswoman Kelly, along with Senator Schumer, has been a stalwart on this issue, several times introducing legislation and amendments to defer the effective date of interest checking repeal. The bill represents a compromise between Congresswoman Kelly's original version of the legislation, which would have delayed repeal of the prohibition for three years, and efforts by the House Republican leadership to repeal the prohibition in a much shorter time frame. H.R.974 would also authorize 24 MMDA transfers and provide the Federal Reserve Board with both authority to pay interest on sterile reserves at a short-term market rate and greater flexibility in setting reserve requirements. In an attempt to maintain the pressure on the Senate to resolve this issue, the House passed H.R.1009, legislation essentially identical to H.R.974, in April 2002. President Bush also called for the bill's enactment.

In the Senate, two bills repealing the prohibition on the payment of interest on demand deposits have been introduced. Senator Chuck Hagel (R-NE) introduced S.229, the Interest on Business Checking Act of 2001, which provides for repeal of the prohibition two years from the date of enactment along with immediate authorization for 24 transfers and payment on interest on sterile reserves. Senator Richard Shelby (R-AL) sponsored S.601, the Small Business Checking Regulatory Relief Act of 2001, which provides for an immediate increase to 24 transfers, no interest on sterile reserves

and repeal of the prohibition effective September 1, 2002. It appears unlikely that either bill would be considered in the Senate as stand-alone legislation. However, the Chairman of the Senate Committee on Health, Education, Labor and Pensions, Senator Edward M. Kennedy, has expressed strong support for legislation to increase the minimum wage. Legislation to provide for interest on corporate checking accounts is considered by Senate leadership as one possible offset for the cost of the higher minimum wage for small business interests, which have been the major proponents (along with the thrift industry) of this legislation.

As the legislative process has continued, an increasing number of bankers have focused on the costs of repealing the prohibition on the payment of interest on demand deposits. At the November 2002 meetings of its Policy Committee and Board of Directors, NYBA determined to oppose any repeal, reaffirming its support for an increase from 6 to 24 in the number of transfers from a money market deposit account. Congress adjourned without taking additional action on the issue. It is not expected to be a major agenda item for early action in the next Congress.

■ TERRORISM INSURANCE

Immediately prior to the August recess, both House and Senate appointed conferees for the terrorism insurance legislation. Meeting throughout the Fall, conferees reached relatively quick agreement on all sections of the bill other than restrictions on tort liability. Among the key conferees were New Yorkers Senator Charles Schumer and Reps. Vito Fossella (R-Staten Island), Sue Kelly (R-Westchester) and John LaFalce (D-Niagara). Agreement on tort reform came in mid-October, but language could not be worked out prior to the election.

Under the agreement, a three-year federal backstop would be put in place for private terrorism insurance policies. Insurers would provide coverage equivalent to 7% of their overall premiums in the first year, 10% in the second, and 15% in the third, and the federal government would insure 90% of losses in excess of those amounts. Government payments below \$10 billion in the first year, \$12.5 billion in the second, and \$15 billion in the third would be recouped through a surcharge on all policyholders. The surcharge could not exceed 3% of premiums in any year.

On the contentious issue of tort reform, conferees agreed to consolidate all future terrorism-related civil

litigation in a single federal court, eliminating state court jurisdiction, but will allow claims for punitive damages against private parties. Administration officials and the real estate industry estimate that \$15 billion in pending real estate development with 300,000 accompanying jobs have been held up because of the absence of terrorism insurance.

When Congress returned after the November elections, passage of terrorism insurance was urged by a coalition of business and labor groups concerned about the availability and cost of insurance. On November 19, the Congress completed action on H.R.3210, the Terrorism Risk Insurance Act of 2002, clearing the bill for the President's consideration. President Bush signed the bill on November 26 as Public Law 107-297. The bill is the result of more than a year of Congressional deliberation and is expected to resolve a crisis in the property and casualty insurance market that has made terrorism insurance either unavailable or vastly more expensive. Without such insurance, many pending and proposed real estate development and other business projects have been delayed or eliminated. NYBA was one of the first organizations in the country to call for enactment of terrorism insurance, writing all members of the New York Congressional delegation in the fall of 2001 to urge that this issue be addressed.

