

■ Review and Outlook

The tragic events of September 11 not only affected each of us personally, they significantly changed the association's focus for the upcoming year. While NYBA continues to work on its core agenda items such as predatory lending, privacy and federal deposit insurance reform, the association's immediate focus is on economic recovery, community service and the rebuilding of New York.

NYBA made great progress on its 2001 agenda. On June 29th Governor Pataki signed legislation to enact revised Article 9 of the Uniform Commercial Code in New York as Chapter 84 of the Laws of 2001. This law, which was a top NYBA priority, became effective on July 1 and governs all loans secured by personal property. It has been called the most significant new commercial law in the United States since 1972. The Governor also signed NYBA-initiated legislation extending the commercial mortgage foreclosure law that was due to expire on July 1. This legislation permits non-judicial foreclosure of commercial mortgages in uncontested situations and also clarifies provisions of the existing law permitting foreclosure on property containing up to 65% residential tenancies in New York City. Additionally, the Governor signed a NYBA-negotiated reform of the State's Principal and Income Act, to be effective January 1, 2002. It authorizes trustees to adjust funds from principal to income or vice versa in order to satisfy the needs of beneficiaries. The law also establishes an optional 4% unitrust into which trustees may choose to place both existing and newly established trusts.

On October 25, the Legislature completed its work on a supplemental budget package, which included the extension through January 1, 2003, of both the bank tax law and financial modernization transition legislation. This NYBA-supported "hold harmless" legislation (originally contained in the State Budget enacted in May 2000 and which expired on December 31, 2000) permits banks to affiliate with non-banking corporations under the Gramm-Leach-Bliley Act (GLBA) without triggering adverse tax consequences under New York's Tax Law for either the bank or the non-bank. Importantly, the Bank Tax extension continues both a combination of the phased reductions in the bank tax rate and, for the first time, an effective net operating loss carry forward provision for New York banks.

Effective September 26, 2001, a NYBA-initiated proposed amendment to Part 6 of the General Regulations of the Banking Board reducing the number of Board meetings required to be held by State-chartered

banks became final. A new Section 6.6 has been added to (i) permit the boards of directors of State-chartered banks and trust companies that are well capitalized, well managed and are more than five years old to meet a minimum of six times per year (rather than the previously required ten) and (ii) eliminates the requirement that Executive Committees meet in any month that the Boards do not meet.

To date, NYBA has successfully averted final passage of overly restrictive high-cost home lending legislation, most notably a bill strongly supported by the American Association of Retired Persons (AARP). The bill, which adopts the low threshold of five percentage points over the weekly average yield on one-year Treasury rate (less than 3% currently) as one of the definitions of a high-cost home loan, prohibits lenders from engaging in a range of practices with regard to high-cost home loans. While the Assembly passed the AARP-sponsored bill on July 18, the Senate leadership has indicated that it plans to hold hearings on the bill in January 2002. In addition to this bill, several localities nationwide have already passed predatory lending legislation, and while no federal legislation is expected to pass this year, the Fed approved several amendments to the regulations implementing the Home Owners Equity Protection Act (HOEPA). These include a reduction in the trigger interest rate for first mortgages from ten percentage points to eight percentage points over the comparable Treasury rates. NYBA continues to state its strong opposition to predatory lending and its support for the Banking Department's Part 41 High-Cost Home Loan regulation. However, the association remains concerned that overly restrictive legislation will have the unintended effect of limiting the availability of credit in low- and moderate-income neighborhoods.

To demonstrate its commitment to the eradication of predatory lending, NYBA's Board of Directors at its November 2001 meeting, voted to adopt NYBA-developed Home Lending Best Practices which the association hopes will become an industry standard. Additionally, NYBA launched the House Equity Lending Project (H.E.L.P.), a program developed with a working group comprised of conventional mortgage lenders and faith-based community leaders in New York City. The program is designed to link potential borrowers with bank lenders in Southeast Queens and Central Brooklyn. The project was announced at a press conference on May 30 with H.E.L.P. advocates Senator Charles E. Schumer, Reverend David Cousins of Bridge Street

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NYBA 2001- 2002 LEGISLATIVE AND REGULATORY PRIORITIES

Status Report - December 2001

Issue	Bill Number	Committee	NYBA Position/Status
STATE ISSUES			
÷ Privacy	Numerous	Banks Consumer Protection	Oppose restrictive measures
÷ Predatory Lending	A-7828-A S.5005	Banks	Oppose restrictive measures; support H.E.L.P. and educational efforts
⬆ Money Laundering			Support anti-money laundering and terrorist financing laws
⬆ Disaster Recovery			
⬆ • Disaster Assistance Legislation	As needed		Support - NYBA formed a Special Advisory Group to guide outside efforts
⬆ • Community Renewal Projects			
⬆ • Disaster Assessment Survey			
÷ *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.128/H.R.746 S.227/H.R.1899 H.R.1293	Banking	NYBA supports 100% municipal deposits coverage; NYBA policy filed with national trade groups;
⬆ Bankruptcy Reform	S.420/H.R.333	Judiciary	Support; passed both Houses
⬆ Regulatory Burden Relief	S.229/S.601	Banking	NYBA petition to Fed for 24 MMDA transfers denied; bill passed House
⬆ *MMDA 24 transfers per month	H.R.974		
⬆ Real Estate Brokerage & Management		Federal Reserve Board/ Treasury Department	Support - Comments filed
⬆ 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 call Mike Smith at (212) 297-1699, Bill Bosies at (212) 297-1664, or Roberta Kotkin at (212) 297-1684. ▼

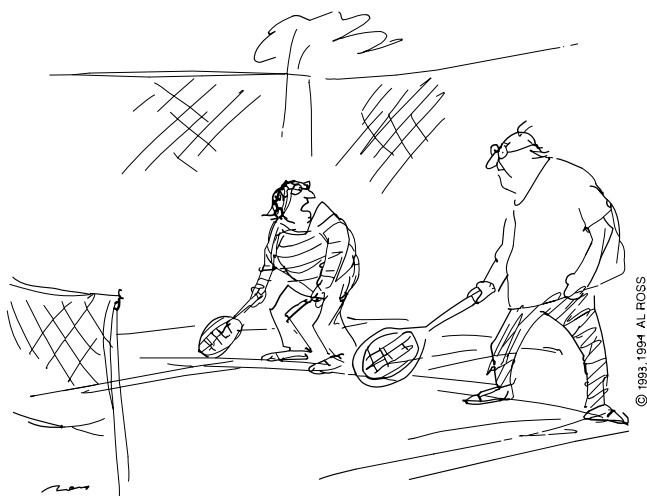
■ State Legislative Developments

Review and Outlook, continued

AME church, Brooklyn, Reverend Jesse Jackson; NYBA President Michael P. Smith and Fannie Mae Vice Chair Jamie S. Gorelick. NYBA is also working with a Federal Trade Commission (FTC)-sponsored task force to develop informational tools designed to educate consumers about the perils of predatory lending. The AARP, Better Business Bureau, the NAACP and the State Attorney General's office are among the groups also represented on the FTC task force.

While NYBA began the 2001 State legislative session anticipating that privacy would once again take center stage in Albany because of the July 1, 2001 implementation date of the privacy provisions (Title V) of the GLBA, no significant bills were ultimately enacted. The groundwork laid by NYBA and the financial services industry last year appears to have convinced legislators that the provisions of the GLBA should be fully implemented and evaluated before creating any new and potentially conflicting State laws.

On the Federal front, while over 50 privacy bills have been introduced, no legislation placing further restrictions on banks' use of consumer and customer information has passed. The focus of Federal legislative interest, has, in large part, been on measures designed to address identity theft – with particular interest in limiting the use of Social Security numbers. However, given the current state of events, privacy issues are not expected to be on the "front burner" in Congress for the foreseeable future. ▼



"Get mad, make believe they're tampering with Social Security benefits!"

■ SUB-PRIME LENDING

Predatory lending seized center stage this legislative session as the American Association of Retired Persons (AARP) mounted a nationwide campaign to pass legislation which, if enacted in New York, would severely restrict the legitimate sub-prime lending activities of NYBA's member banks. The bill was introduced in New York as S.5005(Farley)/A.7828(Greene) and adopts the low threshold of five percentage points over the one-year Treasury rate as one of the definitions of a high-cost home loan.

NYBA believes that this legislation, which prohibits lenders from engaging in a range of practices with regard to high-cost home loans, is overly restrictive and could inadvertently result in a reduction of credit access in low- and moderate-income neighborhoods.

In letters sent to Senate Majority Leader Joseph L. Bruno, Assembly Speaker Sheldon Silver, Senate Banks Committee Chairman Hugh T. Farley and Assembly Banks Committee Chairwoman Aurelia Greene, NYBA President Michael P. Smith explained that the rate threshold established in the AARP-sponsored bill was even more restrictive than those established in other jurisdictions throughout the country, where affected lenders concluded that they would no longer be able to participate in the "high-cost" home loan market because the thresholds were so unreasonably restrictive. This reinforced NYBA's concern that passage of such legislation in New York could reduce credit availability here. NYBA's concerns were further detailed in a Memorandum in Opposition submitted to both the New York Senate and Assembly.

While the bill passed the Assembly on July 18, the Senate leadership has indicated that it plans to hold hearings on the legislation next year. NYBA welcomes hearings on this matter, and continues to support Part 41 – the Banking Department's high-cost home loans regulation. Moreover, to demonstrate its commitment to education regarding predatory lending, NYBA developed its own Home Lending Best Practices, which were adopted by the association's Board of Directors in November. NYBA also is engaging in several other education and lending initiatives designed to stamp out unscrupulous lending practices.

■ PRIVACY

(For background, please see the Feb. 5, 2001 *Banking Journal*.)

NYBA began the State legislative session anticipat-

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ing that privacy would once again take center stage in Albany because of the July 1, 2001 implementation date of the privacy provisions (Title V) of the Gramm-Leach-Bliley Act (GLBA). While a number of bills were introduced in both Houses – several of which were passed in either the Senate or Assembly - no significant bills were ultimately enacted. Even NYBA-supported identity theft legislation, which was passed in the Senate (S.694, Goodman) and a companion bill which was passed in the Assembly (A.3648, Lentol), were never reconciled for final passage by both Houses. Thus, the groundwork laid by NYBA last year appears to have convinced legislators that the provisions of the GLBA should be fully implemented and evaluated before creating any new and potentially conflicting State laws.

Only two privacy-related bills - both of which NYBA did not oppose - have, to date, passed both State legislative bodies. In 2000, the "Telemarketing Fraud Prevention Act" (Chapter Law 546) became law. The statute defines certain telemarketing practices as deceptive, and establishes certain licensing and registration requirements for telemarketers. Financial institutions and their affiliates are exempt from the licensing and registration requirements. The second law enacted in 2000 (Chapter Law 547) established a "do not call" statewide registry to be maintained by the Consumer Protection Board.

Effective April 1, 2001, The Consumer Protection Board published an Emergency Rulemaking in the *State Register* enacting the provisions of the "do not call" legislation. In a March 9, 2001 memo commenting on the proposed rulemaking, NYBA objected to the fact that the rulemaking was inconsistent with the legislative language in several key areas. Most notably, while the statute provided sharing of state registries between affiliates and included affiliates within the exception for established business relationships, the rule restricts the use of registries by affiliates and excludes affiliates' relationships from the established business relationship exception. The emergency regulation as originally written became final on April 11, 2001.

■ ATM FEES

(For background, please see the Feb. 5, 2001 *Banking Journal*.)

ATM fees continued to be of concern this year as a result of the introduction in January 2000 of ATM fee ban legislation by New York City Council Speaker Pe-

ter Vallone. The proposed legislation continued to be "live" throughout 2000. However, the issue did lose momentum for much of 2000, due, among other things, to an aggressive public relations campaign on the benefits of electronic banking and adequate consumer protections, and, importantly, to the number of positive court decisions throughout the nation affirming federal preemption. In December 2000, however, the issue resurfaced in New York City when, on December 6th, the New York City Council held a hearing on its proposed ATM fee ban legislation.

NYBA President Michael P. Smith testified at the hearing, urging that the proposed legislation not move forward, and emphasizing that a free-market system, devoid of price controls, provides the most conducive environment to the growth of cash machine availability and customer convenience. Mr. Smith also testified that New York State law, which the banking industry supports, mandates full disclosure of ATM fees and provides consumers with the opportunity to cancel any transaction that may incur a fee, and stated that the consumer has many alternatives to ATMs for accessing funds. Finally, Mr. Smith testified that the City ordinance would not apply to ATMs that are owned by non-banks, thus having the possible unintended consequence of limiting access to ATM machines owned by regulated banks, while leaving consumers vulnerable to potentially higher fees for access to a growing number of unregulated ATMs.

In addition to Mr. Smith's arguments, outside counsel H. Rodgin Cohen of Sullivan & Cromwell testified that the bill violates both the U.S. and the New York Constitutions. It was evident throughout the session that there was no unanimity among the Council members on the legislation and several members were clearly concerned by the legal arguments and that the legislation was directed solely at banking institutions. Since the hearing there has been no further action on this legislation. Moreover, the response following the hearing was generally encouraging with Mayor Giuliani voicing his opposition to the bill. NYBA will continue to work closely with its ATM Task Force and maintain communications with the City Council.

As NYBA monitored ATM fee ban developments in New York City, the association also paid close attention to developments in other jurisdictions where litigation has ensued regarding the rights of municipalities to impose ATM fee bans. 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. The outcome of these appeals is still pending. (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 has 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 is still pending. (See Significant Legal Decisions, page 23.)

