New York Banking Journal - December 21, 2004

REVIEW & OUTLOOK

2005 Legislative & Regulatory Policies

With a successful 2004 legislative session behind us, the election season over, and a new legislative session soon approaching, NYBA's Legislative and Regulatory Policy Committee, and NYBA's Board of Directors have adopted legislative and regulatory policies for 2005. These policies continue to focus on economic development issues, as well as on the need to modernize the State banking system and charter. The 2005 session may also be defined by the financial challenges that continue to confront New York. NYBA heads into the new session with a State Republican Senate majority reduced by three seats. (An additional Republican incumbent Senator remains locked in a race that is still too close to call at this writing.) In the Assembly, the Democrats have retained their overwhelming majority. By contrast, at the federal level, the re-election of President Bush signals a continuation of many of the President's low-tax, free market policies, particularly as the Republican majority in the Senate was increased by four seats.

2004 State Budget

In an important victory for NYBA, the State Budget, when finally enacted in August 2004, extended both the Bank Tax and the Gramm-Leach-Bliley Act (GLBA) financial modernization provisions adopted at NYBA's request in 2000. As NYBA urged in letters to Governor Pataki and in its consistent lobbying efforts, the expiration dates of the Bank Tax and GLBA language were made co-terminous, with both provisions now expiring on December 31, 2005. Importantly, the Bank Tax was extended without change, reducing, but not eliminating, the risk that amendments to the tax in areas such as REITS and inter-company transactions could be used to help finance budget increases. It is important to note, however, that as a result of a 2003 Court of Appeals decision pertaining to the funding of New York City schools, a court-appointed panel of special masters has now recommended that the cost of providing a sound, basic education for New York City school children requires additional annual funding of $5.6 billion and additional capital spending of more than $9 billion. The finding now goes before the Supreme Court Judge who decided the original suit with a decision in January 2005 expected. The recommendation further exacerbates the deficit problems confronting New York State policy makers in 2005.

The Budget also contains language requested by the Banking Department that expands its assessment base, permitting the Department, for the first time, to charge annual assessments for all of its regulated entities, not solely banks. (However, the Legislature decided not to provide the Department with requested discretionary authority over application, examination and other fees and civil penalties.) As a result of this new authority, the Department has developed a new structure that will require all institutions – rather than just depository institutions - to contribute to the operating budget of the Department. This new assessment structure was designed to address perceived inequities in the current structure, where the depositary institutions completely subsidize the Department's operations. It was also designed to address budgetary challenges faced by the Department as a result of several large State-chartered banks converting to national charters.

State Banking Charter

Recognizing the threat to the dual banking system which evolved, at least in part, from the issuance by the Office of the Comptroller of the Currency (OCC) of two preemption regulations (one of which preempted certain state laws affecting lending, deposit-taking and other operations by national banks, and the other of which clarified that the OCC has exclusive authority to examine, supervise and regulate national banks), NYBA worked with the New York State Banking Department throughout 2004 to modernize the State banking system and to enhance the State charter. In this regard, in reaction to a "Wild Card" petition filed by NYBA seeking parity for State banks with national banks that can charge daily overdraft fees, Superintendent Diana Taylor informed NYBA that pursuant to the Department's interpretation of existing law, any current restrictions that may exist regarding daily overdraft and NSF fees, do not apply to business accounts. The Department also outlined in correspondence to NYBA, a potential regulation addressing NYBA's daily overdraft fee "Wild Card" petition, which has been forwarded to the Governor's Office of Regulatory Reform. Additionally, the Department acted this year on a long-standing NYBA "Wild Card" petition to authorize State-chartered banks to underwrite revenue bonds. In a letter ruling, the Department authorized State banks to begin underwriting immediately subject to each bank's loan-to-one-borrower limit and stated that it planned to initiate a rule-making to broaden the asset configuration. In the 2005 legislative session,

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NYBA will continue to work with the Department, as well as leaders of the Executive and Legislative branches of government on parallel tracks to find additional ways to enhance the State charter and ensure the continued status of New York as the financial capital of the world.

Municipal Finance Legislation

During 2004, NYBA also worked to ensure the continued economic vibrancy of New York and to secure the continued strength of New York's community banks. In this regard, an effective grassroots campaign organized by NYBA helped table a damaging municipal finance bill during the last week of the session. A delegation of bankers from throughout the State went to the Capitol to emphasize to their senators the devastating impact that passage of money market mutual fund investment authority for communities of 300,000 or more could have on many banks. NYBA also delivered a letter signed by many bank CEOs to every member of the Senate majority. The bill was finally held when the Senate adjourned. Additionally, NYBA's Board of Directors has approved a study proposal by Cornell University to measure the importance of local government deposits on banks and the communities they serve. The study is expected to demonstrate that pulling deposits out of local banks could adversely impact economic development. NYBA believes that this information can be used effectively in 2005 when an expected strong push by the securities industry for mutual fund authority for local governments is renewed.

Trust Initiative

A NYBA-requested study is also underway at Appleseed, consultants to the Lower Manhattan Development Corporation. The study is intended to identify trends within the trust industry and to identify the causes for those trends. The study is also expected to make recommendations on ways to revitalize New York's trust industry.

Security Issues

While activity is muted at this time, due to a significant reduction in New York City's bank robbery rate, NYBA will also continue to focus on issues related to bank security in 2005. (The New York City Police Commissioner has credited NYBA for playing a significant role in the reduction of the bank robbery rate.) In the spring of 2004, NYBA provided testimony to the Assembly Standing Committee on Banks on bank security, urging that no legislation mandating the installation of specific security devices (such as bandit barriers or emergency 911 buttons at ATMs) be enacted. NYBA did urge, however, that penalties for bank robberies be increased. At the hearing, the Committee expressed an interest in digital camera technology, and further expressed an interest in pursuing legislation that would seek to regulate non-bank owned ATMs. No such legislation was enacted in 2004. Nevertheless, bank security continues to be a topic for legislative proposals at the New York City level, with the introduction by the City Council of a proposed ordinance, which would mandate that banks file security plans for their bank branches with the New York City Police Department. NYBA is committed to ensuring the safety of bank customers and employees, and thus will continue its work with State and City legislators, regulators and other government officials, including the New York City Police Department and other law enforcement officials throughout the state, to achieve this goal.

Federal Issues

At the federal level, no significant legislative initiatives were enacted in 2004. However, in the 109th Congress, NYBA will continue to work toward deposit insurance reform, including increased coverage for municipal deposits, and bankruptcy reform. NYBA will also continue to support an increase in the number of allowable transfers from a money market deposit account from the current six per month to 24, while maintaining its opposition to lifting the prohibition on the payment of interest on corporate demand deposits. NYBA will also continue to support Operation Credit Union, and national efforts seeking to level the playing field between banks and large bank-like credit unions that pay no Federal, State or local income taxes. ■

STATE LEGISLATIVE DEVELOPMENTS

Bank Security

While bank security continued to be of concern this year, a dramatic reduction in the bank robbery rate in New York City since the summer of 2003 to a large degree diminished the intense focus this issue garnered last year. In fact, at NYBA's Financial Services Forum in March 2004, at which New York City Police Commissioner Ray Kelly was a featured speaker, the Commissioner praised the industry for its commitment to the bank security issue and noted the marked improvement in the pace of bank rob-

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NYBA 2004 LEGISLATIVE AND REGULATORY PRIORITIES

Status Report - December 2004

	Issue	Bill Number	Committee	NYBA Position/Status
	STATE ISSUES			
✔	Budget & Taxes	Budget Chapter Laws 59, 60	Finance/Ways & Means	Support financial modernization without change; passed as part of budget
✔	Bank Security	A.9409 S.7123/A.11213 S.2892-A/A.4171-A	Banks	Oppose restrictive measures; Support New York City "Bank Security Best Practices;" no restrictive measures passed
✔	Bank Fees	S.6611-A/A.10334-A S.6612-B/A.10333-B	Consumer Protection	Oppose restrictions; support overdraft fee; acceptable gift card bill passed
⬆	Predatory Lending/Preemption			Continue to support a uniform standard
✔	Municipal Finance	S.3249-D/A.3873-C Not in Governor's Budget	Local Government	Oppose providing Municipal Deposits to STIP, mutual funds or credit unions; Support eased collateral rules
✔	Privacy	S.6017/A.9220		Oppose restrictive California-type legislation; none passed
✔	Outsourcing	S.6040-B/A.9567-B		No negative measures passed
✔	Credit Unions	S.3166/A.11036 S.7126/A.11212 S.6868-B/A.9475-B		Oppose: increased tax exemption; taking public deposits; powers beyond Federal Credit Unions
⬆	*Trust Agenda		Judiciary	Support; study being done by Lower Manhattan Development Corporation
	• Principal & Income Act Amendments	S.4704		
	• Uneconomical Trusts	S.5166/A.10967		Support, passed both Houses
	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/H.R.1375 S.1967	Banking	Support 24 MMDA transfers; oppose interest on business checking; 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	H.R.2575	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

✔ 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. ▼

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beries.

