

# New York State Banking Journal

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*"Where is the knowledge we have lost in informtion"*

T.S. Elliot

# ■ Review and Outlook

Predatory lending at the State level and deposit insurance reform at the federal level have been the key issues on NYBA's legislative agenda this year. While the issues continue in play, significant progress has been made on both.

Since the beginning of the State legislative session, NYBA focused much of its attention on the issue of high cost home lending. Over the last six months NYBA worked diligently to help craft a bill that strikes the right balance between ensuring adequate housing credit availability and eliminating the predatory practices NYBA opposes.

Although the Assembly made significant improvements to its earlier legislation, NYBA continues to oppose the version the Assembly passed during the last week in June. NYBA believes that, although the latest version of the bill reflects, in several important ways, the substance of discussions that NYBA engaged in with the AARP and other consumer groups, it still contains several flaws that could impair the legitimate lending market. For example, it contains a flawed points and fees threshold and mandates penalties which NYBA believes to be so restrictive as to potentially deter legitimate lenders from participating in the sub-prime market. Unfortunately, the Senate passed the Assembly bill on July 2. However, the Senate also passed a Chapter Amendment with a message of necessity from the Governor, indicating his concern with the bill. This Amendment would bring the bill closer to the product of NYBA's many months of negotiations with the consumer groups. The process is now expected to continue with the focus shifting back to the Assembly where NYBA's leadership plans to meet with Speaker Sheldon Silver to urge his concurrence with the need for further amendments.

While working toward State-level high cost home lending legislation, NYBA testified twice this past Spring before the New York City Council's Committee on Consumer Affairs regarding their proposed ordinance, Int. 67-A. If enacted, this ordinance would prohibit financial firms that grant, underwrite or securitize certain loans deemed to be predatory from doing business with the City of New York. In its testimony, NYBA expressed its concerns with the bill while urging the City Council to recognize the difficulties in complying with a patchwork of conflicting laws and regulations. NYBA also lauded the Council for its Res. 93, which calls on the State legislature to pass a statewide high cost home lending bill.

The Committee on Consumer Affairs approved Res. 93 in May. To date, the City has not passed its ordinance, waiting, instead, to see whether a strong high cost home lending bill will be enacted at the State level.

Also at the State level, NYBA successfully opposed legislation that, if enacted, would have required that every bank-owned ATM machine be equipped with an emergency 911 button. While well-intentioned, this bill (S.6096) was based on an elaborate communications system, which in the few jurisdictions where it has been used, has not proven to be effective in deterring crimes at ATMs. Moreover, NYBA feared that use of such a button by a victim during a crime could have had the unintended consequence of frightening or angering the criminal, thus putting the victim at more – rather than less – risk. Ultimately, the Senate did not act on this legislation. The Legislature did, however, enact NYBA-supported identity theft legislation (S.7697, Spano/A.4939-E, Pheffer) which criminalizes the theft of financial instruments for the purpose of misappropriating another's identity.

On the State regulatory front, NYBA filed a wild card petition with the State Banking Department's Board in May to promulgate a regulation permitting New York State-chartered banks to charge a daily fee on checking accounts that do not have overdraft protection privileges and yet have a negative balance. The OCC, through an interpretive ruling, has already given national banks the authority to charge such a fee.

At the federal level, NYBA aggressively pursued deposit insurance reform that would include the broadening of coverage of municipal deposits. As a result, included within the reform bill, H.R.3717, which the House passed during the last week of May, was a provision expanding the coverage of municipal deposits to \$130,000 plus 80% per depositor, capped at \$2 million. Although the cap was reduced from the \$5 million in the bill reported from the Financial Services Committee, the bill marks the first time that this coverage has been expanded since 1980. The \$5 million coverage cap remains in the Senate bill. Ultimately, NYBA's efforts to win optional coverage above the House threshold was unsuccessful; however the experience was valuable in that the issue was thoroughly reviewed by legislative leaders and the Federal Deposit Insurance Corporation (FDIC). Other bill provisions that could eliminate the need for early deposit insurance premiums which might

(Continued on page 3)

# NYBA 2002 LEGISLATIVE AND REGULATORY PRIORITIES

## Status Report - July 2002

Issue	Bill Number	Committee	NYBA Position/Status
<b>STATE ISSUES</b>			
☰ Privacy	A.4939-E S.7697-A	Banks Consumer Protection	Oppose restrictive measures Support strong I.D. theft bill; bill passed both Houses
☰ Predatory Lending	A-11186 S.7840	Banks Rules	Oppose restrictive measures; support H.E.L.P. and educa- tional efforts
☰ Money Laundering	A.11408 S.6515/S.7631	Banks Rules	Support anti-money laundering and terrorist financing laws
÷ *Environmental Liability Relief for Trustees & Lenders	Budget	Finance Ways & Means	Support
÷ Fee and Services Restrictions	Numerous	Banks	Oppose
÷ *Trust Agenda • Perpetual trusts • Tax relief • Trustee Delegation	S.794/A.7317 S.4781/A.8661 S.4783	Judiciary Finance/Ways & Means Judiciary	Support
<b>FEDERAL ISSUES</b>			
☰ Deposit Insurance Reform	S.1945 H.R.3717	Banking	NYBA supports higher municipal deposits coverage; bill passed House
☰ Bankruptcy Reform	S.420/H.R.333	Judiciary	Support; passed both Houses
☰ Regulatory Burden Relief *MMDA 24 transfers per month	S.229/S.601 H.R.974/H.R..1009	Banking	NYBA petition to Fed for 24 MMDA transfers denied; bill passed House
☰ Real Estate Brokerage & Management	S.1839 H.R.3424	Federal Reserve Board/ Treasury Department	Support - Comments filed; Oppose restrictive legislation Amendment passed House
☰ Terrorism Insurance	S.2600 H.R.3210	Banking Financial Services	Support; passed both Houses
☰ 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

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## Review and Outlook, continued

occur under current law include a Bank Insurance Fund/Savings Association Insurance Fund (BIF/SAIF) merger, elimination of the mandatory premium requirement when the deposit insurance reserve falls below 1.25% of insured deposits, authority for the FDIC to charge smaller, more regular premiums rather than the higher level of less frequent premiums presently required, and, in a provision NYBA strongly supported, significant credits against potential premiums and a strengthened system of mandatory refunds for banks that paid into the BIF and SAIF funds from 1980 to 1996. ▼

# ■ State Legislative Developments

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## ■ SUB-PRIME LENDING

Predatory lending maintained its position on center stage this legislative session, as NYBA engaged in a productive dialogue with New York State legislators and with the Association for the Advancement of Retired Persons (AARP) – the lead proponent of the Assembly's predatory lending bill. NYBA also engaged in a dialogue with an array of city officials, including representatives from the City Council and the Bloomberg administration, regarding Int.67-A, a bill that, if enacted, would prohibit financial firms that grant, underwrite or securitize certain loans deemed to be predatory from doing business with the City of New York.

Over the last six months, NYBA worked diligently to help craft a State-level high cost home lending bill that would strike the right balance between ensuring adequate housing credit availability and eliminating the predatory practices the association opposes. (NYBA testified to the need to find this balance before the Senate Banks Committee in Albany in March and expressed its concerns with the Assembly version of the bill then under consideration. NYBA viewed the tone of the hearing as positive. Press coverage of the hearing accurately reflected NYBA's position and the negative consequences of the bill.)

Throughout the Spring, amidst a backdrop of demonstrations at City Hall, and protests staged for the media in front of the building housing NYBA's offices,

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NYBA and AARP met frequently to discuss this issue. Despite the constructive dialogue with AARP and a coalition of community groups, a final agreement on predatory lending legislation was unattainable as consumer groups opted to have remaining issues resolved with the State legislature. The most contentious issue was not a banking issue but dealt with the liability surrounding the sale of mortgage loans in the secondary market. The community groups wanted assignees to assume virtually all liability for the actions of lenders with respect to high cost home loans; NYBA, along with the Bond Market Association, whose members are more directly affected, objected strongly to AARP's position, as it believes that such broad-based liability would have a serious negative impact on the vitality of the secondary market.

Despite an inability to reach closure on all the bill's issues, due in large part to NYBA's discussions with consumer groups, the bill which was ultimately passed by the Assembly this session on June 25th (A.11856, Greene) is significantly improved from the bill which passed the Assembly during the 2001 legislative session and which was in play for much of this session as well. For example, A.11856 contains an 8% APR threshold (8% over the yield on treasury securities having comparable periods of maturity to the loan maturity), whereas last year's Assembly bill had a 5% APR threshold (5% over the weekly average yield on one year treasury securities). Additionally, A.11856 now only prohibits its oppressive mandatory arbitration provisions, where last year's bill essentially prohibited all mandatory arbitration provisions. Last year's mandatory counseling provision has now been replaced with a requirement for appropriate counseling disclosures, and last year's prohibition on the financing of points and fees has been replaced with a limitation of financing of points and fees to 3% of the principal amount of the loan. Significantly, too, while last year's bill made assignees subject to all affirmative claims and defenses that could be asserted against the lender by the borrower, this year's bill is designed to limit assignee liability to defenses in foreclosure.

Even with all these improvements, however, NYBA continues to oppose A.11856, because it believes that the bill still contains flaws that could impair the legitimate lending market. For example, the bill contains a flawed points and fees threshold and mandates penalties for lenders, which NYBA believes to be so restric-

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tive as to potentially deter legitimate lenders from participating in the sub-prime market.

As a result, NYBA, along with several member bank CEOs, urged the Senate to amend this legislation and reconcile it with the Senate version to more closely reflect the results of the months-long discussions NYBA had with consumer groups at the Legislature's request. While the Senate ultimately passed a bill identical to the Assembly's bill, it also passed a Chapter Amendment with a message of necessity from the Governor, indicating his concern with the bill. The amendments, among other things, contain a higher points and fees threshold, which brings the bill closer to the product of NYBA's negotiations.

The process continues, and the focus now shifts back to the Assembly where NYBA's leadership plans to meet with Speaker Silver to urge his concurrence with the need for further amendments.