ATM Service Restrictions: Legislation was introduced in both Houses in Albany in 2001 (S.5004, Farley/A.5797, Weisenberg) to require that banks and other ATM providers ensure that all new ATMs have special features to make them accessible to the visually impaired. The bills far exceed current Federal require-

ments under the Americans With Disability Act by requiring that: 1) every ATM be specially equipped (rather than one at each ATM location); 2) that all information that is available visually on the ATM screen also be provided orally (current Federal rules call for providing information to enable the machine to be used, which may be satisfied by the use of Braille on the keys); 3) the legislation would require that all functions that can be performed through the ATM be available orally, while most "talking ATMs" currently being developed provide oral information only for common transactions such as cash withdrawals, balance transfers, deposits and account balance requests; and 4) the bill does not address many privacy concerns raised by "talking ATMs." The association filed a memorandum urging that the State defer to new Federal standards currently being developed before adopting independent standards of its own.

■ **MARKETING OF CREDIT CARDS ON COLLEGE CAMPUSES**

In January 2001, Senator George D. Maziarz (R-Niagara) introduced legislation that prohibits the direct merchandising of credit cards on the campuses of the State University of New York (SUNY) and the City University of New York (CUNY). Senator Maziarz held hearings on this matter in the Spring in Albany and Brockport, and this Fall in New York City. In April, NYBA President Michael P. Smith wrote to Senator Maziarz announcing the formation of a special Task Force of banking industry executives to help develop voluntary guidelines for the marketing of credit cards on college campuses. (The Task Force was chaired by R. Carlos Carballada, Chancellor Emeritus of the New York State Board of Regents and a Director of M&T Bank.) The guidelines were completed this Fall and were adopted by the association's Board of Directors at its November Board meeting. The guidelines include the principles set forth in the College Credit Card Marketing Industry's "Code of Conduct" for on-campus Credit Card Solicitation. The guidelines also state that when marketing credit cards on campus, banks will not extend credit to students without a reasonable expectation that they will have the ability to repay. NYBA submitted these guidelines to Senator Maziarz in November.

■ **BANK TAX REFORM**

The New York bank tax law expired on Dec. 31, 2000. At its December 1999 meetings, the Legislative and Regulatory Policy Committee recommended, and

(Continued on next page)

the Board of Directors endorsed, the establishment of a Bank Tax Task Force to study the possible benefits of reforming the bank tax in light of the changes made by the Gramm-Leach-Bliley Act (GLBA), including the possibility of merging the bank tax with the general corporation tax. The Task Force began meeting early in 2000 and identified as its first priority the enactment of "hold harmless" legislation that would permit banks to affiliate with non-banking corporations under the GLBA, without triggering adverse tax consequences under New York's Tax Law for either the bank or the nonbank. When the Budget was enacted in May 2000 it contained two NYBA initiatives:

The "hold harmless" language described above ensured that New York corporations would not be adversely affected by New York's Tax Law for affiliations authorized under the GLBA. In the absence of such a "hold harmless" provision, the Tax Law could impose significant adverse tax consequences on such affiliations by requiring general corporations to be taxed under the Bank Tax. A tax provision establishing such a moratorium was effective immediately. The moratorium applies to both State and New York City taxes.

Since 1998, NYBA has been seeking parity for banks with general corporations in the treatment of income received by mutual funds sponsored or advised by banks (the "Dreyfuss Rule"). Recommendations to both the State Tax Department and New York City Mayor Rudolph Giuliani's Tax Reform Task Force were endorsed by the State and City's Tax Departments. In last year's Budget, the "Dreyfuss Rule" was extended to banking corporations under both the State bank tax law and the New York City bank tax.

Turning to longer-range issues of reforming the bank tax, Task Force representatives participated in a number of meetings with other business interests as part of a Financial Services Modernization Working Group convened by Tax Commissioner Arthur Roth. NYBA's Task Force developed extensive materials for the Working Group describing the benefits and negative features of Articles 32 (the Bank Tax) and 9-A (the General Corporation Tax) and attempted to ensure that the banking industry spoke with one voice in its meetings with the Tax Department. For those purposes, the Task Force included representatives of the Independent Bankers Association of New York State, the Institute for International Bankers and the New York Clearing House Association.

The Task Force also established several subcom-

mittees to analyze key differences between the two Articles of tax and submitted to the State a description of the banking industry's understanding of changes necessary for banks to pay taxes under Article 9-A. In response, the Tax Department decided to develop a discussion draft of concepts that would be included in the legislation to combine Articles 32 and 9-A of the Tax Law. (The Tax Department ran revenue projections with the apparent intent of ensuring that this draft does not increase the industry's overall level of taxation). In the Executive Budget released in January, the Governor proposed extending the Bank Tax, including the financial holding company moratorium provisions, for one year, consistent with NYBA's recommendation. The Task Force held several additional meetings, but has not yet finished its draft. In August, the State Legislature enacted a "bare bones" budget designed to draw Governor Pataki into negotiations on substantially increasing spending and tax cuts. No State tax items, specifically extension of the Bank Tax and financial holding company provisions, were included.

After September 11, it became clear to State Legislative leaders that work on the State budget needed to be completed in order to provide certainty for businesses displaced by the disaster. In a two-day session late in October, the Legislature passed a package of budget bills left unfinished from the "bare bones" budget enacted in August. NYBA urged the Legislature, as part of this package, to extend the Bank Tax for two years, rather than the single year extension included in the Governor's Executive Budget. NYBA argued that the final budget had been delayed so long that a single year extension would result in the Bank Tax expiring almost as soon as it was extended. In addition, NYBA noted the impossibility of the Tax Commissioner's Financial Modernization Task Force completing work on its effort to combine Articles 32 and 9-A of the Tax Law in time for next year's budget (scheduled to be released no later than January). NYBA also pointed out that corporate executives making decisions in response to the World Trade Center disaster needed additional certainty on the tax regime that would govern their organizations.

As a result, 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 for-

mation of financial holding companies that could continue to be taxed under the Article of New York Tax under which they had been paying tax prior to their formation. The reenactment of the Bank Tax for two years is also important because the law is now extended beyond the next gubernatorial election year, and the extended law includes the effective date of the final year of the bank income tax rate reduction. The Bank Tax, which had been set at 9% two years ago, would be reduced from 8% to 7.5%, effective for tax years beginning after July 1, 2002. When totally implemented, this reduction will save the State's banking industry more than \$150 million per year. In addition, the reenacted Bank Tax makes effective the net operating loss carry forward provision first passed in 1997 with an effective date delayed until 2001. Governor Pataki has indicated that all future reductions may be postponed due to the State's unexpected financial crisis caused by the September 11 events.

■ UCC AMENDMENTS

The Governor has signed legislation amending the Uniform Commercial Code's Article 9, which brings New York's Article 9 into conformity with the Act recently adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute. Article 9 governs secured transactions - the process by which lenders secure loans and other obligations with personal property. It also governs the sale of accounts (receivables arising from the sale of goods and services) and chattel paper. The new law expands the scope of the collateral transactions within its coverage, and provides various improvements to the system for the filing of financing statements, including a more centralized regime. Revised Article 9, took effect in 46 states (including New York) and the District of Columbia on July 1. Connecticut delayed implementation until October 1, 2001 and Alaska, Florida and Mississippi until January 1, 2002. NYBA had made the passage of Revised Article 9 one of its foremost priorities.

In its Memorandum of Support NYBA noted that enactment of Revised Article 9 in New York will serve to avoid confusion and complexity in multi-state secured transactions involving New York parties. This is especially true as Revised Article 9 also changes the choice-of-law rule applicable to perfection and thus the filing location for financing statements, and further changes the rules for determining the debtor's location.

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. Although Senate Banks Committee Chairman Hugh T. Farley (R-Schenectady) has introduced legislation to adopt Articles 3 and 4 for several years, Senate Judiciary Committee Chairman James J. Lack (R-Suffolk) continues to express reservations about the information required to be sent to the customer under check truncation in the Uniform Commercial Code. The Assembly reviewed this issue, but no legislation was introduced last session. Most recently, the NCCUSL embarked on a project to revise Articles 3 and 4 further, bringing them up to date with current practices in the payment system. NYBA is awaiting the NCCUSL's revisions to Articles 3 and 4 before continuing to pursue enactment of these Articles.

■ TRUST ISSUES

NYBA's trust legislative and regulatory agenda was materially advanced this year with enactment of a new Principal and Income Act and introduction of all other elements of the association's agenda. All introduced bills remain active next year in the second Session of the Legislature.

Principal and Income Act - The new Principal and Income Act will provide significant additional flexibility for trustees to meet the income and earnings needs of beneficiaries. Governor Pataki signed the bill into law in September and it provides a much-needed modernization of all the categories of principal and income, many of which had not been addressed since the law's last major revision in 1966 - at a time when many current investment instruments did not exist. The provisions of the new law include:

- Adoption of the Uniform Principal and Income Act as the default statute governing the payout of trust income in New York;
- Authorization for trustees to exercise an equitable power of adjustment to move funds from principal to income and from income to principal in order to accommodate the needs of trust beneficiaries;
- Creation of an optional 4% unitrust that trustees could elect to govern the payout of trust funds for both existing and newly created trusts; a trustee would have four years to make an election with respect to existing trusts and two years with respect to newly created trusts; and
- Clarification that trustees could not be surcharged for use of the power to adjust unless their conduct was

an abuse of discretion that was either arbitrary and capricious or dishonest.

NYBA wrote Governor Pataki urging that he approve the bill and briefed the Governor's Counsel on the bill's provisions. The law was signed as Chapter 243 of the Laws of 2001 on September 4. It becomes effective on January 1, 2002.

Fiduciary Income Tax Reform Income - At the request of the Trust and Estates Section of the New York State Bar Association, NYBA amended its fiduciary income tax reform bill to include estates. Previously, in order to minimize the revenue impact, the bill would have affected only trusts. As amended, the bill 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. Chairman Lack indicated, in several meetings with NYBA, that a strong, academically balanced study supporting the need for tax reform and demonstrating its impact on jobs could be instrumental in swaying the views of the Legislature on the bill. However, the dramatic reduction in New York State revenue as a result of the attacks of September 11 makes any additional tax reduction problematical in the short-run. NYBA is meeting with Legislative leaders to urge that fiduciary income tax reform be considered an economic development issue, but early action on this legislation now appears less likely.

Perpetual Trust Legislation - Two key bills have now been introduced to authorize perpetual trusts in New York. Both bills would amend the Rule Against Perpetuities to permit grantors to establish trusts not subject to the Rule. In the Senate, Chairman Lack introduced S.694, that would simply make the Rule inapplicable to trusts characterized in their governing instruments as "perpetual" so long as the trustee is provided with authority to alienate the assets in the trust. 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 Federal tax statute that would void some of the tax benefits of a perpetual trust if certain assets in the trust never vest. NYBA is working with the Legislature to resolve the differences between these two versions of perpetual trust legislation and is seeking support from the Bar Associations and the Judiciary for the bill.

Environmental Liability Relief - A long-term goal of NYBA is environmental liability relief for lenders and trustees. The expiration of the State's "mini-Superfund" last year has created considerable pressure both to reenact the "mini-Superfund" and to adopt "brownfields" legislation in Albany. Both the Governor's Executive Budget and stand-alone legislation in both the Assembly and the Senate contain provisions designed to address these issues, and NYBA, working with a coalition of business and environmental leaders, has gotten favorable language providing liability relief in the Governor's and Senate bills. Unfortunately, the Assembly version does not have liability relief language as satisfactory as other bills. NYBA is continuing to pursue liability relief for lenders and trustees.

Prudent Investor Act Delegation - Passage of the Prudent Investor Act in 1994 resulted in new opportunities for investment for trustees, including, for the first time in New York law, explicit authority for trustees to delegate certain investment and management functions. However, omitted from the bill at the last minute because of opposition from the Attorney General's Charities Bureau was authority for trustees who delegate fiduciary functions to also delegate the liability for those functions. After several meetings, the Charities Bureau has now agreed to support modified delegation language to amend the Prudent Investor Act to permit individual and other non-corporate trustees to delegate their fiduciary liability when they appropriately delegate investment and other decisions. This modification should encourage individual trustees to seek professional assistance in administering their trusts, providing an additional marketing tool for corporate fiduciaries. The bill was introduced in the Senate as S.4783 by Judiciary Committee Chairman Lack and referred to the Judiciary Committee. ▼

■ 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.

ELECTRONIC BANKING LEGISLATION

■ **Unsolicited E-mail** - S.1452(Rath)/A.7762 (Schimming) Restricts unsolicited E-mail. **(POSITION UNDER REVIEW)** This bill passed the Senate and is pending in the Assembly Consumer Affairs and Protection Committee.

■ **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)** This bill passed the Senate and is pending in the Assembly Ways and Means 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 Banks Committee and the Assembly Codes Committee.

■ **"Talking" ATM Machines** - S.4963(Maziarz)/S.5004(Farley)/A.5797-A(Weinberg) Requires "talking" ATM machines which may be accessed by blind consumers. **(OPPOSE)** NYBA filed a strong memorandum in opposition to the bill. This bill is pending in the Senate Banks Committee and passed the Assembly.

■ **911 Buttons and ATMs** - A.1615(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 Rules Committee.

PRIVACY LEGISLATION

■ **Identity Theft** - S.218-B(Nozzolio)/A.3198-B (Canestrari) Penalizes identity theft and prohibits the use of social security numbers without affirmative consent and provides customers rights for credit reports. **(Amendments being sought)** 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 has passed the Senate and is pending in the Assembly Codes Committee.