The bill is a compromise between House and Senate-passed terrorism insurance legislation. In the House, 35 members co-sponsored the bill, including New Yorkers Sue Kelly (R-Westchester), Vito Fossella (R-Staten Island) and Felix Grucci (R-Suffolk). In the Senate, S.2600, the Senate version, had six co-sponsors, including both New York Senators Charles Schumer and Hillary Rodham Clinton. A summary of the bill's provisions follows:

**A brief summary of Public Law 107-297,
The Terrorism Risk Insurance Act of 2002**

The bill establishes within the Department of the Treasury the "Terrorism Insurance Program" (the "Program"). The Program mandates that all property and casualty insurers and certain other insurance carriers participate and sets forth procedures for certifying losses to the Treasury Department. The Program is effective on the date of enactment of the bill and continues through December 31, 2005, although the Secretary of the Treasury may determine that mandatory coverage by private insurers is no longer required during the final program year (2005).

The Program establishes an insurer deductible for each program year. During the transition period beginning on the date of enactment and ending on December 31, 2002, the deductible is equal to 1% of an insurance company's earned premiums on covered policies during the previous calendar year; during the first Program year (2003), the deductible equals 7%; during the second Program year (2004), the deductible equals 10%; and, during the third program year (2005), the deductible equals 15% of earned premiums during the previous calendar year. The Program will cover 90% of all losses due to terrorism (as determined by the Secretary of the Treasury with the concurrence of the Secretary of State and Attorney General) in excess of the annual deductibles. However, neither the Program nor any private insurer will be liable for losses in excess of \$100 billion in any year.

In addition, the Program sets mandatory recoupment amounts to repay the Treasury for any payments made. During the transition period and first Program year, the amount is \$10 billion; during the second Program year, the amount is \$12.5 billion; and, during the third Program year, the amount is \$15 billion. Insurance companies will be required to collect from their policy holders premiums to repay the amount by which covered losses exceed their deductibles in any year up to the mandatory recoupment amount. The Secretary will determine the amount of the premium, but in no case may it exceed three percent of annual premiums. In addition, on a discretionary basis, the Secretary may collect premiums to repay the Treasury for payments in excess of the mandatory recoupment amounts, but such premiums remain subject to the aggregate three percent annual premium limitation.

The bill also requires the Secretary to extend the Program to group life insurers if, after a study and consultation with the National Association of Insurance Commissioners, the Secretary determines that group life coverage is not reasonably available as a result of the threat of terrorism. In addition, the bill explicitly preempts all terrorism exclusions in existing insurance policies and allows reinstatement of such exclusions only in existing policies and only with the affirmative written consent of the policy holders.

In one of the most debated provisions of the bill, it establishes an exclusive federal cause of action for litigation for property damage, personal injury or death arising from a terrorist act, preempting all state causes

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of action of any kind. However, the federal cause of action will employ the substantive law of the state in which the terrorist act occurred. All claims arising from a single terrorist incident will be combined in a single federal district court unless the Federal Judicial Panel on Multidistrict Litigation determines that multiple federal courts should have jurisdiction in the interests of the convenience of the parties and just and efficient conduct of the proceedings. Punitive damages are not considered insurable losses.

The bill also sets forth procedures for the payment of judgments against the blocked assets of identified terrorists or terrorist organizations. It also provides the Federal Reserve Board with the authority to extend discount window credit in certain emergency circumstances on the vote of fewer than five Board members.

The Secretary of the Treasury is given the authority to issue regulations to implement the provisions of the Program. The bill is effective upon enactment. The Treasury Department has begun the process of notifying insurers of their obligations under the bill.

■ REGULATORY BURDEN RELIEF

The House Financial Services Committee approved by voice vote H.R.3951, the Financial Services Regulatory Relief Act of 2002. The bill is designed to modernize several financial services statutes and would update record keeping requirements, give national banks greater flexibility in the payment of dividends, allow regulators to adjust examination cycles for healthy banks and streamline depository institutions merger requirements. The bill also permits de novo interstate branching. Because of a number of provisions expanding credit union powers, the ABA and the national trade groups opposed the bill. During Committee consideration, several amendments were adopted, including an amendment by Rep. Gary Ackerman (D-Queens) to require financial institutions to notify their customers when a negative report is submitted to a credit reporting agency and one proposed by Rep. John LaFalce (D-Niagara) to authorize credit unions to invest in "investment grade" securities for their own accounts. There is currently no Senate counterpart. Congress failed to further consider the bill before adjournment, but it is anticipated that it will be reintroduced in the 108th Congress.