Nevertheless, several bills to which NYBA objected, were active in the State legislature and an additional bank security ordinance – which requires banks to file with the City Police Department written safety plans for each branch they own or operate - was introduced in the New York City Council. Both the New York State legislature and New York City Council have introduced proposals, which, if enacted, would mandate that bandit barriers be installed at bank branches. (See A.9409(Nolan) and proposed New York City Local Law 442.) Additionally, S.2892(Padavan)/A.4571-A(Stringer), a bill requiring that ATMs be equipped with emergency 911 buttons, although ultimately not enacted, continued to be in play throughout the Albany Legislative Session. This year's amended version of the bill did not require that the buttons be activated through the use of an ATM card, thus increasing the likelihood of false alarms. NYBA filed a memorandum in opposition to the bill, stressing that the buttons have not been shown to be effective and that they may place customers in jeopardy of physical harm.

NYBA President Mike Smith testified on the bank security issue before the New York State Assembly Standing Committee on Banks on March 22, 2004. In his testimony, he discussed the initiatives NYBA has undertaken with the New York City Police Department, and reported on the effectiveness of these initiatives, which resulted in a dramatic decrease in the robbery rate. The Committee members indicated a desire to learn more before taking any action on a specific bank security mandate, but expressed an interest in system-wide implementation dates for digital camera technology and also focused on the issue of non-bank owned ATMs. (Legislation [A.9654, Nolan], which requires that non-bank owned ATMs be registered with the Banking Department, was introduced by Assembly Standing Committee on Banks Chairwoman Cathy Nolan in February 2004.) In his testimony, Mr. Smith also reiterated NYBA's support for legislation that would increase the penalty for bank robberies – particularly of the note-passing variety. Legislation addressing such penalties was subsequently introduced in the State Senate and Assembly, (S.7123 (Farley)/A.11213 (Rules, Nolan). While none of these initiatives were enacted in 2004, it is likely that bank security will continue to be a priority in Albany next year – particularly if the crime rate at banks unexpectedly increases.

Background: Bank security issues took center stage during the 2003 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 2003 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 subsequent update of the survey reconfirmed these findings. The survey results and the members' commitment

to safety measures continued to be highly significant, as legislation was 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 2003, the New York City Council Committee on Public Safety held a hearing on bank security 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 were robbed in 2003, 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 long recommended. 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.)

Tax and Budget Issues

Recent Developments: The State Legislature completed the Budget process in early August, passing a long-delayed State Budget and enacting several measures affecting the banking industry. Once more, banking escaped serious negative legislation and a number of measures sought by NYBA passed. The State budget extended both the Bank Tax and the Gramm-Leach-Bliley Act (GLBA) financial modernization provisions adopted at NYBA's request in 2000. As NYBA urged in letters to Governor Pataki last fall and in its consistent lobbying, the expiration dates of the Bank Tax and GLBA language were made co-terminous, with both provisions now expiring on December 31, 2005. Importantly, the Bank Tax was extended without change, reducing, but not eliminating, the risk that amendments to the tax in areas such as REITs and inter-company transactions could be used to help finance budget increases. The Legislature has not yet enacted any measures to address the adverse Court of Appeals decision last year requiring that all New York City students be provided a sound, basic education.

The budget also contains language requested by the Banking Department that expands the assessment base for the Department, permitting the Department for the first time to charge annual assessments for all of its regulated entities, not solely banks. However, the Legislature decided not to provide the Department with requested discretionary authority over application, examination and other fees and civil penalties. The Department plans to roll State bank examination fees into annual banking assessments (as is done for national banks), rather than continuing to charge them when banks are examined. The budget language also extends the supervisory authority of the Banking Department to the New York branches of out-of-state banks.

Other items affecting banks in the budget bills include: extending tax credits and exemptions in the Bank Tax for alternative fuel vehicles; amending the estate tax to ease the treatment of New York property owned by non-residents; extending the expiration date of Empire Zones to 3/31/2005; eliminating a "loophole" in the treatment of wraparound and supplemental mortgages under the New York City mortgage recording tax; disallowing excess deductions for SUVs under the Bank Tax and other taxes; and requiring the payment of certain New York City real property taxes by electronic funds transfer.

The budget bills passed by the Legislature also included authority for New York City to enact several revenue measures that it requested. Importantly, not included was authority to conform the treatment of dividends paid by REITs to federal law, eliminating the 60% dividends received deduction currently provided in State and City Tax Law. NYBA strongly argued for the continuation of the deductibility of dividends received from REITs, noting that the Association is part of a Task Force established by the State and City Tax Commissioners to study whether the taxation of banks and

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other financial services firms should be revised. The City estimated that the REIT provision would raise an additional $10 million annually.

Governor Pataki signed all budget bills into law later in the month with the exception of certain line-item vetoes not relevant to banking.

Background: In January, Governor Pataki presented the 2004-2005 Executive Budget, proposing to revamp the State system of financing education and funding Medicaid in order to close the estimated budget deficit of $5.1 billion. For the banking industry, the budget proposal met NYBA's policy objectives, proposing a one-year extension of the bank tax (currently set to expire December 31, 2004) and a two-year extension of the financial modernization provisions (which expired December 31, 2003) without change. NYBA wrote the Governor and legislative leaders in December 2003, urging that the expiration date of the two sections of bank tax law be made coterminous.

The budget also proposed to authorize the Banking Superintendent to set examination and supervision fees for State-chartered banks and other institutions supervised by the Department in the discretion of the Superintendent. Importantly, for the first time in several years, the budget did not contain a provision authorizing local governments to invest in the State-run Short-Term Investment Pool (STIP). NYBA has consistently opposed opening STIP to local government investments. The budget also contained a provision clarifying the estate tax treatment of certain real estate sales by out-of-state residents.

Even as budget discussions proved unusually contentious, the State Department of Taxation and Finance continued a long-term project designed to determine whether there is consensus for merging the bank tax (Article 32 of the Tax Law) with the tax on non-bank financial institutions (Article 9-A). In March, the Tax Department hosted a meeting of its Financial Services Modernization Task Force to present what it terms a "paradigm," an outline of the way in which the Bank Tax, Article 32 of the Tax Law, would be combined with the General Corporate Tax, Article 9-A of the Tax Law. A delegation from NYBA participated in the meeting along with representatives of the securities and insurance industries. After several of NYBA's bankers made the point that, without further explanation, the banking industry could not judge the merits of the proposal, Tax Department authorities from the State and New York City agreed to draft a more complete outline of their paradigm for future meetings. The Department presented a draft of a proposal to combine the treatment of investment capital and investment income for all financial institutions at the end of June. NYBA’s Tax Committee reviewed the proposal and expressed concern that it remained unclear.

Also in March, NYBA's Legislative and Regulatory Policy Committee endorsed in principle the Banking Department's proposal to revise bank examination fees, fines and other charges to share the cost burden of running the Department more equitably. Bank fees currently make up the vast majority of the Department's budget. The Department later offered amendments to the legislation included in the State budget to clarify the amounts of fees and charges that would be imposed.

The Legislature did not complete action on the State budget prior to its adjournment on June 22, 2004. However, the Legislature returned to session regularly over the course of the Summer until a budget was developed. NYBA remained vigilant and worked to help ensure that no bank tax increases, however characterized, were included in the final budget negotiations.

Of particular concern was a proposal by New York City Mayor Michael Bloomberg, as part of the City budget which must be approved in Albany, to eliminate the interest received deduction for interest paid by a closely held Real Estate Investment Trust (REIT) to its investors, including banks. The proposal would have conformed the treatment of dividends paid by REITs to the Internal Revenue Code. The City estimated the proposal would raise $10 million in revenue every year. A similar proposal was included in last year's City budget with a revenue estimate of $2 million, but was rejected by the State Legislature. NYBA sought to have the State Legislature reject the City's proposal once more this year.