■ **Opt Out** - S.1467(Vellella)/ 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 and Assembly Consumer Affairs and Protection Committees.

■ **Personal I.D. Information** - S.1468(Vellella)/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 Codes Committee and on the Assembly Calendar.

■ **Personal Privacy Act of 2002** - S.2330(Morahan)/A.4230(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.

■ **Internet Privacy** - S.4624(Hannon)/A.2358 (Sweeney) Enacts the Internet Privacy Act, providing protection for customers of New York State agencies in dealing with those agencies over the Internet. **(DID NOT OPPOSE)** This bill passed both Houses of the State Legislature, but has not yet been sent to the Governor.

■ **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)** This bill passed the Senate.

■ **Information Privacy** - S.4971(Nozzolio)/A.8623 (Rules, Request of Grannis) Creates a new "information privacy" title of the general business law, requiring organizations to protect the privacy of their customers. **(UNDER STUDY)** This bill is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **Social Security Numbers** - S.4972(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.

■ **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.

■ **Identity Theft** - A.4939-B(Pheffer) Criminalizes identity theft and creates an identity theft prevention account and identity theft prevention unit. **(DO NOT SUPPORT)** This bill passed the Assembly.

■ **Customer Opt-out** - A 7930(Greene) Requires a customer opt-in before financial institutions can disseminate confidential customer information. **(OPPOSE)** This bill 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. All remain pending in Committee.

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 Committee and has 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 and Assembly Banks Committees.

■ **Credit Card Fees** - S.1059(Santiago)/A.1870 (Lentol) Prohibits credit or debit card issuers from charging interest or fees from card holders who pay off their balances each month. **(OPPOSE)** 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-A (Lack)/ A. 7944 (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 is pending in the Senate Rules Committee.

■ **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 passed the Assembly Banks Committee and is pending on the Assembly Calendar and in the Senate Banks Committee.

■ **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 and Assembly Banks Committees.

■ **Passbook Savings Fees** - S.1819(Padovan)/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 certain conditions are met. **(SUPPORT)** NYBA filed a strong memorandum in support of the bill. This bill is pending in the Senate Rules Committee and the Assembly Transportation Committee.

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

■ **Lienholder Rights** - S.3257-A(Johnson)/A.6491-A (Canestrari) – Protects the rights of lienholders in vessels, aircraft or vehicles seized for use in controlled substances crimes. **(SUPPORT)** This bill has passed both Houses but has not yet been sent to the Governor for his consideration.

■ **Powers of Attorney** - S.4584(Saland)/A.226 (Kaufman) Imposes substantial penalties for the failure to honor short form powers of attorney. **(OPPOSE)** NYBA filed a Memorandum in Opposition. 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, providing them access to State and local deposits and permitting 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(Marchi)/A.3550-C(Vann), 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 Finance Committee.

■ **Local Government Investments** -S.5243(Maziarz/ A.5642(DiNapoli) Authorizes local governments to invest in money market mutual funds. **(OPPOSE)** NYBA has 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 Senate Local Government Committee and was reported from the Assembly Local Governments Committee to the Ways and Means Committee.

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■ **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. **(AMENDMENTS BEING SOUGHT)** This bill is pending in the Senate Finance 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(Veilella) 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. **(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 is pending

in the Senate Rules Committee.

■ **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 Rules Committee.

■ **Non-discrimination** - A.644(Brodsky) Requires that banks providing personal teller service at any of their branches not discriminate on the basis of size of account balance or other factors in providing such service. **(OPPOSE)** This bill was reported from the Assembly Banks Committee and is pending on the Assembly Calendar.

■ **Credit Card Fraud** - A.2093-B(Klein) Requires credit card issuers to implement certain fraud prevention measures. **(OPPOSE)** This bill was reported to the Assembly calendar, where it is pending.

■ **Basic Banking Account** - A.3173(Clark) Increases from eight to 12 the number of basic banking account withdrawals that would be required to be provided without additional charge. **(OPPOSE)** NYBA filed a memorandum strongly opposing this measure. This bill was reported from the Assembly Banks Committee to the Calendar.

■ **Consumer Bill of Rights** - A.5134(Ortiz) Creates a consumer bill of rights. **(OPPOSE)** This bill passed the Assembly Banks Committee and is pending on the Assembly Calendar.

■ **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 Ways and Means 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.
- **Trust Powers** - S.2964(Farley)/A.8632(Rules, request of Schimminger) Clarifies that branches of State-chartered banks headquartered outside of New York can exercise trust powers within the State. **(SUPPORT)** This bill passed the Senate and is pending in the Assembly Banks Committee.
- **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 (Lack)/A.4447(Weinstein) Provides paying a 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 to allocate 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.
- **Environmental Liability Relief** - S.4788 (Marcellino)A.7498(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 passed the Assembly and is pending in the Senate Rules Committee.

- **Charitable Trust Disclosure** – S.5611-B(Stafford)/A.871-D(Morelle) – This legislation, which was amended at NYBA's request, provides for new disclosure and regulatory requirements for organizations engaged in fundraising on behalf of charities. It also clarifies reporting requirements for the trustees of charitable trusts. **(SUPPORT)** The bill passed the Assembly and is pending in the Senate Rules Committee.
- **Perpetual Trusts** - S.794(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) 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.
- **Perpetual Trusts** - A.7317(Carrozza) A bill authorizing perpetual trusts in New York. **(SUPPORT)** This bill is pending in the Assembly Judiciary Committee.

MORTGAGE LEGISLATION

- **Mortgage Fees** - S.1816(Padavan)/A.2310 (McLaughlin) Prohibits mortgagees from charging fees for the issuance of a mortgage satisfaction. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.
- **"Home Equity Fraud Act,"** - S.1818(Padavan) A.3717(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(Veella)/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.

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■ **Environmental Liability Relief** - S.4788 (Marcelino)/A.7498(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 (Gre-Aene) This is 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. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Banks Committee.

■ **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 committing 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.

■ **Third-Party Predatory Lending Practices** – S. 5635 (Smith) – 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 Rules Committee.

■ **Debt Collecting Practices** - A.3781(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.

MISCELLANEOUS LEGISLATION

■ **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)** This bill passed the Senate and is pending in the Assembly Banks Committee.

■ **Environmental Liability** - S.1148(Budget)/A.2000 (Budget) - Provides protection from liability for lenders and trustees for pollution they did not cause or contribute to. **(SUPPORT)** This bill is pending in the Senate Finance and Assembly Ways & Means Committees.

■ **Taxes** - S.1582(Rules)/A.9459(Rules) Extends the Bank Tax and Financial Holding Company Moratorium provisions for two years until December 31, 2002 **(SUPPORT)** This bill is pending in the Senate Finance and Assembly Ways & Means Committees.

■ **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.

■ **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 has passed the Senate and is pending in the Assembly Banks Committee.

■ **Light Pollution** – S. 3386-B (Balboni)/A.5352-B (Grannis) – This bill, principally designed to regulate lighting by State agencies, would create the new offense of “light trespass.” It prohibits any person from lighting their property in such a way as to cause glare or hazardous conditions for others. **(DO NOT OPPOSE)** The bill has passed both Houses of the Legislature, but not yet been sent to the Governor for his consideration.

■ **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(Farley)/A.9147 (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 and Assembly Rules Committees.

■ **New York City Mutual Fund Investments** - S.3814(Goodman)/A.7301(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.

■ **Check Cashing Facilities** - S.5006-B (Farley)/A.8806-A (Rules, Request of Greene) Originally a bill to subject banks that operate separate check cashing facilities to the geographic restrictions, rate limitations and other restrictions of the check cashers law, it has been materially amended to grandfather all existing bank check cashing operations and to eliminate provisions that would have subjected bank check cashing operations to any provisions of the check cashers law other than geographic restrictions. **(OPPOSE)** This bill passed both Houses and has not yet been sent to the Governor. NYBA expects to write the Governor, respectfully requesting a veto of the bill.

■ **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 Banks and Assembly Codes 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. **(NYBA IS SEEKING AMENDMENTS TO RESOLVE DUE PROCESS CONCERNS)** The bill is pending in the Senate Finance Committee. ▼

Chapter Law

Summary

- **Excelsior Linked Deposit Program** - S.3398 (Saland)/A.6769(Schimminger) Makes permanent the provisions of the Program while updating the definition of 'highly distressed area' found in the law. **(Support)** The Governor signed this bill on March 30 as Chapter 14 of the Laws of 2001.
- **Commercial Mortgage Foreclosure** - S.4784(Lack)/A.8554(Tokasz) A NYBA initiative, the bill makes permanent the commercial mortgage foreclosure reform law that was scheduled to expire in July and clarifies that the exemption from the law for buildings with more than 65% residential tenancies in New York City is determined with reference to the number of units in the building. **(SUPPORT)** Governor Pataki signed this bill on June 29 as Chapter 76 of the Laws of 2001.
- **UCC Article 9** - S.1147 (Budget)/ A.1899 (Budget); S. 5404-A (Lack)/ A. 8959-A (Weinstein) – Part of NYBA's 2001 Legislative Agenda, the bill repeals New York's Uniform Commercial Code Article 9, governing secured transactions, and replaces it with the revised and updated Article 9. **(SUPPORT)** Governor Pataki signed S. 5404-A/A. 8959- on June 29 as Chapter Law 84 of the Laws of 2001. The uniform revisions had a nationwide effective date of July 1 and the law has been called the most significant commercial statute since 1972.
- **Powers of Appointment** – S.3751-A (Lack)/A.7699-A (Rivera) – Authorizes a trustee that possesses an unlimited power to invade principal to appoint assets in trust into further trust without the approval of interested parties. **(SUPPORT)** The Governor signed this bill on August 20 as Chapter 204 of the Laws of 2001.
- **Title Insurance Agency** - S.4974(Nozzolio)/A.1832(Lopez) Prohibits mortgage lenders from using the services of a particular title insurance agency. At NYBA's request, the bill was amended to parallel the language in the "wild card" statute. **(SUPPORT)** The Governor signed this bill on August 29 as Chapter 212 of the Laws of 2001.
- **Debt and Claim Compromise** – S.5514(Lack)/A.7345(Rivera) – Permits an interested party, as well as a fiduciary, to make application to a court to settle a claim or debt against an estate. **(OPPOSE)**The Governor signed this bill on September 4 as Chapter 234 of

the Laws of 2001.

- **Principal and Income Act Reform** – S.5531-A (Lack)/A.9050-B(Rules, Request of Weinstein) – A major element of NYBA's trust agenda, this bill reforms the State's 35-year old Principal and Income Act, providing trustees with the authority to equitably allocate funds between principal and income or to elect to place trust assets in a 4% unitrust. **(SUPPORT)** The Governor signed this bill on September 4 as Chapter 243 of the Laws of 2001.
- **Thrift Holding Company Powers** – S. 5592 (Farley)/ A. 9145-A (Rules, Request of Greene) – This bill provides State-chartered mutual holding companies the same powers as Federal thrifts and holding companies. NYBA submitted an opinion by Nixon Peabody which raises concerns that the bill may authorize evasion of the home office protection statute and may provide mutual holding companies with substantially more expansive powers than financial holding companies. The bill has now been amended to address those concerns. **(NO POSITION)** The Governor signed this bill on September 5 as Chapter 291 of the Laws of 2001.
- **Real Estate Appraisers** - S.2838(Farley)/A.8608 (Rules, request of Schimminger) Permits real estate appraisers to be appointed according to policies adopted by bank boards of directors rather than by the boards themselves. **(SUPPORT)** The Governor signed this bill on September 19 as Chapter 313 of the laws of 2001.
- **Credit Union Membership** – S. 5549 (Farley)/ A. 8538-A (Rules, Request of Greene) – Authorizes the addition of new groups to existing credit unions without an amendment to the credit union's bylaws so long as the group contains fewer than 500 members. **(OPPOSE)** The Governor signed this bill on September 19 as Chapter 343 of the Laws of 2001.
- **Trustee Commissions** - S.795(Lack)/A.7792 (Weinstein) Revises trustee commissions under the wills of those dying before August 31, 1956. **(SUPPORT)** Click here to ready NYBA's memorandum in support. NYBA filed a memorandum in support of this bill. The Governor signed this bill on October 23 as Chapter 376 of the Laws of 2001.

■ **Probate Proceedings** – S.2936(Lack)/A.8357 (Rules, Request of Klein) – Clarifies that parties with no interest in a probate proceeding need not be served, in certain cases. **(SUPPORT)** The Governor signed this bill on October 31 as Chapter 393 of the Laws of 2001.

■ **Community Bank Deposit Program** - S. 4639-A (Farley)/A.9215(Rules, Request of Farrell) – Would establish a community bank deposit program to encourage the State Comptroller and Commissioner of Taxation and Finance to deposit State funds in in-State banks. **(SUPPORT)** The Governor signed this bill on October 31 as Chapter 423 of the Laws of 2001. ▼

■ State Regulatory Developments

■ BANKING BOARD ACTIONS

(For background on the ATM lighting issue, please see the Feb. 5, 2001 *Banking Journal*.)

1. 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 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 the meantime, however, NYBA and its member banks have been working with a doctoral student from the Lighting Research Center at Rensselaer Polytechnic

Institute to try and find a lighting solution that is acceptable both to the banks and the Banking Department. This mission is the subject of a doctoral thesis, which NYBA hopes will provide a practical solution to this problem. NYBA received the preliminary conclusions from the Lighting Research Center and is currently reviewing them. NYBA is coordinating these research efforts with the Banking Department.