■ CORPORATE GOVERNANCE - THE SARBANES-OXLEY ACT

On July 30, President Bush signed into law the Sarbanes-Oxley Act, H.R.3763. The bill is designed to reform the oversight of the accounting industry, revise many disclosure requirements for publicly-traded corporations, significantly increase criminal penalties for corporate insiders found guilty of abusing their responsibilities and enhance the authority of the SEC to police corporate misconduct. During a whirlwind conference, Congressional leaders amended a provision that precludes corporations from making personal loans to their own officers and directors to exclude loans covered by Regulation O, the Federal Reserve Board rule that has governed bank insider lending since 1978. NYBA worked closely with the ABA on the amendment, which had been originally proposed by Senator Schumer. A summary of the law, prepared by the ABA, is available on NYBA's website at www.nyba.com.

■ SMALL BUSINESS ADMINISTRATION 7(a) LOANS

In mid-September, the Small Business Administration (SBA) announced that, beginning October 1, it would cap the maximum size of small business loans guaranteed under the SBA's Section 7(a) program at \$500,000. The Administration will also prohibit making a series of smaller loans to an individual borrower that would exceed the \$500,000 limit. The prior Section 7(a) loan program provides a 75% guarantee of loans over \$150,000 up to a maximum guarantee of \$1,000,000. NYBA was among the first groups in the country to oppose this reduction. NYBA wrote all New York Members of the Budget, Small Business and Appropriations Committees urging Congressional action to reverse this SBA decision, and aggressively lobbied the issue. In addition, NYBA contacted the national trade groups and is working in concert with them to reverse the SBA decision. The American Bankers Association wrote in opposition to the SBA decision the final week in September. In addition, sixty-one members of the House of Representatives, including all Small Business Committee members from New York, wrote to House Speaker Dennis Hastert (R-Ill), urging legislation to overturn the SBA's decision prior to adjournment of the House. In the Senate, Small Business Committee Chairman John Kerry (D-Mass) urged

the SBA to restore the higher loan limits.

As the campaign to restore the higher loan limits accelerated, leaders of both Small Business Committees sought inclusion in the longer-term continuing resolution of bipartisan-supported language that would mandate that the Small Business Administration restore the \$1,000,000 limit on guaranteed 7(a) loans. A coalition of banking and business trade groups sent a letter to the White House requesting support for the amendment, and, at the request of the California Bankers Association, 29 California Representatives wrote House Speaker Dennis Hastert, urging reversal of the SBA decision. Finally, the Chairmen of the House Budget and Small Business Committees introduced legislation (H.R.5645) that could have the effect of restoring the \$1,000,000 guarantee limit while the Senate before adjournment passed S.3172, a bill that would alter the funding formula for SBA guaranteed 7(a) loans and restore the higher limits. Although the House did not take up the bill before adjournment, it is expected to be high on the Congressional agenda of the 108th Congress.

The SBA is also considering whether to open the 7(a) program to all 10,000 Federally insured credit unions. Today, only 76 credit unions, which have traditionally engaged in small business lending, may participate in the program. ABA and other national trade groups are opposing this change.

■ CHECK TRUNCATION

The Federal Reserve Board has submitted legislation to facilitate check truncation. The proposed "Check Truncation Act," forwarded by Fed Chairman Alan Greenspan in a letter to the Chairmen of the House Financial Services and Senate Banking Committees, would provide banks the option of electronically collecting and returning checks without formal agreements between institutions by using machine-readable "substitute checks." The proposal would define the legal rights and responsibilities governing "substitute checks," and create a warranty and indemnity structure similar to that of the Uniform Commercial Code. The bill would not mandate the receipt of checks in electronic form. NYBA reviewed the proposal and raised no objection to it. The bill was the subject of hearings in the House Financial Services Committee in late 2002, and is expected to be introduced in the new session of Congress next year.