Gift Card Fees

Recent Developments: In July, the Legislature transmitted to Governor Pataki the two gift card bills passed in June. The first bill, S. 6612-B (Skelos)/A. 10333-B (Pheffer) prohibits retroactive fees and provides that no monthly service fee may be assessed against a gift card or gift certificate until it has been dormant for at least twelve months. The

second bill, S. 6611-A (Fuschillo)/A. 10334-A (Pheffer), defines gift certificates so as to include gift cards and prescribes disclosure requirements including signage at point of sale or by mail and on the gift card or accompanying materials. On July 20, the Governor signed the two bills as Chapters 170 and 171 of the Laws of 2004. They became effective 90 days after enactment, October 18.

In signing the bills, the Governor expressed concern about localities that had independently moved to regulate gift cards, as well as the need for technical clarification of some of the exemptions in the bill. As a result, later in the summer, the Legislature passed a chapter law amendment to the bills. S. 7708 (Skelos)/A. 11789 (Rules, Request of Pheffer) amends the gift card legislation to ease marketing and disclosure requirements on gift cards and to preempt any local law in New York purporting to regulate gift cards. Governor Pataki signed the amendment on September 21 as Chapter Law 507.

Background: As a result of several difficult experiences with traditional gift certificates during the 2003 holiday season, numerous bills were introduced in both Houses of the State Legislature in 2004 to regulate gift certificates and gift cards. Legislators and staff did not distinguish between traditional merchant-issued gift certificates and bank-issued gift cards, although NYBA undertook a vigorous educational campaign to highlight the differences between the two, pointing out the significant consumer benefits, including portability, security, convenience and payment medium properties, offered by bank gift cards.

Working with the Chairs of the Senate and Assembly Consumer Protection Committees, NYBA strongly opposed legislation that would prohibit expiration dates, fees and service charges on gift cards, or that would set specific fee limits. Over the course of a number of drafts, the bills steadily improved, so that in early June 2004, NYBA was able to remove its opposition.

The legislation, which was divided into two separate bills by the sponsors for legislative convenience, passed both Houses and was signed by Governor Pataki in July. The legislation prohibits retroactive fees and provides that no monthly service fee may be assessed until a card has been dormant for at least 12 months. The bills also prescribe disclosure requirements. Among improvements from earlier drafts, they do not prohibit upfront fees for card issuance, they allow for an expiration date, and they contain reasonable disclosure language. Importantly, there are significant exceptions to the definition of gift certificates that exclude, among other things, any electronic payment devices linked to deposit accounts and payroll cards. The legislation ultimately gained the support of the retail industry and was not opposed by major credit card issuers, such as MasterCard.

Predatory Lending/ Enhancements to the State Charter

With the passage in the Fall of 2002 of both a State-wide high-cost home lending law and a New York City Council ordinance (Local Law 36) designed to prohibit financial firms that grant, underwrite or securitize certain loans deemed to be predatory from doing business with the City, the focus of the predatory lending issue – and the related preemption issue – shifted from the legislative branch to the regulators and the court system. In this regard, in early 2004 New York's State Supreme Court ruled that federal law substantially preempts Local Law 36 as to entities and transactions governed by federal law, and that the law was also preempted by New York State's high-cost home lending law. This decision emanated from a lawsuit filed by Mayor Michael Bloomberg, alleging that this high cost home lending ordinance would curtail various powers vested in the Mayor by the City Charter and by State law, and alleging further that the Local Law conflicted with and was therefore preempted by State law. Moreover, the complaint alleged 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 therefore filed an *amicus curiae* brief in support of the Mayor in this case. While the time to appeal this case expired without the filing of an appeal - therefore ensuring that Local Law 36 will never go into effect - this issue continues to have traction in New York City, with the introduction in 2004 by the New York City Council of a proposed ordinance that would require businesses doing business with the City to certify that they are in compliance with State and federal home lending laws.

The question of preemption also continues to be a topic of debate at the State level, in the wake of two regulations issued by the OCC at the beginning of 2004. The first seeks to clarify the

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extent to which the operations of national banks are subject to state laws, and the second concerns the OCC's visitorial powers with respect to national banks. The New York State Assembly Banks Committee held a hearing on these regulations in April 2004. At that hearing, NYBA President Mike Smith testified, reiterating NYBA's position, set forth in a comment letter to the OCC, regarding the preemption regulations. NYBA reiterated its support for the OCC regulations, which clarify existing federal law, at the same time repeating its strong commitment to the dual banking system. State Attorney General Eliot Spitzer also testified, stating that the OCC's preemption regulations exceeded its authority and inappropriately restricted the states' role as consumer law advocate and enforcer. Deputy Banking Superintendent Barbara Kent, echoed the view of the Attorney General, saying that the OCC's preemption regulation would leave New York State consumers less protected. Subsequent to the hearing, both Houses of the State Legislature introduced a resolution urging Congress to review this issue. Ultimately the resolution that passed both Houses, only called on Congress to protect the dual banking system.

In response to the concerns raised by State officials in reaction to the OCC's new regulations, coupled with the departure this year of two large multi-state banks from the State charter, NYBA formed a Task Force dedicated to finding ways to enhance the State charter. The Task Force developed a list of proposed enhancements to the State charter, which NYBA is urging the Banking Superintendent to support. NYBA is working with the Banking Department, and leaders of the Executive and Legislative branches of New York government on parallel tracks with this common goal. NYBA will also explore initiatives on the federal level, including the role of the FDIC in interpreting current federal law to the advantage of state banks.

Among the enhancements NYBA expects to re-visit with the Superintendent are amendments to improve New York's high cost home lending law. In prior discussions with the Banking Department about this law, NYBA expressed its belief that the law could be improved by the adoption of those changes originally set forth in a Senate Chapter Amendment. Among the issues NYBA highlighted as most important are (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; and (iv) limitations to the assignee liability provisions. NYBA also believes that a patchwork of conflicting local and state high cost lending legislation would ultimately be detrimental to the availability of sub-prime credit.

For more background on this issue, see the December 2003 *Banking Journal* available at www.nyba.com.

Privacy

In New York, the 2004 legislative session once again saw no additional privacy restrictions for banks. Despite this successful legislative outcome, it should be noted that a number of privacy bills were considered this session, ranging from opt-in legislation, to restrictions on the use of social security numbers, to bills designed to require businesses to notify customers whenever there is a breach of security with regard to confidental personal information. 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.

Trust Issues

The Governor has received or completed action on all bills that passed both Houses this year affecting the Trust and Investment Division. Very few pieces of trust legislation were considered as the Legislature continued to wrestle with a massive budget deficit and a school funding crisis brought on by a decision of the New York Court of Appeals requiring New York City schools to be funded at a level that provides every student a “sound, basic education.” Because the Court left undefined how to determine what a sound, basic education is, but set a deadline of July 30 for legislative action, State budget discussions, which may be difficult in almost any year, were particularly contentious.

NYBA 2004-2005 Trust Legislative Agenda

Fiduciary Income Tax Reform

NYBA has been working on legislation to ensure that the trust industry remains a mainstay of the New York economy. Critical to the health of the trust industry in the State is fiduciary income tax reform. 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 continuing budget gap that must be closed during each of the coming years presents a major challenge for any legislation that is perceived as potentially losing revenue, the Trust Strategy Group in January 2004 focused on the economic development aspects of NYBA's trust legislative agenda and decided to petition the Lower Manhattan Development Corporation (LMDC) to conduct an independent study of the needs of the trust industry in Lower Manhattan, New York City and New York State. LMDC is a State-chartered, bi-partisan, semi-governmental authority chartered to promote the redevelopment of Lower Manhattan after September 11. It reports to the Legislature and Governor's Office.

After NYBA met with LMDC President Kevin Rampe in March, NYBA submitted a formal proposal for a study. In April, LMDC decided to conduct the study requested, selected the consulting firm Appleseed to perform the study, and requested a high-level meeting with leaders of the trust industry in the State to provide the consultants with key information for the study. NYBA and its key bankers have met several times with Appleseed. The consultant drafted and released a survey of the trust industry in New York City on which NYBA had the opportunity to comment. NYBA also wrote to all members who were being surveyed by Appleseed, urging their cooperation with the survey. To date, Appleseed has received completed surveys from all of the largest corporate trustees in the State and has completed interviews with key trust bankers, accountants, attorneys and other trust professionals. A draft of the Appleseed report may be available early this winter.