A potential new “wrinkle” in this issue may be added as a result of the passage in June 2001 of legislation designed to control light pollution. (A.5352-B(Grannis)/S.3386-B(Balboni).) The bill has not yet been sent to the Governor for his consideration.

Among other provisions, this legislation prohibits any person from committing “light trespass” defined as operating any light fixture in a way that casts glare on any other property so as to reduce privacy, hinder sleep or detract from the appearance of an area in violation of rules and regulations to be adopted by the Commissioner of the Department of Environmental Conservation. NYBA believes that this bill will conflict with the ATM Safety Act. The sponsors said they would write the Governor to suggest that it was not their intent to interfere with the ATM Safety Act. Nevertheless, if this bill is signed by the Governor its provisions may create tension between the strict standards for lighting set forth in the ATM Safety Act. NYBA is working with the Banking Department to resolve conflicts between the ATM Safety Act standards and the light pollution legislation.

2. Wild Card Petition: Number of Required Board Meetings — A NYBA-initiated amendment to Part 6 of the General Regulations of the Banking Board, permitting the boards of directors of State-chartered banks and trust companies that are well-capitalized, well-managed, and have been in existence for more than five years to meet a minimum of six times per year became effective September 26, 2001. Previously, boards of directors were mandated to meet ten times per year by Section 7010 of the Banking Law. Moreover, the requirement in Section 7010 that the executive committee meet at least once in each 30-day period during which the board does not meet, was eliminated for qualifying institutions. NYBA filed a “wild card” petition last year with respect to this issue to gain parity for State-chartered institutions and to ensure that State-chartered banks can attract and retain the most qualified board members for their institutions. (Nation-

al banks are not subject to a legally mandated schedule of meetings.)

3. 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.

4. 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.

5. 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.

6. 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 consistent 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.

■ INTERSTATE TRUST TAXATION

Interstate Trust Tax Regulation - At NYBA's urging, the Department of Taxation and Finance drafted a regulation that clarifies the tax treatment of trusts established by New York grantors in the out-of-state offices of New York banks. Under current law, for a trust to be subject to New York fiduciary income tax, both the grantor and the trustee must be New York domiciliaries. With the advent of interstate branching, the question arose whether branches of New York banks outside the state were New York domiciliaries for tax purposes. Other states that have addressed this question (e.g., Virginia and California) ruled that the mere change in corporate form from an affiliate to a branch of the out-of-state office of a bank does not subject a trust administered in that office to state tax law. In 1999, then Tax Commissioner Michael Urbach, in response to a letter from NYBA President Michael P. Smith, stated the Tax Department's intention to issue a ruling clarifying that

trusts administered in the out-of-state offices of New York banks would not, by the change in corporate status alone, be subject to New York tax liability. In April 2000, the Tax Department shared with NYBA a draft regulation that would accomplish the goal of the letter. NYBA filed a comment letter in May 2000 generally supporting the draft, but suggesting several wording changes. The association urged that the draft then be published for public comment.

In November 2000 and on several subsequent occasions, NYBA met with the Tax Department to discuss the draft regulation, to answer additional questions from the Department on trust tax practice and to provide additional comments. Most recently, the association shared redacted trust instruments with the Department to demonstrate that, in most cases, grantors clearly intend their trusts to be administered in the states in which they are established. The Comptroller of the Currency recently adopted interstate trust regulations for national banks looking to trust instruments to establish the situs of trusts and NYBA is urging the Department to follow suit. The Department is currently reviewing the comments it received. ▼

■ NYBA in Court

■ VISA CHECK/MASTERMONEY ANTITRUST LITIGATION

Recent Developments: On Feb. 22, 2000, United States District Court Judge John Gleeson for the Eastern District of New York issued an order in this antitrust litigation (2nd Cir. No. 00-7699). The order granted class status to “all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept VisaCheck and/or MasterMoney debit cards under the challenged tying arrangements.” 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.

On Oct. 17, 2001, the Second Circuit affirmed the

District Court’s decision, holding that at this stage, the 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 October 31st. The Petition for Rehearing was denied, but the Petition for Rehearing *en banc* is still pending.

KEY POINT: In time, the issue of whether the card associations’ pricing of their debit card products violated Federal antitrust laws will become the focus of this legislation. The current issue, however, is the appropriateness and legality of certifying a class of virtually every retailer in the nation. The class action suit would 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 could 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.

(Continued on page 22)

Banking Industry Trademarks: Protecting Valuable Assets

Banks have established valuable goodwill in such well known names as ALLFIRST,[®] CRESTAR,[®] and SIGNET.[®] Suntrust Banks, Inc. for example, has federally registered more than 40 trademarks for banking-related products and services, including SUNTRUST,[®] SUNTRUST ATM BANKING,[®] TOTAL BUSINESS BANKING,[®] and VALUTREE.[®] Product names, logos, and slogans can become valuable assets, attracting purchasers who have come to rely on the quality of branded goods and services.

Trademarks generally have little or no value initially, but can dramatically appreciate in value through successful use. Unlike copyrights and patents that eventually expire, trademark rights can last forever. Because trademarks are an appreciating asset with a potentially perpetual life, it is important to choose them carefully and protect them through federal registration and controlled licensing.

What is a Trademark?

A trademark is any word, symbol, design, or combination of words and design that identifies one seller's goods from those of another. For example, the words COKE[®] and EXCEDRIN[®] are both trademarks, as are the Ralston Purina Checkerboard Square design and the hour glass-shaped Coca-Cola[®] bottle. A slogan like Nike's JUST DO IT[®] can also be a trademark. When used to identify a service, the mark is called a service mark. McDONALD'S[®] is a service mark for restaurant services, as is the golden arches design. REACH OUT AND TOUCH SOMEONE[®] is a service mark for telephone services. Some marks function as both trademarks and service marks. LEX-US[®] is both a trademark for automobiles and a service mark when used to advertise automobile repair services. Because trademark law is based on the idea that trademarks serve as badges of quality, legal protections exist both to protect the public from deception and confusion, and to protect the mark owner's goodwill in the mark.

Trademark Clearance

Before distributing a product, or advertising a service under a mark, or seeking to register a mark with the U.S. Patent Trademark Office (PTO), a trademark search should be undertaken. This will determine whether prior rights in the mark exist. Comparable in some respects to a real estate title search, the trade-

mark search reveals prior users that could prevent registration of the mark or assert a claim of trademark infringement.

Some business owners mistakenly believe that because the Corporations Division of the Secretary of State in their state accepted a corporate charter or trade name filing, the name can be used for any product or service the business promotes. Nothing could be further from the truth. Acceptance by a state agency has no bearing on whether that same name might infringe on another's federal trademark or service mark. Generally, state acceptance means only that no other entity within that state has incorporated or registered to do business under the same name.

Getting Started

Business owners should first conduct a low-cost, on-line search of PTO records followed by a full trademark search. The cost of a search generally ranges between \$400 and \$800. Full trademark searches are comprehensive and will reveal whether another user or registrant of the same or a similar mark has established superior rights in the relevant field of goods or services.

Logo designs require different searching strategies. It is impossible to search designs as thoroughly as words. Typically, the search firm confines its review to a search of similar designs in the U.S. Patent & Trademark Office records.

Trademark search reports provide raw data that must be interpreted and evaluated. For example, a potentially conflicting mark may not be identical (marks need not be identical to infringe) or may be used for different goods or services, or a pattern of *inter partes* oppositions (a type of litigation) may show up in the PTO file history — all of which need to be evaluated to determine whether a proposed use poses real risks.

Establishing Rights in a Mark

Trademark rights can be established simply by being the first to use a mark in commerce. Regardless of whether the mark is registered, the law generally affords the first user (senior user) legal protection against infringement within its trading area. Trademark rights are infringed when a junior user applies a confusingly similar mark to the same or related goods or services and creates the likelihood of confusion in the relevant marketplace. A trademark achieves the greatest legal protection in the United States when it is

registered with the PTO. It is also possible, and advisable, to reserve rights in a mark prior to its use by filing an intent-to-use application.

Once it is determined that a trademark is available, the sooner actual use commences or an intent-to-use application is filed, the better. The ultimate use required to secure federal registration is a “bona fide use of the mark, in interstate commerce, in the ordinary course of trade.” For purposes of establishing a date of first use and qualifying for registration, trademarked goods must be shipped to an independent recipient in another state. The qualifying use for a service mark generally is an advertising use, in interstate commerce, such as advertising in a national publication or a direct mailing that crosses state lines.

Banking Industry Trademarks . . .

It is a good idea to use the symbol™ in superscript immediately adjacent to all uses of unregistered marks. This symbol provides notice of the user’s claim of proprietary rights and commonly is used while waiting for the federal registration process. Once the federal registration is obtained, the trademark should be displayed with the ® symbol. Premature use of the ® symbol can impair the federal registration or the maintenance of an infringement action.

Trademarks can be licensed to third parties (franchises are a typical example), but care must be taken in drafting license agreements, or trademark rights can be impaired. A trademark license must contain provisions controlling uses of the licensed marks and the quality of goods or services sold under marks. Trademark rights can be lost through uncontrolled licensing. In such event, the mark ceases to serve as a source-identifying badge of quality, and the owner’s rights are jeopardized.

Benefits of Federal Registration

Even though certain legal rights apply based on prior use of a mark, federally registering a mark provides important enhancements of such common law rights, including 1) access to federal courts; 2) the ability to recover profits, damages, and costs in an infringement action [including the possibility of treble damages and attorneys’ fees]; 3) nationwide constructive notice of ownership of the trademark, eliminating a good faith defense for anyone adopting the mark subsequent to the registrant’s date of registration; 4) prima facie evidence of the validity of the registration and the facts asserted in the registration; and 5) the

possibility of incontestability status after five years.

The Federal Application Process

Trademark applications are examined by PTO Examining Attorneys who search the PTO’s records to determine whether any other registered or pending mark is too similar to the applicant’s mark, and whether other statutory criteria have been met. The examination process normally takes about one year. Marks that are not merely descriptive and otherwise pass muster under the Trademark Act are registered on the PTO’s Principal Register. Descriptive marks can be registered on the Supplemental Register. While affording certain rights under the federal Trademark Act, including the right to use the ® symbol and to bring an infringement action in federal court, registration on the Supplemental Register does not provide the full scope of remedies accorded to marks registered on the Principal Register.

Generic terms like “apple” for the fruit (as opposed to “APPLE” for computers, which is not generic) cannot be protected as trademarks, because one may not claim trademark rights in the common generic words that name a product or service. Descriptive marks (AFTER TAN® for tanning lotion; FOOD FAIR® for grocery store services) are not protected initially, but are eligible for trademark protection after acquiring secondary meaning. Secondary meaning exists for those marks which, while descriptive, also become associated in the relevant purchaser’s mind with a certain source or sponsorship of the goods or services, usually established through long use and advertising. A descriptive trademark in continuous use without adverse adjudication of rights for five years is presumed to have acquired secondary meaning, and may then be registered on the Principal Register.

If words and design elements (such as a logo) are presented together, the combination can be registered as a composite mark. However, because infringement analysis requires trademarks to be evaluated as a whole and not dissected, less is more when deciding what to register. In evaluating infringement of a logo combined with words, the words would be considered integral to the logo design. If the logo was substantially copied but other words or no words were used in the infringing version, the registrant’s infringement claim could be substantially weakened by the inclusion. Therefore, separate registration of design and word elements is often recommended.

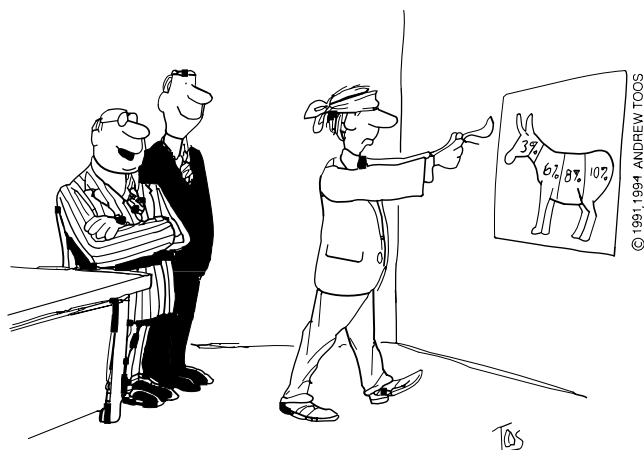
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Domain Names

Domain names may be federally registered as trademarks or service marks if they meet the statutory criteria and distinguish the products or services of one entity from another. Trademark searches should include a review of registered domain names, in part because those launching a new brand name generally expect to register one or more domain names based on that name. Trademark rights are not established or reserved by the registration of a domain name—such rights are established through actual use or reserved through an intent-to-use filing in the PTO. Unlike the marketplace, in which many companies sometimes concurrently use the same name on unrelated products, each domain name is unique. If 50 different companies offer a product under the name ABC, each in a different field or industry, only the first to register the abc.com domain name will be entitled to use it. Trademarks today include domain names, and domain names can become valuable banking industry trademark assets.

Unlike copyrights and patents, which provide a limited duration of protection, trademark rights can last indefinitely if the mark continues to perform a source-indicating function. The term of a federal trademark registration is ten years, indefinitely renewable for ten-year renewal terms. ▼

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“Beats the hell out of performance reviews.”

NYBA in Court, continued from page 19

Background: In this case, several of the nation's largest retailers, including Wal Mart Stores, Sears Roebuck, Safeway and Circuit City, along with a number 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 in total approximately four million merchants. The district court granted class certification, 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."

In its *amicus curiae* brief, 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.