While focusing much of its efforts at the State level, NYBA nevertheless was actively involved at the City level, as well, urging the City Council not to pass its proposed local ordinance, Int.67, regarding high cost home loans. On April 1, NYBA testified before the New York City Council's Committee on Consumer Affairs on Int.67, stating that the interest rate thresholds used to define these loans in the proposed ordinance are so low as to include many legitimate subprime loans. NYBA expressed its concerns with the proposal, while urging the City Council to recognize the difficulties in complying with a patchwork of conflicting laws. The Bloomberg administration's Consumer Affairs Office and Office of Management and Budget also testified in opposition to the bill, as well as the Securities Industry Association. Int.67 was subsequently amended (Int.67-A) to add more lending practices to the list of practices deemed to be predatory. The amended bill also limits the liability of purchasers of and investors in high cost home loans, when appropriate due diligence measures have been taken to ensure that such loans are not predatory.

A second hearing focusing on the amended bill was held on May 6, 2002. At that time NYBA reiterated its concerns regarding the amended version of the bill, but applauded the Committee on Consumer Affairs for its Res.93, which calls on the State legislature to pass a Statewide high cost home lending bill. The Committee approved the resolution, giving NYBA the opportunity to continue to work with State legislators on a

State-wide solution to the predatory lending issue. On July 9th, at a public forum, the Committee's staff updated Committee members on the status of the State legislation.

## ■ PRIVACY

(For background on privacy bills passed in 2000, please see the Dec. 17, 2001 *Banking Journal*.)

The groundwork laid by NYBA over the last several years appears to have convinced legislators that the privacy provisions of the Gramm-Leach-Bliley Act should be fully implemented and evaluated before creating any new and potentially conflicting State laws. As a result, while a number of bills were introduced in the State Legislature this session - no significant restrictive privacy legislation was enacted.

NYBA continues to support the criminalization of identity theft. In this regard, NYBA-supported legislation passed both the Assembly and the Senate in June (S.7697, Spano/A.4939E, Pheffer). This legislation, which is awaiting signature by the Governor, criminalizes the theft of financial instruments for the purpose of misappropriating another's identity.

## ■ ATM FEES

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

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

In California, legislation arose out of the passage of ordinances in Santa Monica and San Francisco banning convenience fees on ATM use by non-customers. In response to those ordinances, Wells Fargo Bank and the Bank of America (i) filed a suit in Federal court claiming that local ordinances are preempted as to national banks by Federal regulations, and (ii) cut off access to ATM machines to non-customers in Santa Monica. United States District Court Judge Vaughn Walker granted the banks a preliminary injunction in November 1999, which was upheld by the Ninth Circuit on March 31, 2000. In early July 2000, Judge Walker issued a ruling striking down the Santa Monica and San Francisco fee bans.

Judge Walker ruled that only the Federal government could impose such restrictions on nationally-chartered banks and thrift institutions, citing the National Bank Act and the Home Owners Loan Act. Nevertheless, both Santa Monica and San Francisco filed notices of appeal on July 14, 2000 and filed their briefs on December 13, 2000. While oral arguments were heard on Jan. 17, 2002, 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 pre-emption arguments first raised in the New Jersey and California fee ban cases.

Most recently, litigation was filed on April 12, 2001 in Iowa by five national banks, challenging a state statute which was interpreted by the state banking department and the attorney general to ban ATM fees. (*Metrobank, N.A. v. Foster* (D. Ia. No. 4-01-CV-80226)). The state filed a motion to dismiss the case as not ripe for adjudication, given that, to date, no bank is charging the ATM fees in question, and the state has therefore not threatened any enforcement action. This motion was denied in August 2001 and the court subsequently granted the bank's motion for summary judgement. The Superintendent of Banks has since announced that his rules against surcharges have been withdrawn and that he will not appeal the court's order. (See Significant Legal Decisions, page 26.)

**ATM Task Force:** Faced with a series of bills mandating ATM service restrictions, NYBA formed an ATM Task Force to address creatively some of the provisions of current legislation. One bill that was strongly urged by its sponsors this year was S.6096-A(Padavan)/A.1615-B (Stringer), legislation that requires all ATM machines to be retrofitted with emergency 911 buttons that allow customers to be directly

connected with 911 operators in case of an emergency. Working closely with bankers on the Task Force, NYBA gathered data on the usage of such buttons in other jurisdictions, on ATM crimes and on customer reactions to such technology. NYBA expressed its belief that the buttons do not work effectively, are not used in emergency situations, are extremely expensive to retrofit and would cover only bank-owned ATMs. Moreover, law enforcement agencies encourage robbery victims to cooperate with attackers, rather than provoke them by attempting to contact authorities during an attack. Nevertheless, only extensive and frequent grass roots contacts by bankers throughout the State has thus far been successful in keeping this bill from coming to a vote in the Senate and it has passed the Assembly three times.

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

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

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## ■ BANK TAX REFORM

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

Last year, when the Legislature reconvened on October 24-25, it reenacted the Bank Tax for two years, retroactive to its expiration on December 31, 2000. The new expiration date is therefore December 31, 2002. In addition, the Legislature extended for two years the expired provisions of the financial modernization moratorium that NYBA had negotiated in 2000, allowing the formation of financial holding companies that could continue to be taxed under the Article of New York Tax Law under which they had been paying tax prior to their formation. The 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, is 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. Last Fall, Governor Pataki indicated that all future reductions may be postponed due to the State's unexpected financial crisis caused by the September 11, 2001 events.

However, when the Governor submitted his Executive Budget in January 2002, the third year of the Bank Tax Rate Reduction was included. The budget passed including the rate reduction.

## ■ UCC AMENDMENTS

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

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

ments to reflect changes in the new version of Article 9. No Assembly companion bill was introduced.

NYBA continues to support New York's adoption of Articles 3 and 4, although significant political problems remain preventing their passage, specifically the issue of check truncation. Senate Banks Committee Chairman Hugh T. Farley (R-Schenectady) has introduced legislation to adopt Articles 3 and 4 for several years (S.4437). While the Assembly has reviewed this issue, no legislation was introduced this session. Most recently, the NCCUSL embarked on a project to revise Articles 3 and 4 further, with the goal of bringing them up to date with current practices in the payment system. NYBA is awaiting the NCCUSL's final revisions to Articles 3 and 4 before continuing to pursue enactment of these Articles.

## ■ TRUST ISSUES

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

### NYBA TRUST LEGISLATIVE AGENDA

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

Senator James J. Lack (R-Suffolk), Chairman of the Senate Judiciary Committee, introduced the fiduciary income tax reform bill as S.4781, while Assembly Ways and Means Committee Chairman Herman D. (Denny) Farrell, Jr., joined by Judiciary Committee Chair Helene Weinstein (D-Brooklyn) and Assemblywoman Ann Margaret Carrozza (D-Queens) introduced the bill as A.8661. 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 recession and attacks of September 11 makes any additional tax reduction in the short-run problematical.

Recognizing that revenue considerations are raising the hurdle for consideration of fiduciary income tax reform, NYBA's Trust and Investment Division Strategic Planning Committee, at its meeting in January, determined to explore the costs and feasibility of doing a study of the relation between the fiduciary income tax and jobs in the trust industry in New York. The Committee designated the Trust and Estates Tax Committee as the steering committee to organize and manage the study. The Tax Committee approved a memorandum to serve as the basis for a request for proposal for the study and is in the process of identifying potential consulting firms, academics and others who could perform the study.

**Perpetual Trust Legislation** – Two bills were introduced to authorize perpetual trusts in New York. Both bills amend the Rule Against Perpetuities to permit grantors to establish trusts not subject to the Rule. In the Senate, Chairman Lack introduced S.694, that would simply make the Rule inapplicable to trusts characterized in their governing instruments as “perpetual” so long as the trustee or other party designated by the grantor is provided with authority to alienate the assets in the trust. In the Assembly, Chair of the EPTL Task Force Assemblywoman Ann Margaret Carrozza introduced A.7317, that suspends the Rule for perpetual trusts and contains a number of provisions designed both to ensure the alienability of property in the trust and to avoid inadvertent triggering of the so-called “Delaware tax trap,” a provision of Federal tax law that would void some of the tax benefits of a perpetual trust if certain assets in the trust may never vest. NYBA is working with the Legislature to resolve the differences between these two versions of perpetual trust legislation.

In addition, NYBA is seeking support throughout the legal community for the bills. The State and City Bar Associations have filed in support. In response to a request from Manhattan Surrogate Judge Renee Roth, NYBA surveyed its members with out-of-state trust operations to determine whether perpetual trusts were being established in jurisdictions that permit them. The

survey showed that both New York and non-New York grantors are regularly establishing such trusts and that every bank surveyed had such trusts in its out-of-state offices. In addition, in June, NYBA met with key members of the Judiciary urging support for the bill and, on June 21, Division Chairman Michael J.A. Smith, Managing Director, Deutsche Bank Private Banking, and Win Rutherford of White and Case, Chairman of the City Bar Task Force on Perpetual Trust Legislation, testified before the Surrogate's Court Advisory Committee on the need for the bills. The testimony eloquently commented on the need for New York trust departments and trust companies to be able to meet the competition for perpetual trusts in the other states, such as Delaware and New Jersey, that have enacted such laws.

**Environmental Liability Relief** – A long-term NYBA goal has been environmental liability relief for lenders and trustees. The expiration of the State's “mini-Superfund” last year 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, and met with the new Chairman of the Assembly Environmental Conservation Committee, Tom DiNapoli (D-Nassau), to urge his support for the legislation.

**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 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 would have encouraged 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. However, in meetings held with the Charities Bureau in May, the Attorney General withdrew his support for the bill, citing concern about imprudent delegation by individual trustees. ▼

## ■ 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](http://www.nyba.com).

### ELECTRONIC BANKING LEGISLATION

■ **Unsolicited E-mail** - S.1452(Rath)/A.7762 (Schimminger) Restricts unsolicited E-mail. **(DID NOT OPPOSE)** This bill passed the Senate and was held 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 Legislature, but has not yet been sent to the Governor for his consideration.

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

■ **"Talking" ATM Machines** - S.4963(Maziarz)/S.5004(Farley)/A.5797-A(Weisenberg) Requires "talking" ATM machines which may be accessed by blind consumers. **(OPPOSE)** NYBA filed a strong memorandum in opposition to the bill and is working to ensure

that the bill is amended to follow the standards for audio signals being developed by the Access Board in Washington. This bill is pending in the Senate Banks Committee and passed the Assembly.