NYBA anticipates that, if its research on existing trusts leaving New York and the failure of New Yorkers to establish new trusts in the State is borne out in the study, LMDC will recommend significant changes to New York's trust law. Of prime importance will be fiduciary income tax reform as described above. An important additional item that may be considered is perpetual trust legislation. See below.

Perpetual Trust Legislation

Three bills have thus far been introduced in the Legislature to authorize perpetual trusts in New York. They all 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 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) has 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. NYBA believes that support from LMDC will be very helpful in moving this legislation.

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Accounting for Conversions of Common Trust Funds to Mutual Funds

In order to attract and retain trust business in New York, NYBA believes that it is critical to avoid layering additional regulation on the industry. For the past year and a half, NYBA has opposed a proposal by the Surrogate's Court Advisory Committee to subject all proprietary mutual funds in which trust funds were invested to the same ten-year accounting requirement that applies to common trust funds. After extensive testimony, meetings and submissions, the Committee has now deferred further consideration of this subject. However, during remarks at NYBA's Trust Conference in October, Surrogate Renee Roth, Chair of the Surrogate's Court Advisory Committee, indicated continued interest in the issue.

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). NYBA has joined with the Bar Associations, Surrogate's Court Advisory Committee and the EPTL-SCPA Legislative Advisory Committee to review the Principal and Income Act, the Uniform Trust Code and other areas of trust law in New York that may need to be revised or updated. This project is expected to take several years.

IRS Trust Tax Regulations

On January 2, 2004, the Internal Revenue Service published in the *Federal Register* final regulations that redefine income for trust purposes. The regulations specifically clarify the tax treatment of payouts from trusts that result from exercise of the power to adjust between income and principal under State law or that constitute a unitrust amount under the Principal and Income Act. Although effective for tax years ending after January 2, 2004, the regulations state that taxpayers may rely on the provisions of the final regulations for any taxable years in which a trust or estate is governed by a state statute (such as New York's Principal and Income Act) authorizing a unitrust payment in satisfaction of the income interest of the income beneficiaries or granting the trustee a power to adjust between income and principal. Thus, as requested by NYBA, the regulations retroactively recognize adjustments and unitrust payments made pursuant to the State's Principal and Income Act that was effective January 1, 2002.

However, NYBA's Trust and Estate Tax Committee identified a flaw in the final regulations. In a letter to the IRS dated July 7, 2004, NYBA noted that the regulations establish an irreconcilable conflict between State non-productive and under-productive property laws and the requirements for the tax treatment of income in charitable remainder unitrusts and income only charitable remainder unitrusts. NYBA has discussed this issue with the IRS and hopes to see it resolved soon. ▼

NYBA 2005 LEGISLATIVE & REGULATORY POLICY

On November 5, 2004, the Legislative and Regulatory Policy Committee of the New York Bankers Association met jointly with the Board of Directors of the Association to recommend the Association's Year 2005 legislative and regulatory policy. Following the joint meeting, the Board met in Executive Session and unanimously adopted the following recommendations.

The first six of these issues represent significant economic development opportunities for the State of New York.

State Bank Charter Modernization

Adoption by the Comptroller of the Currency's Office of two regulations preempting state laws with regard to the lending, deposit-taking and banking operations of national banks and the ability of states to regulate and supervise State-chartered national bank operating subsidiaries gave rise to federal and state efforts to roll back the OCC. NYBA supports the OCC's regulations, but believes that the State banking charter must be preserved and strengthened. The Association has formed a State Charter Strategic Initiative Task Force to identify and recommend actions that can be taken by State and

federal public policy makers to enhance the State banking charter.

Position: NYBA should continue to work to achieve enhancements to the state banking charter that will make it more competitive and more vibrant. Among these enhancements could be amendments to broaden the wild card law. At the same time, where appropriate, NYBA should support federal initiatives designed to provide a clearer roadmap as to the appropriate scope of legislation and regulation at the state and federal levels. Such efforts are currently under review by the Task Force.

Budget and Taxes

During the debate on the budget in 2004, New York State's Bank Tax, including the financial modernization moratorium added at NYBA's request in 2000, was extended until December 31, 2005. In normal years, the Bank Tax would not be a subject of further legislative discussion until 2006. However, New York State is facing another significant budget shortfall in 2005. The most recent Report of the State Comptroller's Office on the Financial Condition of New York State (9/30/04) estimates next year's deficit at $2.9 billion, while other observers and political leaders have estimated a deficit as large as $5-6 billion. These estimates do not include the costs of responding to the Court of Appeals decision that requires reform in the funding of New York City's school system. It is believed that, when Legislative leaders begin to review sources of funding for next year's budget and the school decision, many corporate, including bank, tax measures may be under review.

Position: The Association opposes changes in the Tax Law that single out the banking industry for unfair taxation. In addition, NYBA strongly supports provisions of the Bank Tax that have made New York competitive in attracting new banking jobs and branches. NYBA should continue to pursue an extension of the Bank Tax Law. The Association will continue discussions with the Tax and Revenue Departments of the State and City of New York on a potential merger of the Bank Tax with the General Corporate Tax, but will not advance any position until more information is available on the provisions of such a merger.

Municipal Finance

NYBA has consistently and strongly opposed local government investments in mutual funds, including those limited to investments in which local governments could invest directly. NYBA has pointed out that authorizing such investments would drain deposits from local communities, limiting the ability of banks to provide small business, housing, consumer and local government loans and investments. In addition, the Association has pointed out the potential risk to municipal funds in some of these investments that, unlike bank deposits, are not fully collateralized and may be subject to market fluctuations. In the current climate that combines low returns for many local government deposits with significant budget pressure on virtually all localities, efforts to expand local government investment authority are expected in Albany both by representatives of municipalities and providers of non-bank investment services. In order to facilitate arguments in opposition to authorizing local governments to invest in alternative investment vehicles, NYBA has commissioned a study by the Department of Practical Economics and Management of Cornell University on "The Effects of Municipal Deposits on Local Communities in New York." In addition, recognizing the financial straits in which many local governments in New York find themselves, NYBA is exploring alternatives to the current system of mandatory 100% collateralization of local government deposits.

Position: NYBA opposes providing local governments in New York authority to invest in mutual funds or STIP. The Association 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.

Trust Issues

NYBA's Trust and Investment Division is committed to the health and growth of the State's trust and investment industry. In recent years, a significant number of personal trusts have left New York for states with more favorable

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legislative environments, and virtually no new trusts of any size are being established in New York. In order to address this situation, the Association has developed a trust legislative strategy that has identified several significant amendments to New York's trust law necessary to retain existing trusts and attract new trusts to the State. By far the most important of these is fiduciary income tax reform. New York's fiduciary income tax discriminates against New York residents because it imposes tax only where both the trustee and the grantor of a trust are New York residents. To avoid the State income tax, a grantor need only establish a trust with a non-New York trustee, thus placing New York banks at a severe competitive disadvantage in competing for the trust business of New Yorkers.

Position: NYBA will continue to cooperate with the Lower Manhattan Development Corporation, and its consultant Appleseed, in its study of the health of the trust industry in New York. NYBA will also continue to seek legislation and regulation to make New York's trust industry more competitive nation-wide, including enactment of fiduciary income tax reform.

Vicarious Liability

New York is the only remaining State in the nation that imposes liability on the lessor for accidents involving leased vehicles. The increasing cost of liability and liability insurance has driven virtually every financial institution and most automobile manufacturers out of the leasing business in New York.

Position: NYBA will continue to advocate vicarious liability reform that places the liability for automobile accidents on vehicle lessees so long as appropriate insurance is maintained by the lessee on the vehicle.

Commercial Mortgage Foreclosure Extension

In 1998, at NYBA's request, New York enacted Chapter Law 231, which authorized non-judicial foreclosure on commercial properties. By all accounts, this statute has been successful in easing the previously cumbersome process of commercial foreclosure in the State and in facilitating the flow of funding for commercial real estate finance. The State recognized the value of the statute in 2001 when it extended the law for four years and adopted a technical amendment that clarified the law's applicability to mixed-use (both residential and commercial) buildings.

Position: The New York Bankers Association urges the Legislature to extend and make permanent the provisions of Article 14 of the Real Property Actions and Proceedings Law, authorizing non-judicial foreclosure of commercial real estate by the power of sale. The law has served well the interests of both lenders and borrowers, providing certainty in maintaining the value of collateral and increasing the flow of funds for commercial real estate lending.