Outlook: As the petition for rehearing *en banc* is still outstanding, it is not possible to predict whether this decision will be overturned. If the class certification is upheld, it is possible that the threat of the enormous potential damage award will force an early settlement. While this could result in many negative ramifications for the banking industry, it would very possibly also prevent the underlying antitrust allegations brought in this suit from being litigated. ▼

■ Significant Legal Decisions

■ PREJUDGMENT INTEREST

Spodek v. Park Property Development Associates

Recent Developments: On Nov. 15, 2001, the New York Court of Appeals ruled, in what appears to be a significant departure from prior court holdings, that CPLR Section 5001(a) "permits a creditor to recover prejudgment interest on unpaid interest and principal payments, awarded from the date each payment became due under the terms of the promissory note to the date liability is established." The Court stated that this outcome was consistent not only with the plain language of CPLR 5001(a), which mandates the award of interest to verdict in breach of contract actions, but also is consistent with the Court's long-standing recognition that the purpose of awarding interest is to make an aggrieved party whole.

KEY POINT: This case is potentially quite significant, because heretofore courts were reluctant to award prejudgment interest on unpaid interest payments. Now, however, creditors will be able to seek not only unpaid interest amounts set forth in the underlying credit agreements, but will also be able to receive interest on those amounts. This finding may be of particular importance to lenders at this time, given the current economic climate and the increasing number of loan defaults.

Background: In this case, the defendant executed a note in April 1980, agreeing to pay plaintiff the principal sum of \$1,437,500 in connection with a real estate transaction. Interest was to accrue at the rate of 8% per annum. In this regard, for the first 60 months interest only was to be paid; after that time, principal payments were also to be made at the rate of 1% per annum. Between 1980 and 1997 defendant made no payments. The plaintiff instituted this action in 1997 seeking repayment of principal and interest owed from 1991 (conceding that any sums due prior to 1991 were barred by the Statute of Limitations). After joinder of the issue, plaintiff moved for summary judgment which the Supreme Court denied but the Appellate Division subsequently granted.

Upon remand, the Supreme Court awarded plaintiff interest owed for each month of default from August 1991, together with annual amortized principal payments from April 1992. The Court, however, denied plaintiff's request for prejudgment interest on these sums. On appeal, the Appellate Division reversed the

judgment with respect to the denial of prejudgment interest and remitted to the Supreme Court for the calculation of interest. The Court of Appeals then granted defendant leave to appeal, ultimately affirming the decision of the Appellate Division.

Outlook: As this decision was rendered by New York's highest court and no further appeal is available, this decision should stand as an important vehicle to make lenders whole in litigation scenarios.

■ NATIONAL BANK ACT & ATM SURCHARGE FEES

Metrobank, N.A. v. Foster (D. Ia. 4-01-CV-80226)

Recent Developments: On May 31, 2001 the defendant, Iowa's Superintendent of Banks, filed a motion to dismiss this case, which seeks a declaratory judgment finding that the National Bank Act preempts Iowa Code Chapter 527. Chapter 527 has been interpreted by the Superintendent of Banks and Iowa's Attorney General to ban ATM surcharges. In his motion, the defendant claims that the case is not yet ripe for adjudication because no bank has yet to charge the ATM fees in question and thus the state has not threatened any enforcement action. The defendant also claims that the court should refrain from exercising jurisdiction in this case under the principle of abstention - that is, due to the possibility that defendant's interpretation of Chapter 527 could be challenged in state court, and thus eliminate the need for Federal involvement. As yet, there has been no ruling on this motion.

KEY POINT: As in the California ATM surcharge case, this case may ultimately provide determinative law with respect to the question of whether state and municipal laws and regulations regarding the imposition of ATM surcharges may be preempted by the National Bank Act with respect to national banks.

Background: On April 12, 2001 five national banks filed suit in the United States District Court for the Southern District of Iowa Central Division, seeking a declaratory judgment finding that the National Bank Act preempts Iowa Code Chapter 527, as well as injunctive relief. The complaint alleges that the interpretation and effect of Chapter 527 is to ban ATM surcharges, although the statute does not explicitly say so. Rather, the statute requires that ATMs be available to other fi-

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financial institutions and to all customers “on a nondiscriminatory basis” – a requirement that Iowa’s Superintendent of Banks and Attorney General have both apparently interpreted to create a fee ban.

On May 31, 2001, the defendant filed a motion to dismiss the case on two main grounds: (i) that the case is not ripe for adjudication insofar, as to date, no bank is charging ATM surcharges, and the state has not threatened enforcement against any bank; and (ii) under the principle of abstention, because of the “realistic possibility that Defendant’s interpretation of chapter 527 could be challenged in another case by Plaintiffs or some other bank” presumably in state court. To date, there has been no decision on the motion to dismiss.

Outlook: Because this case is in its most preliminary stages, and the issues before the court in defendant’s current motion to dismiss are more technical than substantive, it is far too early to predict what impact this case will ultimately have on the final resolution of the ATM surcharge issue.

■ 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.

KEY POINT: This case is providing 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, if upheld, 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 may have far reaching effects with respect to the ongoing initiatives in many localities to impose ATM fee restrictions and limitations. Indeed, 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 this

kind of fee ban. Clearly, this decision strengthens NYBA's arguments against any New York City initiative. However, as both local governments are appealing, the final resolution of this issue may still be far off.

■ CONSUMER PROTECTION LAW

Jules Polonetsky, etc., et al. v. Better Homes Depot, Inc. and Eric Fessler (2001 LEXIS N.Y. 3414)

Recent Developments: On Nov. 19, 2001, the New York Court of Appeals overturned a decision of the Appellate Division First Department, which Appellate Division decision had, among other things, granted defendant's motion to dismiss as against Better Homes Depot on the grounds that the real estate transactions in this case did not constitute consumer transactions within New York City's Consumer Protection law. The Court of Appeals stated in its decision that while the simple sale of a house does, in fact, not involve consumer goods or services within the meaning of the law, the program of consumer services rendered in connection with the home sales addressed in this case (see below) were within the purview of the law. The Court of Appeals stated that it was "unwilling to conclude that a program of consumer services loses its character simply because it was rendered in connection with a home sale." Thus, it concluded that the defendant's motion to dismiss must fail.

KEY POINT: There are a number of laws and regulations that already exist to protect consumers against predatory lending, including Part 41, the New York State Banking Department's "high-cost" home loan regulation. In reversing the Appellate Division's decision, the Court of Appeals made clear that New York City's Consumer Protection Law, may be added as a vehicle for addressing real estate-related transactions, provided that more than the actual sale of a home is included. As the predatory lending debate gains public attention and therefore may attract unwarranted (as well as warranted) litigation, this may be a significant factor for defendants and plaintiffs alike.

Background: The plaintiffs sued to enjoin defendants from "committing deceptive trade practices in the marketing and sale of residential homes," and to recover fines pursuant to New York City's Consumer Protection Law (the "Law"). The plaintiffs alleged that defendant Better Homes Depots, Inc. violated the Law by,

among other things: (i) inducing consumers to purchase a home with promises of making needed repairs and renovations, and then failing to make such proposed repairs and renovations; (ii) causing electrical, plumbing and other repairs and renovations to be made without the required permits and without informing consumers of this failure; and (iii) discouraging home buyers from exercising their right to retain an attorney of their choosing and instead steering consumers to lawyers pre-selected by the defendant. Better Homes Depot filed a motion to dismiss on the grounds that these real estate transactions did not constitute consumer transactions within the meaning of the Law, and thus, the complaint failed to state a cause of action. The Supreme Court disagreed with defendant's position, stating instead the real estate transactions in the case, were "within the scope of the Consumer Protection Law, and state a cause of action against Better Homes Depot."

On appeal, the Appellate Division, First Department unanimously modified the lower court's decision, granting the motion to dismiss the complaint as to defendant Better Homes Depot. The Appellate Division stated that the lower court had erred in failing to dismiss the complaint as against this defendant "because real estate sales do not fall within the plain and unambiguous definition of consumer goods or services contained" in the Law.

Outlook: This decision clearly adds another legal vehicle with which to address alleged predatory lending practices in New York City. ▼



■ Federal Legislative Developments

■ DEPOSIT INSURANCE REFORM

The Board of Directors of the New York Bankers Association (NYBA) unanimously endorsed the following policy statement in response to the Federal Deposit Insurance Corporation's options paper on deposit insurance reform:

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 since 1980, the last time deposit insurance limits were raised. 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.

Most of the provisions of the policy statement have been adopted by the national trade groups as part of their deposit insurance reform positions and legislation has been introduced in Congress to implement, in some form, all of NYBA's recommendations. However, the critical issue of full deposit insurance coverage for municipal deposits, which NYBA has identified as its highest deposit insurance reform priority, has not yet been incorporated fully in the ABA deposit insurance policy.

NYBA Chairman Peter J. Humphrey, Chairman, President & CEO, Financial Institutions, Inc., and NYBA President Michael P. Smith attended the ABA Summer Meetings in Colorado in July, seeking the ABA's support for NYBA's position advocating full coverage for public deposits. Mr. Humphrey presented NYBA's deposit insurance policy, emphasizing NYBA's priority interest in full public deposit coverage in the context of

comprehensive reform. His arguments resonated well within the state association group and the ABA's testimony the following week reflected many of the arguments that he presented.

In its testimony before the Senate Banking Committee's Financial Institutions Subcommittee, the ABA for the first time recommended consideration of full coverage of public deposits as part of any comprehensive legislation on deposit insurance reform. Although the ABA's testimony recognized that "there is, frankly, no consensus within the industry on this issue at this point..." the ABA's testimony incorporated many of NYBA's arguments for full coverage, including the cost of managing collateral, opportunity costs of tying up funds in securities that could otherwise be used for community lending and the "precedent under current deposit insurance practices for a differentiation between municipal and other deposits." The ABA suggested that consideration "could be given to providing broader coverage or perhaps granting banks the opportunity to purchase additional insurance for municipal deposits." The ABA's testimony, in advocating the development of consensus legislation also recommended consideration for indexing deposit insurance coverage for inflation; an entry fee for fast-growing banks; smoothing deposit insurance premiums so as to avoid the current pro-cyclical effect of charging premiums only when the fund reserve falls below 1.25%; capping the fund at some level and providing rebates; basing rebates on a bank's historic contributions to the fund; and merger of the insurance funds. The ABA also said that it strongly opposed any requirement that banks pay premiums when the fund reserve exceeded 1.25% of insured deposits.

The change in leadership of the United States Senate accelerated the consideration of deposit insurance reform issues. Former Senate Banking Committee Chairman Phil Gramm (R-TX) opposed an increase in deposit insurance coverage and did not include deposit insurance reform on the Committee's agenda. New Committee Chairman Paul Sarbanes (D-MD) and Financial Institution Subcommittee Chairman Tim Johnson (D-SD) have both expressed support for reform and Senator Johnson has begun to hold a series of hearings on the issue. House Financial Services Committee Chairman Michael Oxley (R-OH) has also held a hearing on the issue, and is now determining whether to initiate legislative action next year. Both Houses of Congress were awaiting the testimony of new Federal De-

posit Insurance Corporation (FDIC) Chairman Donald E. Powell before deciding whether to pursue deposit insurance reform legislation.

On October 17, Chairman Powell presented the FDIC's recommendations on deposit insurance reform before the House Financial Services Subcommittee on Financial Institutions and Consumer Credit. The Chairman emphasized the need to merge the Bank Insurance Fund (BIF) and the Savings Association Insurance Fund (SAIF); supported adjusting the \$100,000 basic deposit insurance coverage limit every five years to account for inflation, with the first adjustment coming in 2005; recommended increasing coverage for retirement accounts, such as IRAs and Keoghs; urged that the FDIC Board be given discretion to adjust the 1.25% deposit insurance reserve ratio in order to avoid exacerbating economic downturns; asked for authority to devise a risk-based pricing system that would require virtually all banks to pay some deposit insurance premium; and recommended a system of assessment credits and cash dividends to account for historical contributions to the reserve fund by individual banks. The Chairman's testimony did not address full coverage for municipal deposits.

At its November 2001 meeting, NYBA's Board of Directors approved a recommendation of the Legislative and Regulatory Policy Committee that NYBA continue to pursue aggressively full coverage for municipal deposits, and NYBA drafted legislation that would provide such coverage with appropriate safeguards. NYBA intends to seek Congressional sponsorship for the legislation early next session. No further action on the issue is expected during this session of Congress.

The major deposit insurance reform bills pending in Congress are:

- S.128, the "Meeting America's Investment Needs in Small Towns Act, sponsored by Sen. Tim Johnson (D-SD), would adjust the basic \$100,000 insurance level, in \$1,000 increments, to account for inflation;
- S.227, the "Municipal Deposit Insurance Protection Act of 2001," introduced by Sen. Robert Torricelli, would provide 100% coverage for in-state deposits;
- H.R.557, sponsored by Rep. Frank Lucas, entitled the "Fairness and Economic Opportunity Act," would use the surplus in the FDIC deposit insurance reserve to pay the interest on Financing Corporation bonds, until they are redeemed, and then to pay it over to insured institutions;

- H.R.746, the "Federal Deposit Insurance Corporation Adjustment Act," sponsored by Rep. Joel Hefley, would index deposit insurance coverage for inflation;
- H.R.1293, introduced by Rep. Bob Ney, the "Deposit Insurance Stabilization Act," would impose an entrance fee on newly-chartered and fast-growing institutions;
- H.R.1355, the "Deposit Insurance Funds Merger Act," introduced by Rep. John LaFalce, would merge the Bank Insurance Fund with the Savings Association Insurance Fund; and
- H.R.1899, sponsored by Rep. Paul Gillmor, the "Municipal Deposit Insurance Protection Act of 2001," would insure aggregate municipal deposits up to the amount of equity capital in a depository institution.

