



BANKING JOURNAL

NEW YORK BANKERS ASSOCIATION NEW YORK STATE

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REVIEW & OUTLOOK

Fair and Accurate Credit Transactions Act

Calendar year 2003 ended on a very positive note, with the signing by President George W. Bush of the Fair and Accurate Credit Transactions Act (H.R.2622), which makes permanent the expiring preemption provisions of the Fair Credit Reporting Act. This NYBA-supported bill includes significantly enhanced identity theft protection and repair provisions and new preemptions of state laws that address the same identity theft areas as the bill. The permanent resolution of this important privacy preemption issue further enhanced what was already a very successful year at the State and local levels.

2003 State Legislative Session

The 2003 Session of the New York State Legislature ended with positive action on several important NYBA initiatives, including the extension of the "wild card" law and passage of long-sought environmental liability legislation. Equally as important, a number of bills which would have hurt many of the State's banks, including a bill that would have required all bank-owned ATMs to be equipped with emergency 911 buttons, failed to pass. Thus, the session, which had presented a number of challenges, particularly with respect to budgetary concerns and bank security issues, was highly successful for NYBA and its members.

This year, NYBA achieved the longest "wild card" extension ever, preserving this important law for another four years (Chapter 241 of the Laws of New York). To date, this legislation has been utilized by NYBA to successfully petition

for (i) the ability of state banks to sell all lines of insurance directly to their customers; (ii) the elimination of the NSF fee cap for State-chartered banks; (iii) a reduction in the number of State-chartered bank board of directors meetings from 10 to 6 per year for most banks; and, just this year, (iv) a regulation permitting boards of directors of New York State-chartered banks to take action by unanimous written consent.

Also this year, despite a 2003-2004 State budget that includes significant increases in personal income and sales taxes, increases in fees, and some cost cutting measures, there were no significant changes in banking corporation taxes. In fact, the bank tax rate reduction, which was achieved in 1999 and which saves the State's banking industry over \$150 million per year, was extended in 2003 for two years. Moreover, the final State budget also extends for one year the financial modernization provisions added after enactment of the Gramm-Leach-Bliley Act (GLBA).

Brownfields

After years of unsuccessful attempts, this year also saw the passage of a brownfields cleanup bill, with environmental liability protection for banks as both lenders and trustees. The bill, whose environmental liability provisions were modeled on the Federal CERCLA legislation passed with NYBA's support in 1996, is designed to ensure that neither lenders nor trustees are held liable for the remediation of environmental contamination that they neither caused nor contributed to. The intervention of an economic development coalition initiated by NYBA (which included Advance Upstate New York, the Long Island

Association and the Partnership for New York City), provided much needed impetus to negotiations on the bill.

Significantly, several bills that would have adversely affected many of the State's banks failed to pass. For example, legislation that would have authorized local governments to invest in mutual funds failed to be finally enacted after numerous effective contacts by many concerned bankers throughout the state.

Security

In the wake of a dramatic increase in bank robberies (particularly in New York City) NYBA formed a Bank Security Task Force which, in conjunction with the New York City Police Department, developed Bank Security Best Practices and conducted a survey seeking to determine the security measures used by City banks and their effectiveness in deterring crime. These tools have proved effective, to date, in dissuading City legislators from acting on a proposal by City Councilman Oliver Koppell that seeks to mandate the use of bandit barriers at all New York City branches. In this regard, NYBA recently testified before the City Council and was able to point to a significant decrease in the bank robbery rate since the introduction of the Best Practices. (In fact, November Police Department statistics have shown a 62% decrease in bank robberies from the same month in 2002.) At the hearing, NYBA also expressed support for Committee on Public Safety Chairman Peter Vallone Jr.'s call for a resolution urging the State Legislature to pass a specific bank robbery statute with increased penalties, a move which NYBA has rec-

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ommended for more than a year.

Moreover, although Assemblyman Scott Stringer continued to advocate his ATM 911 button legislation, extensive and frequent grassroots contacts by bankers throughout the State were ultimately successful in keeping this bill from passage by the full Legislature.

Regulatory Issues

On the State regulatory front, NYBA continues to await action on several pending "wild card" petitions. The latest one was filed with the Banking Department in May 2002 and seeks promulgation of a regulation permitting New York State-chartered banks to charge a daily fee on checking accounts that do not have overdraft protection privileges and yet have a negative balance. NYBA has had a number of meetings with the Banking Superintendent this Fall, which have culminated in the receipt of a letter from the Department outlining a potential regulation addressing our request. Importantly, this proposal includes a complete exemption for businesses from any limitations on overdraft fees which may be charged to consumers.

Federal Activity

At the Federal level, NYBA, this Fall, submitted comments to the Office of the Comptroller of the Currency (OCC) in response to its recent proposal to amend parts 7 and 34 of its regulations. These amendments would add provisions to clarify the applicability of state law to national banks with respect to real estate lending (Part 34) and non-real estate lending, deposit taking and other activities (part 7.) In its letter, NYBA reaffirmed its strong support of the dual

banking system, and stated that the clarifying provisions are consistent with this long-standing policy. NYBA is now working with State and Federal officials to encourage a dialogue on this proposal which has generated much discussion and controversy. ■

STATE LEGISLATIVE DEVELOPMENTS

Bank Security

Bank security issues took center stage during this legislative session, due in large part to a well-publicized increase in bank robberies in New York City during the first half of 2003. In this regard, S.2892(Padavan)/A.4571-A, (Stringer), a bill mandating that ATMs be equipped with emergency 911 buttons, which passed the Assembly in several prior sessions, once again had great traction.

Working closely with bankers on NYBA's ATM & Electronic Banking Committee and Bank Security 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, and are extremely expensive to retrofit. Furthermore, the legislation would cover only bank-owned ATMs. Moreover, many law enforcement experts encourage robbery victims to cooperate with attackers, rather than provoke them by attempting to contact authorities during an attack. Although a version of the 911 bill once again passed the Assembly, extensive and frequent

grass roots contacts by bankers throughout the State were ultimately successful in keeping this bill from coming to a vote in the Senate.

As NYBA sought to convince State legislators that mandated ATM emergency 911 buttons was an unnecessary security measure, the association worked throughout the Winter and Spring with our New York City Bank Security Task Force to find practical ways to address the recent increase in bank robberies. In this regard, the Task Force, in conjunction with the New York City Police Department, developed Bank Security Best Practices, which recommend measures banks can take to help deter robberies in their City branches. Subsequently, the Task Force also developed and responded to a survey to determine the security measures used by City banks and their effectiveness in deterring crime. The survey showed that, in general, banks employ many security measures designed to deter crime. For example, bandit barriers were utilized in almost 88% of the branches that were robbed, and security guards and/or greeters were used in approximately 60% of those branches.

A recent update of the survey reaffirmed these findings. The survey results and the members' commitment to safety measures continues to be highly significant, as legislation has now been introduced by New York City Councilman Oliver Koppell (proposed Local Law 442) that would mandate that bandit barriers be placed in all City bank branches (except for branches with "cashless" environments). In mid-October, the New York City Council Committee on Public Safety held a hearing on bank security

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NYBA 2003 LEGISLATIVE AND REGULATORY PRIORITIES

Status Report - DECEMBER 2003

Issue	Bill Number	Committee	NYBA Position/Status
STATE ISSUES			
✓ Bank Tax	Budget Chapter Laws 62/63	Finance/ Ways & Means	Support extension of Bank Tax without change; enacted. Oppose limits on REITs in New York City; dropped
✓ Bank Security	Chapter Law 553	Banks	Oppose restrictive measures; Support New York City "Bank Security Best Practices;" support 45-day tape; enacted
⚡ Predatory Lending			Continue to support a uniform standard
✓ Municipal Finance	Chapter Law 62	Finance Local Governments	Oppose providing Municipal Deposits to STIP, mutual funds or credit unions; STIP dropped from Budget; did not pass
✓ *Environmental Liability Relief	Chapter Law 1	Environmental	Enacted
✓ "Wild Card" extension	Chapter Law 241	Banks	Enacted
⚡ *Trust Agenda			Support
• Perpetual trusts	S.2292-A/A.2173/A.7928	Judiciary	
✓ Tax relief	Chapter Law 658	Finance/Ways & Means	Enacted
• Principal & Income Act Amendments	S.4704	Finance	
FEDERAL ISSUES			
⚡ Deposit Insurance Reform	S.229 H.R.522	Banking	Support higher municipal deposit coverage; bill passed House
⚡ Bankruptcy Reform	H.R.975	Judiciary	Support; passed House
⚡ Regulatory Burden Relief *MMDA 24 transfers per month	H.R.758 S.1967	Banking	NYBA petition to Fed for 24 MMDA transfers denied; bill passed House
⚡ Real Estate Brokerage & Management	S.98/H.R.111	Fed Reserve Board/ Treasury Department	Support regs - Comments filed; oppose restrictive legislation; moratorium in effect
✓ Privacy	S.660/H.R.2622	Banking Financial Services	Support; signed as Public Law 108-159
⚡ CRA Regulations	Regulatory Proposal	OCC/FDIC/FED/OTS	Support flexible amendments to existing regs including increasing the streamlined exam to \$1 billion
⚡ Basel II Capital Regulations	Regulatory Proposal	OCC/FDIC/FED/OTS	Proposal issued July 18

✓ action completed ⚡ favorable action expected ÷ action stalled *NYBA initiative

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

NYBA 2004 LEGISLATIVE AND REGULATORY PRIORITIES

Status Report - DECEMBER 2003

Issue	Bill Number	Committee	NYBA Position/Status
STATE ISSUES			
☰ Budget & Taxes			Support financial modernization without change; oppose discriminatory tax increases
☰ Bank Security			Oppose restrictive measures; Support New York City "Bank Security Best Practices"
☰ Bank Fees			Oppose restrictions; Support overdraft fee
☰ Predatory Lending/Preemption			Continue to support a uniform standard
☰ Municipal Finance			Oppose providing Municipal Deposits to STIP, mutual funds or credit unions; Support eased collateral rules
☰ Privacy			Oppose restrictive California-type legislation
☰ *Trust Agenda			Support
• Perpetual trusts			
• Tax reform			
• Principal & Income Act Amendments			
FEDERAL ISSUES			
☰ Deposit Insurance Reform	S.229 H.R.522	Banking	Support higher municipal deposit coverage; bill passed House
☰ Bankruptcy Reform	H.R.975	Judiciary	Support; passed House
☰ Regulatory Burden Relief *MMDA 24 transfers per month	H.R.758 S.1967	Banking	NYBA petition to Fed for 24 MMDA transfers denied; bill passed House
☰ Real Estate Brokerage & Management	S.98/H.R.111	Fed Reserve Board/ Treasury Department	Support regs - Comments filed; oppose restrictive legislation; moratorium in effect
☰ Government-sponsored Enterprises		Banking	Support strong Federal regulator
☰ CRA Regulations	Regulatory Proposal	OCC/FDIC/FED/OTS	Support flexible amendments to existing regs including increasing the streamlined exam to \$1 billion
☰ Basel II Capital Regulations	Regulatory Proposal	OCC/FDIC/FED/OTS	Proposal issued July 18, 2003

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State Legislative Developments, continued from page 2

and the bandit barrier proposal. In its testimony before the Committee, NYBA was pleased to report that the number of bank robberies had been declining for the past ten weeks. NYBA credited this decline to, among other things, the cooperative efforts of the Police and NYBA's members, the further implementation by banks of security measures recommended in the Best Practices and the full participation of NYBA's members in the New York City A.P.P.L. training and e-mail alert program.

NYBA also stated its opposition to the bandit barrier proposal because, in most of the branches that have been robbed this year, the barriers failed to halt the crime. NYBA further said it would support Committee Chairman Peter Vallone Jr.'s call for a resolution urging the State Legislature to pass a specific bank robbery statute with increased penalties, a move which NYBA has recommended for over a year. Resolution 1125, which subsequently was introduced and passed by the Council, calls for the Legislature to increase penalties for the crime of bank robbery so that the minimum standard penalty is that imposed for commission of a Class C felony. This would ensure that perpetrators of unarmed note-passing bank robberies would be subject to jail time. (Currently, New York State does not have a specific crime of bank robbery in its penal statute and note-passing robberies fall within the scope of Class E felonies, with no mandated jail sentences.)

NYBA continues to place great emphasis on bank security issues and is now working with CrimeStoppers on a

"tips" and rewards program to help promote the apprehension of bank robbers. The latest bank robbery statistics continue to demonstrate that these efforts are bearing fruit, with the November 2003 bank robbery rate down 62% from the same month last year.

Sub-prime Lending

With the passage in the Fall of 2002 of both a State-wide high cost home lending law (Chapter 626 of the Laws of 2002) and a New York City Council ordinance designed to prohibit financial firms that grant, underwrite or securitize certain loans deemed to be predatory from doing business with the City (Local Law 36), the focus of the predatory lending issue has shifted this year from the legislative branch to the regulators and the court system. In this regard, the Office of the Comptroller of the Currency (OCC) issued two releases in February establishing nationwide guidance to guard against predatory lending practices. The releases emphasized that national banks should have policies and procedures in place to ensure that they are not engaging in predatory practices, and that their lending complies with safety and soundness standards and consumer protection laws.

Concurrently, the OCC published for comment a request for an opinion that the Georgia Fair Lending Act, a high cost home loan statute, is preempted with respect to national banks. National City Bank of Cleveland, OH, and several of its affiliates requested a preemption determination or order. In the request, National City argued that the OCC has occupied the field of regulation of national banks' real estate lending activities, and that therefore a number of the provi-

sions in the Georgia law are inapplicable to national banks. In July, the OCC issued an order holding that the Georgia Fair Lending Act does not apply to national banks because the authority of national banks to engage in real estate lending derives exclusively from federal law. The OCC extended this preemption to national bank operating subsidiaries. In addition to preempting the Georgia law, the OCC has proposed a new regulation that would impose a new anti-predator requirement on lenders and clarify the agency's preemption powers. The proposal would require national banks to make loans on the basis of borrowers' ability to repay, not on the foreclosure value of collateral. Additionally, the new regulation would clarify what types of state laws apply to national banks. The proposal addresses two specific parts of the OCC's regulations, Part 34, which deals with real estate lending, and Part 7, which deals with non-real estate lending, deposit taking and other national bank activities. Among other things, the proposal sets out examples of the types of state laws that the OCC or the courts have concluded would be preempted, including licensing laws, laws that address the terms of credit, permissible rates of interest, escrow accounts and disclosure and advertising.

In its comment letter on the OCC proposal, NYBA expressed its support of initiatives such as the proposed amendments to Part 34, which seek to address unacceptable predatory lending practices, while still promoting the availability of credit to low- and middle-income borrowers. NYBA also reaffirmed its strong support of the dual banking system, and stated that the clarifying provisions set

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forth in the proposed amendments to Part 7 are consistent with this long-standing policy and can have a positive impact on both nationally and state-chartered institutions in New York. NYBA stated that the amendments would provide greater certainty to national banks regarding the interplay of federal and State law and regulation, and noted that State legislation, such as New York's wild card law, should protect against the possibility of a less than level playing field for state banks. The comment period on this proposal has closed; however, because the proposal has created a great deal of debate between State and federal regulators and other government officials, the timing and content of a final regulation remain uncertain.

The first OCC request for comment followed an announcement by the Office of Thrift Supervision (OTS) in January 2003 that federal law preempts many provisions of New York's high cost home loan statute (which became effective on April 1, 2003) from applying to federal savings associations and their operating subsidiaries. In responding to an inquiry, the OTS said that the federal Home Owners' Loan Act (HOLA) provides a uniform federal scheme for federal savings associations, which "occupies the field of regulation for lending activities." The OTS letter goes on to conclude that the "comprehensiveness of the HOLA language demonstrates that Congress intended the federal scheme to be exclusive, leaving no room for state regulation, conflicting or complementary." Because the OTS has already found that the New York law does not apply to federal savings associations, and because the OCC has now similarly found merit

in the preemption argument in the Georgia case, the future applicability of the New York statute and City ordinance to national commercial banks would appear to be virtually extinguished. Moreover, as two of the national rating agencies have announced that they will not rate New York-originated high-cost home loans, or will rate them only if they include costly credit enhancements to protect purchasers from liability for violations of the law by originators or their agents, the long-term viability of New York's predatory lending laws, at least in their current forms, remains questionable at this time.

In this regard, NYBA recently met with the New York State Banking Department, at the Department's invitation, to discuss proposed amendments to Part 41 - the banking regulation which implements New York State's high cost home lending law, as well as to discuss ways in which the law could be improved. While NYBA indicated that the Part 41 amendments were not problematic, we expressed our belief that the law could be improved by the adoption of those changes originally set forth in a Senate Chapter Amendment. Among the issues we highlighted as most important were (i) technical changes to the points and fees calculation; (ii) the exclusion of some amount of yield spread premiums from the points and fees threshold; (iii) the addition of a preemption provision for local laws; and (iv) limitations to the assignee liability provisions. At the meeting, we also reiterated our belief that a patchwork of conflicting local and state high cost lending legislation would ultimately be detrimental to the availability of sub-prime credit.

The fate of New York City's high cost

home lending ordinance has been put in limbo both by the preemption questions raised by regulators and by the filing of a lawsuit by Mayor Michael Bloomberg, alleging that Local Law 36 would curtail various powers vested in the Mayor by the City Charter and by State Law, and alleging further that the Local Law conflicts with and is therefore preempted by State Law. Moreover, the complaint alleges that the State occupies the field of high cost home loan regulation. NYBA has consistently urged that high cost home lending is best addressed by a uniform standard, and has filed an *amicus curiae* brief in support of the Mayor in this case. The judge in this case has converted the parties' pending motion papers regarding a preliminary injunction to cross-motions for summary judgment, because there are no material issues of fact in the case. Thus, when the judge rules on the case, he will be rendering a final decision on the merits. The parties completed briefing in August. In the interim, the New York City ordinance is not in effect.

Background: After almost a year of NYBA discussions with the State and consumer groups to try to achieve a bill balancing the overriding political desire to combat predatory practices, while preserving the legitimate sub-prime lending market, the Governor signed a State-wide high cost home lending law (Chapter 626 of the Laws of 2002) in early October 2002. This legislation reflects many of the elements of our discussions and thus is much improved from the initial Assembly version. However, it does not include amendments passed by the Senate, which would have addressed a number of lingering concerns. The State law's enactment followed passage

the week before by the New York City Council of an ordinance designed to prohibit financial firms that grant, underwrite or securitize certain loans deemed to be predatory from doing business with the City. Subsequently, Mayor Bloomberg vetoed this ordinance, but on November 20th the City Council voted to override this veto.