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

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

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

### PRIVACY LEGISLATION

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

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

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

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

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

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

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

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

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

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

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and the Assembly Consumer Affairs and Protection Committees.

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

■ **Identity Theft** – S. 7697-A (Spano)/A.4939-E(Pheffer) After three-way negotiations involving the Governor and leaders of both Houses, this bill was amended to provide strong criminal identity theft protection without adversely affecting information sharing. **(SUPPORT)** It is a NYBA priority and has passed both Houses of the State Legislature.

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

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

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

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## 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 passed the Assembly.

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

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

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

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

reported out of the Senate Judiciary Committee.

■ **Banks' Right of Set-Off** - S.1676(Stachowski)/A.2746(Higgins) Limits banks' right of set-off against accounts into which social security or supplemental security income payments are deposited. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

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

■ **Passbook Savings Fees** - S.1819(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 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 General Obligations Law provisions requiring 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 passed the Assembly and is pending in the Senate Banks Committee.

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

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

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

■ **Debit Cards** - S.4697-C(Spano)/A.5973-B(Matuso) Provides the same protection for debit cards as credit cards by prohibiting the printing of debit card numbers on transaction forms. **(SUPPORT)** This bill passed both Houses but has not yet been sent to the Governor.

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

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

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

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

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

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

■ **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.

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■ **Fingerprinting Applicants for Bank Charters** -

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

■ **Credit Unions** - S. 4945-C(Marchi)/A.9809-B

(Sweeney) Permits credit unions to accept Excelsior linked deposits. **(OPPOSE)**. This bill passed the Assembly and is pending in the Senate Rules 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(Veella) Limits NSF fees to \$15.

**(OPPOSE)** This bill is pending in the Senate Banks Committee.

■ **Annual Reporting Requirements** - S.4634-A (Farley)

Reduces annual reporting requirements of the Banking Department. **(SUPPORT)** This bill passed the Senate.

■ **Expanding Credit Union's Common Bond** -

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

■ **Unsolicited Checks** - S.4661(Padavan) - Prohibits

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

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

■ **Linked Deposit Program** - S.5249(Balboni) A Governor's Program Bill, it creates a linked deposit program for loans to eliminate environmental contamination.

**(SUPPORT)** The bill passed the Senate and is pending in the Assembly Environmental Conservation Committee.

■ **Loan Checks** - S.7128-A(Fuschillo)/A. 9772-A

(Davis) Establishes procedures for the reduction of fraud with regard to loan-checks. NYBA suggested amendments to this bill, which were adopted. **(SUPPORT)** The bill passed both Houses of the Legislature.

■ **Letters of Credit** - S.7160(Farley)/ A. 11555(Rules,

Request of Farrell) NYBA-supported legislation that permits letters of credit from AAA-rated Federal Home Loan Banks to be accepted at 100% value as collateral for municipal deposits, rather than 140%. **(SUPPORT)** This bill passed both Houses.

■ **Community Bank Deposit Program** – S. 7175

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

■ **Military Decoration Abandonment** - S. 7364(Mo-

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

■ **Group Property/Casualty Insurance** –

S.7519(Veella)/A.11590(Rules, Request of Grannis) Extends until 2007 the expiration date for group property/casualty insurance plans based on credit cards, debit cards or checking accounts. **(SUPPORT)** This bill passed both Houses but has not yet been sent to the Governor.

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

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

### TRUST LEGISLATION

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

■ **Attorney Compensation** - S. 2938 (Lack)/ A. 10737 (Weinstein) authorizes attorneys in Surrogate's Court to receive certain "reasonable expenses necessarily and appropriately incurred" in addition to attorney's fees. **(DID NOT OPPOSE)** The bill passed both Houses but has not yet been sent to Governor Pataki.

■ **Trust Operations by Bank Branches** – S. 2964-A (Farley)/ A. 8632-A (Rules, Request of Schimminger) would clarify that branch offices of national banks as well as national banks headquartered in the State are subject to certain provisions of the Banking Law. Among other provisions, the legislation would state that national bank branches may exercise trust powers. **(SUPPORT)** NYBA wrote Governor Pataki urging that the bill be approved. It passed the Legislature, but has not yet been sent to the Governor.

■ **Guardian Health Care Decisions** – S. 4622-B (Hannon)/ A. 8466-D (Rules, Request of Luster) enacts the "Health Care Decisions Act for Persons with Mental Retardation" to establish procedures under the Surrogate's Court Procedure Act for determining, prior to the appointment of a guardian, whether a mentally retarded person has the ability to make his or her own decisions

regarding health care. **(DID NOT OPPOSE)** The bill remains in the Legislature after passing both Houses.

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

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

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

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

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

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

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■ **Mandatory Fiduciary Accounting** - S. 6934 (Lack)/ A. 10756 (Weinstein) provides for multiple relief against a fiduciary who fails to respond by appearing or filing a court-ordered accounting, including removal of the fiduciary. **(SUPPORT)** The bill passed the Legislature, but has not yet been sent to the Governor for his consideration.

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

■ **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

■ **Special Mortgage Recording Tax** - S.1246 (Skelos)/A.1539 (Morelle) Permits mortgagors to pay the special mortgage recording tax now required to be paid by mortgagees **(SUPPORT)**. This bill passed both Houses but has not yet been sent to the Governor.

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

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

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

■ **Private Mortgage Insurance** - S.4277(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.

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

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

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

■ **Water and Sewer Charges** - S.6046,Rath/A.10463,Sweeney Establishes a procedure for local governments to contract with banks to collect water and sewer charges, real property taxes, special assessments and other fees and charges. **(SUPPORT)** This bill passed both Houses but has not yet been sent to the Governor.

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

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

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

■ **Real Estate Taxes** - S.7150(Fuschillo)/A.11278 (Rules, Request of DiNapoli) Provides penalties when a mortgagee who closes an escrow account for the payment of real estate taxes fails to notify the mortgagor of the responsibility to pay the taxes. The requirement for notice has been a provision of the Real Property Taxation Law for years. **(DID NOT OPPOSE)** This bill passed both Houses, but has not yet been sent to the Governor.

■ **Predatory Lending** - S.7717(Rules), S.7728-A(Farley), S.7811(Farley), S.7840(Farley)/A.11856 (Rules, Request of Greene) A series of bills designed to regulate predatory lending, they reflect the progressive efforts of NYBA to negotiate with AARP and other groups a high cost home loan lending bill that will eliminate predatory practices without adversely affecting legitimate sub-prime lenders. A.11856 passed both House, but the Senate passed an accompanying chapter amendment, S.7840, designed to correct a number of flaws with the bill. The Governor indicated that he would like the Senate and Assembly to work out an acceptable chapter amendment before the bills are sent to him for his consideration. NYBA is scheduled to meet with Speaker Silver to share its views on the bills.

■ **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

NYBA7/02

Senate Codes Committee.

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

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

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

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

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

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

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

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

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

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

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

#### MISCELLANEOUS LEGISLATION

■ **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 both the Senate and Assembly, and has been sent to the Governor for his consideration.

■ **Bankruptcy and Mutual Fund Shares** - S.1470 (Vellella)/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 passed the Senate and is pending in the Assembly Banks Committee.

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

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

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

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

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

the Senate and Assembly Banks Committees.

■ **Statute of Frauds** - S5669-B(Lack)/A.11106-A (Rules, Request of Weinstein) Amends the Statute of Frauds to make oral trades in loan participations legally enforceable. **(SUPPORT)** This bill passed both Houses but has yet to be sent to the Governor.

■ **Small Business Incubators** – S. 6017 (Alesi)/A. 8735 (Rules, Request of Sweeney) Provides assistance to small business started by women, minorities and persons with disabilities including referral to small business incubation centers. **(NO POSITION)** This bill passed both Houses, but has not yet been sent to Governor Pataki.

■ **Separate Municipal Bank Accounts** - S. 6050 (Rath)/ A. 10502 (Sweeney) Removes the requirement that moneys in certain reserve funds be kept in separate bank accounts. **(SUPPORT)** This bill passed the Senate and is pending in the Assembly Education Committee.

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

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

■ **Securities Employee Fingerprinting** – S.6741-A(Skelos)/A.11791(Rules, Request of Silver) Expands the list of employees of the securities industry subject to mandatory fingerprinting. **(NO POSITION)** This bill passed both Houses, but has not yet been sent to the Governor.

■ **Letters of Credit as Collateral** – S. 7160(Farley)/A.11555(Rules, Request of Farrell) Permits letters of credit from highly rated Federal Home Banks to be accepted as collateral for municipal deposits at par

rather than at 140%. **(SUPPORT)** This bill passed both Houses but has not yet been sent to the Governor.

■ **Thrift Community Bank Deposits** - S.7175(Farley)/A.9297-A(Rules, Request of Farrell) – Authorizes thrift institutions to participate in the Community Bank Deposit Program established by the Legislature last year. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Rules Committee.

■ **Savings Banks Record Keeping** – S. 7179(Farley)/A.11112(Rules, Request of Greene) Makes Record keeping requirements for savings banks and savings and loan associations consistent with those applicable to commercial banks. **(SUPPORT)** This bill passed both Houses but has not yet been sent to Governor Pataki.

■ **Water Pollution Revolving Loans** – S.7180-A(Balboni)/A.11167-A(Rules, Request of DiNapoli) Expands the water pollution control revolving loan fund program to include Federal wet weather quality grants. **(SUPPORT)** This bill passed both Houses and is waiting to be forwarded to the Governor for his consideration.

■ **Electronic Signatures** - S.7289-A(Hannon)/A.11628-A(Rules, Request of Destito) Promotes the use of electronic signatures and the acceptance of electronic records. **(SUPPORT)** This bill passed both Houses and is awaiting submission to the Governor.

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

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

(Continued on next page)

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

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

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

## ■ Chapter Law Summary

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

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

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

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

■ **Annual Budget** - S. 6260-B(Budget)/A.9762-B(Budget) and Various Other Budget Bills. The State Legislature completed action this year on the Annual Budget, preserving the third year of the Bank Tax rate reduction, which will reduce the State's bank tax rate to 7.5% for fiscal years beginning on or after July 1, 2002. The budget also expanded the Excelsior Linked Deposit Program by \$150 million. Credit unions were not included in the program as part of the budget, although separate bills are pending that would include them. The budget also increased penalties for violating the State's "do not call" list from \$2,000 to up to \$5,000 per violation. **(SUPPORT)** Governor Pataki signed this bill as Chapter 85 of the laws of 2002 on May 29.