■ PRIVACY

While over 50 bills were introduced at the federal level this year, to date no legislation placing further restrictions on banks' use of consumer and customer information has passed. The focus of federal legislative interest, however, has been 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) – neither of which have yet been scheduled for a hearing or markup - may have some traction. Among other things, these bills prohibit the sale or purchase of an individual's Social Security number without the consent of the individual. Rep. Shaw, who is Chairman of the Ways and Means Committee, took testimony on this issue even before introducing the bill, at which, among others, New York City police officers, FBI agents and victims of identity theft testified.

More recently, Rep. Shaw and Rep. Sue W. Kelly (R-NY) held hearings with respect to the Social Security death master file. This identity theft issue has taken on even greater visibility since the events of September 11.

Additionally, two anti-spam bills introduced in the House of Representatives attracted attention during this legislative session. In particular Rep. Heather Wilson (R-NM) introduced H.R.718 entitled the Unsolicited Commercial Electronic Mail Act. This is a fairly broad bill which includes, among other things, a private right of

action. Rep. Bob Goodlatte (R-VA) introduced a narrower bill (H.R.1017), which is generally less objectionable to the banking industry. The House Commerce Committee has marked-up Rep. Wilson's bill and the House Judiciary Committee did a markup of Rep. Goodlatte's bill. The bill sponsors were working toward a compromise version; however, in the wake of September 11, the issue has been set aside for now.

Among the other privacy initiatives that NYBA is monitoring is an opt-in bill, "The Financial Information Privacy Protection Act of 2001," (S.30) which was introduced in January 2001 by Senator Paul S. Sarbanes (D-MD). This bill calls for an opt-out for the sharing of information among affiliates and an opt-in for some types of information sharing outside of the corporate "family." To date, this bill has not progressed beyond the Senate Banking Committee; however, as Senator Sarbanes has assumed Chairmanship of the Banking Committee, this bill could take on new significance, particularly if opt-in bills (such as one with a considerable chance of passage in California) begin to become law in states around the country. However, given the September 11 events, these privacy issues are not expected to be on the "front burner" in Congress for the foreseeable future.

On the regulatory side, Regulation P, which implements the privacy provisions (Title V) of the Gramm-Leach-Bliley Act (GLBA), went into effect on July 1, 2001. Among other things, the regulation (i) requires financial institutions to establish privacy policies and disclose them annually to all customers, setting forth how the bank will share non-public personal financial information with affiliates and third parties; (ii) permits customers to prohibit (opt-out of) institutions from disclosing personal financial information to nonaffiliated third parties; (iii) prohibits the transfer of credit card or other account number to third-party marketers; and (iv) prohibits pretext calls (that is, makes it illegal for information brokers to call banks to obtain customer information with the intent to defraud the bank or the customer). Additionally, Regulation P directs regulators to establish regulatory standards that ensure the security and confidentiality of customer's information. These guidelines, which were announced on Feb. 1, 2001, require institutions to have written information security programs approved by their boards of directors.

■ PREDATORY LENDING

While the 2000 Congressional session saw the introduction of a number of predatory lending bills, including Senator Charles E. Schumer's (D-NY) Predatory Lending Deterrence Act, (which required impartial credit counseling for borrowers and redefined high-cost loans as those with an interest rate 8 points above the Treasury rate or with points and fees exceeding 4% of the total loan), none were passed.

To date this year, only a few bills have been introduced in the House, the most significant of which is Rep. John J. LaFalce's (D-NY) "The Predatory Lending Consumer Protection Act of 2001." This bill would amend the Truth in Lending Act guidelines for high-cost home mortgages, and among other things, requires additional disclosures; specifies additional prohibitions against prepayment penalties; prohibits all balloon payments; and prohibits the terms of a high-cost mortgage from including advance collection of some single premium credit insurance products. Additionally the bill would amend the Fair Credit Reporting Act to mandate that each high-cost mortgage creditor (including the successor creditor) report the debtor's complete payment history to certain consumer reporting agencies. The bill has been referred to the Subcommittee on Financial Institutions and Consumer Credit. Also, Rep. Jan Schakowsky (D-IL), a member of the House Financial Services Committee, introduced a bill (H.R.2531) intended to protect consumers from predatory lending by prohibiting, among other things, loans made without regard to the ability to pay; financing fees that are more than 3% of the total loan or \$600; unilateral balloon payments that force consumers to refinance at a high interest rate and pay higher fees; and mandatory arbitration clauses. No bill has yet been introduced in the Senate this year; however, Senator Paul Sarbanes (D-MD) has indicated his intent to hold hearings and/or introduce legislation using the Fed's published amendments to the regulations implementing the Home Owners Equity Protection Act (HOEPA). (See page 1.)

■ BANKRUPTCY REFORM

Early in February, both the Senate and House Judiciary Committees held hearings on bankruptcy reform legislation. In the Senate, at a hearing on S.220, Committee Chairman Orrin Hatch (R-UT) said that "bankruptcy reform is clearly the will of the Congress and much

needed for all American consumers." In the House, two days of hearings on H.R.333 led to the scheduling of a full Judiciary Committee mark-up, bypassing the Subcommittee approval process. On February 14, the House Judiciary Committee approved the bill by a vote of 19-8, clearing it for floor action.

The House of Representatives passed H.R.333, the "Bankruptcy Reform Act of 2001," by the overwhelming vote of 306-108 on March 1. Sixteen New York Members joined the majority supporting the bill, while 12 voted against and three did not vote. NYBA wrote all Members of the New York delegation urging a vote in favor of the bill and asked that all member banks and Team 21 members contact their representatives to ask for a "yes" vote. New York Members of Congress who voted for the bill were: Reps. Sherwood Boehlert (R-Oneida), Joe Crowley (D-Queens), Vito Fossella (R-Staten Island), Felix Grucci (R-Suffolk), Amo Houghton (R-Steuben), Steve Israel (D-Suffolk), Sue Kelly (R-Westchester), Peter King (R-Nassau), Carolyn McCarthy (D-Nassau), John McHugh (R-Jefferson), Gregory Meeks (D-Queens), Jack Quinn (R-Erie), Tom Reynolds (R-Erie), John Sweeney (R-Saratoga), Nydia Velazquez (D-Brooklyn) and Jim Walsh (R-Onondaga). Not voting were: Reps. Gary Ackerman (D-Queens), Ben Gilman (R-Westchester), and Ed Towns (D-Brooklyn).

The bill as passed is very similar to the bankruptcy bill that was "pocket vetoed" by President Clinton in December 2000. During floor consideration, amendments were adopted that included: a managers' amendment making technical and conforming changes; a Jackson-Lee amendment that would include a debtor's monthly public school expenses as an allowable expense under the means test; a Green (WI) amendment removing the names of children from bankruptcy filings in order to protect their privacy; and an Oxley/LaFalce amendment that updates the bill to reflect changes made by Congress in the Commodity Futures Modernization Act, passed late last year and certain market developments not obvious when the bill was being considered last year.

The Senate Judiciary Committee favorably reported a somewhat amended version of the bankruptcy reform bill, S.220, by a vote of 10-8, with Senator Charles Schumer continuing his opposition. Among amendments adopted to the Senate bill were a Feingold/Hatch privacy amendment that would limit the sale of customer lists of companies in bankruptcy and two Feingold

amendments on family farm bankruptcies. A new version of the bankruptcy reform bill, S.420, was introduced by the Judiciary Committee Leadership to reflect changes made during Committee consideration.

The full United States Senate, after passing a cloture motion to cut off debate on the bill by a vote of 80-19, passed S.420, the "Bankruptcy Reform Act of 2001," by a vote of 83-15 on March 15. Both New York Senators Charles Schumer and Hillary Rodham Clinton voted to pass the bill. NYBA strongly urged all Members of the New York delegation to support the bill. During debate the Senate rejected numerous amendments designed to restrict the rights in creditors in bankruptcy. Among the few adopted on the floor, however, was an amendment by Senator Schumer to transfer liability for fair lending violations on predatory loans to companies that purchase them from bankrupt lenders. The Senate also approved an amendment by Senator Schumer that is likely to prove highly controversial in conference with the House. The amendment is designed to preclude parties convicted of violence against abortion clinics from avoiding civil liability for their actions through the bankruptcy process.

The evenly divided United States Senate was unable to agree on a procedure to go to conference with the House of Representatives on controversial legislation, including bankruptcy. The reorganization of the Senate as a result of the switch from Republican to Democratic control permitted new Senate Majority Leader Tom Daschle (D-SD) to proceed to consideration of bankruptcy reform and the Senate appointed bankruptcy reform conferees late in July. The House also appointed their conferees that month. New York Senator Charles Schumer is among the Senate conferees and Representatives John LaFalce (D-Niagara) and Jerrold Nadler (D-Manhattan) are among the representatives of the House.

Office of Management and Budget Director Mitchell Daniels wrote all bankruptcy reform bill conferees to urge rejection of the Senate version of the homestead exemption in the reform bill. The House bill supported by the Administration caps the amount of home equity that can be sheltered by a bankrupt debtor at \$100,000 during the first two years of residence in a state, with state law governing thereafter, while the Senate bill to which the Administration objects would provide a flat \$125,000 ceiling. The bankruptcy conference was scheduled to begin on September 12, but the attacks of

September 11 delayed the beginning of the conference to November 14, on which date Conference Committee Chairman James Sensenbrenner (R-WI) instructed staff to develop a joint proposal to be given to members after the Thanksgiving break on how to move forward with the legislation. Democratic members of the Conference, however, questioned whether it was appropriate to be considering reform legislation when the nation appears to be heading into recession. Final action on the bill remains unlikely this year.

The following is a short summary of the bankruptcy reform bills with the major areas of disagreement between House and Senate highlighted:

BANKRUPTCY REFORM LEGISLATION SUMMARY

Both S.420 and H.R.333 are 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 bills would also amend Chapter 11 with regard to businesses and Chapter 12 on agricultural bankruptcies. The bills are quite similar and are both based on legislation that passed Congress last year, but was vetoed by President Clinton. This Summary will focus on the major provisions of the bills, as well as discussing some of the differences that need to be reconciled before a bill can be sent to President Bush's desk. The President has indicated that he will sign a bankruptcy reform bill similar to either version.

I. Needs-Based Bankruptcy – Both bills create 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 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. Small differences exist in these provisions with the House bill generally more protective of creditors. The Office of U.S. Trustee is *required* to file a motion to dismiss a Chapter 7 petition by a debtor with more than 150% of the median income who 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. Limits are placed on the ability to shelter real estate from bankruptcy with the House bill prohibiting shelter of more

than \$100,000 when the debtor has moved into a state within two years while the Senate bill sets a flat \$125,000 ceiling on homestead shelters. This provision is likely to be one of the most contentious in any House-Senate compromise negotiation.

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.

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 under both bills, 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 three years of the filing under the Senate bill and five years under the House bill. 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 bills establish an expedited form of Chapter 11 reorganization for businesses with less than \$3 million in outstanding debts; allow creditors to be represented by non-attorneys at the first creditor's meeting; lengthen the permissible time periods between prior bankruptcy discharges and new Chapter 7 or 13 filings; and allow direct appeals of bankruptcy court rulings to the U.S. Court of Appeals under certain circumstances.

More extensive summaries of the Senate and House bills, along with copies of the bills themselves, may be obtained from the Library of Congress legislative website, "Thomas."

■ EXPANDED MMDA and INTEREST ON BUSINESS CHECKING

For the past five years, NYBA has been among the few state and national bank trade groups 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 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. NYBA also urged that any repeal of the prohibition on the payment of interest on corporate checking accounts be accompanied by the longest possible transition and be coupled with payment of interest on sterile reserves.

In April, 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 the Senate, two bills repealing the prohibition on the payment of interest on demand deposits were 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 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 new Chairman of the Senate Committee on Health, Education, Labor and Pensions, Senator Edward M. Kennedy (D-MA), 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. In addition, although any further action on this legislation this year is considered extremely unlikely, America's Community Banks, representing the thrift industry, is urging repeal of the prohibition of the payment of interest on demand deposits in order to assist small businesses in recovering from the current economic downturn.

■ FINANCIAL ANTI-FRAUD NETWORK

The House of Representatives passed, by a vote of 392-4, H.R.1408, the Financial Services Antifraud Network Act. The bill establishes a mechanism to link over 250 financial regulators at the Federal, state and local levels, permitting them to share final disciplinary and formal enforcement actions against financial institutions and professionals suspected of committing fraud. Financial regulators also would have access to the FBI fingerprint database. The bill's sponsors stressed that no consumer information would be shared.

■ INTERNET GAMBLING

By a vote of 34-18, the House Financial Services Committee reported out H.R. 556, the Unlawful Internet Gambling Funding Prohibition Act. The bill prohibits a person engaged in the business of betting or wagering from accepting bank instruments (including credit cards, electronic transfers and checks) in connection with unlawful Internet gambling. Banks are not considered in the "business of betting or wagering" under the bill unless they act with actual knowledge as agents of the gambling business. The bill now goes to the Judiciary Committee where action is uncertain. ▼

■ Federal Regulatory Developments

■ REAL ESTATE BROKERAGE AND MANAGEMENT

In January, 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 American Bankers Association (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 strongly supporting the proposal. NYBA noted that a home is the largest single financial asset owned by most Americans and a 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 have inundated Congress with more than 100,000 letters, while bankers have sent far fewer.