From the beginning of 2002, NYBA worked diligently to help craft a State-level high cost home lending bill that would strike the right balance between ensuring adequate housing credit availability and eliminating the predatory practices the association opposes. NYBA testified to the need to find this balance before the Senate Banks Committee in Albany in March and expressed its concerns with the Assembly version of the bill then under consideration.

Throughout the Spring of 2002, amidst a backdrop of demonstrations at City Hall, and protests staged for the media in front of the building housing NYBA's offices, NYBA and AARP met frequently to discuss this issue. Despite the constructive dialogue with AARP and a coalition of community groups, a final agreement on a State-wide bill was unattainable as consumer groups opted to have remaining issues resolved with the legislature. The most contentious issue was not a banking issue but dealt with the liability surrounding the sale of mortgage loans in the secondary market. The community groups wanted assignees to assume virtually all liability for the actions of lenders with respect to high cost home loans; the Bond Market Association, whose members are more directly affected, objected strongly to AARP's position. NYBA agreed that

such blanket liability could have a serious negative impact on the vitality of the secondary market.

Despite an inability to reach closure on all the bill's issues, the State bill which was ultimately signed into law is significantly improved, due in large part to NYBA's discussions with consumer groups, from the bill that passed the Assembly during the 2001 legislative session and which was in play for much of the 2002 session as well. That original bill contained significantly lower APR and points and fees thresholds, allowed for no financing of points and fees, would have required mandatory counseling and had broader liability for assignees. Even with these improvements, NYBA still believes that the legislation contains flaws that could impair the legitimate lending market, particularly because it fails to include amendments urged by NYBA and passed by the Senate.

While focusing much of its efforts at the State level, NYBA nevertheless was actively involved at the New York City level as well, urging the City Council not to pass Int. 67-A, its ordinance regarding high-cost home loans. On April 1, 2002, NYBA testified before the New York City Council's Committee on Consumer Affairs, stating that the interest rate thresholds used to define these loans were so low as to include many legitimate subprime loans. NYBA expressed its concerns with the proposal, while urging the Council to recognize the difficulties in complying with a patchwork of conflicting laws. At a second hearing in May 2002, which focused on an amended version of the bill, NYBA reiterated its concerns with the bill, but applauded the Committee on Consumer Affairs for

its Res. 93, which called on the State legislature to pass a uniform State-wide high-cost home lending bill. The Committee approved the resolution, giving NYBA the continuing opportunity to urge City Council members to ultimately opt for a State-wide solution rather than final approval of the City ordinance. In this regard, NYBA sent a letter to Philip Reed, Chairman of the Committee on Consumer Affairs, urging that the Council opt for a State-wide solution. NYBA also wrote to Council Speaker Gifford Miller with the same message. Finally, NYBA called upon Mayor Bloomberg to veto passage of the ordinance in favor of a State law. While Mayor Bloomberg did, in fact, ultimately veto the ordinance, noting that it not only contradicted the terms of the "detailed and comprehensive" State law, but was also an "indirect and incomplete" attempt to address lending practices, this veto was overridden by the City Council on November 20.

Privacy

In New York, the legislative session once again resulted in no additional privacy restrictions for banks. In fact, the only significant privacy legislation passed by both the Senate and Assembly this session was a bill authorizing the transfer of the telephone numbers of all New Yorkers who registered for the State's "Do Not Call" list to the Federal "Do Not Call" list, thus obviating the necessity for New Yorkers to re-register to take advantage of the Federal program. Despite this successful legislative outcome, it should be noted that a number of privacy bills were considered this session, ranging from opt-in legislation,

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to restrictions on the use of social security numbers, to bills designed to restrict the flow of unsolicited e-mails and faxes. Thus, this topic continues to be one of great interest to the Senate and Assembly. Moreover, with the advent of a very strong consumer advocacy movement nationwide, it is anticipated that, as has already occurred in California (and in New York State with respect to the issue of predatory lending), localities throughout the State could consider privacy restrictions of their own in the future.

ATM Fees

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

ATM fee ban prohibitions at the state and local levels appear to be a thing of the past, as the United States Supreme Court, in May 2003, left standing a lower court ruling in the case of *The City and County of San Francisco v. The Bank of America, et al.*, holding that federal law preempts local governmental regulation of ATM fees with respect to national banks. As a result of this and several other judicial decisions clearly supporting national banks' ability to charge convenience fees for ATM use by non-customers, it is unlikely that this type of prohibition will be the subject of future state or local legislation.

Bank Tax Reform

Background: The Bank Tax expired once more on December 31, 2002. With the two-year State budget deficit projected to exceed \$12 billion, NYBA was concerned that the Bank Tax could be a target for potential revenue-raising measures. NYBA wrote Governor Pataki,

Senate Majority Leader Joseph L. Bruno and Assembly Speaker Sheldon Silver pointing out the importance of financial services to the New York State economy and urging that the Bank Tax be extended without change. NYBA also urged that the financial modernization provisions added to the Bank Tax in 2000 in response to the enactment of Gramm-Leach-Bliley and its authorization of financial holding companies also be extended.

Governor Pataki released the 2003-2004 Executive Budget the last week in January, proposing a combination of spending cuts, debt refinancing, program reforms and revenue increases to close the more than \$2 billion budget gap for the rest of the 2002-2003 fiscal year and the \$10 billion deficit projected for 2003-2004. Among items affecting banking, the Budget proposed to make permanent the Bank Tax Law that expired on December 31 and to extend the transitional financial modernization provisions negotiated by NYBA in response to the Gramm-Leach-Bliley Act for an additional year.

Mayor Bloomberg also released the New York City budget proposal the same week, including a provision that would conform the treatment of dividends from real estate investment trusts (REITs) under City tax law to Federal law. The proposal would disallow the current deduction enjoyed by shareholders in REITs, including bank shareholders, for dividends received from the REIT. However, because the proposal had to be approved by the State Legislature, NYBA focused its efforts on defeating the provision there. The State Bank Tax provides the same favorable tax treatment to dividends received by bank

shareholders in a REIT as does the City Bank Tax. The City budget would also limit the favorable tax treatment enjoyed under the real estate transfer tax on the transfer of an economic interest in an entity with assets other than real estate and close a mortgage recording tax exemption for Supplemental mortgages. In addition, Mayor Bloomberg proposed to reinstate the commuter tax at the same tax rate as personal income taxes applicable to City residents and use part of the revenue derived therefrom to reduce the personal income tax rate from 25-40% for all City taxpayers.

The following week, the Governor released the budget bills that were needed to enact the State 2003-2004 spending and tax plan. In addition to making permanent the bank tax, which NYBA applauded, the budget also proposed to authorize local governments to invest up to 25% of their investible funds in the State short-term investment pool (STIP), and an additional 10% in commercial paper and in bankers' acceptances. NYBA has consistently opposed the use of STIP for local government investments because it would drain funds from local communities, reducing resources available for housing, small business and other local lending. NYBA met with the Governor's senior staff to urge that the STIP proposal be dropped, as well as to discuss the bank tax, "wild card," predatory lending and trust tax legislation. NYBA then began a targeted contact campaign with the Chairs of the Senate and Assembly Local Governments Committees.

After key grassroots contacts from bankers throughout the State, the Senate leadership announced a package of local government mandate relief mea-

asures that did not include authorization for local governments to invest in the State-run short-term investment pool (STIP). In a press conference joined by Local Government Committee Chair Elizabeth Little (R-Glens Falls), the Senate emphasized the need to provide additional flexibility to local governments when State assistance may be limited. In the Assembly, a bill (A.5257, Sweeney) to authorize STIP was narrowly reported from the Local Governments Committee and referred to the Ways and Means Committee. Even some of the Assembly Members who supported the bill expressed concern that it would adversely affect community banks. NYBA met with the Chairman of the Ways and Means Committee in opposition to the bill, and in April NYBA and member bankers met with Assemblyman Robert Sweeney (D-Suffolk), sponsor of the bill to allow local governments to invest in STIP.

At the end of April, Senate Majority Leader Joseph L. Bruno and Assembly Speaker Sheldon Silver announced an agreement on a State budget without the participation of Governor Pataki. Over the threat of a veto by the Governor, the Legislature then passed a series of bills to restore almost \$2 billion in additional State spending along with the tax increases necessary to fund the new spending. The bank tax, which expired on December 31, was extended for two years with the financial modernization provisions added in the wake of the Gramm-Leach-Bliley Act extended for a year. In addition, the Legislature added a new provision designed to prevent tax evasion. The provision requires that all banks, business corporations and other business taxpayers add back certain roy-

alty and interest payments from affiliates when the payments serve no valid business purpose and are not conducted on an arms-length basis. Because bank inter-company loans must comply with Federal Reserve Act Sections 23-A and -B, requiring arms-length treatment, some tax experts believed that the provision would have little effect on the industry, but some banks expressed concern that the language was so ambiguous that it could cover routine banking transactions.

The revenue-raising bill also increased the State sales tax from 4% to 4.25%, increased top marginal tax rates on upper income taxpayers, raised numerous fees for State services, and provided relief from certain mandates to local governments, including elimination of the requirement that certain reserve funds be maintained in separate bank accounts. Importantly, the Governor's proposal to permit local governments to invest in the State-run short-term investment pool (STIP), against which NYBA has generated a significant grassroots lobbying effort, was eliminated. The bill also mandated additional notice requirements from the holders of certain property subject to escheat to the State to the last known addresses of the owners thereof. And the bill decoupled State depreciation rules from the more generous Federal depreciation established in the wake of September 11, other than for property put in service in lower Manhattan.

After completing work on the State budget bills, pending the Governor's consideration, the Legislature then passed legislation to authorize New York City to increase certain taxes and raise other revenues to close its budget gap.

Importantly, as urged by NYBA, the provision originally contained in the bill that authorized the City to conform its taxation of REITs to Federal tax law was dropped.

On May 14, Governor Pataki vetoed all or parts of the budget bills passed by the State Legislature, including the entire revenue-raising bill (A. 2106-B/S. 1406-B). By Thursday afternoon, May 15, every veto had been overridden in separate votes in the Senate and Assembly. As a result, the entire State Budget became law, including the two-year extension of the BankTax urged by NYBA. The budget also extended the financial modernization provisions added in the wake of the Gramm-Leach-Bliley Act for one year, as proposed by the Governor. The Governor's veto of the New York City revenue and tax package was also quickly overridden by the Legislature and the City Council passed the final budget bills in late June.

As a footnote to the budget discussions, NYBA participated in a series of meetings with staff of the Legislature's tax-writing committees who are seeking clarification of a provision (Part U3) included in this year's budget that is designed to close an abusive tax loophole allowing certain corporations to use intangible out-of-state holding companies to avoid tax on royalty income. NYBA raised concerns that the provision was so broadly drafted that it could inadvertently cloud some traditional financial institution inter-company loans. Legislative staff made clear that their intent is only to capture abusive situations. They also stated that, as they developed language to clarify the provision, they intended to share it with NYBA.

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Recent Developments: In the closing days of the Legislative Session, although the Legislature did not agree on a final bill to make these technical corrections, the language amending the Bank Tax was identical in all bills and NYBA's Tax Committee concluded that it caused no problems for traditional banking transactions. S.5692 and A.9097 passed their respective Houses but the 60 plus page bills differed from each other in a single paragraph. In separate one-day sessions in September and October respectively, the Senate and Assembly passed S. 5725 (Rules)/A. 9171 (Rules), which corrects several provisions of the State budget enacted in May, including this language. The bill reflects agreement with the Governor and the two Houses to clarify a number of provisions in this year's budget. Among the provisions of the bill is an amendment to the Bank Tax that makes clear that a budget provision that closes a loophole that allowed certain related corporations to escape tax on royalty income within the State does not apply to routine inter-company banking transactions. NYBA's Tax Committee had the opportunity to review the language prior to passage to ensure that it did not inadvertently adversely affect banking interests. Governor Pataki signed the bill as Chapter 686 of the Laws of 2003.

NYBA is now preparing for the 2004 Legislative Session, when the financial modernization provisions of the Bank Tax once again expire. In preparation for the budget debates, NYBA wrote Governor Pataki and legislative leaders from both Houses in Albany to urge that the current financial modernization provision in the Bank Tax, which is scheduled to expire on December 31, be made

permanent. NYBA noted that the provision facilitates affiliations among banks, insurers and securities firms and encourages holding companies to maintain their headquarters in New York. NYBA is also conducting research to outline the economic development benefits of the provisions of the existing Bank Tax. New York City's Department of Finance has already identified the existing tax treatment of REITs as a "loophole" which it intends to limit. With a State budget deficit estimated to approach \$6 billion and a City budget deficit that may exceed \$1 billion, taxes are certain to be part of the debate in Albany next year. However, the Governor, Senate Majority Leader Joe Bruno and Assembly Speaker Sheldon Silver have all said that they will not initiate tax increases.

Environmental Liability Relief

Recent Developments: The State Senate met in Albany on September 16 and passed and cleared for Governor Pataki's consideration the long-sought brownfields clean-up bill (S. 5702, Marcellino/A. 9120, Rules, Request of DiNapoli) with environmental liability protection for banks as both lenders and trustees. The bill also reauthorized and provided funding for the State's mini-superfund and provided tax incentives and expedited administrative procedures for remediating and redeveloping the State's brownfields sites. Reflecting the importance he attaches to the bill, the Governor signed it as Chapter 1 of the Laws of 2003. He also released a press statement that included NYBA's supportive comments commending him and the Legislature for their work on the bill.

Background: Environmental liability relief for lenders and trustees has been a long-term NYBA goal. The expiration of the State's "mini-Superfund" in 2001 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. In April, new Assembly Environmental Conservation Committee Chairman Tom DiNapoli (D-Nassau) introduced a bill (A.7507) that came closer to the Senate and Administration versions of brownfields relief and contains lender and trustee liability relief language consistent with that proposed by NYBA.

Support for environmental liability relief grew steadily. Last Summer, responding in part to NYBA's request, Senator Hillary Rodham Clinton (D-NY) urged the Legislature to pass brownfields relief legislation and the expiration of the State's mini-Superfund law brought strong pressure from environmental groups to reform and re-enact the State's environmental protection laws. NYBA consistently urged legislative leaders to ensure that environmental liability relief for lenders and trustees remained among their priorities in environmental reform, and all legislative efforts included some form of such relief. At their meetings in November 2002, NYBA's Policy Committee and Board of Directors also placed environmental liability relief among their 2003 priorities.

New York City Mayor Michael Bloomberg weighed in, urging liability relief as part of his package of incentives for the construction of affordable housing on many brownfields sites throughout the City.

Early in the year, the full Senate passed NYBA-supported brownfields legislation (S.2935, Marcellino), and, at the end of April, the Senate Environmental Conservation Committee reported out a NYBA-supported bill that limited fiduciary liability for property they hold in the trust to the value of the assets held in the trust. The bill (S.882, Marcellino/A.486, Morelle) was pending on the Senate calendar. This legislative action occurred even as NYBA convened a group of State-wide business associations, including Advance Upstate-NY and the New York City Partnership, to develop a unified position on brownfields legislation that would, among other things, provide environmental liability relief for lenders and trustees. The coalition developed a policy paper that presented a consensus of views regarding brownfields legislation and shared it with the Governor and legislative leaders.

In the last days of the regular Legislative Session in June, the Governor and leaders of the Senate and Assembly reached apparent agreement on a bill to clean up brownfields, reauthorize and re-fund the State's mini-Superfund and provide lender and trustee liability relief. The Governor sent up a three-day message of necessity endorsing the bill and the Assembly passed it before adjourning.

Trust Issues

NYBA 2003 Trust Legislative Agenda

Environmental Liability Relief (See separate section, left)

Fiduciary Income Tax Reform

NYBA identified fiduciary income tax reform as its principal objective in trusts and estates legislation for 2003. 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.

Recognizing that the \$11.5 billion budget gap that had to be closed over the next 11 months presented a major challenge for any legislation that was perceived as potentially losing revenue, the Trust Strategy Group in January 2003 decided to conduct a survey to determine the revenue impact to the State of fiduciary income tax reform. Many believed that the prolonged bear market dramatically reduced capital gains tax revenue to New York, the bulk of revenue from the fiduciary income tax. Continued pressures to move trusts out of the State, combined with the loss of jobs and their concomitant income,

sales tax and excise tax revenues, could very well offset any reduction in State revenues from fiduciary income tax reform. Nevertheless, the completed survey showed that, among 16 leading trust departments and trust companies in the State, the fiduciary income tax generated more than \$42 million in revenue to New York State and City in 2001 alone. Eliminating this source of revenue, even with potentially offsetting revenue from retaining trusts in the State, would be difficult in the current budget climate.

As NYBA lobbied for fiduciary tax reform, members of the Legislature requested a white paper on the need for reform. NYBA prepared and forwarded the white paper to the Legislature in early December 2002. NYBA also prepared a short list of bullet points highlighting the conclusions of the white paper. Although the State's deep fiscal crisis appears to preclude the opportunity for tax reform in the immediate future, NYBA will continue to present the economic development benefits of reform along. This issue will be considered in the 2004 Legislative Session.

Perpetual Trust Legislation -

Three bills have been introduced in the Legislature to authorize perpetual trusts in New York. The bills amend the Rule Against Perpetuities to permit grantors to establish trusts not subject to the Rule. In the Senate, new Judiciary Committee Chairman John DeFrancisco (R-Syracuse) introduced S.2292, 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

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authority to alienate the assets in the trust. In the Assembly, Chair of the EPTL Task Force Assemblywoman Ann Margaret Carrozza introduced A.7928, 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. In addition, Assemblyman Ivan Lafayette (D-Queens) introduced A.2173, establishing perpetual trusts.

NYBA is working with the Legislature to resolve the differences between the differing 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.

Interstate Trust Taxation -

Recent Developments -S.4703, DeFrancisco/A.7522, Weinstein was sent to Governor Pataki for his consideration in September and signed on October 7 as Chapter Law 658. Importantly, as requested by NYBA, the bill is retroactive to 1996. NYBA wrote the Governor urging that he sign the bill and noting the importance to New York as a center of the trust industry of such a bill, as well as the fact that the Tax Department, at NYBA's request, had found that there is no revenue impact from the bill because failure to enact it would result in New York banks maintaining out-of-state offices as affiliates instead of being able to take advantage of the economic efficiencies of branching.

Background: The advent of inter-

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

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

and invited NYBA to draft legislation, which the Department agreed to review, to remedy the concern.