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



# ■ State Regulatory Developments

## ■ BANKING BOARD ACTIONS

**1. High Cost Home Loans** — At its April 17, 2002 meeting, the New York State Banking Department Board announced its plan to issue for comment proposed amendments to Part 41. The amendments were published in the May 8th edition of *The New York State Register*. Perhaps, the most notable of these proposed amendments is a ban on the financing of single premium credit insurance in connection with a high cost home loan subject to Part 41, to which NYBA does not object. The proposed amendments also contemplate the choice of two sources to be used when determining the applicable yield on U.S. Treasury securities. In its June 18, 2002 comment letter regarding these proposals, NYBA urged the Banking Department to limit to one, the choice of sources to be used for the "interest rate" test. Specifically, NYBA suggested that the "Federal CFR" cite (as published in the Federal Reserve Statistical Release known as H-15 Selected Interest Rates) be the mandated source as it has more maturities than the proposed alternative – the Banking Department website. NYBA pointed out that the choice of a single source would both eliminate the ambiguous requirement contained in the proposed amendment that the lender uses its chosen yield "consistently" and would also eliminate the regulatory burden set forth in the proposal of having to make a note in each file as to what index was being utilized. All comments on the proposed amendments were due on June 21.

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

**2. ATM Lighting Standards** — NYBA continues to engage in a dialogue with the New York Banking Department regarding its enforcement of the ATM Safety Act. Numerous NYBA members have expressed concern that they are often cited for violations of the lighting standards, despite their best efforts at compliance and their belief that some of the requirements are disturbing to neighbors and, in fact, may violate local codes. Superintendent of Banks Elizabeth McCaul has repeatedly stated that she has no discretion under the statute to provide flexibility in its administration or enforcement. Progress was made in this regard at the end of the 2000 legislative session, with both the Banking Department and NYBA supporting a technical correction to the ATM Safety Act designed to allow the Banking Department greater flexibility in its enforcement. Although this cor-

rective legislation was debated in the final week of the session, an agreement could not be reached. No such legislation was introduced in the 2001 legislative session.

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

**3. Checking Account Fee** — On May 13, 2002 NYBA petitioned the Banking Department to promulgate a regulation that would permit New York State-chartered banks to have the authority to charge a daily fee to checking accounts which do not have overdraft protection privileges and yet have a negative balance. The OCC, through an interpretive ruling set forth at 12 C.F.R. 7.4002, has already given national banks the authority to charge such a fee. This NYBA petition is consistent with its goal of obtaining parity between state and national banks. NYBA is awaiting action by the Banking Department.

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

## **5. Wild Card Petition: Underwriting of Municipal Revenue Bonds**

On March 16, 2000, NYBA filed a "wild card" petition with the New York State Banking Department requesting that State banks be provided the authority to underwrite municipal revenue bonds given to national

(Continued on page 22)

## Analysis of Employment Discrimination Cases in U.S. Courts of Appeal

A recently published survey of federal court data reveals surprising information about the relative rates of success of plaintiffs and employers in employment discrimination cases. In pertinent part, the study found that:

A. Between 1988 and 1997, employment discrimination plaintiffs prevailed in only 26.8% of the federal court trials. This is lower than the overall plaintiff success rate of 44.2%;

B. Among the 12 federal circuits, the average reversal rate of trial victories by employment discrimination plaintiffs is 43.61%. This is greater than the reversal rate in almost every other category of cases heard by the federal court;

C. When employers prevail at trial, the reversal rate is less than 6%, smaller than almost any other kind of case heard by the federal courts;

D. The gap between the reversal rates of plaintiffs and employers is larger for employment cases than any other category of case (almost 38%);

E. Between 1988 and 1997, the First Circuit (*i.e.*, Maine, Massachusetts, Puerto Rico, Rhode Island and New Hampshire) did not reverse any trial victory by an employer in an employment discrimination case, but reversed six of the 14 plaintiffs' trial victories (almost 43%);

F. In the Fifth Circuit (*i.e.*, Texas, Mississippi and Louisiana), almost 61% of plaintiffs' trial victories were reversed between 1988 and 1997; and,

G. Employers appealing adverse pretrial dispositive motion rulings obtained reversal in almost 45% of the appeals, while plaintiffs appealing adverse pre-trial dispositive motions obtained reversal in about 11% of the appeals. The gap between employer and plaintiff success rates of almost 34% is higher than almost all other categories of federal court litigation.

This report was prepared by Theodore Eisenberg and Stuart J. Schwab. It can be found at [www.findjustice.com/mmr/news/eisenber-schwab/schwab-report.htm](http://www.findjustice.com/mmr/news/eisenber-schwab/schwab-report.htm).

Based upon the foregoing, employers willing to take cases to trial and then to appeal adverse verdicts have a far better chance of succeeding than they might perceive. Conversely, plaintiffs' counsel should be forewarned that an employer willing to take a case to trial and then to appeal is far more likely to escape liability than media reports of plaintiffs' verdicts would lead one to believe. This information might be espe-

cially compelling to plaintiffs' counsel who experience success in other areas of the law, where plaintiffs verdicts are obtained more easily and affirmed more regularly by the federal appellate courts.

### Supreme Court Clarifies EEOC's Role in Litigating Employment Disputes Subject to Private Arbitration Agreement

#### Viability of Private Arbitration to Resolve Workplace Complaints Remains Strong

In its second decision within ten months recognizing the enforceability of private arbitration agreements, the U. S. Supreme Court, in *EEOC v. Waffle House, Inc.*, has clarified the role of the Equal Employment Opportunity Commission in litigating discrimination complaints subject to an arbitration agreement. On January 15, the Court issued its decision upholding the EEOC's right to seek all available remedies for job discrimination regardless of the employer-employee agreement to resolve their disputes through binding arbitration. Rejecting any limitation upon the Commission's right to enforce federal anti-discrimination laws, the Court held: "There is no language in the statute or ... cases suggesting that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available."

Jackson Lewis represented the employer in the litigation. Partner David Gordon, who argued the case before the Court, commented, "We're disappointed in the Court's ruling, but we don't believe employers should be discouraged from implementing or maintaining arbitration systems as a result of this decision. The Court's decision did nothing to call into question the viability and enforceability of a fair and reasonable mandatory arbitration procedure for resolving workplace disputes outside the courtroom."

Indeed, while reaffirming the EEOC's independent right to seek remedies for job discrimination, the Supreme Court acknowledged the longstanding federal policy favoring arbitration agreements – most recently recognized in its March 2001 decision in *Circuit City Stores, Inc. v. Adams*. In *Circuit City*, the Court unequivocally stated that employment contracts, including private agreements to arbitrate employment

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disputes, fall within the Federal Arbitration Act.

In reaching its decision in *Waffle House*, the Supreme Court compared the scope of the EEOC's enforcement authority with the FAA's guarantee of enforceability of private agreements to arbitrate. Since the EEOC itself was not a party to the arbitration agreement between the company and the individual, the Court found the agency could pursue statutory remedies for the alleged discrimination, including the "victim-specific" relief of reinstatement, backpay, compensatory and punitive damages. Once a charge is filed, the Court noted, the EEOC becomes "the master of its own case ...." and is not a mere surrogate for the aggrieved worker.

#### **Rare Filing of Lawsuit by Agency**

The situation the Supreme Court considered in the *Waffle House* case was unusual. As the Supreme Court noted in its opinion, the EEOC files suit in less than one percent of all charges that come before it each year. In fact, in fiscal year 2000, the Commission filed fewer than 300 lawsuits, representing less than five percent of all cases in which the agency itself found reasonable cause to believe discrimination occurred. In contrast, alleged victims of employment discrimination filed more than 21,000 lawsuits in the federal courts in 2000.

Thus, it was a rare occurrence that the EEOC subsequently filed the lawsuit independently of the employee, alleging the company's employment practices, including the discharge, violated the ADA. Although the employee had agreed to resolve any disputes with his employer through arbitration, instead he had gone directly to the EEOC with his complaint.

In the lawsuit, the agency sought injunctive relief to eradicate the effects of the alleged unlawful practices, as well as specific relief designed to make the employee whole. Rather than dismiss the case because of the binding arbitration agreement between the parties, the EEOC had authority to exercise its enforcement powers, including seeking monetary and other remedies that are specific to the individual employee, the Supreme Court found.

#### **Where Does Arbitration of Employment Disputes Stand Now?**

Many employers may be wondering whether this Supreme Court decision limits the enforceability or desirability of private agreements to arbitrate employ-

ment disputes. The first place to look for an answer to those questions is the language of the decision itself, where the Court commented that the EEOC's ability to seek relief in cases where an employee has agreed to binding arbitration, but has not yet invoked the procedure, "will have a negligible effect on the federal policy favoring arbitration." The Court went on to say that given the EEOC's restrained litigation practice over the past 20 years, concerns that this decision will discourage use of arbitration agreements are "highly implausible." "When speculating about the impact this decision might have on the behavior of employees and employers, we think it is worth recognizing that the EEOC files suit in less than one percent of the charges filed each year," the Court noted.

The reasons employers have turned to the private arbitration of employment disputes have not disappeared. In the past decade, the tremendous increase in employee lawsuits, the ability of plaintiffs to recover virtually unlimited damage awards, and the unpredictability of juries have combined to make employment litigation even more treacherous and costly for employers. Arbitration offers a change of forum, while still assuring the parties the same rights and remedies as a court or fair employment practice agency.

**Editor's Note:** This article is provided for informational purposes and is not intended to be legal advice. Readers should consult counsel of their own choosing for their particular questions and concerns. The Jackson Lewis Alternative Dispute Resolution Practice Group is available to assist employers in developing, implementing, and enforcing alternative dispute resolution programs, including mandatory pre-dispute arbitration.

For more information about Jackson Lewis, please visit our web site: [www.jacksonlewis.com](http://www.jacksonlewis.com), or contact Paul J. Siegel, Esq., by telephone at 516-364-0404, or via e-mail at [siegelp@jacksonlewis.com](mailto:siegelp@jacksonlewis.com).

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

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

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

mitted 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

(For Background, please see the Dec. 17, 2001 issue of the *Banking Journal*.)