Bank Security

A dramatic decrease in bank robberies during 2004, which New York City Police Commissioner Ray Kelly, among others, attributed at least in part to NYBA's cooperative efforts to develop bank security best practices and work with law enforcement on bank security issues, toned down calls for legislation. Nevertheless, several bills to which the Association objects were active in the State legislature and an additional bank security ordinance - which would require banks to file with the City Police Department written safety plans for each branch they own or operate - was introduced in the New York City Council. Bills were also introduced in both the New York State Legislature and New York City Council that would mandate that bandit barriers be installed at bank branches. Additionally, a bill requiring that ATMs be equipped with emergency 911 buttons, although ultimately not enacted, continued to be in play throughout the Legislative Session in Albany. The amended version of the bill did not require that the buttons be activated through the use of an ATM card, thus increasing the likelihood of false alarms. NYBA filed a memorandum in opposition to the bill, stressing that the buttons have not been shown to be effective and that they may place customers in jeopardy of physical harm.

Position: 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. Additionally, NYBA should continue to support legislation at the State level that would create the specific crime of "bank robbery" containing increased criminal penalties.

Fees

Federal and State legislators and regulators continue to consider bills that would regulate fees for financial services in various fashions. During 2004, NYBA engaged in an extensive effort to ameliorate a bill in the State Legislature to regulate fees and charges associated with gift cards and gift certificates. The bill that was ultimately enacted provided for additional disclosures and provided issuers the freedom to charge properly disclosed fees after cards were dormant for a year. In addition, NYBA continues to work with the Banking Department to provide State-chartered banks the same flexibility as national banks to charge daily overdraft fees on demand deposit accounts, resulting this year in a Department opinion that such fees could be charged on all commercial accounts.

Position: As sought in its 2002 petition to the New York State Banking Department, NYBA should continue to work to encourage the promulgation of a regulation permitting New York State-chartered banks to charge a daily overdraft fee. NYBA should further continue to work to maintain fee deregulation and oppose initiatives designed to cap or ban fees. However, when appropriate, NYBA should support reasonable disclosure requirements.

Privacy

Although State and federal privacy initiatives have significantly diminished with the passage and implementation of the FACT Act and numerous other privacy-protection measures, a surprising decision from the U.S. Court of Appeals upholding an extremely restrictive California privacy bill that many observers had expected to be pre-empted by the FACT Act may renew interest, at least at the State level, in privacy legislation.

Position: NYBA should continue to maintain its leadership position in promoting banking policies and practices that safeguard customer privacy and penalize identity theft, while opposing legislation that would reduce the competitiveness of the State's financial services industry.

Credit Unions

With the growth in the size and sophistication of credit unions, more and more banks are finding local credit unions among their toughest competitors. Many New York credit unions are converting to the recently approved expanded community credit union charter. In the past, a community charter had to represent a neighborhood, village or small town. Under new NCUA rules, a community can consist of an entire metropolitan statistical area or a City the size of New York.

It has long been the Association's view that effective regulation of credit unions must begin with reform of Federal income tax law to subject larger, bank-like credit unions to the same level of taxation as applies to other financial institutions. The national banking trade groups, including the American Bankers Association and the Independent Community Bankers of America have organized Operation Credit Union, a nationwide grassroots effort to involve bankers in a campaign to subject large, bank-like credit unions to the same level of taxes and regulation as commercial banks and thrifts. The Association is strongly supporting this effort.

Position: NYBA will continue to support Operation Credit Union and to oppose H.R.3579, a bill that would greatly expand credit union commercial lending authority while undercutting the capital regulation of all federally insured credit unions. The Association will also oppose legislation in Albany to provide authority to State-chartered credit unions in excess of that available to Federal credit unions.

Federal Issues

NYBA remains extremely active at the federal level, supporting a number of issues important to New York banks. Among these are:

■ **Deposit Insurance Reform** - The Association is committed to its current position on deposit insurance reform, maintaining emphasis on achieving higher coverage for municipal deposits as the first priority during the deposit insurance reform debate. In addition, the Association supports indexing deposit insurance coverage to inflation, charging an entry fee for deposits of new and fast-growing depository institutions and, in the context of these reforms, the merger of BIF and SAIF with a cap on the deposit insurance required reserve and rebates as appropriate. The Association opposes any increase in deposit insurance premiums so long as the reserve remains in excess of 1.25% of insured deposits. The Association also believes that the issue of municipal deposits for thrifts is best resolved in

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the context of deposit insurance reform legislation in Washington. Any consideration of the thrift municipal deposit issue in Albany should defer to the debate on deposit insurance reform in Washington.

■ **Interest on Corporate Checking Accounts** - NYBA supports an immediate increase in the number of allowable transfers from a money market deposit account from the current six per month to twenty-four. The Association opposes lifting the prohibition on the payment of interest on corporate demand deposits.

■ **Bankruptcy Reform** - NYBA strongly supports meaningful bankruptcy reform legislation and urges Congress to take up the issue once more in 2005. The number of bankruptcy filings continues to increase with more than 1.6 million consumers filing for discharge in bankruptcy last year alone.

■ **Real Estate Brokerage** - NYBA opposes legislation that would preclude the Treasury Department and Federal Reserve Board from authorizing banks and financial holding companies to engage in real estate brokerage. The Association believes that the regulatory process established in the Gramm-Leach-Bliley Act should be permitted to operate.

■ **Regulatory Burden Relief** - All banks are operating under a severely increased burden of federal and State regulation, resulting in particularly onerous costs and time constraints for smaller banks. NYBA strongly supports efforts to reduce regulatory burden by, for example, examining the necessity of maintaining all of the strictures of the Sarbanes-Oxley Act and the USA PATRIOT Act.

■ **Government-Sponsored Enterprises (GSEs)** - NYBA has consistently supported the mission of the Federal Home Loan Banks and of Fannie Mae and Freddie Mac, but has not taken any position on the regulatory structure that should govern them. NYBA supports strong, effective regulation of the GSEs. However, the Association believes that the appropriate structure of such regulation should be determined by those with direct responsibility for its implementation. The Association also recommends that the Federal Home Loan Banks be supervised by the same agency that supervises the other housing GSEs.

■ **Terrorism Risk Insurance** - Passage of the Terrorism Risk Insurance Act in 2002 was critical to the health and maintenance of the real estate, banking and insurance industries in New York and elsewhere. That Act is scheduled to expire next year, even as the private insurance industry has not completed plans for a transition to private terrorism insurance coverage. NYBA supports early passage by the 109th Congress of an extension of the Terrorism Risk Insurance Act.

Position: NYBA will continue to maintain a leadership position on federal issues, working closely with our national trade groups to effect changes in federal law and regulation of benefit to New York banks.

■ **Accounting Issues** - In recent years, a number of standard-setting organizations have proposed or adopted significant alterations in the traditional accounting for banking activities. The historic role of the bank regulatory agencies in establishing accounting rules has been eclipsed by non-bank regulators such as the Securities and Exchange Commission (SEC), Financial Accounting Standards Board (FASB), American Institute of Certified Public Accountants (AICPA) and others. In part because of pressure for uniformity in accounting standards with other industries and partly as a result of financial accounting disclosure scandals, many of the proposals of these groups have represented radical departures from established bank accounting norms.

Position: NYBA, with the guidance of its new CFO Committee, will develop proposed responses to initiatives by national and international accounting standard-setting bodies and will work with the national trade groups in responding. A thorough review of the effects of the Sarbanes-Oxley Act on publicly-traded banks is necessary and the provisions of the USA PATRIOT Act that require excessive paperwork should be re-examined. The Committee will also assist in educating bankers on the impact of adopted accounting changes.

■ **Offshoring/Outsourcing** - During 2004, the issue of moving jobs in high technology and customer service outside the United States became a major legislative and regulatory concern. Variously called “outsourcing,” “worldsourcing,” or “right-sourcing,” it was taken up by candidates in Presidential,

Congressional and even local elections. More than 185 bills in 38 states were introduced on the subject, 18 of which passed State Legislatures, but only nine of which were signed by State Governors. In addition, eight Governors issued executive orders on the issue. In Washington, efforts were made through the appropriations process to limit American firms' freedom to operate most efficiently geographically. While no similar bills gained traction in Albany, many were introduced and could become issues.