NYBA submitted a legislative draft in September 2002 and has since made a change in the draft at the Department's suggestion. The Department approved the draft as accomplishing the purpose NYBA described and shared it with State Legislative and Executive branch leaders. The draft was introduced in both the Assembly and Senate this Spring.

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

Accounting for Conversions of Common Trust Funds to Mutual Funds -

Recent Developments: After several additional discussions, the Committee shared with NYBA a draft of legislation that would subject all mutual funds for which banks served as investment advisers, custodians or had other third-party relationships to the ten-year accounting requirement in the Banking Law applicable to common trust funds. NYBA strongly objected that the draft would reach multi-billion dollar funds with only a tiny percentage of trust assets invested and would place New York trust companies and trust departments

in an adverse competitive position. NYBA also noted the plenary authority over mutual fund regulation held by the Securities and Exchange Commission. The Committee is now reviewing NYBA's comments.

Background: The Surrogate's Court Advisory Committee raised concerns about the conversion of common trust funds to proprietary mutual funds. The Committee believes strongly that converted mutual funds should continue to be subject to some form of the ten-year accounting requirement governing common trust funds. NYBA put together and hosted a meeting of a working group to review current protections available to trust investors in mutual funds and common trust funds and what type of information could be readily supplied. On January 31, NYBA testified before the Advisory Committee, providing information with regard to available protections. The Committee appointed a Subcommittee to work with NYBA on the issue. In early April a delegation from NYBA met with the Subcommittee to discuss the issue. During the meeting, the Subcommittee agreed to develop a proposal to share with NYBA that would cover all trust investments in proprietary mutual funds, permit trust departments to charge trusts for the cost of any required accountings, revise and simplify the current system of accountings and work with the SEC to enhance Federal oversight of proprietary mutual funds.

Technical Amendments to the Principal and Income Act

The implementation of the new Principal and Income Act, beginning January 1, 2002, raised a number of

technical questions for which statutory clarification may be helpful. NYBA worked with the EPTL-SCPA Legislative Advisory Committee and other groups to develop a technical corrections bill. The bill, among other issues, addresses the commissionable base when equitable adjustments are made, and the timing for valuing assets held in trust. The bill was introduced in the Senate (S.4704, DeFrancisco) on April 14 but has not yet been introduced in the Assembly. ▼

2003 Chapter Law Summary

Chapter Law 1

■ **Environmental Liability Protection for Lenders and Trustees** - (S.5702, Marcellino/A.9120, Rules, Request of DiNapoli) Long-sought-after brownfields legislation that sets effective limits on lender and trustee environmental liability. When the Governor signed the bill, he released a press statement that included NYBA's supportive comments. **(SUPPORT)** The bill's liability provisions parallel the Federal CERCLA legislation ensuring that lenders who neither cause nor contributed to environmental contamination are not liable for the costs of remediation and capping the liability of a trustee at the amount of assets held in the trust that contains the contaminated property. Reflecting the importance of the bill to the Governor, it was given Chapter Number 1 of the Laws of 2003.

Chapter Law 62

■ **2003 Budget and Tax Legislation** - S.1406 (Budget)/A.2106 (Budget) Over Governor Pataki's veto, the Legislature passed a series of bills to restore almost \$2 billion in additional State spending along with the tax increases necessary to fund the new spending. The bank tax, which expired on December 31, was extended for two years with the financial modernization provisions added in the wake of the Gramm-Leach-Bliley Act extended for a year. In addition, the Legislature added a new provision designed to prevent tax evasion, which needed to be later amended. (See Chapter Law 686 below). The provision required that all banks, business corporations and other business taxpayers add back certain royalty and interest payments from affiliates when the payments serve no valid business purpose and are not conducted on an arms' length basis.

The revenue-raising bill also increased the State sales tax from 4% to 4.25%, increased top marginal tax rates on upper income taxpayers, raised numerous fees for State services, and provided relief from certain mandates to local governments, including elimination of the requirement that certain reserve funds be maintained in separate bank accounts. Importantly, the Governor's proposal to permit local governments to invest in the State-run short-term investment pool (STIP), against which NYBA generated a significant grassroots lobbying effort, was eliminated. The bill also mandated additional notice requirements from the holders of certain property subject to escheat to the State to the last known addresses of the owners thereof. And the bill decoupled

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State depreciation rules from the more generous Federal depreciation established in the wake of September 11, other than for property put in service in lower Manhattan. The bill became Chapter 62 of the Laws of 2003 on May 15 when it was passed by a two-thirds vote of both Houses over the Governor's veto.

Chapter Law 63

■ **New York City Budget and Taxes** - S.4968 (Rules)/A.8388 (Rules) After completing work on the State budget bills, the Legislature passed legislation to authorize New York City to increase certain taxes and raise other revenues to close its budget gap. Importantly, the provision originally contained in the bill that authorized the City to conform its taxation of REITS to Federal tax law was dropped. The bill became Chapter 63 of the Laws of 2003 on May 19 after passing both Houses by a two-thirds vote over the Governor's veto.

Chapter Law 106

■ **New York Military Relief** - S.5679 (Little)/A.9110 (Rules, Request of Silver) A bill to provide various benefits to New Yorkers called into military service, was signed into law as Chapter 106. **(DID NOT OPPOSE)** Among other sections, the bill incorporates into New York law language virtually identical to the provisions of the Soldiers and Sailors Civil Relief Act. Governor Pataki signed this bill on July 1.

Chapter Law 124

■ **"Do Not Call" List Transfer** - S.5484, Fuschillo/A.8986 (Rules, Request of Klein) A bill that transfers the two and a half million names and telephone

numbers on New York's "do not call" list to the FTC. **(SUPPORT)** The Governor signed the bill as Chapter 124 of the Laws of 2003 on July 7.

Chapter Law 141

■ **SONY MAE Extension** - S.4009 (Bonacic)/A.8649 (Rules, Request of Ramos) Extends until July 16, 2004 certain powers of the State of New York Mortgage Agency's insurance fund and increases certain bond limits. **(SUPPORT)** The Governor signed the bill as Chapter 141 of the Laws of 2003 on July 22.

Chapter Law 146

■ **Banking Department Authority** - S.4823 (Farley)/A.7969 (Rules, Request of Nolan) Authorizes the Banking Department to vary the bond amount with respect to certain licensed lenders and increases authority over certain consultants. **(DID NOT OPPOSE)** The Governor signed the bill on July 22 as Chapter 146 of the Laws of 2003

Chapter Law 221

■ **Security Guard Requirements** - S.3373-A (Golden)/A.6930-A (Cusick) Exempts additional categories of law enforcement personnel from the training requirements of the Security Guard Act. **(SUPPORT)** The Governor signed the bill as Chapter 221 of the Laws of 2003 on July 29.

Chapter Law 232

■ **Corporate Guardians** - S.4236(Hannon)/A.8507 (Rules, Request of Sidikman) Authorizes corporate guardians to make decisions to withhold or maintain life-sustaining treatment for

mentally retarded persons. **(DID NOT OPPOSE)** The Governor signed the bill on July 29 as Chapter 232 of the Laws of 2003.

Chapter Law 241

■ **"Wild Card" Extension** - S.5387-A/A.8890-A (Rules, Request of Nolan) A NYBA priority, the bill extends for four years, until September 10, 2007, the expiration date for the State's "wild card" law that provides the Banking Department with authority to grant parity to State-chartered banks with national banks. The bill also provides a similar "wild card" provision for thrift institutions but excludes municipal deposits and "home office protection." **(SUPPORT)** The Governor signed the bill on July 29 as Chapter 241 of the Laws of 2003.

Chapter Law 302

■ **Criminal Background Checks** - 3870 (Farley)/A.7966 (Rules, Request of Nolan) Expands the authority for the Banking Department to conduct criminal history background checks on applicants for licenses under the Banking Law - a bill that NYBA worked on with the Department. **(SUPPORT)** The Governor signed the bill as Chapter 302 of the Laws of 2003 on August 5.

Chapter Law 328

■ **College Savings Program** - S.5163-A (LaValle)/ A.8572-A (Rules, Request of Tonko) Increases the investment authority of the State Comptroller's Office with regard to the College Choice Savings Program. **(DID NOT OPPOSE)** The Governor signed the bill as Chapter Law 328 of the Laws of 2003 on August 5.

Chapter Law 499

■ **Identity Theft Protection** - S.4531-A (Saland)/A.5150-A (Pheffer) Prohibits businesses from printing credit or debit card numbers or expirations dates on electronically printed receipts. NYBA worked with the sponsors of the bill and it was amended to grandfather many existing machines, exclude manual im- printers and permit the printing of up to five digits for security reasons. Virtually identical language is included in the new Federal FACT Act, extending the expiring preemption provisions of the FCRA (q.v.). **(SUPPORT)** The Governor signed the bill as Chapter 499 of the Laws of 2003 on September 9.

Chapter Law 524

■ **Public Improvement Liens** - S.2922 (Hannon)/A.6400-A (Tocci) Ex- tends from six months to one year the period for filing a notice of lien, or ex- tension thereof, on a public improve- ment project. **(DID NOT OPPOSE)** The Governor signed the bill as Chapter 524 of the Laws of 2003 on September 17.

Chapter Law 537

■ **Credit Card Usage** - S.5414 (Volk- er)/A.7514 (A.Cohen) Authorizes the payment of mandatory surcharges and crime victim assistance fees by credit card. **(SUPPORT)** The Governor signed the bill as Chapter 537 of the Laws of 2003 on September 17.

Chapter Law 553

■ **ATM Videotape Retention** - S.808- A (LaValle)/A.8442 (Rules, Request of Nolan) Requires that ATM surveillance tapes be kept for 45 days, rather than the current 30 days. The bill was amend- ed at NYBA's request to reduce the

holding period from 60 days as original- ly proposed because of a lack of storage space at some banks. **(SUPPORT)** The Governor signed the bill as Chapter 553 of the Laws of 2003 on September 17.

Chapter Law 555

■ **Mortgage Insurance Limits** - S.1131 (Seward)/A.8846 (Rules, Request of Grannis) Increases the amount of mortgage insurance that may be written on a first lien. **(SUPPORT)** The Gover- nor signed the bill on September 17 as Chapter 555 of the Laws of 2003.

Chapter Law 589

■ **Power to Renounce** - S.5004 (De- Francisco)/A.7494 (Glick) Clarifies cir- cumstances in which an attorney-in-fact or other third party may make a renunci- ation on behalf of a person with a dis- ability. **(SUPPORT)** The Governor signed the bill as Chapter 589 of the Laws of 2003 on September 22.

Chapter Law 612

■ **Trustee Objection** - S.4905 (De- Francisco)/A.1491 (Seddio) Authorizes a nominated trustee or co-trustee to ob- ject to the issuance of letters testamen- tary or appointment of a lifetime trustee. **(SUPPORT)** The Governor signed the bill as Chapter 612 of the Laws of 2003 on September 30.

Chapter Law 630

■ **Child Performer's Trust** - S.4696- B(Velella)/A.7510 (Weinstein) Enacts the Child Performer and Education Trust Act of 2003; this bill is intended to ensure that child performers in New York re- ceive an adequate education and that a portion of their earnings is set aside in a trust account until they reach their ma-

jority. **(NO POSITION)** Governor Pata- ki signed the bill as Chapter 630 of the Laws of 2003 on September 30.

Chapter Law 631

■ **Living Trust Jury Trials** - S.2938(DeFrancisco)/A.7882(Rules, Re- quest of Seddio) Establishes the right to a jury trial to settle questions of fact with regard to the establishment of re- vocable lifetime trusts. **(OPPOSE)** Al- though NYBA filed a memo noting the increased cost and delay intendat upon jury trials and the intent of testators to avoid proceedings similar to those in- volving will contests. The Governor signed the bill as Chapter 631 of the Laws of 2003 on September 30.

Chapter Law 632

■ **Standby Guardians** - S.5306 (Rath)/ A.8808(Rules, Request of Glick) Clarifies the appointment of standby guardians. **(SUPPORT)** The Governor signed the bill on September 30 as Chapter 632 of the Laws of 2003.

Chapter Law 633

■ **Trustee Distributions** - S.5174(DeFrancisco)/A.8090 (Rules, Re- quest of Weinstein) An Office of Court Administration bill authorizing trustees in certain circumstances to make distri- butions to themselves. **(SUPPORT)** The Governor signed the bill as Chapter 633 of the Laws of 2003 on September 30.

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Chapter Law 635

■ Check Cashers Exemption

Amendment - S.5422-A(Farley)/A.8889-A (Rules, Request of Nolan) Limits the exemption for banks from the check cashing law for those public accommodation offices that are primarily engaged in check cashing. NYBA opposed this legislation in a memo that pointed out the bill's anti-competitive provisions. **(OPPOSE)** The Governor signed the bill as Chapter 635 of the Laws of 2003 on September 30.

Chapter Law 639

■ Tax-Induced Trust Changes -

S.3137 (DeFrancisco)/A.2609 (Gianaris) Modifies the list of acts prohibited to certain charitable trusts to include changes made by the Internal Revenue Code in the taxation of split-interest trusts. **(SUPPORT)** The Governor signed the bill as Chapter 639 of the Laws of 2003 on October 7.

Chapter Law 656

■ Student Financial Education Act

- S.4113 (Saland)/A.5171 (Tocci) Creates the Student Financial Education Act. The bill is designed to encourage teaching children to save and understand credit; it also provides credit unions the opportunity to establish school savings plans, but teachers and parents are not eligible to join. **(OPPOSE THE CREDIT UNION FEATURES)** The Governor signed the bill as Chapter 656 of the Laws of 2003 on October 7.

Chapter Law 658

■ **Interstate Trust Taxation** - A NYBA initiative, S.4703, DeFrancisco/A.7522, Weinstein) Clarifies that trusts established by New Yorkers in the out-of-state

affiliates of New York banks would not become subject to New York tax because the affiliates were converted to branches. **(SUPPORT)** The Governor signed the bill as Chapter 658 of the Laws of 2003 on October 7 and it is retroactive to 1996.

Chapter Law 663

■ **Misuse of Bank Name** - S.5513 (Farley)/A.8963 (Nolan) Prohibits the use of a bank's name to advertise, market or solicit the sales of products or services without the consent of the bank. **(SUPPORT)** The Governor signed the bill as Chapter 663 of the Laws of 2003 on October 7.

Chapter Law 679

■ **Credit Union Powers** - S.5590 (Farley)/A.5342-C (Greene) Provides State credit unions with some of the authority of Federal credit unions. **(OPPOSE)** The Governor signed the bill as Chapter 679 of the Laws of 2003 on October 15.

Chapter Law 686

■ **Tax Law Technical Corrections** - S.5725 (Rules)/A.9171 (Rules) Corrects provisions of the State budget enacted in May, including language clarifying that provisions of the Bank Tax that close a loophole that allowed some companies to escape taxation on income related to royalties applies only to royalties. Several banks were concerned that the provision could be interpreted to apply to intercompany loans and NYBA met with legislative staff to ensure that appropriate language was adopted. **(SUPPORT)** The Governor signed the bill as Chapter 686 of the Laws of 2003 on October 21.

Chapter Law 687

■ Insurance Agent Licensing -

S.5729 (Seward)/A.9186 (Rules, Grannis) Reenacts the licensing provisions for insurance agents and brokers, making them uniform with other states. NYBA worked with the Governor's counsel and legislative staff to make clear that the new licensing requirements preserve the existing group enroller exemption for credit insurance programs. **(SUPPORT)** The Governor signed the bill as Chapter 687 of the Laws of 2003 on October 21.

Veto Message Number 168

■ Notice to Lienholders of Motor Vehicle Forfeiture -

In addition to the bills that passed both Houses and were signed by Governor Pataki, one significant bill supported by NYBA was vetoed by the Governor. The Governor vetoed S.2476-A (Johnson)/A.5418-A (Canestrari), a bill to establish uniform procedures for local governments to provide notice to lienholders of vehicles seized for criminal activity and to establish a uniform innocent lienholder defense to forfeiture proceedings. The bill was opposed by the New York City and Nassau County Police Departments. NYBA had written urging that the bill be signed. **(SUPPORT)** The New York State Court of Appeals has accepted a case challenging the constitutionality of the current vehicle forfeiture provisions in effect in several counties. It is unlikely that the Legislature or Governor will take up this subject again until the Court rules. A decision could come as early as the Spring. ▼

STATE LEGISLATIVE ACTIVITY

Electronic Banking Legislation

■ **Electronic Mail** S.648 (Smith)/A.853(Cook) Curtails the transmission of unsolicited electronic mail through public computer networks. **(NO POSITION)** The bill is pending in the Senate and Assembly Codes Committees.

■ **ATM 911 Buttons** S.2892(Padavan)/A.4571-A (Stringer) Requires all bank-owned ATMs, throughout the State, to be equipped with emergency 911 buttons. **(OPPOSE)** NYBA met with the Assembly bill sponsor to explain bank security measures and engaged in a targeted grass roots campaign in the Senate in opposition to the bill. The bill passed the Assembly but remains in the Senate Banks Committee.

■ **Light Pollution** S.3003(Marcellino)/A.6950 Grannis) Establishes a system of state regulation of light pollution and defines the new tort of "light trespass." **(OPPOSE)** This bill, which the Governor vetoed when it passed the Legislature in 2001, would have created a direct conflict in bank responsibilities for compliance with the lighting provisions of the ATM Safety Act and the new regulations governing light pollution. The bill was amended at NYBA's request to exempt lighting under the ATM Safety Act. It passed the Assembly but remains in the Senate Rules Committee.

■ **Paper Check Fees** S.3419(McGee)/A.1367 (Glick) Prohibits banks and other businesses from charging any fee for the use of paper checks, bills, invoices or other instruments if no such fee is charged for the delivery of such instru-

ments over the internet. **(OPPOSE)** NYBA filed a strong memorandum in opposition to the bill, arguing that it was preempted by the Federal E-Sign statute. It is pending on the Senate and Assembly calendars.

■ **ATM Lighting** S.4388(Farley)/A.9276(Nolan), changing the definition of candlefoot power to foot-candles and making certain other technical amendments to the lighting provisions of the ATM Safety Act. **(SUPPORT)** This bill is pending in the Senate and Assembly Banks Committees.

■ **Talking ATMs** A.3863(Weisenberg) Requires that all bank-owned ATMs be equipped with audio as well as visual signals for all functions that may be performed at them. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Banks Committee. NYBA filed a memorandum urging the Legislature to conform any legislation in this area with the new Federal standards on audio signals for ATM machines being developed by the Access Board and the Department of Justice under the Americans with Disabilities Act. We understand that advocacy groups for the visually handicapped are taking the same position.