The realtors have also written President Bush urging that he oppose this proposal. NYBA has joined the 50 other state bankers associations and the ABA in a letter to the President urging that the regulatory procedure established in the Gramm-Leach-Bliley Act be allowed to work. The regulators have not indicated when they will consider the proposal.

In December, legislation prohibiting banking companies from engaging in real estate lending was introduced in the House of Representatives. The bill, H.R.3424, was co-sponsored by Reps. Tom Reynolds (R-Erie) and Ed Towns (D-Brooklyn) along with 31 other members of Congress. NYBA wrote all other members of the New York delegation urging that they not co-sponsor the bill.

■ PERSONNEL CHANGES

In August, Donald E. Powell was sworn in as Chairman of the Federal Deposit Insurance Corporation (FDIC) with a term that runs to October 3, 2007. Mr. Powell was previously Chairman, President & CEO of the First National Bank of Amarillo, TX. He is a Texas native, a close confidant of President Bush and a knowledgeable community banker.

Former New York Federal Reserve Bank Executive Vice President Peter R. Fisher has been confirmed as Under Secretary of the Treasury for Domestic Finance. He is responsible for coordinating the Treasury's views on economic policy, financial institutions and financial markets, as well as the Treasury's fiscal management policies.

The Senate confirmed former ABA President Mark Olson to the Board of Governors of the Federal Reserve System. Also confirmed were: for Federal Reserve Board Governor, Tennessee bank economist Susan Bies; for Director of the Office of Thrift Supervision, former California Banking Superintendent James Gilleran; and as Director of the Federal Housing Finance Board, former New York State Senator Franz Leichter.

■ PREDATORY LENDING

On December 12, 2001 the Federal Reserve Board approved the issuance of a final rule that amends Regulation Z (Truth in Lending) to broaden the scope of loans subject to the terms of the Home Ownership and Equity Protection Act (HOEPA) of 1994. Among other things, the amendment lowers by two percentage

points the rate-based trigger for first lien loans. Thus, lenders making first mortgages with interest rates eight (vs. ten) percentage points above comparable Treasury securities must now adhere to HOEPA's more stringent consumer protections and disclosure requirements. The final rule does not, however, amend the existing trigger for second mortgages.

The fee-based trigger has also been revised to include single-premium credit insurance and similar credit protection products paid at closing. The amendments also include a rule restricting creditors from refinancings of their own HOEPA loans within the loan's first year when the transactions are not in the borrower's interest. HOEPA's prohibition against extending credit without regard to a consumer's repayment ability is also enhanced by a new requirement that creditors document and verify income for HOEPA-covered loans. The costs of credit life and similar forms of insurance will now be required to be included in the mandatory disclosures regarding a loan's total cost.

The Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation and Office of Thrift Supervision issued examiner guidelines in January, offering an extensive definition of subprime lending and recommending that banks hold significantly more capital for subprime loans. The agencies defined subprime portfolios as those made up of loans to borrowers with higher risk characteristics, including: a Fair, Isaac & Co. score of 660 or lower, or an equivalent credit rating; two or more thirty-day delinquencies in the past year; bankruptcy in the past five years; a debt service-to-income ratio of 50% or greater; or a foreclosure, repossession or charge-off in the preceding 24 months. The guidelines apply to institutions that have a subprime asset concentration of 25% of Tier 1 capital or higher. Examiners are instructed to require these financial institutions to hold capital that is one and one-half to three times higher than that typically set aside for mortgage loans.

■ 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 In-

come 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 proposal accorded well with pending changes in New York's Principal and Income Act and 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 expects to complete action on the proposal by the close of its regulatory year, June 30, 2002. With the enactment of the Principal and Income Act in New York, certainty on the tax treatment of trust accounting income has become critical.

■ FARM CREDIT SYSTEM

In April, NYBA filed comments with the Farm Credit Administration in opposition to its proposal to create national charters for direct farm lenders in the Farm Credit System. NYBA expressed concern that the Farm Credit System had strayed from its mission of providing credit to farmers for agricultural purposes and that the implicit Federal guarantee supporting Farm Credit System bonds gave the System a competitive advantage over the commercial banking industry in raising funds for agricultural lending. NYBA also commented that the national charter program could lead to Farm Credit System lenders focusing more directly on larger corporate borrowers to the detriment of family farmers. As the second largest agricultural state in the nation, New York is a major focus for agricultural lending.

At its October meeting, the Board of Directors of the Farm Credit Administration decided against adopting rules authorizing the creation of national charters for Farm Credit System institutions, determining that the issue needs more study. NYBA's comments, consistent with those of the ABA and of many other state bankers associations that commented, apparently helped persuade the Board that such charters would detract from the ability of System institutions to serve local and rural credit needs and would create Federally-subsidized competitors to commercial banks. The FCA Board directed the staff to begin drafting a new policy statement concerning the mission of the Farm Credit System.

(Continued on next page)

■ 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, 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's comments 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's comments also 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's comments 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 not expected to issue any additional request for comments on the CRA regulations until next year.

■ POSTING OF CUSTOMER CHECKS

The Office of the Comptroller of the Currency has adopted a policy similar to that in effect in New York, clarifying that national banks can post checks to a customer's account in any order so long as they do so pursuant to a sound decision process. Along with adopting a regulation to remove limitations on the amount that

could be charged in insufficient funds (NSF) fees last year, the Banking Department adopted a regulation affirming State-chartered banks' ability to post checks to a customer's account in any order so long as they provided customers with notice of the order.

■ STATE MEMBER BANK SUBSIDIARIES

The Federal Reserve Board adopted a final regulation clarifying the authority of State-chartered member banks to establish financial subsidiaries under the Gramm-Leach-Bliley Act. Implementing Section 121 of the Act, the rule authorizes qualifying state member banks to engage in activities determined to be financial in nature or incidental to financial activities through a financial subsidiary. To qualify, a member bank and all its depository institution affiliates must be well-capitalized and well-managed; the aggregate assets of all financial subsidiaries may not exceed 45% of the bank's assets or \$50 billion; if one of the 100 largest insured banks, it must have at least one issue of highly rated subordinated debt; and the bank must be authorized by the Fed and its State banking supervisory agency to acquire control of, or an interest in, a financial subsidiary.

Banks meeting these qualifications may establish financial subsidiaries to engage in activities that the bank may engage in directly, as well as securities underwriting and dealing, selling insurance, operating a travel agency and other activities that the Fed, in consultation with the Secretary of the Treasury, determines to be financial in nature or incidental to financial activities. The Fed and Treasury are currently considering a proposal to determine that real estate brokerage and management are financial in nature or incidental to financial activities. If adopted, the proposal would permit state member bank financial subsidiaries, as well as national bank financial subsidiaries and financial holding companies, to engage in real estate brokerage and management. NYBA filed a comment letter supporting this proposal and urged all banks to comment to their members of Congress in opposition to a real estate broker effort to prevent its adoption.

■ MONEY LAUNDERING GUIDANCE

The Treasury has issued interim guidance to help banks comply with two anti-money laundering provisions (Sections 313 and 319[b]) of the USA Patriot Act of 2001 that are scheduled to take effect on December 25th. The interim guidance includes a model certifica-

tion form that banks may use to meet compliance requirements under those provisions, which provisions will prohibit banks in the United States from providing correspondent accounts directly to foreign shell banks. They also will require institutions to start keeping records of foreign bank owners to which they provide correspondent accounts, as well as records of foreign banks' agents for processing legal papers in the event of lawsuits. The Treasury is preparing similar requirements for broker-dealers. The interim guidance may be accessed at: www.treas.gov/press/releases/regs.pdf. (See also pages 36 - 38.)

■ "PUSH OUT" PROVISIONS

For background, see August 10 Banking Journal, p. 34

New developments: The SEC has stated that it will be issuing a new document subject to notice and comment. While it is not clear whether the new document will be a completely new proposal it is fairly clear that the May 12, 2002 deadline will not hold.

The August 10 Banking Journal is available on NYBA's website nyba.com. ▼

■ Disaster Recovery

The attacks on the World Trade Center and the Pentagon as well as the crash of the hijacked airliner in Pennsylvania have changed the legislative agenda in Albany and Washington dramatically. The banking industry along with other financial service providers was among the hardest hit in the attacks with many institutions located far from ground zero suffering short- or long-term service interruptions. NYBA has shared its condolences with the banks that lost employees or were otherwise adversely affected by the disaster. In addition, NYBA has been involved in numerous efforts at the State and Federal levels to assist in disaster recovery efforts for the victims of the World Trade Center attacks and to enhance prospects for the economic recovery of lower Manhattan and of the New York State economy as a whole.

■ SPECIAL ADVISORY GROUP

In the wake of the attacks, NYBA established a Special Advisory Group of the New York City members

of its Board of Directors and Legislative and Regulatory Policy Committee. Formed specifically to act as a sounding board for new ideas from the public and private sectors, to coordinate the industry's response and to provide assistance on a wide range of initiatives to rebuild New York City, the Special Advisory Group is chaired by Dennis G. Buchert, President & CEO of IJB Whitehall Bank and Trust Company. NYBA also wrote to all members of the New York State Legislature and other government officials confirming the industry's responsiveness to the crisis and detailing only a fraction of the actions that the industry has taken to assist its customers, communities and the public. The Group has met several times and is engaged in a number of efforts to respond to the aftermath of the attacks. At its first meeting, the Group determined to conduct a disaster impact survey of all member banks in the New York metropolitan region in order to gauge more accurately the effects of the disaster and the needs of the banking industry. The Group also decided unanimously that among its guiding principles would be that the banking industry would not seek special treatment or use the attacks as a basis for pursuing unrelated agendas.

The Group has also been serving as a clearinghouse for banker volunteer efforts, forwarding, for example, to the Board of Directors a recommendation (which was approved) to endorse Operation Hope, an initiative dedicated to providing "economic triage" to the neediest of the September 11 victims and their families. The Group is also assisting government efforts to develop a coordinated economic recovery proposal. In this effort, NYBA remains in ongoing contact with Federal, State and local officials involved in legislative efforts to speed economic assistance. The Board of Directors voted unanimously to endorse NYBA's leadership role in disaster recovery and economic development and its participation in nationwide lobbying for additional economic assistance when appropriate legislative proposals for such assistance are advanced.

NYBA also participated with the ABA and the Virginia Bankers Association in the establishment of a collective banking industry relief fund for victims of the September 11 terror attacks. To date, well over \$1 million has been contributed to the fund by banks and bankers throughout the nation.

(Continued on next page)

■ LEGISLATIVE RESPONSES

In Albany, the State Legislature met in mid-September for the purpose of addressing the terror attacks. The Legislature passed a package of four bills advanced by Governor Pataki to increase penalties for terrorist actions, improve law enforcement capabilities and assist emergency relief efforts. The Legislature also passed a bill to make falsely reporting a bomb or other terror threat a felony.

• Federal Anti-Money Laundering Legislation

In Washington, Congress moved quickly to enact a package of bills, many of which had been pending for several years, to enhance the efforts of the banking industry to combat money laundering and to ease restrictions on law enforcement's efforts to prevent the financing of terrorist actions. In a bill that was ultimately attached to omnibus anti-terrorist legislation (Title III of H.R.3162), the House and Senate Banking Committees produced the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.

The legislation creates several new obligations for financial institutions, placing particular emphasis on account relationships between banks and accounts maintained for foreign persons and institutions. The law also gives the Treasury Department significant new authority and enhanced tools to address the financial aspects of the war on terrorism.

The following is an analysis of key sections of the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (Title III of the USA PATRIOT Act of 2001) prepared by John J. Byrne, ABA Senior Counsel and Compliance Manager.

1. Grants authority to the Secretary of the Treasury to impose "Special Measures" on domestic financial institutions concerning only jurisdictions, financial institutions, or international transactions that are of "Primary Money Laundering Concern." (Sec. 311)

This section establishes five "special measures" which the Secretary of the Treasury may impose on a financial institution if it does business with a jurisdiction that is considered to be a "primary money laundering concern." Before invoking any special measures, the Secretary must consult with the Chairman of the Federal Reserve, any other appropriate federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration

Board, and in the discretion of the Treasury, such other agencies and interested parties as the Secretary may find to be appropriate.

The five "special measures" that the Secretary may impose on a financial institution (as defined in 31 U.S.C. 5312 (b)(2)) include: 1) maintain additional record keeping and reporting on certain transactions; 2) ascertain, to the extent reasonable and practicable, the beneficial owner of certain accounts by a foreign person; 3) obtain additional information on certain payable-through accounts for foreign financial institutions; 4) obtain additional information on correspondent accounts for foreign financial institutions; and 5) prohibit or impose conditions (beyond those conditions in special measures three and four) on banks' payable-through or correspondent accounts with foreign banking institutions.

The first four measures may be imposed by regulation or order. However, if the Secretary proceeds by issuing an order, a notice of proposed rulemaking must accompany the order. The measure will cease to be in effect after 120 days unless the Secretary prescribes a regulation. The fifth special measure may be imposed only by regulation.

Comment on the Section:

This section is limited only to institutions that have relationships with foreign jurisdictions or accountholders. Most community banks will not be affected by the special measures if they are put into place. The measures cannot be introduced without a "finding" by the Treasury and consultation with a number of agencies. In addition, the measures require a rulemaking if over 120 days in length and the Treasury must define "beneficial ownership" for all purposes under this section.

2. Requires Due Diligence Standards for Private and Correspondent Bank Accounts (Sec. 312)

This section requires only financial institutions that have private or correspondent accounts with non-U.S. persons to establish policies and procedures reasonably designed to detect money laundering through those accounts.