■ PERSONNEL CHANGES

In addition to the retirement of long-serving Representatives Ben Gilman (R-Orange) and John LaFalce (D-Niagara), the November elections and their aftermath have brought several changes to the New York Congressional delegation. Congressman Felix Grucci, serving his first term as the Representative of Suffolk County's First Congressional District, was narrowly defeated by Tim Bishop. Representative Tom Reynolds (R-Williamsville) was elected Chairman of the Republican Congressional Campaign Committee during organizational meetings of House Republicans in November. Congressman Reynolds will become the highest-ranking New Yorker in Congress when he assumes the fourth-ranking leadership post in January. Additional Committee and leadership changes may be expected when Congress organizes in January. ▼

■ Federal Regulatory Developments

■ HIGH COST HOME LENDING

Home lending issues appear to be the focus of several regulatory bodies at the Federal level. For example, in June, the Federal Reserve released a final rule amending Regulation C. In this rule, the Fed set HMDA thresholds for determining which loans require the reporting of loan pricing data. These are spreads of 3% or more for first-lien loans, and spreads of 5% or more for subordinate lien loans. The rule also requires the lien status of applications and originated loans to be reported, and requires lenders to ask applicants their ethnicity, sex and race in telephone applications. Compliance with the data collection for telephone applications takes effect January 1, 2003. At the urging of banks and industry trade groups, including NYBA, compliance with the new thresholds and lien status was pushed back from January 1, 2003 to January 1, 2004.

On July 29, 2002 the Department of Housing and Urban Development released proposed regulations revising the rules implementing the Real Estate

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Settlement Procedures Act (RESPA). The proposal is designed to simplify the home mortgage lending process and reduce consumer settlement costs. It would clarify the compensation and role of mortgage brokers and the role of loan originators; redesign the Good Faith Estimate and restrict allowable variations from the Estimate at closing; and provide a framework for packaging guaranteed settlement services exempt from RESPA's Section 8 (anti-kickback) liability. The comment period for this proposal, which would apply to both first and junior liens, purchase money loans and refinancings, ended on October 28, 2002.

As thousands of comment letters were filed, it is anticipated that it will be some time before further action is taken with respect to these proposed regulations.

■ CORPORATE GOVERNANCE

The Securities and Exchange Commission (SEC) has published a proposed rule which would implement several provisions of the Sarbanes-Oxley Act of 2002, including a proposal relating to Section 407, "Disclosure of audit committee financial expert." Section 407 essentially mandates the SEC to (1) define financial expert, considering certain specified qualifications; (2) require disclosure as to whether or not the issuer has a financial expert on the audit committee and (3) issue final rules, as necessary or appropriate in the public interest and consistent with the protection of investors to implement by January 26, 2003.

NYBA in late November, sent a comment letter to the SEC in which NYBA stated its concern that the proposal relating to Section 407 is so limiting in its definition of "financial expert" that it may inadvertently eliminate from audit committee consideration some of the most qualified candidates. Moreover, NYBA stated that while Section 407 of the Sarbanes-Oxley Act directs the SEC to issue rules requiring each reporting company to disclose whether its audit committee is comprised of at least one member who is a financial expert, the SEC's implementing proposal would not only require disclosure of whether a company's audit committee has a financial expert, but also would require the disclosure of the number and names of audit committee financial experts. NYBA stated its belief that this requirement would create even more obstacles to recruiting the best-qualified audit committee financial experts. Thus, NYBA urged in its letter that the proposal be amended, both with respect to the definition of

financial expert and with respect to the public disclosure of the names of such financial experts. Finally, NYBA urged that the SEC provide for a transition period of at least one year before the implementing rules become effective, in order that registrants have sufficient time to identify the appropriate changes they will need to make, and give them sufficient time to understand and comply with the final rules prior to making any changes in the composition of their audit committees. A copy of NYBA's comment letter can be found at www.nyba.com. The comment period for this SEC proposal closed on November 29, 2002.

■ IRS TRUST REGULATIONS

On May 18, NYBA filed comments with the Internal Revenue Service supporting a proposal published in the February 15 *Federal Register* that would revise the tax definition of income for trust accounting purposes. The proposal would recognize changes made by state laws that both incorporate the equitable adjustment power contemplated by the Uniform Principal and Income Act and that authorize unitrusts that provide annual income between 3% and 5% of the annual fair market value of the trust assets. NYBA's comments noted that the Principal and Income Act would provide trustees with additional flexibility in meeting the needs of trust beneficiaries without jeopardizing the marital deduction or other favorable features of the tax treatment of trusts. The IRS indicated that it expected to complete action on the proposal by the close of its regulatory year, June 30, 2002, but had not done so by that date. With the enactment of the Principal and Income Act in New York, certainty on the tax treatment of trust accounting income has become critical. As a result, NYBA sent a letter to the Internal Revenue Service in October, urging that the IRS complete action on its regulations on trust accounting income. NYBA urged that the IRS also amend its regulations to make them effective at the beginning of 2002, rather than, as proposed, at the beginning of the year following promulgation of the new rules. Moreover, in recognition that it may be impossible for the Service to finalize the regulations prior to December 31, 2002, NYBA asked that the IRS publish guidance that would provide trustees a safe harbor in making equitable adjustments under the provisions of the new Principal and Income Act prior to promulgation of the regulations. The IRS has not as yet responded.