Privacy Legislation

■ **"Do Not Fax" List** S.128(Alesi)/A.4466(Klein) Allowing individuals to register their fax numbers on the State's "do not call" list. **(NO POSITION)** The bill is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **Internet Privacy** S.600(Hannon)/A.4385(Klein) Establishes a voluntary New York State Internet Privacy Law. **(NO POSITION)** The bill passed the Senate and is pending in the Assembly Consumer Affairs and Protection Committee.

■ **Personal ID Information** S.607 (Saland)/A.2148 (Tokasz) Prohibits the sale, exchange, rental or other use of personal identification information without the express written consent of the individual. **(OPPOSE)** This bill is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **E-mail Ads** S.1680(Rath)/A.6036 (Schimminger) Regulates unsolicited e-mail advertisements. **(OPPOSE, SEEKING AMENDMENTS)** NYBA opposes this bill in its current form because it would authorize Internet service providers to limit access to customers by businesses even where there is an existing business relationship or debtor-creditor relationship. The sponsor agreed to consider NYBA's amendments. The bill passed the Senate and is pending in the Assembly Consumer Affairs and Protection Committee.

■ **Unsolicited Faxes** S.1681(Rath)/A.3895 (Acampora) Makes certain harassing fax transmissions criminal acts. **(OPPOSE, SEEKING AMENDMENTS)** NYBA suggested that the bill be amended to clarify what types of harassing conduct would be criminalized under its provisions. The sponsor agreed to consider NYBA's amendments. The bill passed the Senate and is pending in the

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Assembly Codes Committee.

■ **Health Information** S.2115 (Morahan)/A.2505 (Kaufman) Establishes a statewide privacy protection program for health information, personal data and through the telecommunications network. **(NO POSITION)** The bill is pending in the Senate Codes and Assembly Governmental Operations Committees.

■ **Credit Card Identification** S.3443 (Velella) Prohibits recording a consumer's address or telephone number on a credit card transaction form or any attachment thereto. **(NO POSITION)** The bill is pending in the Senate Consumer Protection Committee.

■ **FCRA Amendments** S.3590 (Flanagan) Enhances consumer rights under the Fair Credit Reporting Act and requires prior notice to consumers before taking adverse action based on a credit report. **(OPPOSE)** The bill is pending in the Senate Consumer Protection Committee.

■ **"Do Not E-Mail" Registry** S.4507 (Rath)/A.7261 (McEneny) Establishes a new state-wide "do not e-mail" registry for spam. **(NO POSITION)** It is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **"Do Not Call/E-Mail" List** S.4511 (Rath)/A.709 (Grannis) Authorizes the inclusion of persons who do not wish to receive unauthorized e-mails on the State's "Do Not Call" list. **(NO POSITION)** The bill passed the Senate Consumer Protection Committee and is

pending in the Assembly Consumer Affairs and Protection Committee.

■ **E-Mail Regulation** S.4557(Rath)/A.5153(Pheffer) Makes unsolicited e-mail unlawful unless it identifies the sender and prohibits the sale, lease or exchange of personal information obtained on-line without the consent of the consumer. **(NO POSITION)** The bill is pending in the Senate Consumer Protection Committee and passed the Assembly.

■ **Sale of Social Security Numbers** S.309(Nozzolio) Prohibits the sale, lease, sharing or trading of social security numbers without the informed written consent of the holder. **(NO POSITION)** It is pending in the Senate Consumer Protection Committee.

■ **Internet Privacy** S.1100(Hannon) Enacts the "Internet Privacy Policy Act," restricting the release of personal information over the Internet by any State agency. **(NO POSITION)** The bill is pending in the Senate Energy and Telecommunications Committee.

■ **Disclosure of Financial Information** S.4150 (Hannon) Prohibits the disclosure of financial information to third parties without notice to the consumer. **(OPPOSE)** It is pending in the Senate Banks Committee.

■ **SPAM** S.4826(Maltese)/A.7909 (Rules, Request of Markey), A bill proposed by the Attorney General, it would regulate the transmission of unsolicited e-mail. **(NO POSITION)** The bill is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and

Protections Committees.

■ **Security Freezes** A.7419(Klein) Authorizes consumers to place security freezes on their consumer reports that, with certain exceptions, prohibit the release of the report. **(NO POSITION)** The bill is pending in the Assembly Consumer Affairs and Protection Committee.

■ **Privacy Opt-In** A.7489(Nolan) A Law Department bill, it prohibits the release of confidential customer information by financial institutions without the informed written consent of the customer. **(OPPOSE)** It is pending in the Assembly Banks Committee.

■ **Do Not Call** A.7984(Rules, Request of Gianaris) Prohibits telemarketers from calling current customers whose names are on the State "do not call" list unless there is an existing contract in force or the call is for the purpose of debt collection. **(OPPOSE)** It remains in the Assembly Consumer Affairs and Protection Committee.

■ **Fair Credit Reporting Act** A.8134 (Rules, Request of Pheffer) A Department of Law bill, it enhances consumer rights under the Fair Credit Reporting Act. **(OPPOSE)** The bill is pending in the Consumer Affairs and Protection Committee.

■ **Financial Privacy New York Act** - A.9220(Grannis) A pre-filed bill modeled on the new California privacy bill. It provides a consumer opt-out for relations with affiliates and opt-in for relations with third parties. **(OPPOSE)** The bill is pending in the Insurance Committee.

Retail Legislation

■ Travelers Checks/Money Orders

S.258(Skelos)/A.3325(Klein) Reduces to five years, from 15 years and seven years respectively, the period of time after which travelers checks and money orders are deemed abandoned property and escheated to the State. **(OPPOSE)** It is pending in the Senate Finance and Assembly Judiciary Committees.

■ Social Security Checks S.381

(Maltese)/A.126(Markey) Requires banks to cash social security checks for non-customers. **(OPPOSE)** The bill passed the Assembly and is pending in the Senate Banks Committee.

■ Credit Report S.833(Padavan)/

A.1562(Pheffer) Provides for consumers to receive a free annual copy of their credit report, by electronic mail at the consumer's option, and increases required disclosures. **(OPPOSE)** It is pending in the Senate Consumer Protection and the Assembly Rules Committees.

■ Credit Card Balances S.865 (Vellela)/A.245-A(Lentol)

Prohibits imposition of an annual fee on consumers who pay off their credit card balances in full each month. **(DO NOT OPPOSE, AS AMENDED)** This legislation, which passed the Assembly, was recalled and amended by its sponsor at NYBA's request to limit its application only to those circumstances in which a credit card issuer imposes an annual fee on a card that previously did not have an annual fee solely because the card holder pays the balance in full each month.

■ **Right of Set-off** S.925(Stachowski)/A.1919 (Higgins) Restricts banks' right of set-off against deposit accounts into which social security or supplemental security income payments are deposited. **(OPPOSE)** The bill is pending in the Senate and Assembly Banks Committees.

■ **Credit Card Late Fees** S.1317 (Morahan)/A.7457 (Gromack) Prohibits credit card late fees so long as a payment is no more than 10 days late. **(OPPOSE)** The bill is pending in the Senate Consumer Protection and Assembly Consumer Affairs and Protection Committees.

■ **Credit Card Late Fees** S.1318 (Morahan)/A.7458 (Gromack) Prohibits late fees when the amount due in a given month is less than the late fee. NYBA filed a memorandum in opposition. **(OPPOSE)** The bill is pending in the Senate Rules Committee and in the Assembly Consumer Affairs and Protection Committee.

■ **Credit Card Interest Rates** S.1321 (Morahan)/A.1670(Gromack) Authorizes the Banking Board to impose maximum interest rates on credit cards, not to exceed 15% in most circumstances. **(OPPOSE)** The bill is pending in the Senate and Assembly Banks Committees.

■ **Credit Card Fees** S.1454-A(Skelos)/A.5725 (Weisenberg)/A.8185(Rules, Request of Tokasz) Prohibits issuers of credit cards from imposing any over-the-limit fee on credit cards when the issuer accepts or pays the transaction that puts the customer's account over the limit. **(OPPOSE)** NYBA filed a memorandum in opposition to this bill and

brought a delegation to meet with the bill's sponsor. The bill is pending in the Senate Rules Committee and the Assembly Consumer Affairs and Protection Committee.

■ Credit Card Cancellations

S.1557(Volker)/A.1788(Tokasz) Requires credit card issuers to provide notice of the cancellation of a card when it is relied on for overdraft protection. **(OPPOSE)** The bill is pending in the Senate and Assembly Banks Committees.

■ Venue for Enforcing Judgments

S.2883(Volker)/A.7497(Weinstein) Limits the venue for suits to enforce judgments regarding consumer credit transactions to the County in New York City in which the defendant resides or the transaction took place. This legislation would make the venue for enforcing judgments essentially identical to that for the original litigation. **(DO NOT OPPOSE)** The bill passed the Assembly and is pending in the Senate Codes Committee.

■ Credit Card Applications

S.4055(Morahan)/A.4831-A(Cohen) Prohibits the mailing of credit card applications. **(OPPOSE)** The bill is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **Credit Card Applications** S.4214 (Velella)/A.3492-A(Dinowitz) Prohibits the mailing of credit card applications to persons under 21 years of age. **(OPPOSE)** It is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

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■ **Rental Purchase Agreements**

S.4242(Fuschillo)/A.5191(McDonough) Enhances consumer protections with regard to rental purchase agreements. **(NO POSITION)** The bill is pending in the Senate Consumer Protection and Assembly Judiciary Committees.

■ **Insufficient Funds** S.164(Morahan)

Prohibits banks from charging for the deposit of a check that is subsequently dishonored because of insufficient funds. **(OPPOSE)** It is pending in the Senate Banks Committee.

■ **NSF Fees** S.276(Vellela) Imposes a

maximum NSF fee of \$15. **(OPPOSE)** The bill is pending in the Senate Banks Committee.

■ **Credit Cards** S.510(Maziarz) Pro-

hibits the direct merchandising of credit cards to any student through CUNY or SUNY. **(OPPOSE)** The bill is pending in the Senate Higher Education Committee.

■ **Loan Checks** S.2828(Padavan)

Prohibits credit card issuers from mailing loan checks to New York residents **(OPPOSE)** It is pending in the Senate Consumer Protection Committee.

■ **Storage Liens** S.4563(Johnson)

Subordinates liens for the storage of motor vehicles, boats and aircraft to pre-existing liens. **(SUPPORT)** The bill is pending in the Senate Judiciary Committee.

■ **Internet Credit Card Disclosure**

S.4741 (Fuschillo) Requires the Banking Department to distribute information on credit card rates and fees over the Internet. **(SUPPORT)** The bill is pending in

the Senate Consumer Protection Committee.

■ **Loan Checks** A.4848(Pretlow) Pro-

hibits banks from issuing unsolicited loan checks. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Banks Committee.

■ **Basic Banking Notices** A.5144

(Perry) Requires posting of notices with regard to the availability of basic banking accounts. **(OPPOSE)** The bill is pending on the Assembly calendar.

■ **Criminal Possession of ATM**

Cards A.8093 (Rules, Request of Carrozza) Makes theft or illegal possession of an ATM card a crime. **(SUPPORT)** It is pending in the Assembly Economic Development Committee.

Trust Legislation

■ **Champerty** S.2992-A(Marchi)/

A.7244(John) Eliminates the defense of champerty in the purchase of certain debt obligations, except with indenture trustees. **(SUPPORT)** The sponsors have accepted amendments that NYBA offered and the bills are pending in the Senate and Assembly Judiciary Committees.

■ **Guardian Pay** S.3499(Volker)/

A.8086(Rules, Request of Lentol) An Office of Court Administration bill, it authorizes the compensation of guardians ad litem to be paid out of public funds. **(SUPPORT)** It is pending in the Senate Codes and Assembly Ways and Means Committees.

■ **Perpetual Trust Act**

S.2292(DeFrancisco) Enacts the Perpetual Trust Act. **(SUPPORT)** The bill is pending in the Senate Judiciary Committee.

■ **Principal and Income Act Technical Corrections** S.4704(DeFrancisco)

Would enact technical amendments to the Principal and Income Act. **(SUPPORT)** The bill is pending in the Senate Judiciary Committee.

■ **Trust Termination** S.5166 (De-

Francisco) Establishes a procedure for the termination of uneconomical trusts; NYBA proposed a series of amendments to clarify the treatment of charitable trusts under this bill and to cap the size of trusts that may be terminated at \$200,000. **(OPPOSE, SEEKING AMENDMENTS)** This bill passed the Senate and is pending in the Assembly Judiciary Committee.

■ **Perpetual Trusts** A.2173(Lafayette)

Establishes perpetual trusts. **(SUPPORT)** The bill is pending in the Assembly Judiciary Committee.

■ **Charitable Trust Commissions**

A.7479(Weinstein) Alters the commissions payable on certain charitable trusts. **(POSITION BEING DEVELOPED)** The bill is pending in the Assembly Judiciary Committee.

■ **Rule Against Perpetuities**

A.7928(Rules, Request of Carrozza) Amends the rule against perpetuities to authorize the creation of perpetual trusts. **(SUPPORT)** The bill is pending in the Assembly Judiciary Committee.

Mortgage Legislation

■ Mortgage Escrow Accounts

S.262(Skelos)/A.6245(Weisenberg) Requires that mortgage lenders provide notice to mortgagors, real property taxing authorities and real property insurers on the satisfaction of a mortgage where the lender is maintaining an escrow account from which taxes or insurance premiums are paid. **(OPPOSE)** The bill is pending in the Senate Local Governments and Assembly Ways and Means Committees.

■ **Mortgage Loans** S.1030-A(Kuhl)/A.1977-A (Pheffer) Requires that final payments on mortgage loans be credited within five days of receipt. **(DO NOT OPPOSE, IF AMENDED)** The bill is pending in the Senate Judiciary and Assembly Codes Committees.

■ **Appraisal Reports** S.1450(Volker)/A.2594(Wirth) Requires lenders to provide appraisal reports to their customers who must pay for the appraisals within ten days. **(OPPOSE)** The bill is pending in the Senate Judiciary and Assembly Consumer Affairs and Protection Committees.

■ **Mortgage Copy** S.2286 (DeFrancisco)/A.9181(Rules, Request of Sweeney) Penalizes mortgagees for failing to forward a time- and date-stamped copy of a mortgage to mortgagors within 30 days of recording. **(OPPOSE)** NYBA filed a memorandum in opposition to the proposal and is working to develop alternatives. The bill is pending in the Senate Rules and Assembly Judiciary Committees.

■ **Assignment of Mortgage** S.2287 (DeFrancisco)/A.4710(Brennan) Permits a refinancing mortgagor to receive an assignment of mortgage rather than a discharge **(SUPPORT)** This bill is pending in the Senate Rules and Assembly Judiciary Committees.

■ **Liens for Real Estate Contracts** S.2517(Spano)/A.4994(Abbate) Provides for the filing of a mechanics lien after the execution of a contract of sale or lease of real property, whether the contract is executed or not. **(OPPOSE)** The bill passed the Senate and is pending in the Assembly Judiciary Committee.

■ **Special Additional Mortgage Recording Tax** S.2575 (Skelos)/A.7285(Morelle) Permits state-chartered lenders to impose the special additional mortgage recording tax on mortgagors. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Rules Committee.

■ **Mortgage Guarantee Insurance** S.3561(Velella)/A.4528(Grannis) Permits mortgagors to eliminate mortgage guarantee insurance when the loan-to-value ratio on a mortgage falls below 75% if the borrower pays for a reappraisal, has a good payment history and the loan is at least five years old. **(OPPOSE)** NYBA responded that the bill was preempted by the Homeowners Protection Act of 1998. The bill passed the Assembly and is pending in the Senate Insurance Committee.

■ **Revising Notices of Pendency** S.5045-A(Volker)/A.6031-A (Schimming) Provides a means to restore a notice of pendency (used in real estate

foreclosures) and reforms the means of canceling a notice **(SUPPORT)** It is pending in the Senate Rules and Assembly Judiciary Committees.

■ Loan Review Board

S.2953(Mendez) Establishes a loan review board within the Banking Department for denied loan applications **(OPPOSE)** The bill is pending in the Senate Banks Committee.

■ Mortgage Banker Registration

S.3425(Farley) Reduces the number of mortgages that may be made in any two-year period before registration as a mortgage banker is required. **(NO POSITION)** The bill passed the Senate and is pending in the Assembly Banks Committee.

■ Homestead Exemption S.4335

(Leibell) Increases the homestead exemption for the bankruptcy law and for satisfaction of money judgments from \$10,000 to \$20,000. **(OPPOSE)** This bill is pending in the Senate Codes Committee.

■ Real Estate Agent Definition

S.4371(DeFrancisco) Expands the requirement of licensing as a real estate agent or broker for finding, referring or procuring real estate. **(OPPOSE)** NYBA filed a strong memorandum in opposition, noting that this legislation could require banks to be licensed for many traditional banking and trust activities. This bill is pending in the Senate Rules Committee.

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■ **Manufactured Homes as Real Property** S.4778-A(Farley) Permits but does not require the owner of a manufactured home to convert a motor vehicle certificate of title for the home into a real estate encumbrance if the manufactured home is affixed to real estate. **(SUPPORT)** It allows owners to take advantage of Freddie Mac requirements for purchasing mortgages on manufactured homes. It is pending in the Senate Banks Committee.

■ **Mortgage Banker Licensing** A.8064(Rules, Request of Seddio) Provides for the licensing of natural persons who originate mortgages, but excludes the employees of banks and their affiliates. **(SUPPORT, WITH AMENDMENTS)** NYBA is seeking amendments to clarify that the exclusion for bank employees also applies to their affiliates. The bill is pending in the Assembly Ways and Means Committee.

Miscellaneous Legislation

■ **Money Laundering/Weapons** S.3(Balboni) Jointly advanced by the Governor and Attorney General, establishes the crimes of money laundering for terrorism and penalize possession or use of chemical or biological weapons. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Codes Committee.

■ **Lessor Liability** S.397-A(Johnson)/A.1042-A(Canestrari) Reduces lessor liability for motor vehicles leased for one year or more **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Transportation Committee.

■ **Short-form Power of Attorney** S.991(Trunzo)/A.3394(Levy) Requires all banks in the State to accept the short-form power of attorney and certain durable powers. **(SUPPORT, WITH AMENDMENTS)** The bill is pending in the Senate and Assembly Banks Committees.

■ **Excelsior Linked Deposit Program** S.1151-A(Marchi)/A.2078 (Sweeney) Authorizes credit unions to participate in the Excelsior Linked Deposit Program and increases funds available under the Program. **(OPPOSE)** NYBA filed a memorandum in opposition to this bill, pointing out the inequity of permitting institutions that pay no state taxes to accept tax deposits. The bill passed the Assembly and is pending on the Senate Calendar.