Position: NYBA opposes efforts to restrict the freedom of banks to serve their customers in as efficient and competitive a manner as possible. ▼

2004 Chapter Law Summary

Chapter Law 1

■ **Anti-Terrorism:** A.11723-A (Rules, Request of Lentol)/S.7685 (Balboni) was designed to strengthen New York State's anti-terrorism Laws. It includes provisions creating the crimes of money laundering for the sake of terrorism in the first, second and third degrees. Governor Pataki signed the bill as Chapter 1 of the Laws of 2004 on July 23.

Chapter Law 59

■ **Banking Department Budget Provisions:** S.6059-B (Budget)/A.9559-B (Budget) enacts the transportation and economic development budget, including expanded authorization for the Banking Department to charge annual assessments of the institutions it regulates. Previously, the Department could charge annual assessments only of State-chartered depository institutions. The bill was signed on August 20 as Chapter 59 of the Laws of 2004, but several lines not relevant to banking were vetoed.

Chapter Law 60

■ **Bank Tax Extension:** S.6060-B (Budget)/A.6060-B (Budget) enacts the revenue provisions of the annual budget. The bill extends the Bank Tax for an additional year and the GLBA provisions for two years so that both expire on December 31, 2005. NYBA strongly supported extending the Bank Tax without change. In addition, the bill clarified the State Estate Tax. It contains a provision that removes an inequitable feature of the State Tax Law that imposed estate taxes on the New York property of non-residents who had formerly resided in New York that could, in some cases, substantially exceed the value of the New York property. With the exception of several line item vetoes not relevant to banking, this bill was signed on August 20 as Chapter Law 60.

Chapter Law 82

■ **Principal and Income Act Amendment:** S.6308 (DeFrancisco)/A.10962 (Rules, Request of Peralta) restricts the ability of a trustee to exercise the power to adjust principal or income if it would impose additional taxes on a trust. NYBA supported the bill. Designed to help trustees avoid inadvertently triggering adverse tax consequences for certain trusts, the bill was signed on May 18 as Chapter Law 82.

Chapter Law 147

■ **SONY Mae Authority:** S.6393-A (Bonacic)/A.11220 (Ramos) extends until July 16, 2005, the expiration of certain powers of the State of New York Mortgage Agency's (SONY Mae) and to increase SONY Mae's bonding limits. It was signed as Chapter Law 147 on July 13.

Chapter Law 165

■ **Agricultural Producer Security Interests:** S.6349-A (Hoffmann)/A.10898-A (Rules, Request of Magee) creates a trust to enforce certain agricultural producer security interests. Governor Pataki signed the bill as Chapter Law 165 on July 20.

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Chapter Law 170

■ **Gift Card Disclosure:** S.6611-A (Fuschillo)/ A.10334-A (Pheffer) requires increased disclosure of the terms and conditions of gift cards and gift certificates. NYBA worked with the Chairs of the Senate and Assembly Consumer Protection Committees to ensure that the newly required disclosures were not unduly burdensome. Governor Pataki signed the bill into law on July 20 as Chapter 170.

Chapter Law 171

■ **Gift Card Restrictions:** S.6612-B (Skelos)/A.10333-B (Pheffer) restricts the fees that may be charged on gift cards. The original version of the bill would have prohibited any dormancy fees and severely restricted other fees. After several discussions with NYBA, the bill was amended to authorize upfront fees, permit dormancy fees after a card had not been used for a year and permit other types of fees. Governor Pataki signed the bill on July 20 as Chapter Law 171.

Chapter Law 236

■ **Micro-Loan Fund:** A.6679-A (Lifton)/A.2808-A (McGee) establishes a micro-business revolving loan program within the rural revitalization program of the New York State Urban Development Corporation. Governor Pataki signed the bill as Chapter 236 of the Laws of 2004 on July 27.

Chapter Law 291

■ **Excelsior Business Loan Maturity:** A.6035 (Schimminger)/S.3333 (Saland) extends the maximum maturity of Excelsior-linked business loans from two years to four years. NYBA strongly supported the bill. It was signed as Chapter 291 of the Laws of 2004 on August 3.

Chapter Law 300

■ **Banking Development District Expiration:** A.9445 (Lafayette)/S.6805 (Farley) extends the expiration date of certain provisions of the banking development district program to 2012. Governor Pataki signed the bill on August 3 as Chapter 300 of the Laws of 2004.

Chapter Law 318

■ **LLC SBA Lending:** S.5823-B (Skelos)/A.9384-A (DiNapoli) authorizes joint ventures operating as limited liability companies to apply for licenses as investment companies so as to offer certain small business loans. The bill was signed as Chapter 318 of the Laws of 2004 on August 10.

Chapter Law 356

■ **Banking Department Supervisory Authority:** A.10875 (Rules, Request of Nolan)/S.6465 (Farley) amends the supervisory authority of the Banking Superintendent. The bill was signed by Governor Pataki as Chapter 356 of the Laws of 2004 on August 10.

Chapter Law 359

■ **Uneconomical Trust Termination:** A.10967 (Rules, Request of Grodenchik)/ S.5166 (DeFrancisco) establishes a statutory procedure for terminating uneconomical trusts. At NYBA's request, the legislative history of the bill was amended to ensure that it would not result in additional needless litigation. Governor Pataki signed the bill as Chapter Law 359 on August 10.

Chapter Law 394

■ **Champerty:** A.7244-C (John)/ S.2992-C (DeFrancisco) eliminates the defense of champerty for certain purchased debt obligations. The bill was amended at NYBA's request to permit indenture trustees to continue to assert the defense of champerty, to apply only to obligations in excess of $500,000, and to apply the new provision only for newly instituted litigation, not existing cases. The bill was signed on August 17 as Chapter 394 of the Laws of 2004.

Chapter Law 417

■ **"Do Not Call" List Fines:** S.6041 (Fuschillo)/A.10145 (Klein) increases the fine for violation of the State "do not call" list to the same level as the federal fine. On August 26, Governor Pataki signed the bill as Chapter 417 of the Laws of 2004.

Chapter Law 432

■ **Corporate Check Cashers:** S.7710-A (Farley)/A.11796-A (Rules, Request of Nolan) eases regulation of check cashers that cash checks only for other than natural persons. It was signed by the Governor as Chapter 432 of the Laws of 2004 on September 14.

Chapter Law 455

■ **Banking Board Requirements:** A.11303 (Rules, Request of Carrozza)/ S.6467-A (Farley) revises certain banking board citizenship and public reporting requirements. Governor Pataki signed the bill as Chapter Law 455 on September 14.

Chapter Law 507

■ **Gift Card Bill Chapter Amendment:** S.7708 (Skelos)/A.11789 (Rules, Request of Pheffer) amends the gift card legislation (S.6611-A, S.6612-B) to ease marketing and disclosure requirements on gift cards and to preempt any local law in New York purporting to regulate gift cards. The bill was signed by Governor Pataki on September 21 as Chapter Law 507.

Chapter Law 527

■ **Premium Finance Agencies:** S.123-C (Alesi)/A.2559-C (Gianaris) regulates premium finance agencies. It was signed by Governor Pataki on September 28 as Chapter 527 of the Laws of 2004.

Chapter Law 563

■ **Foreign Bank Personal Loans:** S.6379 (Farley)/ A.10867 (Rules, Request of Nolan) conforms the limits on personal loans by foreign banks to those applicable to domestic banks. The bill was signed by Governor Pataki on October 5 as Chapter 563 of the Laws of 2004.

Chapter Law 566

■ **Bank Investment Authority:** S.6470-A (Farley)/ A.10873-A (Rules, Request of Nolan), modernizes provisions of the banking law including expanded investment authority for State-chartered banks. A NYBA initiative, the bill increases from 20% of capital to 100% the amount of equities in which State-chartered banks grandfathered under FDICIA may invest. The bill also authorizes the issuance of bank stock in uncertificated form. The Governor signed the bill on October 5 as Chapter Law 566.

Chapter Law 574

■ **Banking Department Investigations:** S.7508 (Farley)/A.11664 (Rules, Request of Nolan) designates the criminal investigations bureau of the Banking Department as a "qualified agency" under the Executive Law, allowing the bureau to check the criminal records of persons it is investigating directly. The bill was signed by the Governor on October 5 as Chapter Law 574.