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. NYBA urged that the draft then be published for public comment.

Beginning 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 has 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

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looking to trust instruments to establish the situs of trusts and NYBA is urging the Department to follow suit. The Department has not yet acted on the draft and is seeking additional comment from the State Bar Association. NYBA has urged the Bar Association to support the proposal and the Bar has indicated that it will do so.

The Department is currently reviewing the comments it received.

### ■ CHARITABLE TRUST REPORTING REGS

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

### ■ NON-NEW YORK TRUST FILING

In mid-April the State Department of Taxation and Finance sent out thousands of notices to bank trust departments requesting documentation that trusts whose tax returns filed with the Internal Revenue Service listed a New York State address were not required to pay New York fiduciary income tax. NYBA's Trust and Estate Tax Committee, chaired by John Reale, Vice President, The Bank of New York, coordinated a response among New York trust departments and companies and NYBA hosted a meeting with Tax Department staff seeking an alternative to the exten-

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sive document searches that would have been necessary in response to the notices. The Department agreed to work with NYBA to establish a system of testing a relatively small number of returns from each affected bank to determine if the returns are required to be filed under New York law. NYBA submitted to the Tax Department the names of key contacts at each bank that received the notices to coordinate the sampling process. ▼

## ■ NYBA in Court

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

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

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

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

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formed Bluebird and transferred to it all of the Continental first series certificates.

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

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

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

The Court of Appeals reversed the decision of the Appellate Division on March 26, 2002. It ruled that

nothing in GOL Section 13-107 requires that a transferee demonstrate its own injury in order to bring a claim for damages. Rather, it stated that the wording of that statute makes it clear that the buyer of a bond receives exactly the same claims as the seller held before the transfer. The Court of Appeals declined to address the trustees assertions that (i) GOL Section 13-101 directs that GOL Section 13-107 be interpreted to conform to TIA, and thereby reflect federal "public policy" that claims remain with the bond seller; and (ii) TIA preempts GOL Section 13-107. Rather, the Court of Appeals remanded to the Appellate Division for consideration of those two issues. Briefs on remand were filed May 7th and May 30.

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

## ■ VISA CHECK/MASTERMONEY ANTITRUST LITIGATION

**Recent Developments:** On June 10, 2002, the U.S. Supreme Court denied *certiorari*, thus leaving stand the lower court's decision granting class status to a broad array of merchant plaintiffs.

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, which was denied. A petition for a writ of *certiorari* was filed with the United States Supreme Court on April 3 and NYBA filed a supporting *amicus* brief on May 3.

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

also make it easier for other plaintiff classes to win certification against financial institutions that are often targets of class action litigation.

**Background:** In this case, several of the nation's largest retailers, including Wal Mart Stores, Sears Roebuck, Safeway and Circuit City, along with a 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 to the Second Circuit Court of Appeals, NYBA challenged whether the court engaged in the "rigorous analysis" necessary to ensure that the requirements of Rule 23 allowing class certification were met. NYBA stated that the court wrongly failed to address any conflicts posed by the opposing parties' experts and also failed to consider the issue of manageability, noting that the court wrongly put off for another day the question of whether the damages issues in this case could end up requiring four million individual trials to resolve the question of damages.

**Outlook:** The Supreme Court's denial of *certiorari* means that the plaintiff class may proceed with its substantive claims. Because of the significant dollar amount in question, it is possible that defendants may feel the need to contemplate an early settlement. ▼

# ■ Significant Legal Decisions

## ■ USE OF SOCIAL SECURITY BENEFITS

### **Lopez v. Washington Mutual Bank:**

**Recent Developments:** On March 14, 2002 the Ninth Circuit Court of Appeals ruled that the use of Social Security and Supplemental Security Income (SSI) benefit funds directly deposited into a customer's account to clear overdraft balances violated 42 U.S.C. 407(a) and 1383(d), provisions which protect Social Security and SSI benefits from "execution, levy, attachment, garnishment, or other legal process" of creditors.

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

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

The District Court granted Washington Mutual's motion for summary judgment, stating that the bank's overdraft practice did not constitute "other legal process" in violation of Section 407, as the practice did not involve any coercion of the benefits recipient. The Ninth Circuit reversed, holding that the setoff of the benefit funds did in fact constitute "other legal process". The bank filed a petition for rehearing *en banc*. The U.S. Treasury, Social Security Administration and Office of Thrift Supervision also filed briefs supporting a rehearing. The court then directed the plaintiffs to

file a response to the petition, which was done on May 31.

**Outlook:** If the Ninth Circuit ruling is upheld, it could have a disruptive impact on normal bank operations relative to Social Security/SSI accounts, at least to those institutions within that Circuit's jurisdiction.

## ■ NATIONAL BANK ACT & ATM SURCHARGE FEES

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

**Recent Developments:** On March 6, 2002, the district court granted summary judgment to the national bank plaintiffs in this case, who sought 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 as banning ATM surcharges. In its decision, the district court held that the governing statute was the National Bank Act, a law that has been authoritatively interpreted as allowing national banks to charge the fees in question, and preempting any contrary state laws. Iowa's Superintendent of Banking has since announced that his rules against surcharges – both as to national banks and state banks – have been withdrawn, and that he will not appeal the district court order.

**KEY POINT:** This case is providing 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 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, Iowa's Superintendent of Banks, 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. That motion was denied in August 2001.

**Outlook:** As the Superintendent of Banks has determined not to appeal this case, it will provide further judicial support for national banks' ability to assess ATM surcharges.

## ■ ATM SURCHARGE FEES

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

**Recent Developments:** In July 2000, the United States District Court for the Northern District of California issued a ruling that struck down ATM surcharge bans in Santa Monica and San Francisco. U.S. District Court Judge Vaughn Walker ruled that only the Federal government could impose such restrictions on nationally chartered banks and thrift institutions, citing the National Bank Act and Home Owners Loan Act. Both Santa Monica and San Francisco filed notices of appeal on July 14, 2000. The banks filed their briefs in this matter on Dec. 13, 2000. Oral arguments were held on Jan. 17, 2002.

**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 de-regulated 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. However, as both local governments have appealed, the final resolution of this issue may still be far off. ▼

# ■ Federal Legislative Developments

## ■ DEPOSIT INSURANCE REFORM

(For Background, please see the Dec. 17, 2001 issue of the *Banking Journal*.)

In Washington, the pace of deposit insurance reform has been quickening throughout the year. In February, deposit insurance reform bills were introduced in both Houses that significantly advance the goal of full deposit insurance coverage. In the House, Congressman Spencer Bachus (R-AL) introduced H.R.3717, a comprehensive reform bill that would provide an increase in basic deposit insurance coverage to \$130,000, index future coverage to inflation, merge BIF and SAIF, double the basic coverage limit for retirement accounts, even out bank deposit insurance premiums to avoid sharp increases during recessions and provide for a credit against premiums for institutions that paid to recapitalize BIF and SAIF from 1989 to 1997. The bill also moved NYBA's policy of full coverage of municipal deposits closer by incorporating legislation introduced by Congressman Paul Gillmor (R-OH) that would cover municipal deposits up to the level of a bank's equity capital. The bill was co-sponsored by 15 Republican members of the House, including New York's Representative Peter King (R-Nassau), a former County Treasurer.

Senator Tim Johnson (D-SD) introduced S.1945, the "Safe and Fair Deposit Insurance Act of 2002." The bill is similar to H.R.3717, as introduced, but would cover retirement accounts to \$250,000, as endorsed by FDIC Chairman Donald E. Powell, index the \$130,000 general coverage level every five years and provide additional coverage for in-state municipal deposits. Depositors would receive 80% coverage of deposits in excess of \$130,000, up to \$5 million. The bill has strong bi-partisan sponsorship. After the introduction of these bills, NYBA's Legislative and Regulatory Policy Committee met and endorsed a recommendation of its Deposit Insurance Task Force to negotiate an effective and reasonable provision on municipal deposit insurance coverage, providing banks the option of avoiding collateralization of such deposits. NYBA noted to the sponsors of H.R.3717 that the provision covering municipal deposits to the level of a bank's capital was unworkable (failed banks have no capital) and urged alternatives.

In early March, the House Financial Services Subcommittee on Financial Institutions approved

H.R.3717 after adopting several significant amendments. On municipal coverage, the bill was improved by incorporating language similar to that in S.1945, providing coverage, in addition to the basic limit of \$130,000 up to the lesser of \$5 million per municipal depositor or 80% of the balance in the account. An amendment was also adopted during Subcommittee consideration to provide discounts against future deposit insurance premiums for lifeline banking accounts. The amendment would lower modestly any future premiums charged New York banks, which are required to offer basic banking accounts.

Later in March, a NYBA delegation attended the ABA's Spring Summit meeting in Washington, including Brad Rock, Chairman, President & CEO of Bank of Smithtown, Jerry Zehr, President & CEO of Ontario National Bank and NYBA President Mike Smith. The meeting focused on deposit insurance reform and real estate brokerage. NYBA also visited the leaders of the House Financial Services Committee from New York, including Ranking Democrat John LaFalce (Niagara). The overriding theme of the Summit meeting was strong opposition to any legislation that could raise the cost of deposit insurance for well-managed banks. Complementing this view was the strong sense that the current version of deposit insurance reform legislation (H.R.3717) did not provide an adequate credit for the premiums paid by banks that recapitalized the deposit insurance fund from 1987 to 1996. In order to address this "free rider" problem, the ABA supported an amendment that would increase the amount of credit that banks receive for their previous contributions to the deposit insurance fund. Banks that paid no premiums would receive no credit. NYBA made a strong presentation, endorsed by the Ohio Bankers Association, in favor of optional deposit insurance for municipal deposits and received the support of more than half the bankers present. NYBA met further with Chairman Don Powell of the FDIC to discuss optional insurance for municipal deposits. The New York Representatives with whom the Association met were generally open to optional municipal deposit insurance coverage.

On April 17, the House Financial Services Committee favorably reported H.R.3717, the Federal Deposit Insurance Reform Act of 2002, by an overwhelming vote of 52-2. The bill survived numerous attempts to weaken provisions increasing deposit insurance

coverage increases and to reduce the amount of refunds or dividends that the FDIC would pay. In the end, only three, mainly technical, amendments were adopted in Committee. Included in a managers' amendment, however, was language important to NYBA sponsored by Rep. Carolyn Maloney (D-Manhattan) that would increase the amount of credits received by banks that had paid to refund the FDIC from 1989 to 1996 and mandate FDIC refunds of premiums when the fund balance increased. These two amendments effectively address the "free rider" issue.