■ **Low-interest Loans** S.1419 (Alesi)/A.1884 (Sweeney) Authorizes the Urban Development Corporation to make low-interest loans to businesses likely to be injured economically because of an owner's absence for military service. **(SUPPORT)** The bill passed the Assembly and was reported from the Senate Corporations, Authorities and Commissions Committee to the Finance Committee.

■ **Credit Union Sales and Use Tax Exemption** S.2179(Farley)/A.861 (Greene) Exempts State-chartered credit unions, like Federal credit unions, from sales and use taxes on acquisitions of personal property and services for their own use. **(OPPOSE)** The bill is pending in the Senate Investigations and Government Operations and the Assembly Ways and Means Committees.

■ **UCC Articles 3 & 4** S.2260(Farley) Updates and revises Articles 3 and 4 of the Uniform Commercial Code (with regard to negotiable instruments and bank deposits and collections) to accord with the uniform law in the other 49 states. **(SUPPORT)** The bill is pending in the Senate Judiciary Committee.

■ **Bank Examinations** S.2264(Farley) Revises the confidentiality of bank examinations and reports. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Banks Committee.

■ **Short-form Power of Attorney** S.2672(Saland)/A.3172(Kaufman) Provides significant potential damages for failure to honor a properly executed short-form power of attorney **(OPPOSE)** The bill is pending in the Senate and Assembly Judiciary Committees.

■ **Thrift Community Bank Deposits** S.3032 (Farley)/A.6966-A(Farrell) Authorizes thrift institutions to participate in the community bank deposit program. **(OPPOSE)** It passed the Assembly and is pending in the Senate Rules Committee.

■ **Local Government Investments** S.3249-A(Maziarz)/A.3873-A(DiNapoli) Authorizes local governments to invest in money market mutual funds, with counties with populations below 100,000 required to make such investments through banks or trust companies. **(OPPOSE)** NYBA filed a memorandum in opposition to the bill and targeted a grassroots campaign on key potential legislators. The bill is pending in the Senate and Assembly Rules Committees.

■ **Excelsior Linked Deposits** S.3333 (Saland)/A.6035(Schimminger) Extends the maximum maturity of Excelsior linked deposits from two to four years. **(SUPPORT)** The bill passed the Assembly and is pending in the Senate Finance Committees.

■ **Service Charge** S.3419(McGee)/A.1367(Glick) Prohibits the imposition of a service charge on mailed bills or invoices if no such charge is imposed on bills or invoices sent by e-mail **(NO POSITION)** This bill is pending in the Senate Rules Committee and on the Assembly Calendar.

■ **Tax Allocation** S.4604-A(Skelos)/A.8500 (Rules, Request of Morelle) Revises the rules for allocating income for purposes of both the Banking and General Corporation Tax Laws. **(POSITION UNDER STUDY)** The bill is pending in the Senate Investigations and Government Operations and the Assembly Ways and Means Committee.

■ **Banking Law Penalties** S.3424 (Farley) Makes uniform certain penalties under the Banking Law. **(SUPPORT)** This bill passed the Senate and is pending in the Assembly Banks Committee.

■ **Budget Planners** S.3871-A(Farley) Requires that budget planners be licensed and regulated. This bill passed the Senate and is pending in the Assembly Banks Committee. **(DO NOT OPPOSE)**

■ **Foreign Branch Authority** S.4386(Farley) Provides the branches of New York State-chartered banks in foreign countries the same authority as

banks in those countries. **(SUPPORT)** The bill is pending in the Senate Banks Committee.

■ **Community Development Financial Institutions** S.4390 (Farley) Creates a community development financial assistance fund to provide State assistance to local community development financial institutions. **(NO POSITION)** It is pending in the Senate Banks Committee.

■ **Capital Issuance** S.4575(Farley) Provides authority for bank boards of directors to issue capital notes and accept mortgages in payment. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Banks Committee.

■ **Corporate Governance** The Attorney General proposed a package of bills designed to strengthen corporate governance procedures. Among these, two bills have thus far been introduced in the Senate. S.4834-A(Lavalle) enhances oversight of public accounting firms and is pending in the Senate Higher Education Committee. **(NO POSITION)** S.4836-A(Leibell) provides additional protection against financial fraud in not-for-profit corporations **(OPPOSE)** and is pending in the Senate Corporations, Authorities and Commissions Committee.

■ **Lessor Liability** S.5642(Johnson) Modeled on bills in Connecticut and Rhode Island, this bill relieves automobile lessors of liability for accidents involving leased vehicles so long as the lessees maintain sufficient insurance on the vehicles. **(SUPPORT)** Similar to

S.397-A, which passed the Senate, this bill is intended as a compromise to help move the lessor liability issue. It is pending in the Senate Rules Committee.

■ **State Deposits on CRA Ratings** A.2171 (Lafayette) Prohibits the Comptroller from depositing State funds in a bank rated less than satisfactory on its CRA examination. **(OPPOSE)** The bill is pending on the Assembly calendar.

■ **Consumer's Bill of Rights** A.3847(Ortiz) Creates a financial consumer's bill of rights. **(OPPOSE)** The bill is pending on the Assembly calendar.

■ **Local Government Deposits** A.3874(DiNapoli) Authorizes savings banks headquartered in communities with no commercial bank headquarters to accept local government deposits. **(OPPOSE)** The bill is pending in the Assembly Local Governments Committee. NYBA filed a memorandum in opposition and urged key local bankers to contact the bill's sponsor.

■ **Excelsior Loans** A.5948(Rivera) Permits banks to make a series of linked Excelsior loans aggregating \$50,000, rather than requiring each such loan to equal \$50,000. **(SUPPORT)** It is pending in the Assembly Small Business Committee.

■ **Credit Union Membership** A.8007(Rules, Request of Nolan) Expands credit union eligibility to include the domestic partners of existing members. **(OPPOSE)** It is pending in the Assembly Banks Committee. ▼

NYBA 2004 LEGISLATIVE & REGULATORY POLICY

On November 7, 2003, the Legislative and Regulatory Policy Committee of the New York Bankers Association met jointly with NYBA's Board of Directors to recommend NYBA's Year 2004 legislative and regulatory policy. Following the joint meeting, the Board met in Executive Session and unanimously adopted the following recommendations:

Bank Security

In response to concerns with regard to bank robbery and security issues, NYBA should continue to work cooperatively with law enforcement officials to develop additional effective methods of reducing bank crime. NYBA should continue to oppose mandates of specific one-size-fits-all security requirements at all levels of government. In addition, NYBA should continue to support legislation at the State level that would create the specific crime of "bank robbery" with increased penalties, particularly for note-passing crimes. NYBA should also explore expanding successful New York City-based programs such as APPL to the rest of the State and pursue participation in rewards programs, such as Crimestoppers. NYBA will also support total conversion to digital camera technology over the next few years.

Privacy/FCRA

NYBA should continue to maintain its leadership position on this issue at the State level, reconvening its privacy task force and inter-industry privacy coalition as needed. At the federal level, NYBA should continue to support broader protections against identity theft and increased methods of combat-

ing such theft, when reasonable, in exchange for making permanent the State law preemption provisions of the Fair Credit Reporting Act.

(The State law preemption provisions were made permanent with the signing by President Bush of the Fair and Accurate Credit Transactions Act in December 2003.)

Bank Fees

The deregulation of bank fees and service charges was one of the signal achievements affecting bank public policy in the last decade. NYBA should continue to work to maintain fee deregulation and oppose initiatives designed to cap or ban fees. However, when appropriate, NYBA should support reasonable and cost-effective disclosure requirements. In this process, NYBA will involve all affected parties, including the retail merchants with regard to fees affecting their customers.

NYBA will also continue to encourage the Banking Department to promulgate a regulation providing parity for New York State-chartered banks in charging daily overdraft fees. NYBA will also develop "Best Practices" with regard to so-called "Bounce Protection Programs."

Budget & Taxes

NYBA opposes changes in the Tax Law that single out the banking industry for unfair taxation. Given the renaissance of branch banking in New York State and the influx of out-of-state banks and expansion of in-state branch networks, NYBA strongly opposes any changes in the Bank Tax that would reduce the attractiveness of the State to new banking jobs and branches. NYBA

will conduct an independent survey to determine the number of new jobs brought to the State by increased branching. NYBA also supports the extension of the expiring provisions of the Bank Tax that accommodate the Gramm-Leach-Bliley Act.

Preemption/Predatory Lending

NYBA should continue to work toward achieving amendments to the current State high-cost home lending law, including a uniform State standard for regulated entities. NYBA should also continue to support federal preemption initiatives designed to provide a clearer road map as to the appropriate scope of legislation and regulation at the state and federal levels. NYBA's support of such initiatives should, however, continue to be evaluated based on the initiatives' impact on the dual banking system. NYBA supports both a strong state and a strong national banking charter.

Municipal Finance

NYBA opposes providing local governments in New York authority to invest in mutual funds or STIP. NYBA believes that such investments would limit the ability of local banks to provide support for their communities in the form of local loans and investments and drain deposits from local areas. Under certain economic scenarios, such alternative investments could also prove unacceptably risky to local governments. However, recognizing the extreme financial pressure under which many local governments are operating today, NYBA would be willing to work with municipalities to develop

ways to enhance the earnings opportunities on their excess balances. Among these initiatives would be programs to simplify and improve collateral rules.

Federal Issues

NYBA will "stay the course" on its federal legislative and regulatory program.

- 1) On deposit insurance, NYBA supports H.R. 522 and believes that its provisions on increased coverage for municipal deposits represent a consensus of New York banks.
- 2) NYBA opposes repeal of the prohibition on the payment of interest on demand deposits while supporting an immediate increase from six to twenty-four in the number of permissible monthly transfers from a money market deposit account.
- 3) NYBA supports meaningful bankruptcy reform legislation and urges the Senate to take up the House-passed version of bankruptcy reform.
- 4) NYBA strongly opposes legislation to prevent the Treasury Department and Federal Reserve Board from making determinations under the Gramm-Leach-Bliley Act with regard to what activities are financial in nature, in particular, whether national banks and financial holding companies can engage in real estate brokerage.
- 5) NYBA continues to oppose the credit union and industrial loan company provisions of H.R. 1375, the Financial Services Regulatory Relief Act.
- 6) With regard to the regulation of Government-Sponsored Enterprises (GSEs), NYBA supports a strong regulatory agency with the authority to set both capital requirements and program parameters and the ability to regulate all

housing-related enterprises (Fannie Mae, Freddie Mac and the Federal Home Loan Banks). NYBA will form a special task force to consider GSEs, including the Farm Credit System, and the FHLBs, especially in light of the importance of the Federal Home Loan Bank System to member banks.

Trust Issues

NYBA supports the legislative and regulatory agenda of NYBA's Trust and Investment Division. NYBA believes that enactment of fiduciary income tax reform is a vital economic development interest of New York State. NYBA also supports enactment of perpetual trust legislation and believes that subjecting bank-sponsored mutual funds holding trust assets to a ten-year accounting requirement would seriously limit the competitiveness of New York banks and trust companies.

Credit Unions

NYBA will continue to oppose legislation in Albany to provide authority to State-chartered credit unions in excess of that available to Federal credit unions. NYBA will also support legislation in Washington to require larger, bank-like credit unions to pay taxes equivalent to those paid by other financial institutions and to differentiate between these larger institutions and traditional small credit unions that require no further regulation. NYBA will work to unite the entire membership behind the federal strategy being developed by the ABA Credit Union Task Force. NYBA recognizes this is a long-term process that requires commitment from a united banking industry.

Miscellaneous

In previous meetings, NYBA agreed to continue to support providing micro Excelsior-linked loans in distressed areas of the State, enhance equity investment opportunities for banks grandfathered under FDICIA and support issuance of bank stock in non-certificate form. ▼

STATE REGULATORY DEVELOPMENTS

Banking Board Actions

1. Board Members Written Consent

— In April, the Banking Department finalized a regulation requested by NYBA that permits a bank's board of directors to act by unanimous written consent without a meeting in a number of circumstances.

The regulation was effective on April 2, 2003. The Department also published a final regulation effective April 2 that clarified the maximum number of vacancies on a board of directors that may be left unfilled until the next annual shareholders meeting.

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.

This NYBA request was 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.

2. Checking Account Fees — On May 13, 2002 NYBA petitioned the Banking Department to promulgate a regulation that would permit New York State-chartered banks to have the authority to charge a daily fee to checking accounts 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. 74002, 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 has now met on several occasions with Superintendent of Banks Diana L. Taylor to discuss this issue. The Superintendent has expressed her desire to preserve parity between national and state chartered banks, and has agreed to work with NYBA to explore the most appropriate way to address this issue. In the discussions, the Banking Department expressed concern regarding the proliferation of bounce protection programs. While NYBA has been able to draw a distinction between such programs and the daily overdraft fee, it is clear that such programs are being carefully evaluated by the Department at this time. (The OCC has issued a bulletin, as well, which raises potential compliance problems with this type of program.)

NYBA's discussions with the Department recently culminated in receipt of a letter from the Superintendent that outlines a potential regulation addressing NYBA's request. Importantly, this proposal includes a complete exemption for businesses from any limitations on

overdraft fees which may be charged to consumers. NYBA plans to continue its dialogue with the Department on this important issue.

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

3. 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. Former Superintendent of Banks Elizabeth McCaul repeatedly stated that she had no discretion under the statute to provide flexibility in its administration or enforcement. Progress was made in this regard at the end of the 2000 legislative session, with both the Banking Department and NYBA supporting a technical correction to the ATM Safety Act designed to allow the Banking Department greater flexibility in its enforcement. Although this corrective legislation was debated in the final week of the session, an agreement could not be reached. No such legislation was introduced in the 2001 legislative session.

In 2002, Senator Hugh Farley introduced S.7156, which sought 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.

A similar bill, S.4388/Farley, was introduced in the Senate in 2003, but was not passed. Once again, no companion bill was introduced in the Assembly. NYBA plans to renew its dialogue on this matter with the new Superintendent of Banks Diana Taylor. Legislation, to which NYBA does not object, and which extends the retention period for ATM surveillance tapes from 30 to 45 days was passed in both the Senate and Assembly (S.808-A(LaValle)/A.8442 (Rules, Request of Nolan)).

4. **Wild Card Petition: Underwriting of Municipal Revenue Bonds**

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

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

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

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

NYBA IN COURT

The Mayor of the City of New York v. The Council of the City of New York and The Comptroller of the City of New York

Recent Developments: In a conference regarding this matter, which pertains to the validity of New York City's high-cost home loan ordinance, New York State Supreme Court Judge Stallman stated his desire to convert the parties' motion papers regarding a preliminary injunction to cross-motions for summary judgment because there are no material issues of fact in the case. Thus, when he rules on the case, he will be rendering a final decision on the merits. The parties agreed to this strategy; all additional papers were required to be submitted by August 25th. Until a decision is rendered, the New York City high-cost home lending ordinance is not in effect.

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KEY POINT: This case is important, in that it will, to some degree, establish parameters for those banking issues over which the City - and perhaps other localities - may claim legislative jurisdiction. Given the recent interest localities have shown towards consumer issues such as predatory lending and privacy, the outcome of this case could be quite significant in determining whether we can expect more such local ordinances in the future.

Background: The New York City Council, over objections from the City's financial sector, passed a predatory lending ordinance in September, 2002. The bill prohibited firms deemed to be predatory from doing business with the City. In late October, 2002 New York City Mayor Michael Bloomberg vetoed the ordinance. In his veto message, the Mayor stated that the bill, Int. 67-A, was an "indirect and incomplete" attempt to address lending practices which the Governor, in signing a state predatory lending bill, Chapter 626 of the Laws of 2002, already had done in a "detailed and comprehensive manner." Mayor Bloomberg also stated his belief, that Int. No. 67-A is preempted by Chapter 626, and if not so preempted would result in a patchwork of inconsistent provisions in State and local law. The City Council overrode the Mayor's veto in November, 2002 and in February 2003 the Mayor sued the City Council and the City Comptroller, alleging that Local Law 36 would curtail various powers vested in the Mayor by the City Charter and by State law, and alleging further that the Local Law conflicts with and is therefore preempted by State Law. Moreover, the complaint alleged that the State occu-

pies the field of high cost home loan regulation. The following week, the Court issued a temporary restraining order, prohibiting the implementation, administration or enforcement of any provision of Local Law 36. The law had been due to take effect on February 18, 2003. On March 28, 2003, NYBA filed an *amicus curiae* brief in support of Mayor Bloomberg's motion for a preliminary injunction.

Outlook: It is too early to tell whether the Mayor will be successful in his challenge to the law. Nevertheless, because the case will be decided on the basis of cross-motions for summary judgment, a final outcome will not be delayed by the need for a trial.

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

Recent Developments: On December 31, 2002 the Surrogate's Court in Westchester County issued a Decision and Order in which the court distinguished between the duties of executors and trustees, and therefore refused to dismiss a life beneficiary's objections to an intermediate accounting by JP Morgan Chase (Chase) who was acting in both capacities. On January 16, 2003, Chase filed a notice of appeal to the Appellate Division, Second Department. NYBA filed an *amicus curiae* brief in support of Chase in June, 2003. Oral arguments were presented in October 2003, but a decision is still pending.

KEY POINT: Contrary to the Surrogate's decision in this case, it is currently widely believed that when fiduciaries act as both executor and trustee, all issues pertaining to acts or omissions during the estate administration are deter-

mined finally by the decree settling the estate and trust beneficiaries who are made parties to the estate accounting do not have the right to raise any of those issues in a trust accounting proceeding. Therefore, if the Surrogate's decision stands, it could have a significant impact on the practices of the fiduciary industry and the scope of fiduciary liability.

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

Chase filed an intermediate accounting of the trust following the death of the individual co-trustee in 1996. The life beneficiary filed objections on a number of grounds, including the alleged failure of the Bank to compel itself as executor either to distribute assets from the estate sooner or to change the investments in the trust, as well as the failure of the trustee to object to the executors' accounting. Chase moved to dismiss those objections on the ground they are barred by the decree settling the executors' account, in the proceeding to which the beneficiary was a party. The Surrogate distinguished between the duties of the trustees and those of the executors, and held that these claims are not barred.

Outlook: It is too early to tell whether this decision will be reversed or upheld. It is clear, however, that if the Surrogate is upheld, it will significantly impact on the roles of executors and trustees in New York. Moreover, among other things, it is likely to undermine the finality of numerous accounting decrees where a fiduciary has acted in a dual capacity.