Chapter Law 577

■ **Brownfields Clean-up:** S.7726 (Marcellino)/A.11802 (Rules, Request of DiNapoli) is a technical correction to the brownfields clean-up bill enacted last year (Chapter Law 1 of 2003). Among other provisions, the bill revises one of the liability exemptions included in last year's bill, clarifying that lenders are not liable for new loans made to finance brownfields remediation so long as they do not cause or contribute to contamination. The Governor signed the bill on October 5 as Chapter 577 of the Laws of 2004.

Chapter Law 605

■ **Financial Guarantee Insurance:** S.6679-B (Seward)/A.10832-A (Rules, Request of Grannis) regulates financial guarantee insurance. The bill was amended at NYBA's request to delete language that some thought could adversely affect credit insurance and was signed into law by Governor Pataki as Chapter 605 on October 19.

Chapter Law 625

■ **Money Transmitter Agency Relationships:** S.7565 (Farley)/A.10868-A (Rules, Request of Nolan) further regulates money transmitters and their agents. Governor Pataki signed the bill on October 19 as Chapter 625 of the Laws of 2004.

Chapter Law 637

■ **Definition of Real Estate:** S. 5733 (Maziarz)/A. 9188 (Rules, Request of Morelle) clarifies the definition of recreational vehicles under the Real Property Tax Law. The bill was signed as Chapter 637 of the Laws of 2004 on October 26.

Chapter Law 638

■ **Workers' Comp Direct Deposit:** S.5835 (Maziarz)/A.9502 (Hoyt) permits all or a portion of workers' compensation payments to be directly deposited in workers' accounts. Governor Pataki signed the bill as Chapter Law 638 on October 26.

Chapter Law 660

■ **Credit Union Parity:** S.6868-B/ A.9475-B (Nolan) provides New York State-chartered credit unions with greater parity with federal credit unions. The bill was amended as requested by NYBA to eliminate language that could have provided State-chartered credit unions with authority in excess of federal credit unions. Governor Pataki signed it as Chapter 660 of the Laws of 2004 on October 26.

Chapter Law 662

■ **Credit Union Conversion:** S.7127-A (Farley)/A.11023-A (Rules, Request of Nolan) provides procedures for State-chartered credit unions to convert to mutual savings banks. NYBA supported the bill. It was signed by Governor Pataki as Chapter Law 662 on October 26.

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Chapter Law 676

■ **Local Government Reserve Funds:** S.1679-A (Rath)/A.10537 (Sweeney) removes the requirement that moneys in certain local government reserve funds be maintained in separate bank accounts. Governor Pataki signed the bill on November 3 as Chapter 676 of the Laws of 2004.

Chapter Law 677

■ **Money Transmitter Supervision:** S.2263-B (Farley)/A.11416-A (Rules, Request of L. Diaz) provides the Banking Department with additional authority over money transmitters. Governor Pataki signed the bill on November 3 as Chapter Law 677.

Chapter Law 679

■ **Not-for-Profit Cemetery Trusts:** S. 3418-A (Marchi)/A. 7346-B (Tokasz) clarifies the applicability of the Prudent Investor Act and the power to adjust under the Principal and Income Act to not-for-profit cemetery trusts. It was signed by Governor Pataki as Chapter 679 of the Laws of 2004 on November 3.

Chapter Law 690

■ **Credit Card Towing Fees:** S.7180-A (Balboni)/A.10376-A (John) requires tow truck operators that accept payment for towing and storage charges by credit card at their shops to do so in payment for a tow. Governor Pataki signed the bill into law on November 3 as Chapter 690 of the Laws of 2004.

Chapter Law 694

■ **College Credit Card Marketing:** S.510-C (Maziarz)/A.9719-A (Boyland) establishes procedures for on-campus credit card marketing. NYBA worked with the sponsor to ensure that the bill did not inadvertently ban marketing on campuses. Governor Pataki signed the bill on November 16 as Chapter Law 694.

Chapter Law 699

■ **Security Guard Background Checks:** S.3939-A (Balboni)/A.8650-A (Rules, Request of Schimminger) subjects security guards to a mandatory federal background check. The bill was signed by Governor Pataki on November 16 as Chapter 699 of the Laws of 2004.

Chapter Law 709

■ **Attorney-Executor Disclosure:** S.6986 (DeFrancisco)/A.11127 (Rules, Request of Weinstein) clarifies disclosure requirements for attorneys who also serve as their clients' executors. The Governor signed the bill on November 16 as Chapter Law 709.

Chapter Law 713

■ **College Marketing Chapter Law Amendment:** S.7663-B (Maziarz)/A.11799 (Rules, Request of Boyland) amends the campus credit card marketing legislation passed earlier (S.510-C above) to clarify that banks may continue to market credit cards on-campus as long as marketing is done pursuant to a credit card marketing policy. The bill was signed by Governor Pataki on November 16 as Chapter 713 of the Laws of 2004.

Chapter Law Unassigned

■ **Beginning Farmer Financing:** S.3734-A (Hoffmann)/A.8360-A (Rules, Request of Magee) authorizes banks to borrow from the Environmental Facilities Corporation for financial assistance to beginning farmers. The Governor signed the bill on August 17, but no chapter law number has as yet been assigned.

BILLS VETOED

The Governor also vetoed two bills of interest to banking.

Veto Message 248

■ **ATM Lighting Requirements:** A.9276-A (Nolan)/S.7124-A (Farley) amends the lighting requirements of the ATM Safety Act. Governor Pataki vetoed the bill on October 5. In Veto Message 248, the Governor explained that the new bill could "result in ATM facilities being out of compliance with the new, supposedly less rigorous tests, even though those same facilities are in compliance with current law." NYBA is currently working with Banking Department officials and State legislators to resolve these technical difficulties.

Veto Message 261

■ **Notices of Pendency:** S.5991-A (Volker)/A.9612-A (Schimminger) permits the filing of a successive notice of pendency in a foreclosure action even where a previous notice has expired. On November 3, Governor Pataki vetoed the bill; in Veto Message 261, he cited technical deficiencies. ▼

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-A (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 has begun a targeted grass roots campaign in the Senate in opposition to the bill. The bill is pending in the Senate Banks Committee and on the Assembly Calendar.

■ **Light Pollution** S.3003-D (Marcellino)/A.6950-D(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, could create 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 and is pending 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 instruments 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 in the Senate Rules Committee and on the Assembly Calendar.

■ **Seizure of a Motor Vehicle** S.4324(Kuhl)/A.5412(Perry) Prohibits the seizure of a motor vehicle leased by a debtor to satisfy a money judgment against the debtor. **(SUPPORT)** This bill passed the Assembly and was starred on the Senate Calendar.

■ **Basic Banking Accounts** S.6039 (Spano)/A.2334(Clark) Increases the number of allowable ATM withdrawals from a basic banking account from eight to twelve for customers 65 years of age or older. **(OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

■ **Non-bank ATMs** S.6285-A(Spano)/A.10301-A(Brodsky) Requires the Secretary of State to license non-bank ATMs. **(POSITION UNDER REVIEW)** This bill is pending in the Senate Rules Committee and in the Assembly Economic Development Committee.

■ **Non-bank ATM Registration** S.7128(Farley)/A.9654-B(Nolan) Establishes a registration procedure for non-bank ATMs and requires posting of fees and other information for machine users. **(DO NOT OPPOSE)** This bill passed the Assembly and is pending in the Senate Banks Committee.

■ **Money Transmitters** S.7276(Mendez)/A.9653(Nolan) Requires money transmitters to post daily currency exchange rates. **(NO POSITION)** The bill passed the Assembly and is pending in the Senate Banks Committee.

■ **ATM Lighting** S.4388(Farley), 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 Banks Committee.

■ **Direct Deposit Recovery Prohibited** A.3232-A(Dinowitz) Restricts the ability of an employer to recover directly deposited payroll funds. **(OPPOSE)** This bill is pending in the Assembly Codes Committee.

■ **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. 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. NYBA understands that advocacy groups for the visually handicapped are taking the same position.

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■ **ATM Crimes** A.9508(Stringer) Requires the Division of Criminal Justice Services to maintain records of crimes committed at bank-owned ATMs. **(DO NOT OPPOSE)** This bill is pending in the Assembly Judiciary Committee.

■ **Talking ATMS/Braille Receipts** A.9614(Nolan) Requires that each bank designate at least one banking facility in each county as accessible to the visually impaired including, but not limited to, having an ATM capable of printing a receipt in Braille. **(OPPOSE)** This bill was pending on the Assembly Calendar. There is no Senate companion.