NYBA spent several days in Washington defending provisions of the bill that increase municipal deposit coverage and attempting to work out an agreement with the New York thrift industry that would permit both trade groups to work together for optional deposit insurance. On the eve of the markup, NYBA negotiated an amendment that had been developed in conjunction with IBANYS and, ultimately, with CBANYS support, to institute a new system of optional insurance in excess of the new coverage levels along with accepting deposit parity for all New York banks. The compromise approach was offered by Rep. Sue Kelly (R-Westchester) but was withdrawn after lengthy debate for possible later consideration. Subsequently, an objectionable amendment precluding commercial banks from taking advantage of the new coverage until New York granted thrift parity was defeated on a bipartisan basis. Rep. John LaFalce (D-Niagara) offered an amendment to delete the higher limits of municipal deposit insurance coverage from the bill. It lost by a vote of 32-16.

After full Committee action, a coalition of public policy leaders, including the Federal Reserve Board, Treasury and FDIC, worked to eliminate higher coverage for municipal deposits from the bill. With little national trade group support, NYBA worked to maintain the highest possible coverage levels in the bill. The week prior to Memorial Day, the House of Representatives passed H.R.3717, the Federal Deposit Insurance Reform Act of 2002, by a vote of 408-18. All New York members of Congress voted for the bill. The House Republican Leadership crafted a compromise with the most vocal critics of deposit insurance reform to produce the overwhelming majority.

Within the reform package, the House approved a provision to expand coverage of municipal deposits

to \$130,000 plus 80% per depositor, capped at \$2 million. Although the cap was reduced from the \$5 million in the bill reported from the Financial Services Committee, the bill marks the first time this coverage has been expanded since 1980. The \$5 million coverage cap remains in the Senate bill. While NYBA's effort to secure optional coverage above the House threshold was unsuccessful, it was fully vetted with the FDIC and legislative leaders and NYBA will continue to pursue it in the weeks ahead.

The bill would also provide parity for New York thrifts by preempting restrictive state laws that prohibit their acceptance of municipal deposits without obtaining a bank charter. New York is the only state that continues to prohibit municipal deposits in thrifts. Inclusion of this provision, pursuant to NYBA's agreement with IBANYS that it was not objectionable within comprehensive reform, should also serve to unite the entire industry's efforts in future Congressional consideration and avoid the often contentious debates in Albany.

Other provisions in the bill which could eliminate the need for early deposit insurance premiums which might have occurred under current law include the merger of BIF and SAIF, elimination of the mandatory premium requirement when the deposit insurance reserve falls below 1.25% of insured deposits, authority for the FDIC to charge smaller, more regular premiums rather than the higher level of less frequent premiums required under current law, and, in a provision NYBA strongly supported, significant credits against potential premiums and a strengthened system of mandatory refunds for banks that paid into the BIF and SAIF funds from 1989 to 1996.

The Congressional Budget Office (CBO), an independent, non-partisan agency that analyzes legislation for Congress, issued a report on deposit insurance reform that contained only positive comments on increasing coverage for municipal deposits. CBO's report, produced at the request of Senate Banking Committee Ranking Member Phil Gramm (R-TX), highlighted benefits for both banks and municipalities from increased coverage and paralleled arguments NYBA has been making with Congress and the FDIC. The report stated that increasing municipal coverage would decrease bank costs of holding collateral and free funds for additional lending. It also indicated that municipalities would enjoy increased returns on their

deposits and greater security in the event of a bank failure. NYBA then conducted a survey of members of its Municipal Finance Committee to identify more precisely the costs and benefits of increasing municipal deposit insurance coverage. The survey results, although not yet complete, show that the FDIC's estimate that providing coverage up to \$5 million would cost 3.6 basis points was very conservative.

The FDIC analysis of the March 31 call reports in last June revealed that, as a result of increases in insured deposits, higher than expected losses in insured bank failures and changes in data provided on the call reports, the Bank Insurance Fund (BIF) fell below the mandated 1.25% designated reserve ratio. However, the Corporation will not consider reimposing deposit insurance premiums until November, when call report data from the second and third quarters may reverse the decline. NYBA's deposit insurance task force met to review the Association's strategy for increasing deposit insurance coverage of municipal deposits. Under the deposit insurance reform bills pending in both Houses of Congress, the FDIC would have significant additional flexibility in determining whether to charge deposit insurance premiums and banks that paid into the fund during the early 90's would receive significant credits against any future premiums.

At this writing, the Senate Banking Committee is expected to schedule shortly a mark-up of S.1945. A summary of the House-passed version of H.R.3717 follows:

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

On Tuesday, May 21, 2002, the United States House of Representatives passed, by a vote of 408-18, H.R.3717, the Federal Deposit Insurance Reform Act of 2002. All members of the New York Congressional delegation voted for the bill. The bill includes the following provisions:

- Merger of the Bank Insurance Fund (BIF) and the Savings Association Insurance Fund (SAIF) into a newly created Deposit Insurance Fund (DIF).
- Increases in deposit insurance coverage, including:
  - a general coverage increase for all deposit accounts from \$100,000 to \$130,000;
  - providing pass-through deposit insurance coverage for employee benefit plans, but prohibiting institutions

that are not well-capitalized from accepting such plans;

- increase in insurance for retirement plans, including IRAs, 401(k)s and Keogh plans, to \$230,000;
- indexing the new \$130,000 standard maximum insurance limit every 5 years to inflation, rounded to the nearest \$10,000 and beginning January 1, 2005; and
- increasing coverage for public depositors, including state and local governments, to the new standard maximum insurance limit plus 80% of the amount in each depositor's account up to \$2 million.

- Preemption on State restrictions on the ability of insured depository institutions (defined as commercial and savings banks) to accept public deposits and on State restrictions on the ability of public depositors to make such deposits.
- Expansion of the investment authority for the deposit insurance fund beyond U.S. government obligations.
- Authority for the FDIC to set deposit insurance assessments at whatever level is necessary or appropriate to maintain the designated reserve ratio, eliminating the current requirement of 23 basis point assessments under certain circumstances, and repealing the limitation on the FDIC charging premiums to the best-managed, best capitalized institutions so long as the deposit insurance reserve ratio remains above 1.25%; however, the highest rated institutions could not be charged a premium in excess of 1 basis point unless the ratio falls below 1.15%.
- Replacement of the current 1.25% mandatory designated reserve ratio (DRR) with a new DRR range of 1.15% to 1.40% with the FDIC Board having discretion to adopt a DRR within this range based on (1) present and future risk of losses to the DIF; (2) economic conditions; and (3) any other factors the Board considers appropriate. All changes to the range are subject to notice and comment.
- Establishment of a system of dividends and credits from the DIF, including:
  - a requirement that dividends be paid comprised of all amounts in excess of that necessary to maintain the DRR when the reserve ratio equals or exceeds 1.40% of estimated insured deposits;
  - a requirement that dividends equal to 50% of assessment income be paid whenever the reserve ratio equals or exceeds 1.35% and is less than 1.40%;
  - authority for the FDIC to pay dividends whenever the reserve ratio equals or exceeds 1.30% and the Board

has set the DRR below 1.30%;

- a transitional credit of 12 basis points of the total assessment base as of December 31, 2001 (equaling approximately \$5.4 billion) for insured depository institutions based on their percentage of total industry insured deposits as of December 31, 1996; and
- modification in the definition of the DIF reserve ratio to add back any reserves the FDIC has set aside from the reserve fund for anticipated losses from failed institutions.

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

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

## ■ PRIVACY

To date no legislation placing further restrictions on banks' use of consumer and customer information has passed during this legislative session. The focus of federal legislative interest, however, remains 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) – may have some traction. S848 was reported by the Senate Judiciary Committee on May 16, 2002 and the Senate Finance Social Security - Family Policy Subcommittee held a hearing on the bill in early July. It is possible that the language of S.848 will be attached to an appropriations bill later this year. 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

House bill last year, at which time, among other witnesses, New York City police officers, FBI agents and victims of identity theft testified.

## ■ PREDATORY LENDING

Despite significant focus at the State level, the predatory lending issues remains subdued at the federal legislative level, with only a few bills having been introduced in this legislative session. On the Senate side, Senate Banking Committee Chairman Paul Sarbanes (D-MD) and fourteen Democratic co-sponsors (including New York Senators Schumer and Clinton) introduced S.2438, The Predatory Lending Consumer Protection Act of 2002. The bill would amend federal rules governing high cost home loans to lower the threshold definition of such loans to 6 percentage points over comparable Treasury security rates for first mortgages and 8 for junior liens or loans. Loans with total points and fees exceeding \$1,000 or 5% of the total loan amount would also be deemed to be "high cost". The bill further prohibits financing of points and fees over 3% of the loan amount or \$600; and, among other restrictions, places limits on prepayment penalties, financing of single premium credit insurance, and mandatory arbitration clauses. The bill also extends liability to subsequent holders for home improvement contractor violations and provides additional disclosures and civil and class action remedies. The House "companion" bill, H.R.1051, was introduced by Representative John LaFalce (D-Niagara) early in this legislative session. 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.

None of these bills is currently expected to be enacted during this legislative session.

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## ■ BANKRUPTCY REFORM

Last year, both Houses of Congress passed bankruptcy reform legislation by veto-proof margins. In the House, H.R.333, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, passed by a vote of 306-108 with a strong majority of New York Representatives voting in favor of the bill. In the Senate, S.420, the Bankruptcy Reform Act of 2001, was passed by a vote of 83-15, with the support of both New York Senators. NYBA supports both versions of the bankruptcy reform legislation, preferring H.R.333 as somewhat more favorable to creditors. The major issues dividing the two legislative bodies are not significant factors in NYBA's position. Bankruptcy conferees have been meeting since early this year to work out differences between the two bills and reached agreement on every issue on July 25. The last issue to be resolved was the extent to which the assets of organizations that attempt to limit access to providers of lawful goods or services are sheltered from civil attachment by their victims, an amendment that was proposed by Senator Schumer.