This section requires enhanced due diligence procedures (outlined in the section) for institutions that maintain correspondent accounts for a foreign bank operating under an offshore banking license, under a banking license issued by a country designated as non-cooperative (of which designation the U.S. concurs), or by the Treasury special measures designation.

This section also establishes minimum standards for due diligence with respect to private banking accounts (defined as minimum aggregate deposits of funds or other assets of not less than \$1 million) maintained for non-U.S. persons. These minimum standards require a financial institution to implement procedures for ascertaining the beneficial owner of the account, and, in the case of a senior foreign political figure or his immediate family members, the institution must conduct additional scrutiny for detecting transactions that may involve the proceeds of foreign corruption.

This section requires the Secretary to promulgate regulations within 180 days. Requirements of the section take effect 270 days after enactment regardless of whether final regulations have been issued. The regulations cover all parts of this section.

Comment on the Section:

This section is limited to correspondent and private bank accounts for non-U.S. persons and the Treasury must issue regulations to clarify terms and policy requirements within 6 months.

3. Prohibits Correspondent Accounts with Foreign Shell Banks (Sec. 313)

Financial institutions, by December 25, 2001, are barred from maintaining correspondent bank accounts for foreign shell banks (*i.e.*, a bank that does not have a physical presence in any country). This provision does not apply if the foreign bank is an affiliate of a depository institution and subject to supervision by a banking authority in the country that regulates the affiliated depository institution. The Secretary of the Treasury must, by regulation, delineate the reasonable steps necessary for a financial institution to ensure that any correspondent account for a foreign bank is being used to indirectly provide banking services to a shell bank.

Comment on this Section:

It is important for the Treasury to quickly promulgate regulations under this section so covered institutions have information on what constitutes "reasonable steps."

4. Cooperative Efforts to Deter Money Laundering (Sec. 314)

The Secretary must, within 4 months of October 26, 2001, prescribe regulations on further encouraging cooperation among financial institutions, regulators, and law enforcement to share information with financial institutions on terrorist acts or money laundering activi-

ties. The regulations may require each institution to designate one or more persons to receive information and the establishment of procedures to protect the shared information consistent with the capacity, size, and nature of the institution to which the particular procedures apply.

This section also permits financial institutions and trade associations, after notice to the Treasury, to share information on suspected terrorists or money laundering activities. This sharing will not be violative of the federal privacy regulations.

Finally, the biannual Suspicious Activity Reports Review must be published semiannually.

Comments on the Section:

This new information sharing capacity has long been sought by financial institution security officials as the most efficient means of deterring organized criminal efforts.

5. Concentration Accounts (Sec. 325)

Allow the Secretary of the Treasury to prescribe regulations on the maintenance of "concentration accounts" to ensure that such accounts are not used to disguise the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner.

Comments on the Section:

There is no requirement to issue the regulations but look for the federal banking agencies to further define the issue in examination procedures.

6. Verification of Customer Identification (Sec. 326)

This section requires the Secretary to issue regulations (with an effective date of October 26, 2002) to establish minimum procedures for financial institutions to use in verifying the identity of a customer during the account opening process. The regulations should take into consideration situations, such as by mail or electronically, where the customer is not physically present at the financial institution as well as the types of accounts and the types of identifying information that is available.

This section also requires a study, to be submitted within 6 months of October 26, 2001, on determining the most "timely and effective" ways to require foreign nationals to provide identification when opening up an account.

Comments on the Section:

(Continued on next page)

ABA will be coordinating a project on appropriate and reasonable industry options for account opening procedures.

7. Consideration of Anti-Money Laundering Record (Sec. 327)

This section requires federal banking regulators, when considering merger applications, to take into account the effectiveness of all parties to the transaction in combating and preventing money laundering activities, including in overseas activities.

Comments on the Section:

No comments.

8. Permits Institutions to Include Suspicions of Illegal Activity in Written Information Employment References (Sec. 355)

This section addresses a long-standing industry concern by permitting depository institutions to provide information, in a written employment reference, to other institutions concerning the possible involvement in potentially unlawful activity by a current or former employee.

Comments on the Section:

The section makes it clear that there is no affirmative duty to provide such information and that there is no protection from liability if the information is provided with malicious intent.

9. Requires Suspicious Activity Reporting by Brokers and Dealers (Sec. 356)

This section requires the Secretary, in consultation with the Securities Exchange Commission and the Federal Reserve, to issue regulations (to be final by July 1, 2002) requiring registered brokers and dealers to submit suspicious activity reports.

Comments on this Section:

This will clear up confusion on SAR reporting for broker/dealers affiliated with depository institutions

10. Establishes a Secure Network for SAR/CTR Reporting Purposes (Sec. 362)

The bill directs the Secretary to establish a secure web site to receive Suspicious Activity Reports (SARs) and Currency Transaction Reports (CTRs) as well as to provide institutions with alerts and other information regarding suspicious activity that warrant immediate attention. This provision will have the practical effect of allowing banks to file SARs and CTRs on-line and immediately. This section must be fully operational within 9 months of October 26, 2001.

Comments on this Section:

Financial institutions and law enforcement should both benefit from this change.

11. Requires Study on Streamlining Currency Transaction Reports (Sec. 366)

Requires the Secretary to conduct a study on possible expansion of the exemptions to the CTR requirement available under current law. This provision is consistent with the priorities from the 2001 Money Laundering Strategy, and it offers the industry the opportunity to assist in a review of the reporting requirements to enhance efficiency. The report is required by October 26, 2002.

Comments on this Section:

The Bank Secrecy Act Advisory Group is already beginning the process of fact finding.

12. Other Sections

Other changes of note include requiring the Treasury to issue regulations on anti-money laundering programs for non-bank financial institutions (Sec. 352) within 6 months, creating a new crime of "bulk cash smuggling" into or out of the United States, and a number of additional crimes as money laundering predicate offenses under title 18 of the U.S. Code.

• Economic Stimulus Efforts

Congress also struggled to provide economic stimulus legislation that would respond to the growing realization that the domestic economy is in recession, while providing additional aid to the efforts of New York City and New York State to recover from the economic impact of the disaster. Although estimates of the impact of the attack on New York are still very uncertain, a November report from the New York City Partnership stated that the terror attacks caused \$83 billion worth of damage to New York City. While 125,000 jobs will be lost this quarter as a result of the attack, many of those will return. However, the report predicted that about 57,000 jobs will be lost through 2003. In lower Manhattan, 100,000 jobs and 30% of the office space were lost. After quick passage of an appropriation of \$20 billion as part of an overall \$40 billion aid package in response to the tragedy, Congressional initiatives to provide additional aid became confused. In late October, the House of Representatives passed an economic stimulus package (H.R.3090) by a narrow margin (216-214) that would cost \$99.5 billion in fiscal year 2002 and \$159 billion over ten years. The legislation, among other things, would give tax breaks to individuals who

didn't earn enough income to qualify for a rebate check earlier this year; repeal retroactively the corporate alternative minimum tax; enhance expensing write-offs for business capital assets; and accelerate the cut in the 27% individual income tax rate so that it falls to 25% in 2002, four years earlier than under current law. The bill also simplifies capital gains taxes by repealing mark-to-market and the five-year holding period applicable to the 18 % and 8% rates so that the lower rates would apply to assets held more than one year; and contains a provision that would make permanent the Subpart F exception for active financing income. However, the partisan vote in the House ensured that the Senate version of stimulus legislation would look quite different.

In the Senate, an economic stimulus bill reported by the Finance Committee twice failed to muster the 60 votes necessary under the rules of the Senate to survive a budget point of order and it appears highly unlikely that the bill (H.R.3090, as amended) can pass the Senate in its current form. In addition to tax rebates for lower income workers, extensions of unemployment benefits and assistance to States with medicare and other expenses, the bill contains \$5 billion in economic relief for New York City. In a package negotiated by Senators Charles Schumer and Hillary Clinton and backed by Senate Democratic leaders, the bill provides up to \$4,800 per employee in wage credits for employers in the New York recovery zone who maintain up to September 11 employment levels in New York City; authorizes the issuance of \$15 billion in tax-exempt private activity bonds to rebuild areas damaged in the terror attack; provides a tax incentive to encourage the reinvestment of insurance proceeds received from property damaged in the attacks to the extent the proceeds are reinvested in eligible property in New York City; and reauthorizes exceptions for qualified mortgage bond financed loans to victims of Presidentially declared disasters. Objections to the bill were unrelated to the New York City assistance provisions. After the bill failed on the Senate floor, the way was cleared for negotiations between President Bush and Congressional leaders on an economic assistance package acceptable to all parties. During the first week in December, House and Senate leaders reached agreement on a procedure for negotiations on an economic stimulus bill. With New York Representative Charles Rangel (D-Manhattan) the only House Democrat in the six-member House-Senate negotiating team, New York's inter-

ests in any final stimulus package may be considered.

- **Terrorism Insurance**

The insurance industry's unprecedented payout as a result of the New York City terror attacks have led most, if not all, insurers to exclude terror attacks from their policy renewals due at the end of 2001. The absence of such insurance may have a significant adverse impact on the availability of financing for many real estate and other commercial projects. As a result, Congress and the Administration are working on legislation to provide a Federal backstop for the insurance industry to cover large-scale terrorist attacks. In the House, legislation (H.R.3210) to provide Federal support for terrorism insurance provided by the insurance industry passed by a vote of 227-193. The largely party line vote found only New York Democratic Representative Ed Towns (Brooklyn) joining the Republicans in the delegation in support of the bill. Under the bill, the Federal government would underwrite 90% of claims for terrorist incidents that cause in excess of \$100 million in damages. For incidents with damages between \$100 million and \$20 billion, government assistance would be repaid through assessments on the insurance industry. Damages in excess of \$20 billion would be repaid through policyholder surcharges. Provisions that bar the payment of punitive damages and cap attorneys' fees provoked Democratic opposition. Senate leadership is working on a bipartisan bill that could pass the Senate and go into Conference with the House before adjournment this month.

Three terrorism insurance bills were introduced in the United States Senate: S.1743 introduced by Senator Fritz Hollings (D-SC), S.1744 introduced by Senator John McCain (R-AZ) and S.1751 introduced by Senator Phil Gramm (R-TX). The bills share some similarities and Senate leadership is working on a bipartisan bill that could pass the Senate and go into Conference with the House before adjournment this month. (Go to www.nyba.com, government relations, for more details on the proposed bills.)

- **Small Business Loans**

The House Small Business Committee passed by voice vote a bill (H.R.3230) that would provide additional access to Small Business Administration (SBA) (Continued on next page) assistance for small businesses adversely affected by

the September 11 attacks. The bill would provide economic injury disaster loans to affected businesses on more favorable terms and expand eligibility for the SBA 7(a) loan guarantee program. The bill was cosponsored by, among others, Reps. Vito Fossella (R-Richmond), Felix Grucci (R-Suffolk), Steve Israel (D-Suffolk), John LaFalce (D-Niagara), Nita Lowey (D-Westchester), Jerrold Nadler (D-Manhattan) and John Sweeney (R-Saratoga). Senate Small Business Committee Chairman John Kerry (D-Mass) has introduced a companion bill (S.1499).

• **Soldiers and Sailors Civil Relief Act**

NYBA posted to its web-site a memo prepared by the ABA describing, in question and answer format, the provisions of the Soldiers and Sailors Civil Relief Act. The law, which provides financial and judicial relief to reservists and members of the national guard called to active duty, permits interest rates on loans extended prior to a service member going on active duty to be reduced to 6% and foreclosures, evictions and other legal proceedings to be deferred. The memo is available at nyba.com.

■ **ADMINISTRATIVE RESPONSES**

Governor Pataki issued an Executive Order authorizing the next of kin of persons missing in the World Trade Center bombings, or in the disasters at the Pentagon or in Pennsylvania, to access the bank accounts of their loved ones and to receive proceeds from insurance policies under certain circumstances. The New York State Banking Department, in New York Disaster – Guidance Letter 2, issued a streamlined form of affidavit under which the spouses of victims of the disaster or the guardians or care givers of their minor children may access up to \$15,000 in bank deposits and money market funds of the victims. The Guidance Letter, Governor’s Executive Order and simplified affidavit form are available on the Banking Department’s web-site at www.banking.state.ny.us.

President George W. Bush issued an Executive Order blocking all property and interests in property, including bank accounts, securities, and other financial instruments, and prohibiting all persons, including financial institutions from engaging in any transactions with 27 named individuals and groups and with any other individuals or groups who may be identified by the Secretaries of State or Treasury as engaging or

posing a significant risk of engaging in acts of terrorism against the United States or of aiding persons or organizations who engage in or threaten such acts. The Executive Order and implementing regulations can be found on the Department of Treasury’s web-site at www.treas.gov.

The Federal bank regulatory agencies and the State Banking Department also announced that they would provide credit under the Community Reinvestment Act for banks that provide recovery assistance in the New York City and Washington, D.C. arrears affected by the September 11 terrorist attacks. The regulators said that credit would be available for loans and investments for rebuilding in the affected areas, for financial advice and assistance to victims and their families, and for grants and banking services to individuals, businesses and other affected organizations. The regulators will also recognize the following as community development: reconstruction projects, stabilization initiatives in affected commercial areas, and economic development programs that help retain, improve or create jobs.

The Treasury Department established a new voluntary financial institutions hot-line (1-866-556-3974) for banks to report suspicious financial transactions that may be related to the September 11 terrorist attacks. Banks that report activity through the hot-line are asked to continue to file suspicious activity reports for the same events. ▼

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