Bernie Huggins v. George Pataki, HSBC Bank USA and Spring Creek Associates, LP

Recent Developments: In July 2002 the United States District Court for the Eastern District of New York dismissed this action, in which plaintiff had alleged that HSBC's compliance with New York's garnishment statute, when it knew or should have known that the plaintiff's account was exempt from garnishment, violated his due process rights under the Fourteenth Amendment of the United States Constitution and under the Social Security Act. On August 9, 2002 Plaintiff-Appellant appealed this case to the United States Court of Appeals, Second Circuit. In July 2003, NYBA filed an *amicus curiae* brief in support of HSBC. Shortly thereafter, the plaintiff withdrew his appeal.

KEY POINT: Given the vast number of garnishment notices which are served on banks daily, if there had been a finding in this case that shifted the burden to banks to determine whether or not funds in an account are exempt from the garnishment statute, it would have created significant administrative and legal challenges for financial institutions.

Background: The plaintiff Bernie Huggins who was disabled and a recipient of Social Security Disability payments, maintained an account with HSBC for the purpose of receiving his Social Security payments via electronic transfer. For at least six months prior to the events in this case, Mr. Huggin's account contained only Social Security funds. Defendant Spring Creek Associates obtained a money judgment against Huggins. Pursuant to New York's garnishment statute, Spring Creek served a "Restraining Notice and Information Subpoena" on HSBC, requiring it to freeze Huggin's account. However, Spring Creek did not give Huggins the required notice of the freeze nor an additional specific required notice which informs debtors that they may be able to get their restrained funds back if such funds fall within various enumerated categories (one of which is Social Security funds). Plaintiff argued that despite prevailing precedent finding New York's garnishment procedures to be constitutional, intervening changes in technology, which enable banks to know immediately whether funds are exempt from the garnishment statute, should place the burden on banks to determine whether or not to garnish money in an account. Judge Gleeson disagreed with the plaintiff's arguments, indicating that they might best be directed to the state legislature.

Prior to a decision being rendered in the United States District Court, claims against Governor Pataki and the State of New York were voluntarily dismissed on July 12, 2001.

By stipulation dated July 23, 2001, Spring Creek and Mr. Huggins agreed to

lift the restraint on Mr. Huggin's account, to limit damages to Spring Creek, and to extend Spring Creek's time to answer to September 21, 2001. Spring Creek never answered. By judgment entered July 17, 2002, the District Court dismissed the case in its entirety.

Outlook: Plaintiff's withdrawal of his appeal leaves the current garnishment procedures intact for now. However, NYBA recently learned that several new lawsuits have been filed which mirror the claims set forth in the Huggins matter. Thus, it is clear that this issue has not yet been permanently resolved. ▼

SIGNIFICANT LEGAL DECISIONS

Payment of Surety Bond Valley National Bank v. Greenwich Insurance Company and XL Reinsurance America, Inc. 2002 CV 5069 (VM)

Recent Developments: Valley National Bank (Valley) filed a complaint against the Defendants, alleging that they failed to pay Valley money owed pursuant to a surety bond that Defendants had issued to National Investment Services, Inc. (National) to guarantee the payment of obligations owed by National to Valley. Valley then brought a motion for summary judgment. Defendants opposed the motion, and sought further discovery to mount a defense based on their allegation that Valley fraudulently induced them to issue the bond. On April 29, 2003 the United States District court, Southern District of New York granted plaintiff's motion for

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summary judgment and directed entry of a judgment against the co-defendant sureties in a sum in excess of \$7,000,000. The defendant sureties filed a notice of appeal. However, the parties subsequently entered into a settlement agreement in which the plaintiffs were paid \$6.7 million from the defendants.

KEY POINT: This is a positive development for banks and other obligees under surety bonds. The court's unwillingness to entertain the sureties' fraud claim as a defense to payment, and the subsequent favorable settlement, indicate that these bonds continue to have value and that courts will enforce waiver of defense provisions.

Background: Valley was provided with a surety bond by the borrower, National, to guarantee its payment obligations under an insurance premium financing agreement (PFA). Under the PFA, Valley agreed to advance \$7,500,000 to National, which was to use the Funds to finance premiums on National's insurance policy with Twin Oaks Insurance Company, Ltd. National was to repay the Funds in eight equal installments. To insure against the risk that National might default on the installments, Valley received contractual guarantees from National and National obtained a premium finance bond from the Defendants that guaranteed payment of National's obligations to Valley in the event of National's default. When National did, in fact, default, Valley notified the defendants that it was asserting a claim under the Bond. Valley alleged that by the express terms of the Bond, the Defendants' obligation was immediate and unconditional.

Defendants, however, alleged that unbeknownst to them at the time they issued the Bond, Valley was either involved in or aware of a fraudulent scheme by which Valley and other parties disguised simple loans as premium finance arrangements, then negotiated bonds to guarantee these arrangements. Defendants contended that if they had known that the Bond was backing a line of credit loan, they would never have issued it, as they were not in the business of financial guaranty insurance - a higher risk form of insurance that protects lenders against default by borrowers on financial obligations. Defendants alleged that Valley fraudulently induced them to issue the Bond and therefore refused to compensate Valley.

The court, applying New York law, held that the sureties had waived their defenses to payment in a disclaimer clause that had been negotiated between the parties. The court distinguished the findings in the case of *JP Morgan Chase Bank v. Liberty Mutual Ins. Co.*, a recent case involving the high profile Enron scandal, where the court found that similarly broad disclaimers in the bonds did not preclude a defense of fraudulent inducement. The court stated that unlike the situation in the Valley case, the *JP Morgan* case "involved an unusual case of fraud at the extreme, embodied in the deceptive business practices of the now defunct Enron Corporation." Significantly, in this case, the court refused to permit discovery by the sureties, who sought to develop facts in support of their fraud defense against Valley.

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

Recent Developments: On January 27, 2003 Wells Fargo Bank sued the Commissioner of the California Department of Corporations (the "Commissioner"), to enjoin the investigation and enforcement of a California per diem interest statute, which prohibits the charging of interest on residential first mortgages more than one day prior to the recording of a mortgage deed, even though the borrowed funds may have long since been disbursed. The complaint alleges that only the Comptroller of the Currency has the authority to exercise visitatorial powers over national banks and their separately incorporated operating subsidiaries. The complaint also alleged that this statutory prohibition was preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980. (DIDMCA). On February 4, 2003, the Commissioner instituted administrative procedures to revoke the license of the bank's operating subsidiary, Wells Fargo Home Mortgage, Inc. (WFHMI). On March 10, 2003 the court entered a preliminary injunction enjoining the Commissioner from exercising visitatorial powers over the plaintiffs. However, the plaintiffs were unsuccessful in seeking to enjoin the license revocation proceedings. On May 9, 2003, the court granted summary judgment to Wells Fargo Bank, ruling that the Comptroller of the Currency has exclusive "visitatorial" powers over national banks and their nonbank operating subsidiaries. The Court also ruled that DIDMCA preempted the per diem prohibition.

Key Point: This case is yet another example of the interplay between state and federal regulation of national banks and their subsidiaries. This issue has taken center stage this year since the OCC preempted Georgia's high cost home lending law with respect to national banks and their subsidiaries, and also proposed a new regulation that would clarify what types of state law apply to national banks. (See discussion in Federal Regulatory Developments, page 40). As the debate between state and federal regulators continues to percolate, court decisions will no doubt continue to be used to bolster (or contradict) their positions.

Background: Wells Fargo is a federally chartered national banking association, whose wholly owned subsidiary WFHMI is a state-chartered corporation, which makes more than \$1 million in first-lien residential mortgages in California each year. Between 1996 and 2003 WFHMI held licenses to engage in real estate lending activities pursuant to the provisions of the California Residential Mortgage Lending Act (CRMLA) and the California Finance Lenders Law (CFLL). In August 2001 and at subsequent times, the Commissioner instituted regulatory exams of WFHMI pursuant to the terms of the CFLL.

In December 2002, the Commissioner demanded that WFHMI conduct an audit of mortgage loans made during 2001 and 2002, in order to identify any loans where WFHMI may have charged per diem interest in violation of California law. WFHMI objected to this request, stating that it is subject to the OCC's exclusive regulatory authority. In

January 2003, Wells Fargo and WFHMI filed this federal lawsuit, after which the Commissioner instituted administrative proceedings to revoke WFHMI's licenses under CRMLA and CFLL. Plaintiffs unsuccessfully sought to enjoin the revocation proceedings; however they were successful in obtaining a preliminary injunction preventing the Commissioner from exercising visitatorial powers over plaintiffs or from otherwise preventing WFHMI from conducting its mortgage lending business in California.

The Commissioner argued that notwithstanding his revocation of WFHMI's California licenses for its mortgage lending business in California, he is still authorized to exercise visitatorial powers over WFHMI. While the Commissioner conceded that the OCC has exclusive visitatorial power over national banks, he challenged the notion that the OCC has similar exclusive visitatorial authority over operating subsidiaries of national banks. Wells Fargo argued that because the OCC is exercising federal visitatorial powers over WFHMI, the Commissioner is preempted from exercising the same regulatory authority over WFHMI. The court agreed with the Plaintiffs, holding that the Commissioner has no visitatorial powers over WFHMI, and further agreed with the plaintiffs' contention that California's per diem statutes cannot be enforced against WFHMI as DIDMCA expressly preempts them.

Outlook: This issue continues to have traction nationwide. In fact, in April 2003 similar litigation was filed in Connecticut (*Wachovia Bank, N.A. v. Burke* (D. Conn. No. 3:03 CV 0738 JCH)). While Wachovia has filed a motion for summary judgment, no decision has as

yet been rendered. Therefore, the impact that this body of cases will have on regulators and legislators remains to be seen. ▼

FEDERAL LEGISLATIVE DEVELOPMENTS

Deposit Insurance Reform

(For background, please see previous issues of the *Banking Journal*.)

Senate Activity:

Recent Developments: No further action in the Senate is expected until 2004.

Background: Early in January, Sen. Tim Johnson (D-SD) introduced S.229, the Safe and Fair Deposit Insurance Act, a bill that includes a provision strongly endorsed by NYBA that would increase deposit insurance coverage of municipal deposits to the lesser of 80% of the amount on deposit in each account or \$5 million. The bill would also reform the deposit insurance system, increasing the general coverage limit to \$130,000, which would then be indexed to inflation, and the limit on retirement accounts to \$250,000. The bill is not expected to be acted upon by the Senate Banking Committee.

However, S.229 stimulated early interest in deposit insurance reform in the Senate Banking Committee and, on February 26, the Committee held a hearing on the deposit insurance system at which the key Federal financial institution regulators commented on proposed legislation to reform the FDIC. Federal Reserve Board Chairman Alan Greenspan reiterated the Fed's opposition to
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any coverage increases in deposit insurance while strongly endorsing the merger of the Bank Insurance Fund (BIF) and the Savings Association Insurance Fund (SAIF) and other systemic reforms. Treasury Department Undersecretary Peter Fisher also opposed coverage increases while generally endorsing the provisions of the pending legislation that would require new and fast-growing depository institutions to pay their fair share of deposit insurance premiums before institutions that had refinanced the deposit insurance funds in the early 90's were required to pay more. FDIC Chairman Don Powell continued to strongly urge the FDIC's deposit insurance reform package, but suggested that the Corporation is not wedded to any particular coverage increase other than indexing. On the subject of increased coverage for municipal deposits, which is NYBA's priority in the deposit insurance reform bills, Treasury Undersecretary Fisher specifically opposed any increased municipal deposit coverage. The Treasury agreed to provide draft deposit insurance reform legislation to the Committee as soon as it had developed a consensus among the bank regulators on an appropriate bill.

With interest in deposit insurance reform accelerating, NYBA's Deposit Insurance Reform Task Force met by conference call to review strategy in preparation for possible action in both the Senate Banking and House Financial Services Committees. The Task Force determined that NYBA should continue to maintain its emphasis on increased coverage for municipal deposits and appropriate contributions by "free riders" who have paid no deposit insurance premiums in spite of substantially in-

creasing the volume of insured deposits in the system.

Immediately prior to the Spring recess, Senator Rick Santorum (R-PA) introduced S.913, the Federal Deposit Insurance Fairness and Economic Opportunity Act. The bill would require the FDIC to rebate any amounts in excess of 1.40% in the deposit insurance reserve based on the historical contributions to the fund of insured banks. It is identical to language in the House version of deposit insurance reform, H.R.522.

In May, the Treasury sent up its deposit insurance reform bill with the concurrence of all the bank regulatory agencies. Senate Banking Committee Chairman Richard Shelby (R-AL) is expected to introduce it shortly. The product of several months of negotiation among the banking regulators and the Department, the bill would merge BIF and SAIF, provide greater flexibility to FDIC in determining when to impose premiums and provide certain credits to banking institutions that had paid to refinance the deposit insurance fund in the early 1990's. However, the bill contains no coverage increases and does not impose premiums on new and quickly growing institutions as effectively as H.R.522. NYBA will be working with Senator Schumer and the Senate Banking Committee to improve the Senate version of the bill.

House Activity

Background: On February 4, House Financial Services Committee Chairman Michael Oxley (R-OH), Ranking Member Barney Frank (D-MA) and Financial Institutions Subcommittee Chairman Spencer Bachus (R-AL) reintroduced deposit insurance reform legislation. The bill, H.R.522, is identical to

legislation that passed the full House of Representatives overwhelmingly last year.

On March 13, the House Financial Services Committee approved H.R.522 by voice vote. There were no significant amendments adopted to the bill other than a managers' amendment containing largely technical corrections requested by the FDIC. On April 2, the House of Representatives passed the Federal Deposit Insurance Reform Act of 2003 by the overwhelming vote of 411-11. Prior to the vote, NYBA wrote to the entire New York Congressional delegation urging support for the bill. All members of the delegation voted for the bill. For a summary of the House-passed bill, please refer to the August 2003 Banking Journal available at www.nyba.com.

Bankruptcy Reform

Recent Developments: Although the House passed a bill, the Senate took no further action on bankruptcy reform in 2003

Background: On bankruptcy reform, as on deposit insurance reform, the 108th Congress continued where the 107th Congress had left off. On February 27, House Judiciary Committee Chairman James Sensenbrenner (R-WI) introduced a bankruptcy reform bill, H.R.975, which was identical to the Conference Report agreed to by House and Senate negotiators last year with the exception of the abortion clinic violence language, which was removed. After a single hearing, the Judiciary Committee reported out H.R.975, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2003 by a party line vote of 18-11 with one abstention. On March 19, the House of Representatives, by a 315-

113 vote, passed the legislation. Among the amendments to the bill on the House floor was a provision that clarified the treatment of bank financial contracts when a counterparty enters bankruptcy. All New York Republicans and Democrats Tim Bishop (R-Suffolk), Joe Crowley (D-Queens), Steve Israel (D-Suffolk), Carolyn McCarthy (D-Nassau), Greg Meeks (D-Queens) and Ed Towns (D-Brooklyn) joined in the overwhelming majority in favor of the bill.

No bankruptcy reform bill has yet been introduced in the Senate. Although Senate Judiciary Committee Chairman Orrin Hatch (R-UT) previously stated that he intends to take the House-passed version of bankruptcy reform directly to the Senate floor, influential members of his Committee object to bypassing the Committee process. In addition, Senator Charles Schumer restated his commitment to offering his amendment to preclude activists who are subject to civil penalties for abortion clinic violence from seeking discharge of those penalties in bankruptcy.

Real Estate Brokerage & Management

Recent Developments: The pace of new members agreeing to co-sponsor the Realtors' bills has slowed appreciably and Chairman Oxley continued to make clear his opposition to the legislation. The Realtors decided to once more use the appropriations process to preclude adoption of the real estate brokerage regulation and in September the House passed H.R. 2989, the Transportation and Treasury Departments appropriations bill. The bill would extend the moratorium on approval of the regulation by Treasury and the Federal Reserve

Board until September 30, 2004. However, the Senate version of the appropriations bill contained no similar language.

During conference committee discussions between the Senate and House on the appropriations bill, an effort was reportedly made to make permanent the prohibition on the regulation. NYBA contacted New York conferee Rep. John Sweeney's (R-Saratoga) office to oppose the prohibition. Although no agreement on a final bill was reached, and the Treasury Department's 2003-2004 appropriations were contained in an omnibus continuing resolution, language to make the prohibition on a regulation authorizing real estate brokerage was not included in the bill. The moratorium, however, was extended until January 31, 2004, when the continuing resolution expires, and is expected to be part of any omnibus appropriations bill ultimately agreed to by the Congress next year. NYBA continues to work with the national trade groups in opposition to the moratorium.

Background. On the first day of the new Congress, legislation was reintroduced to prohibit the Federal Reserve Board and Treasury Department from authorizing financial holding companies and national banks to engage in real estate brokerage activities. In the House, the bill number is H.R.111 and it had 118 original co-sponsors. The Senate bill is S.98, and it had 8 original co-sponsors. NYBA wrote all members of the New York delegation urging that they not co-sponsor the bill. However, House Financial Services Chairman Michael Oxley (R-OH) strongly supported the use of the current regulatory process of the Gramm-Leach-Bliley Act to determine

whether financial holding companies and national banks may engage in real estate brokerage and management activities. He condemned H.R.111, saying legislative attempts to stymie the rule-making process are counterproductive and undermine the future of any legislation that relies on the expert judgment of regulators. The antipathy to the bill by the leadership of the House Financial Services Committee was illustrated when Rep. Carolyn McCarthy (D-Nassau) was named the 10th New Yorker on the Committee and immediately withdrew her co-sponsorship of the bill.

Nevertheless, the real estate brokers continued to press to keep banks out of the brokerage business, succeeding in inserting in the omnibus appropriations bill for the 2003-2003 fiscal year, which was passed in February, a moratorium on the use of any appropriated funds by the Treasury Department or Federal Reserve Board to develop or promulgate a regulation to authorize financial holding companies and national banks to engage in real estate brokerage or management until September 30, 2003. The Treasury had previously indicated that it did not intend to issue such a regulation in the near future.

As the Congressional year progressed, the Realtors sought additional co-sponsors for their bills. With 23 co-sponsors in the Senate, including New York's Sen. Hillary Rodham Clinton, and 244 in the House, including 18 New Yorkers, NYBA conducted a grassroots campaign urging bankers to write their Members in opposition to the bills.

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Small Business Administration

Recent Developments: Several pieces of legislation affected the Small Business Administration in addition to the changes in the 7(a) program reported in the August issue of the *Banking Journal*. The House of Representatives passed H.R.923, a bill to permit smaller loan loss reserves for certain loans under the Small Business Administration's Section 504 program. The bill would apply to frequent or Premier users of the 504 program and would also contain incentives to ensure that borrowers are not charged higher fees in response to changes in loan loss reserves.