Arguments in favor of bankruptcy reform include:

- Bankruptcy reform will eliminate many of the abuses that have allowed higher income filers to avoid paying their creditors. The bill, by establishing a needs-based system of bankruptcy, will encourage those who can afford to pay back some of their unsecured loans to do so.
- Bankruptcy reform will assist in limiting the burden of unpaid credit on consumers who pay their bills on time and in full. Currently, bankruptcy filings result in losses to creditors of more than \$40 billion each year, a cost equivalent to more than \$400 for each of the nation's 100 million households.
- Last year more than 1.3 million Americans filed for bankruptcy at a time when the economy was still enjoying a continuation of its record expansion. This year filings are up dramatically and may result in the greatest number of bankruptcies on record, even though unemployment and inflation continue to be modest and the economic downturn is limited.
- The bill would protect the most vulnerable, by sheltering all filers who earn less than the median income from its more restrictive provisions and by providing a new priority in bankruptcy for child support and alimony payments. In fact, child support advocates have

said that the bill will "enhance substantially" the enforcement of support obligations against debtors in bankruptcy.

## BANKRUPTCY REFORM LEGISLATION SUMMARY

Both Houses of the United States Congress have overwhelmingly passed legislation to reform the bankruptcy code. The House passed H.R.333, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, by a vote of 306-108 with a solid majority of New York Representatives voting in favor of the bill. Both New York Senators voted for S.420, the Bankruptcy Reform Act of 2001, which passed the Senate by a vote of 83-15. The bills 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 in 2000, but was vetoed by President Clinton. This Summary will focus on the major provisions of the bills. 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.

**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.”

## ■ REAL ESTATE BROKERAGE & MANAGEMENT

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

NYBA filed a comment letter in April 2001 strongly supporting the proposal. NYBA noted that their home is the largest single financial asset owned by most Americans and their mortgage the largest financial commitment. One of the definitions adopted by Congress for activities that are financial in nature is “arranging, effecting or facilitating financial transactions for the account of third parties,” a definition within which brokering a transaction in real estate or managing real estate comfortably fits. Moreover, NYBA also pointed out that real estate brokerage and management are certainly incidental to the financial activity of investing in real estate through the purchase or lease of a real estate asset. NYBA’s comments also noted the ability of many real estate brokerage companies to offer “one-stop shopping” for their customers by combining brokerage of real estate with mortgage lending, and argued the need for banks to remain competitive by being able to engage in similar transactions.

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

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

- Congress established the Fed/Treasury regulatory mechanism as a means at arriving at an expert determination on issues of financial competition. To override that provision at this early stage would invite financial participants to involve Congress in every competitive dispute in the future.
- Consumers who employ a bank-affiliated real estate broker or manager will be fully protected, not only under all Federal, state and local laws that apply to brokers and managers of real estate, but also under additional banking regulations, such as the anti-tying provisions of the Bank Holding Company Act of 1956.
- Real estate brokerage and management present no significant safety and soundness concerns, requiring only a small investment of bank capital and virtually no risk to bank profitability. The activities are closely related to functions, such as real estate lending and appraisal, that banks already perform.
- Technological and competitive changes in the real estate brokerage marketplace, including on-line brokerage services, the spread of multiple listing services and the availability of nationwide networks of brokers and managers, have already substantially increased competition for Realtors. The advent of financial holding company and subsidiary competition will not have a material impact on competition, as demonstrated by the fact that thrift institutions nationwide and State-chartered banks in many states already have real estate brokerage authority.

In late 2001, realtors were successful in having legislation introduced in both Houses of Congress that would preclude the Federal Reserve Board and Treasury from approving any regulation authorizing financial holding companies or national banks from engaging in real estate brokerage and management. To date, the House bill, H.R.3424, has more than 240 cosponsors, including 18 from New York, while the Senate bill, S.1839, has 15, including Senator Clinton. The Federal Reserve Board and Treasury Department have announced that they will not consider the real estate brokerage regulation prior to 2003. Nevertheless, the realtors have moved to attach their legislation as an amendment to pending appropriations bills. On July 11, the House Appropriations Committee added an amendment that prohibits the Treasury Depart-

ment from using any appropriated funds to approve or enforce the regulation authorizing real estate brokerage. The full House is scheduled to consider the bill this week. The Senate Appropriations Committee is also scheduled to consider an amendment this week to preclude the Treasury Department from using any appropriated funds on the amendment. At this writing, the fate of this amendment is uncertain.

### ■ EXPANDED MMDA and INTEREST ON BUSINESS CHECKING

For the past six years, NYBA has been alone among state bankers associations in opposing legislation calling for the immediate or short-term repeal of the prohibition on the payment of interest on demand deposits. The practical effect of repeal of the prohibition would be to permit interest on corporate checking accounts, since all other types of accountholders are eligible for NOW accounts. NYBA has twice unsuccessfully petitioned the Board of Governors of the Federal Reserve System to use its regulatory authority to increase from six to 24 per month the number of authorized withdrawals from a money market deposit account, an amendment that would, in effect, permit daily payment of interest on idle transaction account balances. NYBA has 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 2001, the House of Representatives passed H.R. 974, the Small Business Interest Checking Act of 2001, sponsored by Representative Sue Kelly (R-Westchester) by voice vote. Congresswoman Kelly, along with Senator Schumer, has been a stalwart on this issue, several times introducing legislation and amendments to defer the effective date of interest checking repeal. The bill represents a compromise between Congresswoman Kelly's original version of the legislation, which would have delayed re-

peal 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. NYBA has indicated its acceptance of the three-year transition period in the original version of H.R. 974. In an attempt to maintain the pressure on the Senate to resolve this issue, the House passed H.R. 1009, legislation essentially identical to H.R. 974, in April 2002. President Bush also called for the bill's enactment.

In the Senate, two bills repealing the prohibition on the payment of interest on demand deposits have been introduced. Senator Chuck Hagel (R-NE) introduced S.229, the Interest on Business Checking Act of 2001, which provides for repeal of the prohibition two years from date of enactment along with immediate authorization for 24 transfers and payment on interest on sterile reserves. Senator Richard Shelby (R-AL) sponsored S.601, the Small Business Checking Regulatory Relief Act of 2001, which provides for an immediate increase to 24 transfers, no interest on sterile reserves and repeal of the prohibition effective September 1, 2002. It appears unlikely that either bill would be considered in the Senate as stand-alone legislation. However, the Chairman of the Senate Committee on Health, Education, Labor and Pensions, Senator Edward M. Kennedy, has expressed strong support for legislation to increase the minimum wage. Legislation to provide for interest on corporate checking accounts is considered by Senate leadership as one possible offset for the cost of the higher minimum wage for small business interests, which have been the major proponents (along with the thrift industry) of this legislation.

Arguments in support of an extended transition to interest on corporate checking include:

- Banks need the time to adjust their loan portfolios to match the higher costs of small business demand deposit accounts with the rates of commercial loans.
- Most businesses with excess reserves can obtain the equivalent to interest on business checking through sweep accounts linked to repurchase agreements or similar instruments.
- Banks need the time and opportunity to design new account products with new pricing features to respond

to the interest on business checking market.

## ■ TERRORISM INSURANCE

The attacks on the World Trade Center last year initiated a crisis in property and casualty insurance, including business interruption insurance, for many properties and businesses, particularly for those located in high profile locations. The cost of such insurance, when available at all, has increased dramatically, with some premiums trebling. According to the U.S. General Accounting Office (GAO), limitations on the availability of terrorism insurance is contributing to the slowdown in the economy, particularly in the commercial real estate market. Federal Reserve Chairman Alan Greenspan has strongly endorsed that view and called on the Congress to react by reinsuring the commercial property and casualty terrorism insurance policies of the private insurance industry.

In November 2001, the House of Representatives reacted by passing H.R.3210 to provide a Federal backstop for terrorism insurance provided by the insurance industry 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 \$1 billion in damages. For incidents with damages between \$1 billion 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 leaders negotiated at length on a version of terrorism insurance that would satisfy both parties. In June, the Senate passed S.2600 by a vote of 84-14. The Senate bill, considered much more favorable to the insurance industry than the House bill (H.R.3210), would provide, in effect, Federal reinsurance for terrorism insurance losses. The bill would provide for the Federal government to reinsure 80% of losses up to \$10 billion during 2002 and up to \$15 billion during 2003 and 90% of losses above those amounts in both years up to an overall cap of \$100

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billion. The \$100 billion cap would also apply to insurance payments by private insurers. President Bush issued a statement after the Senate vote calling on conferees to include provisions in the final bill that limit punitive damages and "predatory lawsuits" against individuals and businesses. The Senate bill limits Federal payments for punitive damages. Both New York Senators voted for S.2600. At this writing, conferees have not yet been appointed for the bills.

NYBA has been strongly supporting terrorism insurance legislation since late last year. NYBA wrote all members of the New York delegation asking for their votes in favor of the bills. It is currently urging the appointment of conferees and completion of legislative action.

See bill comparison chart on page 40.

#### ■ **DUAL CHARTERING FOR INSURANCE COMPANIES**

Representative John LaFalce introduced legislation in February (H.R.3766) to create an optional Federal chartering system for insurance companies. The bill is a companion to legislation introduced late last year by Senator Charles Schumer. The Federal chartering system for insurers, similar to the dual chartering system for banks, is designed to permit insurance underwriters, agents and brokers that operate nationwide to have a single system of regulation.

#### ■ **PERSONNEL CHANGES**

New York Representative John LaFalce (D-Niagara) announced that he would not seek re-election in November. The Congressman, Ranking Member of the House Financial Services Committee, was first elected in 1974 and has been instrumental in the passage of virtually every important piece of banking legislation for the past two decades. The Congressional redistricting plan approved by the Justice Department would have required the Congressman to face off in a primary against fellow Democrats.

Rep. Benjamin Gilman (R-Orange) also announced his retirement from Congress, after 15 terms. After chairing the House International Relations Committee for six years, he was forced by term limits to relinquish the gavel. He has compiled a

strong record on human rights and backed a firm U.S. foreign policy around the world. He also chose not to face off against other Republicans in a primary.