■ COMMUNITY REINVESTMENT ACT (CRA) REGULATIONS

The Federal bank regulatory agencies (Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, Office of Thrift Supervision) are required regularly to review the regulations implementing statutes that they administer. In July 2001, they published an advance notice of proposed rule-making, requesting comment on whether the regulations implementing the Community Reinvestment Act (CRA), completely revised in the mid-90's, are effective in meeting the agencies' goals of "(1) emphasizing in examinations an institution's actual performance in, rather than its process for, addressing CRA responsibilities; (2) promoting consistency in evaluations; and (3) eliminating unnecessary burden." The agencies' request for comments also outlined a series of questions designed to elicit information on the impact of the regulations on individual constituencies.

NYBA filed comments with the agencies generally supporting current regulations implementing CRA. NYBA urged the agencies to increase the threshold level for streamlined community bank examinations from the current \$250 million to \$1 billion, noting the increasing size of community banks, particularly in a state such as New York. NYBA urged that the current \$1 billion threshold for bank holding companies to qualify for the streamlined examination be eliminated. In addition, NYBA urged that the regulators avoid judging institutions solely by the quantity of their CRA-related loans and investment, but also by the impact of these activities on the communities in which the banks are located. NYBA also urged more flexible implementation of the strategic plan option, developed by NYBA in response to the request for comments by the New York State Banking Department in 1992, and opposed any increase in record keeping and disclosure requirements. The agencies are expected to issue an additional request for comments on the CRA regulations later this year or early next year.

■ RISK-BASED CAPITAL

(For Background see the July 26, 2002 *Banking Journal*, p. 38, available at www.nyba.com.)

For several years, international banking regulators, under the aegis of the Bank for International Settlements headquartered in Basel, Switzerland, have been working to develop revised risk-based capital standards that would reflect changes in banking markets since the last set of such standards were adopted worldwide in the late 1980's.

In July, the Basel regulators released a revised consultative paper on the management and supervision of operational risk. NYBA filed comments with the Secretariat of the Basel Committee on Banking Supervision and the Federal bank regulatory agencies generally supporting the revised paper. Many banks had strongly opposed the original proposal, published in December 2001. NYBA noted that the revised draft represents a marked improvement on the 2001 proposal and would provide guidance for banks to develop appropriate policies and procedures for identifying, assessing, monitoring and controlling or mitigating the increasing operational risk in the banking environment. However, NYBA cautioned that the Committee should not attempt to impose uniform standards on all size banks, should encourage national banking authorities to avoid overlap and duplication of regulatory and supervisory standards, and should not permit supervisory examination standards to become overly burdensome.

■ USA PATRIOT ACT REGULATIONS

In response to a request for comments from the Treasury Department and the Federal financial institution regulators, NYBA filed comments on proposed regulations to implement Section 326 of the USA Patriot Act dealing with required customer identification programs. The proposal requires banks and other depository institutions to adopt procedures to verify the identity of their customers, to maintain records of the information used to verify identities and to determine whether customers appear on any government lists of known or suspected terrorists. In its comments, NYBA strongly supported the fight against terrorism and all reasonable efforts to identify assets or accounts used by terrorists or those who finance them. However, NYBA requested that the proposal be amended to

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minimize the burden imposed by the regulations. Among other comments, the association urged that banks be provided a year to comply with any regulations finally adopted; that the agencies provide additional definitions and examples of "customer" and "account;" that banks be permitted to maintain information to show that they verified a customer's identity rather than copies of the identification documents used; and urged that the agencies adopt a standard-form notice to advise customers that government regulations require that the customers' identities be verified. A copy of NYBA's comments is available at www.nyba.com.