The Senate has not addressed the loan loss reserve issue.

In addition, the Senate passed S.1375, the Small Business Administration 50th Anniversary Reauthorization Act, by unanimous consent. The bill increases the maximum section 504 loan guarantee to \$1.5 million from \$1 million for most loans and from \$1.3 million to \$2 million for certain special public policy loans. The House has not yet acted on companion legislation.

Expanded MMDA & Interest on Business Checking

Recent Developments: In the Senate, legislative consideration was delayed by a disagreement on the treatment of industrial loan companies. H.R. 758 would authorize industrial loan companies to offer interest-bearing checking and NOW accounts. Two senior members of the Senate Banking Committee strongly disagreed over this issue and the Federal Reserve Board has opposed authorizing any type of demand deposit

account for industrial loan companies unless their holding companies are regulated as financial holding companies. The FDIC has stated that it sees no need for such regulation.

In an effort to break the gridlock, Senator Chuck Hagel (R-NE) in November introduced S. 1967, the Interest on Business Checking Act. The bill would immediately increase from six to twenty-four per month the number of allowable transfers from a money market deposit account and repeal the prohibition on the payment of interest on demand deposits two years after enactment, unless the bank regulatory agencies develop regulations providing for an earlier repeal date. The bill would also provide for the payment of interest by the Federal Reserve on reserve balances held at Federal Reserve Banks. NYBA continues to oppose the repeal of the prohibition on the payment of interest on demand deposits. The Senate Banking Committee is not scheduled to take any further action on this issue.

Background: Early in March, the Financial Institutions Subcommittee of the House Financial Services Committee held a hearing on newly introduced bills (the Business Checking Freedom Act of 2003) that would repeal after one year the prohibition on the payment of interest on demand deposits (H.R.859) and increase immediately from six to twenty-four the number of allowable transfers from a money market deposit account (MMDA) and authorize the Federal Reserve Board to pay interest on sterile reserves (H.R.758). Federal Reserve Governor Donald Kohn offered strong support for both bills, and Treasury Department Assistant Secretary Wayne Abenathy stated the Administration's op-

position to the payment of interest on sterile reserves "at this time." Witnesses representing the thrift industry and small businesses strongly supported an early repeal of the prohibition on the payment of interest on demand deposits, while testimony from the ICBA supported 24 transfers from an MMDA and was neutral on the repeal of the prohibition on the payment of interest on demand deposits. NYBA supported H.R.758, which is sponsored by Rep. Sue Kelly (R-NY), and opposed H.R.859.

On March 13, the Committee approved H.R.758, legislation originally introduced by Representatives Sue Kelly (R-Westchester) and Carolyn Maloney (D-Manhattan) to increase from 6 to twenty-four the number of allowable transfers from a money market deposit account, authorize the Federal Reserve Board to pay interest on sterile reserves, provide the Fed additional flexibility in setting reserve requirements and transfer sufficient funds from the Federal Reserve surplus to the Treasury to pay for interest on sterile reserves from 2003 to 2007. NYBA had strongly supported the bill. However, prior to final passage, the bill was amended by voice vote to repeal the long-standing prohibition on the payment of interest on demand deposits, an action that NYBA opposed. By a vote of 28-23, the date on which repeal would take effect was delayed from one year to two. Prior to the Committee's actions, NYBA wrote all members of the Financial Services Committee from New York in support of H.R.758, but in opposition to repeal of the prohibition of the payment of interest on demand deposits. The full House passed the bill by voice vote on April 1.

Privacy/Fair Credit Reporting Act

Recent Developments: When Congress returned from its Summer recess after Labor Day, both Houses moved quickly to complete action on an extension of the preemption provisions of the Fair Credit Reporting Act. On September 10, the House of Representatives passed H.R. 2622, the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) by the overwhelming margin of 392 to 30. Representative Jerry Nadler (D-Manhattan) was the only New York member who voted against the bill, although Rep. Charles Rangel (D-Manhattan), who was recuperating from knee surgery, was not present for the vote. During floor debate, amendments were adopted to expand consumer access to free credit reports to regional credit bureaus (beyond the three national credit bureaus already covered by the bill) and to preempt state laws regarding free credit reports and disclosure of credit scores. Rejected were amendments to sunset the extension of the preemptions in FCRA after nine years, to limit the ability of credit card companies to use negative information in consumer credit reports to change interest rates of consumer credit accounts, and to grandfather otherwise preempted provisions of California privacy laws.

Following the strong House vote, Senate Banking Committee Chairman Richard Shelby (R-AL), who had previously indicated that he would prefer to extend but not make permanent the preemptions in the FCRA, stated that he felt that the strong identity theft protections contained in the House bill justified making the preemptions permanent. He provided a Committee print as a mark-

up vehicle and, late in September, the Senate Banking Committee approved by voice vote a bill to make permanent the expiring preemptions of state law in the Fair Credit Reporting Act (FCRA). The bill, the National Consumer Credit Reporting System Improvement Act of 2003, was similar to the House-passed H.R. 2622. In addition to making permanent FCRA's provisions that preclude states from legislating in several key areas affecting information sharing, the bill also prohibited sharing non-public personal information with affiliates unless customers, with certain important exceptions, have been provided a right to opt out, included enhanced identity theft notification and credit history repair procedures, and provided new disclosure requirements for credit reports and credit scores. Senator Charles Schumer (D-NY) discussed, but did not offer, an amendment requiring disclosures of debit card fees. NYBA provided the Senator extensive information on the technological impossibility of providing such disclosure using current equipment, and on the scope of the bill, involving millions of point of sale terminals currently being used by merchants.

In November, the Senate passed the product of the Committee mark-up, S.1753, the National Consumer Credit Reporting System Improvement Act of 2003, by the overwhelming vote of 95-2. Only the two Senators from California voted against final passage. At the same time, the Senate named conferees to complete action on the bill before Congress adjourned for the year. The House also named conferees, including New York Representative Sue Kelly (R-Westchester.

During debate on the bill, the Sen-

ate rejected, by a vote of 70-24, an amendment that would have incorporated the California standards for information sharing with affiliates. NYBA and the national banking trade groups opposed the amendment. Senator Charles Schumer (D-NY) voted against the amendment while Senator Hillary Rodham Clinton (D-NY) voted in favor. Amendments to the bill which were adopted included a managers' amendment that limits private rights of action and contained technical changes to the adverse action and affiliate sharing language, as well as amendments clarifying the definition of medical information, limiting the duration of consumer opt-outs, improving the ability of victims of identity theft to clear their records, and a requirement that the FTC be notified when certain breaches of information security occur.

Conferees from the House and Senate set to work after the Veteran's Day recess, and, on November 21, reached agreement on a bill. H.R. 2622, the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), was then brought to a vote in both Houses prior to adjournment for Thanksgiving. The House passed the bill on November 21 by a vote of 379-49 (with New York Reps. Jerry Nadler of Manhattan, Major Owens of Brooklyn and Louise Slaughter of Rochester voting no) and the Senate on November 22 by unanimous consent. President Bush signed H.R. 2622 as Public Law 108-159 on December 4. A summary of the bill, based on the summary prepared by the House Financial Services Committee, follows:

(Continued on next page)

Public Law 108-159, the Fair and Accurate Credit Transactions Act of 2003

Summary

The legislation:

- Allows consumers to place "fraud alerts" in their credit reports to prevent identity thieves from opening accounts in their names, including special provisions to protect active duty military personnel;
- Allows consumers to block information from being given to a credit bureau and from being reported by a credit bureau if such information results from identity theft;
- Provides identity theft victims with a summary of their rights;
- Gives consumers the right to see their credit scores;
- Gives all consumers the right to free copies of their credit reports;
- Restricts access to consumers' sensitive health information;
- Simplifies the way consumers can limit unsolicited marketing offers;
- Ensures improved accuracy of credit reporting procedures; and
- Provides consumers with one-call-for-all protection by requiring credit bureaus to share consumer calls on identity theft, including requested fraud alert blocking.

The bill also imposes new obligations on financial institutions to prevent identity theft and to ensure accuracy as follows:

- Requires creditors to take certain precautions before extending credit to consumers who have placed "fraud alerts" in their files;
- Prohibits merchants from printing more than the last 5 digits of a payment card on an electronic receipt (see Chap-

ter Law 499, page 15;

- Requires banks to develop policies and procedures to identify potential instances of identity theft;
- Requires financial institutions to reconcile potentially fraudulent consumer address information;
- Requires lenders to disclose their contact information on consumer reports.

On December 16, the Federal Reserve Board and Federal Trade Commission issued proposed regulations and interim final regulations designating December 31, 2003 as the effective date for the state preemption provisions of the FACT Act. The proposal also establishes March 31, 2004 as the effective date for the identity theft provisions that do not entail significant changes in business procedures and December 31 for those that do. The agencies requested comments by January 12 on the latter two effective dates. The proposal was necessary because the legislation inadvertently failed to establish an effective date for the language making permanent the preemptions.

Background: The provisions of the Fair Credit Reporting Act (FCRA) that preempt state laws restricting the flow of credit information expire on January 1, 2004. Both the House Financial Services and the Senate Banking Committees have been holding a series of hearings on the FCRA and its impact on the national economy and on consumer privacy. On June 30, Treasury Secretary John Snow announced the support of the Bush Administration for legislation to extend the expiring provisions of the Act. The Administration is also supporting a package of reforms to the FCRA

that would assist in detecting and deterring identity theft. Rep. Spencer Bachus (R-AL) and 32 co-sponsors have also introduced bipartisan legislation (H.R.2622) to extend the provisions. Among the co-sponsors were New York Reps. Peter King (R-Nassau), Sue Kelly (R-Westchester), Carolyn Maloney (D-Manhattan), Carolyn McCarthy (D-Nassau), Joe Crowley (D-Queens) and Steve Israel (D-Suffolk).

The House Financial Services Committee concluded hearings on the FCRA extension on July 10 and scheduled a mark-up of the bill over the following two weeks. At the last hearing, Secretary Snow and Federal Trade Commission Chairman Timothy Morris both urged that the Committee not allow the preemption provisions to lapse. Secretary Snow stated that the provisions of H.R.2622 were consistent with the Administration's goals of maintaining access to the credit system and combating identity theft.

The House Financial Services Committee reported out, by a vote of 61-3, H.R.2622, the Fair and Accurate Credit Transactions Act of 2003. The bill makes permanent the expiring preemption provisions of the Fair Credit Reporting Act and establishes a number of new consumer protections. It strengthens protections against identity theft, establishes procedures to improve the resolution of consumer disputes with regard to reports of identity theft and the accuracy of consumer records that may have been affected by such theft, and provides consumers a right to request a free annual credit report, including any credit scores used by the credit bureau and instructions on how consumers can improve their credit scores. During

Committee consideration, a number of amendments were adopted to strengthen the confidentiality of medical information, establish new fraud identification tools and help consumers limit pre-screened offers of credit and insurance. Chairman Oxley told NYBA during its Annual Visit that he intended to bring the bill to a vote on the House floor in September. Senator Schumer also said that Senate Banking Committee Chairman Richard Shelby (R-AL) had asked Senate Leadership for floor time for a Senate version of the FCRA extension in September.

Check 21

Recent developments: In early October, a Conference Committee completed action on H.R. 1474. Called the Check Truncation Act of 2003 (and known commonly as "Check 21"), it was co-sponsored by five New York Members of Congress and would facilitate, but not require, check truncation. Conference Report 108-291, which embodies the bill, passed both Houses and was signed by President Bush as Public Law 108-100 on October 28. The bill's effect on New York Banking Law Section 9-m, which requires that any bank that offers any consumer demand deposit account must provide an account that offers the return of paid checks, is being studied. A summary of the Law prepared by the Congressional Research Service follows:

H.R. 1474, The Check Truncation Act of 2003 (Check 21)

Summary

- Sets forth a statutory framework under which a substitute check is the legal equivalent of an original check for all purposes, if the substitute check: (1) ac-

curately represents all of the information on the front and back of the original check as of the time the original check was truncated; and (2) bears the legend: "This is a legal copy of your check. You can use it the same way you would use the original check."

- (Sec. 3) Defines "substitute check" as a paper reproduction of the original check that: (1) contains an image of the front and back of the original; (2) bears a "MICR line" or "magnetic ink character recognition line" containing all the information appearing on the MICR line of the original check; (3) conforms, in paper stock, dimension, and otherwise, with generally applicable industry standards for substitute checks; and (4) is suitable for automated processing in the same manner as the original.

- Defines check truncation as removing an original paper check from the check collection or return process and sending in lieu of it a substitute check or, by agreement, information relating to the original check (including data taken from the MICR line of the original check or an electronic image of the original check), whether with or without subsequent delivery of the original paper check.

- (Sec. 4) Prescribes implementation guidelines covering: (1) bank endorsements and identification of the reconstituting bank (a bank that creates a substitute check or is the first bank to transfer or present such a check already created by a non-bank person); (2) the applicability of Federal and State law, the Code of Federal Regulations, and the Uniform Commercial Code; (2) substitute check warranties; (3) indemnity procedures, including a comparative negligence standard; and (4) expedited recredit procedures for consumers and for

claimant banks in instances where a substitute check is improperly charged to an account (including notice requirements for reversal of a recredit).

- (Sec. 8) Sets forth: (1) procedures for claimant banks against an indemnifying bank for expedited recredit; (2) excused bank delays owing to emergency conditions; (3) a measure of damages for breach of warranty or failure to comply with requirements that incorporates a comparative negligence standard; (4) a one-year statute of limitations under which the cause of action accrues as of the date the injured party first learns, or reasonably should have learned, of the facts and circumstances giving rise to the cause of action; and (5) consumer education requirements regarding substitute checks.

- (Sec. 14) States that any provision of this Act pertaining to expedited recredit procedures for banks may be varied by agreement of the banks involved.

- (Sec. 16) Instructs the Board of Governors of the Federal Reserve System (Board) to study and report to Congress on: (1) the percentage of total checks cleared in which the paper check is not returned to the paying bank; (2) the extent to which banks make funds available to consumers for local and nonlocal checks before the expiration of maximum hold periods; (3) the length of time within which depository banks learn of the nonpayment of local and nonlocal checks; (4) the increase or decrease in check-related losses over the study period; and (5) the appropriateness of certain time periods and amount limits applicable under the Expedited Funds Availability Act, as in effect on the date of enactment of this Act.

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- (Sec. 17) Directs the Board to include in subsequent annual reports the amount of operating costs attributable to transportation of commercial checks between Federal Reserve bank check processing centers, including an estimate of the Federal Reserve banks' imputed revenues derived from such transportation.
- (Sec. 18) Instructs the Comptroller General to evaluate and report to Congress on the implementation and administration of this Act.
- (Sec. 19) Authorizes appropriations to the Secretary of the Treasury for fiscal years beginning after FY 2003 to replace the deposit of compensating balances with direct U.S. payments to reimburse financial institutions in their capacity as depositaries and financial agents of the United States for all services required by the Secretary (or a designee) to be performed on behalf of the Secretary or another Federal agency, including services rendered before FY 2004. (Currently the Secretary compensates financial institutions for various critical depositary and financial agency services provided for or on behalf of the United States by: (1) placing large compensating balances on deposit in such institutions; (2) using imputed interest on such funds to offset charges for such services; and (3) increasing or decreasing the size of such balances as interest rates fluctuate or the public debt outstanding reaches the statutory debt limit.)
- Prescribes procedural guidelines for the Secretary to promptly begin phasing in the use of appropriations to pay such institutions and to expedite the transition away from the use of compensating balances.
- Requires the Secretary to report on the

use of compensating balances and on the use of appropriations authorized for such purpose for each fiscal year.

Government Sponsored Enterprises (GSEs)

As a result of accounting irregularities discovered at the Federal National Mortgage Corporation (Freddie Mac) and losses realized by several individual Federal Home Loan Banks, the Bush Administration proposed legislation to move the regulation of Fannie Mae, Freddie Mac and the Federal Home Loan Banks to a single regulator in the Treasury Department. Senate Banking Committee Chairman Shelby and House Financial Services Committee Chairman Michael Oxley (R-OH) committed to work together on a joint bill to accomplish the regulatory reorganization. However, when a House bill designed to accomplish this purpose (H.R. 2575) was scheduled for consideration in the Financial Services Committee in October, the Committee indefinitely postponed the mark-up. The bill was stalled when the Treasury Department and Fannie Mae, both of which had supported the legislation in principle, announced their opposition to the bill. In addition, there was widespread disagreement on many details of the bill, particularly whether Federal Home Loan Bank supervision should be included and the extent to which the bill should provide the new regulatory agency with authority to engage in prudential supervision of the GSEs.

A week later, Treasury Secretary John Snow and Housing and Urban Development Secretary Mel Martinez supported a similar legislative concept that would provide a new regulator with

strong supervisory authority. Senate Banking Committee Chairman Richard Shelby (R-AL) is reportedly developing such a bill. NYBA's Legislative and Regulatory Policy Committee and Board of Directors, at its November 2003 meeting, voted to support legislation to establish a strong regulatory agency with the authority to set both capital requirements and program parameters and the ability to regulate all housing-related enterprises (Fannie Mae, Freddie Mac and the Federal Home Loan Banks). NYBA will form a special task force to consider GSEs, including the Farm Credit System, and the FHLBs, especially in light of the importance of the Federal Home Loan Bank System to member banks.

Miscellaneous

- The House accepted the Senate amendments to S.877, the **CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing Act)**, by a voice vote, clearing the bill for the President's consideration. The bill requires that appropriate identifying language be included in the "sender" line of all commercial e-mail advertisements, that consumers be provided the opportunity to opt out of receiving such e-mails, and preempts state anti-spam laws. The bill also directs the FTC to consider a plan to create a nationwide "do not e-mail" list, similar to the "do not call" list, but the FTC has already indicated that it does not have the resources to create or manage such a list. S. 877's effective date is January 1, 2004. The President signed S.877 on December 16 as Public Law 108-187.
- The House and Senate passed S.811, the **American Dream Downpay-**

ment Assistance Act, by unanimous consent. The bill, passed by the Senate in November, provides grants and loans to assist first-time, low-income homebuyers with the downpayment for their homes and increases the size of available FHA loan guarantees for apartment buildings in high-cost areas. Senator Hilary Rodham Clinton (D-NY), in remarks to the New York Housing Conference annual luncheon, praised the bill for providing recognition of the difficulty of providing affordable housing in high-cost areas such as New York. The President signed the bill on December 16 as Public Law 108-186.