#### ■ **REGULATORY BURDEN RELIEF**

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

#### ■ **DISASTER RECOVERY LEGISLATION**

President Bush, in March, signed economic stimulus legislation that the Administration had been promoting for several months. The bill, H.R.3090, the "Job Creation and Worker Assistance Act of 2002," provides \$5 billion in tax relief for businesses and individuals in the New York Liberty Zone, a newly created economic development zone surrounding the site of the World Trade Center attack. In addition, provisions of the bill that affect financial institutions include:

- a five-year extension of the exception under Subpart F for active financing income;
- an additional depreciation deduction of 30% of the adjusted basis of property with a recovery period of up to 20 years, to sunset after 36 months;
- a five-year carryback of net operating losses, to sunset after 24 months;
- two-year extensions of the qualified zone activity bond authorization, the work opportunity and welfare-

to-work tax credits, and the Archer medical savings accounts;

- authorization for electronic issuance of Forms 1099; and
- clarification of the discharge of indebtedness by a Subchapter S corporation. ▼

## ■ Federal Regulatory Developments

### ■ HIGH COST HOME LENDING

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

On June 26, 2002, at a speech at the National Press Club, Department of Housing and Urban Development Secretary Mel Martinez provided an outline of the Bush administration's plan to reform the home buying process by revising rules implementing the 1974 Real Estate Settlement Procedures Act (RESPA). While Secretary Martinez did not unveil any details about the Plan, he said that principles that will guide the RESPA proposal include the borrower's right to adequate settlement cost information early in the process, simplified disclosures and improved consumer education. The proposal, when released, is subject to a 15-day review by Congress, before it is published in the *Federal Register*. (Currently, it is expected to be published in August.)

### ■ IRS TRUST REGULATIONS

On May 18, NYBA filed comments with the Internal Revenue Service supporting a proposal published in the February 15 *Federal Register* that would revise the tax definition of income for trust accounting purposes. The proposal would recognize changes made by state laws that both incorporate the equitable adjustment power contemplated by the Uniform Principal and Income Act and that authorize unitrusts that provide annual income between 3% and 5% of the annual fair market value of the trust assets. NYBA's comments noted that the 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 expected to complete action on the proposal by the close of its regulatory year, June 30, 2002, but had not done so by that date. With the enactment of the Principal and Income Act in New York, certainty on the tax treatment of trust accounting income has become critical.

### ■ CHECK TRUNCATION

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

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## ■ COMMUNITY REINVESTMENT ACT (CRA) REGULATIONS

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

NYBA filed comments with the agencies generally supporting current regulations implementing CRA. NYBA'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 later this year.

## ■ RISK-BASED CAPITAL

The Federal regulators approved final regulations on the risk-based capital treatment of claims against securities firms. Currently, loans to and other claims on the credit of a securities firm have been rated at 100%, but the new rule will allow the weighting to drop to 20% if the securities firm is "qualified." A "qualified" U.S.

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securities firm is SEC registered and in compliance with the SEC's net capital rules. Non-U.S. firms may qualify if they are in member countries of the Organization for Economic Cooperation and Development (OECD) and meet OECD risk-based capital requirements.

For several years, international banking regulators, under the aegis of the Bank for International Settlements headquartered in Basel, Switzerland, has been working to develop revised risk-based capital standards that would reflect changes in banking markets since the last set of such standards were adopted worldwide in the late 80's. Unfortunately, the most recent draft contained standards for operational and other risk that would be highly costly to implement and of very doubtful utility. These proposals have been subject to searching criticism by Federal banking regulators and the U.S. banking industry. The Basel regulators have announced a major revision of the proposal, due for release next year. The New York Bankers Association filed comments with Federal regulators urging that they ensure that the revision does not impose unnecessary or impractical regulatory burdens on U.S. banks or create a competitive imbalance within the U.S. banking system or between U.S. and other multinational banks.

## ■ "PUSH OUT" PROVISIONS

(For Background, please see the Dec. 17, 2001 issue of the *Banking Journal*.)

**New developments:** The SEC affirmed an order in May 2002 formally extending the compliance date for the push-out provisions under Title II of the Gramm-Leach-Bliley Act from May 12, 2002 until November 12, 2002 for the dealer provisions and May 12, 2003 for the broker provisions. The Commission has yet to resolve many regulatory issues under Title II including the confirmed ability of banks to sweep into no load mutual funds and to offer certain trust and custody services to customers.

The December 17, 2001 *Banking Journal* is available on NYBA's website [www.nyba.com](http://www.nyba.com). ▼

# ■ Comment

## The FDIC Ombudsman – A Good Person for Bankers to Know

*By: Leslie R. Crawford, FDIC Deputy Ombudsman*

Do you have an issue about the examiners in your bank? Do you want to know how to interpret or apply a Federal Deposit Insurance Corporation (FDIC) regulation? Do you think the FDIC is taking too long to process an application or respond on some matter? Where can you turn? For these types of problems, and others, the FDIC's Ombudsman stands ready to help.

The FDIC Office of the Ombudsman (OO) was created as a result of the Riegle Community Development and Regulatory Improvement Act of 1994. The office is a neutral and confidential liaison and source of assistance for bankers on any problem they may have in dealing with the FDIC.

Since the office's establishment at the FDIC in 1995, the OO has handled several thousand requests for help from financial institutions, most involving inquiries about FDIC policies, rules and regulations. The issues varied widely in the degree of sensitivity and complexity, from questions about FDIC deposit insurance coverage to complaints about supervisory determinations. As a confidential and neutral organization, the OO cannot overturn or impose agency decisions. But it can locate answers and help parties clarify and frame their issues, explore options and work with insured financial institutions and the FDIC to encourage dialogue and open lines of communication.

Here are some of the ways the OO has helped insured financial institutions:

- **Facilitating communication.** A banker contacted the OO about a dispute with the FDIC over supervisory findings, and the bank's perception that the FDIC was being overly harsh to teach the bank "who is in charge." Through a discussion with the FDIC regional staff, the OO was able to open a dialogue among the parties which eliminated the banker's perception.
- **Conducting informal fact-finding.** A financial institution with a strong safety and soundness record disputed its latest Community Reinvestment Act (CRA) rating. The OO concluded that the problem was caused by a significant lack of communication between the parties, and lack of adherence to FDIC policy regarding the required notice to banks. The FDIC ultimately reviewed the rating and revised it favorably.
- **Finding answers and conducting research.** A

banker contacted the OO about a disagreement with an FDIC examiner relating to the interpretation of an FDIC regulation during a safety and soundness examination. Because the banker was concerned about confidentiality, the OO made discreet and confidential inquiries about the regulation within the FDIC. Ultimately, the examiner's interpretation was determined to contravene FDIC policies. OO also met with the bank's staff and helped develop strategies to address their disagreement directly with the examiner.

- **Addressing concerns of retaliation.** A bank's president contacted the OO about the bank's fear of a particular examiner scheduled to lead an upcoming examination, because of previous complaints made about the examiner. The OO consulted with the Field Office Supervisor on this matter. Although the Field Office Supervisor was confident the bank would receive fair treatment, he addressed the banker's concerns by designating a different Examiner In Charge. The Field Office Supervisor contacted the bank's president to advise the banker of this decision and to offer assurances that the FDIC does not tolerate retaliatory conduct.

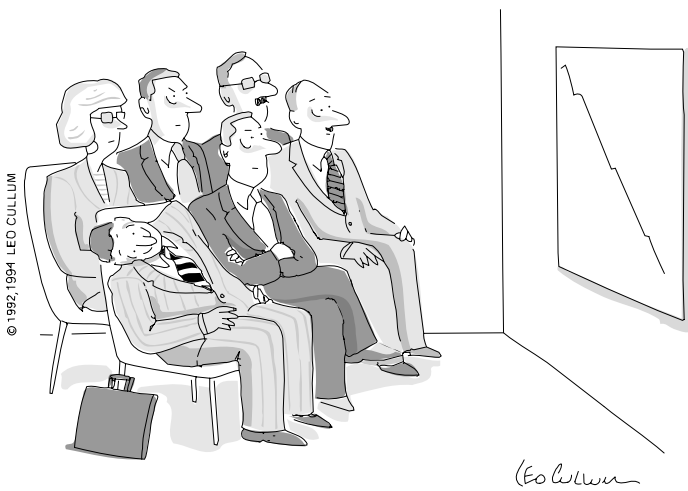
- **Responding to concerns about the application process.** A bank chairman complained that the FDIC had not responded in a timely way to the bank's application for deposit insurance. The OO worked with the bank chairman and the FDIC Case Manager. Although the FDIC was following the appropriate steps, the FDIC Case Manager worked with the banker and approved the application within one day.

- **Providing feedback at appropriate levels in FDIC.** A banker read in a newspaper that the FDIC was considering a change in the process whereby the Corporation assesses deposit insurance premiums. The banker was concerned about the article, and contacted the OO because he wanted to verify the information and express his views and opinions. The OO provided the banker with the FDIC's "official" position regarding this issue and included its comments and opinions regarding same anonymously in a feedback report that the OO routinely provides to FDIC senior management.

For bankers, the OO is a no-cost, safe and confidential option for obtaining FDIC information and solving potential or existing problems. As an ombudsman, we must advocate for fair process, not individuals. You may contact the OO by telephone at 1-877-275-3342, and selecting option 3 from the automated menu, or e-mail [Ombudsman@fdic.gov](mailto:Ombudsman@fdic.gov). ▼

## Comparison of Terrorism Insurance Legislation

Bill/Status	Threshold	Federal Coverage	Cap	Eligibility	Expiration	Other
<b>H.R. 3210</b> Passed House 227-193	\$1 billion	90% of losses; amount from \$1 billion to \$20 billion subject to repayment by industry-wide assessment. Amounts over \$20 billion subject to repayment through policyholder surcharge (not to exceed 3% of premium)	\$100 billion	10% of company capital plus 10% of net commercial P/C premiums	Jan. 1, 2003	Sets limits on punitive damages, attorneys' fees and damages for non-economic claims
<b>S.2600</b> Introduced by Sen. Dodd/ Passed Senate 84 - 14	\$10 billion in 2002; \$15 billion in 2003	80% of losses up to \$10 billion; 90% above \$10 billion	<b>\$100 billion</b>	All commercial line P/C carriers required to participate; personal line carriers participation optional	Dec. 31, 2002 unless extended to Dec. 31, 2003	Exclusive Federal Cause of Action for terror attacks – Federal Funds may not be used for Punitive Damages



*“Liquidity safety, or convenient liquidity.  
That is the question, Ethel!”*