In October, the Treasury Department announced that banks and other financial institutions will not be expected to comply with the new customer identification requirements of the USA PATRIOT Act on the originally scheduled effective date of October 25, 2002. The Department indicated that comments it and the bank regulators had received had "revealed substantial issues" that it and the regulators are analyzing. The Department stated that, when final regulations are adopted, the rules will provide financial institutions with a reasonable amount of time in which to come into compliance. However, the Department noted that financial institutions should already be taking basic steps to ensure appropriate customer identification.

■ DEBT CANCELLATION CONTRACTS

Following issuance of a letter ruling by the New York State Insurance Department opining that debt cancellation contracts are insurance, the Office of the Comptroller of the Currency issued a regulation reiterating that, when national banks offer debt cancellation contracts (DCC) or debt suspension agreements (DSA), they are subject to regulation by the OCC. The new rule adds consumer protections and establishes new safety and soundness standards. One of the rule's provisions prohibits national banks from requiring a single lump-sum payment for a DCC or DSA purchased in connection with a mortgage loan. ▼

NYBA 2003 LEGISLATIVE AND REGULATORY POLICY, continued from page 3

"wild card" petitions.

Bank Tax Extension and Budget Considerations

Many tax and budget specialists are currently anticipating a dramatic worsening of New York State's 2003 budget crisis, with a slowdown in revenue accompanied by an increase in requests for State assistance from needy local governments, social service agency beneficiaries and special interest groups. Some analysts have predicted a budget shortfall in the range of \$10 to \$12 billion for 2003 with perhaps as much as \$3 billion needed to close the gap that has opened in the already enacted 2002 budget. At the same time, the Bank Tax is scheduled to expire on December 31, 2002, requiring legislative reenactment as part of next year's budget. NYBA recognizes the seriousness of the fiscal challenges facing New York next year and is seeking to work with other business groups on budget and revenue issues. NYBA supports legislation making permanent the Bank Tax, including the transitional financial modernization provisions, and will review the revenue impact of any proposed revenue measure.

Corporate Governance

Passage of the Sarbanes-Oxley Act has raised considerable concern among many financial institutions that provisions of implementing regulations may impede the attraction and retention of the highly qualified directors on which proper management of the industry relies. In particular, NYBA's Policy Committee and Board identified regulatory actions regarding the independence of bank directors and qualifications for financial expertise in directors as areas in which NYBA could appropriately perform a role. NYBA will be active in the regulatory process, including rule-makings involving the securities exchanges, on corporate governance issues. In addition, NYBA has formed a task force to respond to this heightened legislative and regulatory scrutiny under new corporate governance criteria. In this regard, with input from the Task Force, NYBA has filed a comment letter with the SEC, in which we urge that the proposed definition of a "financial expert" be amended so that it does not inadvertently eliminate from audit committee consideration some of the most qualified candidates.

Deposit Insurance Reform

NYBA reaffirmed its current position on deposit insurance reform, maintaining emphasis on achieving higher coverage for municipal deposits as the first priority during the deposit insurance reform debate. NYBA will also continue to support and provide input for the study of optional deposit insurance coverage for municipal deposits currently being performed by the FDIC at NYBA's request. In addition, NYBA supports indexing deposit insurance coverage to inflation, charging an entry fee for deposits of new and fast-growing depository institutions and, in the context of these reforms, the merger of BIF and SAIF with a cap on the required reserve and rebates as appropriate. NYBA opposes any increase in deposit insurance premiums so long as the reserve remains in excess of 1.25% of insured deposits.

NYBA also believes that the issue of municipal deposits for thrifts is best resolved in the context of deposit insurance reform legislation in Washington. Any consideration of the thrift municipal deposit issue in Albany should defer to the debate on deposit insurance reform in Washington.

Municipal Finance

The National Association of State Treasurers (NAST) has proposed legislation to create a statewide collateral pool backing municipal deposits. NYBA opposes proposals to create statewide pools for municipal deposits, either as investment vehicles or for collateralization purposes. Such pools would create inappropriate and disproportionate risk within the banking system, could reduce the ability of banks to provide funding for community, small business, housing and other local needs and would be of little benefit to municipalities. In summary, NYBA believes that the current system is working.