- Both Houses also passed S.1947, the **Preserving Independence of Financial Institutions Examination Act**. The bill criminalizes the extension or offer of credit or a gratuity by depository institutions and their employees, but not their holding companies. Credit unions, Federal Reserve Banks and Federal Home Loan Banks are also exempt, as are credit cards and certain home mortgage loans. The President signed S.1947 as Public Law 108-198 on December 16.

- The President signed S.1768, a bill to extend the National Flood Insurance Program, scheduled to expire on December 31, 2003, for three months, as Public Law 108-171 on December 6. Both Houses are considering changes to the Program. The House has already passed H.R.253, the **Flood Insurance Reform Act of 2003**, by a vote of 352-67. The bill is designed to reform the National Flood Insurance Program by limiting access to the Program for homeowners who experience multiple floods. It also extends the program for 5 years.

- The House in November passed

H.R.2420, the **Mutual Funds Integrity and Fee Transparency Act of 2003**, by a vote of 418-2. The bill, which was reported from the Financial Services Committee in June, was amended prior to House passage to address some of the recently disclosed concerns with regard to mutual fund conduct. H.R.2420 requires that the Securities and Exchange Commission (SEC) adopt regulations requiring that mutual fund trades be submitted to intermediaries no later than 4 p.m., a response to concerns raised by the banking industry that a 4 p.m. "hard close" would discriminate against customers who use financial intermediaries instead of executing trades directly with mutual funds. The bill would also: require the SEC to permit redemption fees in excess of 2% if necessary to prevent short-term trading; prohibit joint management of hedge funds and mutual funds; and substantially increase required disclosures to investors on operating costs, portfolio transaction costs, soft dollar arrangements, and certain directed brokerage and revenue sharing arrangements. The Senate is expected to consider companion legislation next year.

- The House Ways and Means Committee passed, by a vote of 24-15, H.R.2896, the **American Jobs Creation Act of 2003**. The bill contains several improvements to the provisions governing Subchapter S corporations, including an increase in the number of allowable shareholders from 75 to 100 and a provision to treat up to three generations of family members as one shareholder.

- The House of Representatives also passed H.R.2143, the **Unlawful Internet Gambling Funding Prohibition**

Act, by a vote of 319-104. The bill restricts the use of the U.S. payment system for unlawful internet gambling transactions, giving enforcement authority to the Federal banking regulators and the FTC. The Senate may take up similar legislation next year.

- In addition, the House passed H.R.1529, the **Involuntary Bankruptcy Improvement Act**, by voice vote. The bill, designed to allow public officials who have been placed in involuntary bankruptcy by groups or individuals that challenge the legitimacy of the U.S. government to expunge bankruptcies based on materially false statements from their credit and judicial histories, may be taken up in the Senate later this Congress.

- The House also passed H.R.1115, the **Class Action Fairness Act of 2003** by a vote of 253-170. All New York Republicans voted for the bill other than Rep. Peter King (Nassau), while New York Democrats other than Rep. Carolyn McCarthy (Nassau) voted nay. Reps. Gary Ackerman (D-Queens) and John McHugh (R-Watertown) did not vote. The legislation makes it easier for class action suits to be removed to federal court from the individual state courts. As originally drafted, the bill would have permitted removal if at least 100 plaintiffs and \$2 million were involved or if any of the plaintiffs lived in a different state than a defendant. However, during floor debate, an amendment by House Judiciary Committee Chairman James Sensenbrenner, Jr. (R-WI) was adopted that broadens the category of class-action suits that could remain in state court. The Sensenbrenner amendment raises the dollar threshold in the bill to \$5 million and excludes suits in which

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FEDERAL REGULATORY DEVELOPMENTS

High Cost Home Lending

In July, the OCC issued an order holding that the Georgia Fair Lending Act does not apply to national banks because the authority of national banks to engage in real estate lending derives exclusively from federal law. The OCC extended this preemption to national bank operating subsidiaries. In addition to preempting the Georgia law, the OCC has proposed a new regulation that would impose a new anti-predator requirement on lenders and clarify the agency's preemption powers. The proposal would require national banks to make loans on the basis of borrowers' ability to repay, not on the foreclosure value of collateral. Additionally, the new regulation would clarify what types of state laws apply to national banks. The proposal addresses two specific parts of the OCC's regulations, Part 34, which deals with real estate lending, and Part 7 which deals with non-real estate lending, deposit taking and other national bank activities. Among other things, the proposal sets out examples of the types of state laws that the OCC or the courts have concluded would be preempted, including licensing laws, laws that address the terms of credit, permissible rates of interest, escrow accounts and disclosure and advertising. Significantly, the proposed regulation goes well beyond the issue of predatory lending, setting a single standard for state laws' application to national banks.

In its comment letter, NYBA expressed its support of initiatives such as the proposed amendments to Part 34, which seek to address unacceptable predatory lending practices, while still promoting the availability of credit to low and middle income borrowers.

two-thirds of the plaintiffs live in the same state as the defendant. The Senate Judiciary Committee approved a similar bill, S.274., but no further action has yet been taken.

- The House Financial Services Committee approved H.R.1375, **the Financial Services Regulatory Relief Act**, by voice vote. The bill is designed to create a more streamlined and effective regulatory compliance process, but has several controversial provisions. H.R.1375 authorizes *de novo* interstate branching, repealing the current state option, which has been exercised in New York, to require interstate branching only through the purchase of an existing bank or branch. The bill retains current state law intrastate branching restrictions, including New York's home office protection laws. Industrial loan companies, which are regulated as banks by the FDIC, but whose parent companies are not regulated as financial or bank holding companies by the Federal Reserve Board, could take advantage of the *de novo* interstate branching provision, allowing non-financial firms into nationwide banking. The bill also allows regulators to adjust examination cycles for healthy banks, increases bank flexibility in the payment of dividends and streamlines depository institution merger requirements. However, H.R.1375 also relaxes restrictions on credit unions, allowing privately insured credit unions to join the Federal Home Loan Bank System, expanding business lending authority and allowing credit unions to offer certain products to non-members. The bill was approved without changes by the House Judiciary Committee but no further action was taken prior to adjournment. There is no companion legislation in the Senate. ▼

NYBA also reaffirmed its strong support of the dual banking system, and stated that the clarifying provisions set forth in the proposed amendments to Part 7 are consistent with this long-standing policy and can have a positive impact on both nationally and state-chartered institutions in New York. NYBA stated that the amendments would provide greater certainty to national banks regarding the interplay of federal and State law and regulation, and noted that State legislation, such as New York's wild card law, should protect against the possibility of a less than level playing field for state banks.

Although the comment period for this proposed regulation closed on October 5, 2003, the ultimate fate of this proposal remains unclear, as it has triggered controversy between state and federal legislators and regulators. In this regard, for example, New York State Superintendent of Banks Diana Taylor has publicly expressed deep concern with the scope of this proposed regulation. Similarly, New York Attorney General Eliot Spitzer is urging the OCC to abandon the proposal. Four New York members of the House Financial Services Committee have also sent a letter to OCC Comptroller John Hawke Jr., opposing the proposal and stating their concern that "exclusive federal regulatory oversight of these entities will result in lesser, not greater, protections for consumers." Comptroller Hawke has also now responded to a letter to the Democrats on the Senate Banking Committee which protested the OCC's proposal. NYBA is working to facilitate a dialogue between State and federal officials on this issue.

On July 29, 2002 the Department of Housing and Urban Development (HUD) released proposed regulations revising the rules implementing the Real Estate Settlement Procedures Act (RESPA). The proposal is designed to simplify the home mortgage lending process and reduce consumer settlement costs. It would clarify the compensation and role of mortgage brokers and the role of loan originators; redesign the Good Faith Estimate and restrict allowable variations from the Estimate at closing; and provide a framework for packaging guaranteed settlement services exempt from RESPA's Section 8 (anti-kickback) liability. The comment period for this proposal, which would apply to both first and junior liens, purchase money loans and refinancings, ended on October 28, 2002.

However, after reading thousands of comment letters, and under pressure from lawmakers and the industry, HUD Secretary Mel Martinez retreated on finalizing this proposal in the near term. In late March, he indicated that such a proposal might not be issued until later in the year. Secretary Martinez announced his resignation in early December 2003. It was initially, therefore, believed that the fate of this proposal would be murky at best. However, on December 16, 2003, HUD advanced the plan by sending its proposed changes to the Office of Management & Budget, the White House agency that reviews all proposed federal rules to assess how they may impact the economy.

Corporate Governance

In the wake of the passage of the Sarbanes-Oxley Act in 2002, several implementing regulations have been issued by the Securities and Exchange Commission (SEC). For example, a final rule implementing the disclosure requirements set forth in Section 406 and 407 was issued in January 2003 and became effective on March 3, 2003. The rule requires companies, other than registered investment companies, to include two new types of disclosures in their annual reports filed pursuant to the Securities Exchange Act of 1934. First the rules require a company to disclose if it has at least one "audit committee financial expert" serving on its audit committee. (In general an audit committee financial expert is defined as a person who has (i) an understanding of generally accepted accounting principles and financial statements; (ii) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves; (iii) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are comparable to those than can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities; (iv) an understanding of internal controls and procedures for financial reporting; and (v) an understanding of audit committee functions.) If a company does have such a financial expert, the company must disclose the name of the expert and whether he/she is independent of management. A company that does not have an audit committee finan-

cial expert must disclose this and explain why. The rules also require a company to disclose whether it has adopted a code of ethics that applies to the company's principal officers. A company disclosing that it has not adopted such a code must disclose this fact and the reasons why it has not done so. Amendments to and waivers from this code of ethics must be promptly disclosed as well. NYBA filed a comment letter to the proposed rule in late November 2002. The text of the final rule can be found at <http://www.sec.gov/rules/final/33-8177.htm>.

Among others, final rules have also been issued strengthening requirements regarding auditor independence and enhancing disclosures regarding fees paid to auditors as well as prohibiting the listing of any security of an issuer that is not in compliance with the audit committee requirements mandated by Sarbanes-Oxley.

IRS Trust Regs

On May 18, 2002 NYBA filed comments with the Internal Revenue Service supporting a proposal published in the February 15, 2002 *Federal Register* that would revise the tax definition of income for trust accounting purposes. The proposal would recognize changes made by state laws that both incorporate the equitable adjustment power contemplated by the Uniform Principal and Income Act and that authorize unitrusts that provide annual income between 3% and 5% of the annual fair market value of the trust assets. NYBA's comments noted that the Principal and Income Act would provide trustees with additional flexibility in meeting the

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needs of trust beneficiaries without jeopardizing the marital deduction or other favorable features of the tax treatment of trusts. The IRS indicated that it expected to complete action on the proposal by the close of its regulatory year, June 30, 2002, but had not done so by that date. With the enactment of the Principal and Income Act in New York, certainty on the tax treatment of trust accounting income has become critical. As a result, NYBA sent a letter to the Internal Revenue Service in October, urging that the IRS complete action on its regulations on trust accounting income. NYBA urged that the IRS also amend its regulations to make them effective at the beginning of 2002, rather than, as proposed, at the beginning of the year following promulgation of the new rules. Moreover, in recognition that it might be impossible for the Service to finalize the regulations prior to December 31, 2002, NYBA asked that the IRS publish guidance that would provide trustees a safe harbor in making equitable adjustments under the provisions of the new Principal and Income Act prior to promulgation of the regulations. The IRS responded with a letter to NYBA indicating that they intended to finalize these regulations by June 30, 2003. At this writing, they have not done so.

Community Reinvestment Act (CRA) Regs

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 burdens." The agencies' request for comments also outlined a series of questions designed to elicit information on the impact of the regulations on individual constituencies.

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

next year.

Risk-Based Capital

(For Background see the July 26, 2002 and August 2003 *Banking Journals*, available at www.nyba.com.)

Recent Developments: In July, the Federal bank regulatory agencies published proposed regulations to implement the Basel II risk-based capital agreement. However, the agencies themselves, particularly the Office of the Comptroller of the Currency and Federal Deposit Insurance Corporation, expressed grave doubts about the fairness and appropriateness of the proposals. The agencies stated that the final rules, if adopted, would apply only to the ten or so largest, most internationally active banks, with an option for the ten or so banks in the next tier to adopt the rules if they chose. During Congressional hearings in September designed to focus on whether the new rules would create competitive inequities, all of the agencies expressed the view that further study is needed to make that determination and that they are continuing to press for changes in the rules during discussions with their counterparts at the Bank for International Settlements. NYBA is continuing to monitor the proposals.

USA Patriot Act Regs

Recent Developments: During September, the Treasury Department announced that it would not amend the provisions of the regulations implementing the USA PATRIOT Act's section 326 to require additional recordkeeping, such as keeping copies of customers' driver's licenses or prohibit the use of

certain forms of customer identification such as the Mexican matricula consular. NYBA had filed a comment letter on the proposal opposing the amendments. The rule took effect as scheduled on October 1.

Background: On April 30, The Treasury Department released final regulations implementing Section 326 of the USA PATRIOT Act. The regulations were effective at the end of May, but financial institutions had until October 1, 2003 to comply. NYBA was one of a number of institutions that filed comments last summer on the proposed regulations. The Treasury implemented many of the changes proposed by NYBA, deferring the effective date for a year from the originally proposed October 25, 2002; clarifying definitions; eliminating the requirement that institutions copy and maintain copies of documents used to verify identities; and providing a standard form of notice to bank customers that the identity verification requirements are in compliance with Federal law.

As also urged by NYBA, the regulations are risk-based, requiring additional financial institution efforts with regard to higher risk potential customers or accounts. The regulations require that each covered financial institution, at a minimum: verify the identity of any person seeking to open an account to the extent reasonable and practicable; maintain records of the information used to verify a person's identity, including name, address and other identifying information; and, consult lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency to determine whether a person seeking to

open an account appears on any such list.

In response to mounting Congressional concern that the Treasury regulations did not go far enough, in late June, the Treasury Department announced that it would publish a request for comment on certain provisions of its regulations interpreting Section 326 of the USA PATRIOT Act. The request for comments, which was not a proposed regulation, asked whether and under what circumstances financial institutions should be required to keep copies of the identification documents used by customers to open new accounts and whether certain forms of foreign-government-issued identification should not be considered acceptable proof of identity for new accounts. NYBA filed comments on this proposal in July. After reviewing over 34,000 comments, Treasury recommended that no changes be made to the rule.

Credit Union Membership Regs

Over the objections of NYBA and hundreds of bankers and banker's organizations that filed comments, the National Credit Union Administration (NCUA) approved final regulations that greatly expand the authority of Federal credit unions to increase their membership. The rules create a new occupational charter, allowing Federal credit unions to serve entire trades, industries or professions. In a nod to adverse commenters, the NCUA limited the occupational charter to a defined geographic area.

The new rule also greatly eases application requirements for community charters, including automatic approval

for charters that would cover an entire city, county or smaller political subdivision and for metropolitan statistical areas (MSA) up to one million population. The rule also eliminates the traditional credit union overlap protection that prevented new credit unions in areas already served by an existing Federal credit union. The NCUA also proposed new regulations to expand authorized member business loan authority for Federal credit unions. The proposal would exclude loan participations from the limit on member business loans, expand the definition of allowable loans and increase credit unions' loan to one borrower limits for such loans. The national banking trade groups opposed the proposal. The National Credit Union Administration is now considering their comments.

A report by the General Accounting Office in November concluded that the credit union industry has split into two distinct groups - smaller credit unions which retain their traditional common bonds and larger credit unions which compete directly with banks and offer a full range of bank-like products. The report also pointed out that banks do a somewhat better job than credit unions in serving low- and moderate-income communities. GAO also recommended that the NCUA adopt more effective examination and supervision techniques and a risk-based premium program for the Credit Union Share Insurance Fund. NYBA has been urging that larger, bank-like credit unions be subject to similar treatment as banks, including taxation.

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Loan Loss Reserves

In July, the American Institute of Certified Public Accountants proposed a significant revision in accounting for bank loan loss reserves. The proposal would require reserves to be recalculated quarterly, to be subject to FASB standards and to include disclosures of credit scoring models, credit risk grades, collateral information and classes of loans. The proposal would be effective for fiscal years beginning after December 15, 2003. NYBA filed comments in strong opposition to the proposal. The Association argued that the proposal, which was also the subject of a NYBA grassroots campaign, would have the effect of significantly reducing the level of the allowance for credit losses for accounting purposes, because it excludes from the reserve all but identified losses. NYBA also argued that the proposal would result in increased volatility in reserves and a potential threat to bank safety and soundness in an adverse credit environment. The Federal bank regulatory agencies filed a strongly worded comment with the AICPA opposing the proposed accounting procedure for loan loss reserves and urging that it be abandoned. The letter, signed by principals of all the agencies, presented similar arguments to those raised by NYBA in its comments and stated that the AICPA position would interfere with the ability of the agencies to effectively supervise the nation's financial institutions. Shortly afterward, AICPA announced that it would reconsider the proposal.

Anti-tying Regulations

The Federal Reserve Board has proposed two regulations interpreting the anti-tying restrictions of Section 106 of the Bank Holding Company Act of 1956. The first would provide a comprehensive guide to Section 106, outlining both permitted and prohibited conduct under the Act; the second would define financial subsidiaries of bank holding companies as affiliates, exempting them from some of the restrictions of Section 106. Comments were due on the proposal by September 30 and the Comptroller of the Currency's Office announced that it would use the Fed's proposal, when finalized, in interpreting the applicability of Section 106 to national banks. The banking industry filed comments that were generally supportive of the Fed's proposals, while the Department of Justice suggested that the proposal conform the interpretation of the anti-tying provisions of Section 106 of the Bank Holding Company Act of 1956 with that of the Clayton Antitrust Act. The Fed has not yet finalized its proposal.

Personnel Changes

In November, the Senate confirmed Massachusetts Banks Commissioner **Thomas Curry** to the Board of the Federal Deposit Insurance Corporation (FDIC), bringing the Board to its full five-member strength for the first time since 1998.

Former Treasury Undersecretary **Timothy Geithner** was selected as President and Chief Executive of the Federal Reserve Bank of New York. In that role, he also serves as Vice Chairman of the Federal Open Market Committee. Immediate Past Director of

Policy Development at the International Monetary Fund, he joined the New York Fed in mid-November.

NYBA Treasurer **Sanford A. Belden**, President and CEO, Community Bank, N.A., was elected to the Board of Directors of the Federal Home Loan Bank of New York, becoming the first traditional commercial banker to serve on the New York Home Loan Bank's Board. ▼