Credit Unions

Credit unions continue to pursue an aggressive political and legislative agenda. Their tax exempt status and freedom from many of the regulations that govern the banking industry have made them formidable competitors. NYBA will work with the national trade groups on developing and implementing a strategy that will help level the playing field for banks and credit unions. NYBA, working within the national trade group policy, will support efforts to impose the same tax and regulatory treatment on large credit

unions that is currently imposed on banks. At the State level, NYBA has been successful in resisting efforts by State-chartered credit unions to expand their franchise and will continue to oppose expanding the State credit union charter.

Outstanding Federal Issues

NYBA has always been very active on federal issues, including interaction with the national trade groups, regulatory agencies and the New York Congressional delegation. From the negotiations on insurance that led to the enactment of the Gramm-Leach-Bliley Act through identifying and promoting legislative changes of interest to New York in areas such as terrorism insurance and restoring the \$1,000,000 ceiling on SBA-guaranteed loans, NYBA has been unique among state bankers associations in the level of its Federal involvement. In this regard, NYBA strongly supported terrorism insurance legislation, which was finally passed by the 107th Congress in its last days prior to adjournment. The bill will provide federal government reinsurance coverage in property and casualty insurance policies up to \$100 billion. Private insurers will provide the first \$10 billion in coverage. NYBA will continue its active advocacy role in Washington, supporting passage of bankruptcy reform and increased SBA 7(a) small business loan ceiling legislation. NYBA opposes restrictive legislation pursued by the real estate brokerage industry to roll back the flexibility provided in the Gramm-Leach-Bliley Act for banks and financial holding companies to engage in real estate brokerage and management.

Interest on Corporate Checking Accounts

NYBA supports an increase in the number of allowable transfers from a money market deposit account from the current six per month to 24. NYBA opposes lifting the prohibition on the payment of interest on corporate demand deposits.

Grassroots

In light of heightened consumer activism and local government action, NYBA recognizes the need to reinvigorate and formalize its grassroots activities, especially in preparation for the 2003 legislative session. At both the State and Federal levels, NYBA's members will need to become even more politically proactive in response to anticipated legislative challenges. ▼

NEW YORK BANKERS ASSOCIATION
ANNUAL MEETING & LEGISLATIVE CONFERENCE

Monday, January 13, 2003

Crowne Plaza Albany, Albany, New York

10:00 a.m.	REGISTRATION <i>(Crowne Plaza Albany)</i>	2:30 p.m.	BUDGET & TAX ISSUES <i>(Empire State Convention Center, Meeting Room 6)</i> Carole E. Stone <i>Director</i> New York State Division of Budget
11:00 a.m.	WELCOME & ELECTION OF OFFICERS Robert G. Wilmers <i>Chairman, NYBA</i> <i>Chairman, President & CEO</i> M & T Bank Corporation Gabriel P. Caprio <i>Incoming Chairman, NYBA</i> <i>President & CEO</i> Amalgamated Bank	3:00 p.m.	2003 PRIORITY ISSUES Hon. Hugh T. Farley <i>Chairman</i> Senate Banks Committee Hon. Aurelia Greene* <i>Chairwoman</i> Assembly Banks Committee Daniel A. Muccia <i>First Deputy Superintendent</i> New York State Banking Department
11:15 a.m.	LEGISLATIVE BRIEFING Thomas M. O'Brien <i>Chairman, Government Relations Council, NYBA</i> <i>President & CEO, Atlantic Bank of New York</i> Michael P. Smith <i>President, NYBA</i>	4:00 p.m.	ATM ISSUES Hon. Scott M. Stringer New York State Assembly
12:00 p.m.	LUNCHEON - GUEST SPEAKERS Hon. Joseph L. Bruno <i>Majority Leader</i> New York State Senate Hon. Sheldon Silver* <i>Speaker</i> New York State Assembly Hon. Eliot Spitzer* <i>Attorney General</i> New York State Hon. Alan Hevesi* <i>Comptroller</i> New York State	4:30 p.m.	POLITICAL PREVIEW Fredric U. Dicker <i>State Editor, New York Post</i>
		5:00 p.m. - 7:00 p.m.	LEGISLATIVE RECEPTION <i>"The Well," Legislative Office Building at the State Capitol</i> E. J. McMahon, <i>Senior Fellow</i> with The Manhattan Institute, New York City, will also offer commentary on the State Budget

**Please note: Speakers with asterisks are "invited"*