Privacy Legislation

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

■ **Sale of Social Security Numbers** S.309(Nozzolio)/A.11470(Rules, request of Abbate) 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 Rules and the Assembly Consumer Affairs and Protection Committees.

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

■ **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. This bill is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **Health Info Privacy** 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.

■ **Predictive Dialers in Telemarketing Calls** S.4497(Alesi)/A.10144(Klein) Bans the use of predictive dialers in telemarketing calls. **(OPPOSE, SEEKING AMENDMENTS)** NYBA is working with other business groups for amendments to conform the language of this bill to the new federal CAN SPAM Act. This bill passed the Senate and is pending in the Assembly Consumer Affairs and Protection Committees.

■ **"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 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.

■ **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.

■ **Financial Information New York Privacy Act** S.6017 (Seward)/A.9220 (Grannis) Modeled on the California privacy bill enacted in 2003, the bill requires opt-in for sharing of information with non-affiliates and opt-out for sharing with affiliates. **(OPPOSE)** This bill is pending in the Senate and Assembly Insurance Committees.

■ **"Do Not Call" list and Faxes** S.6192 (Fuschillo)/A.9611 (Pheffer) Recommended by the Attorney General, this bill includes in the State's "Do Not Call" registry faxes intended to induce payment for good or services. **(NO POSITION)** The bill is pending in the Senate Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **Privacy Notification** S.6517 (Fuschillo)/A.9184-A(Rules, Request of Klein) Requires businesses and State agencies to notify customers when confidential personal information has been compromised. **(OPPOSE)** This bill was reported to the Assembly Rules Committee and is pending in the Senate Energy and Telecommunications Committee.

■ **Use of Social Security Numbers** S.6568(Nozzolio)/A.11148(Rules, Request of Ortiz) Prohibits the use of social security numbers in business transactions. **(OPPOSE)** NYBA filed a memorandum in opposition noting the legitimate uses of social security numbers that many banks employ that do not threaten the privacy of customers. After the bill was reported to the Senate Calendar, the sponsor agreed to hold it. It has also been held in the Assembly Consumer Affairs and Protection Committee.

■ **Privacy Notification II** S.6615-A (Spano)/A.9431-A(Brodsky) Requires all businesses that maintain confidential data to provide customers with a notice if their data base may have been breached. **(OPPOSE)** The bill was pulled from the agenda of the Senate Corporations, Authorities and Commissions Committee after NYBA filed a strong memorandum in opposition and met with the sponsors. It was reported to the Assembly Codes Committee.

■ **Release of Confidential Information** S.7121(Farley)/A.10295(Nolan) Requires banks to notify their customers of any release of personal identification information. **(OPPOSE)** The bill is pending in the Senate Banks and Assembly Codes Committees.

■ **Auditing of International Offices** S.7122(Farley)/A.10070(Nolan) Provides the Banking Department with the authority to audit international administrative offices of all banks doing business in New York to enforce appropriate privacy restrictions. **(NO POSITION)** NYBA believes the Department already has this authority. This bill is pending in the Senate and Assembly Banks Committees.

■ **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.

■ **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.

■ **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.

■ **Use of Social Security Numbers** S.6142-A(Rath) Limits the use of social security numbers in insurance transactions. **(OPPOSE)** This bill is pending in the Senate Insurance Committee.

■ **Fax Regulation** A.3773(Pheffer) Establishes extensive regulation of unsolicited faxes. **(OPPOSE)** This bill was pending on the Assembly Calendar.

■ **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.

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■ **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-B(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 has been reported to the Assembly Rules 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.

■ **Account Numbers of Receipts** A.9942(Dinowitz) Prohibits more than the last five numbers of a bank account to be printed on receipts for any financial transaction with a bank. **(OPPOSE)** This bill was reported from the Assembly Banks Committee to the Codes Committee.

Retail Legislation

■ **TravelersChecks/MoneyOrders** 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 Consumer Affairs and Protection 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 has been 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. The bill passed the Assembly and is pending in the Senate Consumer Protection Committee.

■ **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 passed the Senate Rules Committee and is pending in the 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 passed the Senate and is pending 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 10% 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 Consumer Protection and the Assembly Consumer Affairs and Protection Committees.

■ **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.

■ **Credit Billing Penalty**
S.1619(Stavisky)/A.356(Greene) Increases the penalty for credit billing errors. **(OPPOSE)** The bill was pending on the Assembly Calendar and in the Senate Consumer Protection Committee.

■ **Customer I.D. Information**
S.2388(Kruger)/A.6114(Kaufman) Prohibits merchants from writing customer identification information on attachments to credit card receipts. It is already illegal to record such information on the receipts themselves. **(DO NOT OPPOSE)** The bill passed the Assembly and is pending in the Senate Consumer Protection Committee.

■ **Notice of Garnishment**
S.2878(Volker)/A.8665 (Rules, Request of Weinstein) Requires advance notice of garnishment or execution to an account holder **(OPPOSE)** The bill passed the Assembly and is pending in the Senate Codes Committee.

■ **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(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.

■ **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.

■ **Seizure of a Motor Vehicle**
S.4324(Kuhl)/A.5412(Perry) Prohibits the seizure of a motor vehicle leased by a debtor to satisfy a money judgment against the debtor. **(SUPPORT)** The bill passed the Assembly and was starred on the Senate Calendar.

■ **Gift Cards and Gift Certificates**
S.5994(McGee)/A.9386(Glick) Regulates gift cards and gift certificates. **(OPPOSE)** This bill is pending in the Senate and Assembly Consumer Protection Committees.

■ **Money Transmitters** S.6378(Farley)/A.10870(Rules, Request of Nolan) A Banking Department bill that makes technical corrections to the money transmitters law. **(NO POSITION)** This bill passed the Senate but the Assembly had the enacting clause stricken.

■ **Money Transmitting Penalties**
S.6380(Farley)/A.10872(Rules, Request of Nolan) Clarifies the definition of and increases penalties for illegal money transmission. **(NO POSITION)** A Banking Department bill, it passed the Senate and was reported from the Assembly Banks Committee to the Codes Committee.

■ **Security Breach** S.7121(Farley)/A.10295(Nolan) Requires bank to notify their customers if any personal financial information is, or may have been, acquired by an unauthorized person. **(OPPOSE)** The bill was reported from the Assembly Banks Committee to the Codes Committee and 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.

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■ **Loan Checks** S.2828(Padavan) Prohibits credit card issuers from mailing loan checks to New York residents **(OPPOSE)** The bill is pending in the Senate Consumer Protection Committee.

■ **Storage Liens** S.4563-A(Johnson) Subordinates liens for the storage of motor vehicles, boats and aircraft to preexisting 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. **(DO NOT OPPOSE)** The bill is pending in the Senate Consumer Protection Committee.

■ **Gift Cards and Gift Certificates** S.6218(LaValle) Prohibits expiration of gift cards and gift certificates. **(OPPOSE)** This bill is pending in the Senate Consumer Protection Committee.

■ **College Card Marketing** S.7069(Spano) Requires colleges and universities to offer new students a course in financial literacy and authorizes them to regulate on-campus marketing of credit cards. **(OPPOSE)** The bill is pending in the Senate Higher Education Committee.

■ **Gift Card Dates** S.7206(Fuschillo) An Attorney General bill, it prohibits expiration dates and fees on gift cards. **(OPPOSE)** It is pending in the Senate Consumer Protection Committee.

■ **Merchant Fee Disclosure** A.72(Lafayette) Requires merchants to disclose the compensation they pay credit card companies to process their receipts. **(OPPOSE)** The bill is pending on the Assembly Calendar.

■ **Attorney Account Fees** A.838(Greene) Prohibits banks from charging fees for certain attorney trust accounts. **(OPPOSE)** The bill is pending in the Assembly Codes Committee.

■ **Improper Debt Collection** A.1882(Norman) Creates a private right of action for improper debt collection practices. **(OPPOSE)** The bill is pending on the Assembly Calendar.

■ **Debt Collectors' Notice** A.3549 (Pheffer) Requires debt collectors to send consumers a written notice of their rights. **(OPPOSE)** The bill is pending on the Assembly Calendar.

■ **Loan Checks** A.4848(Pretlow) Prohibits 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 in the Assembly Banks Committee.

■ **Credit Protection Services** A.5148(Pheffer) Requires additional disclosures on credit protection services, including the fact that purchasing or refusing the insurance would have no impact on a bank's decision whether to grant credit. **(OPPOSE)** The bill passed the Assembly.

■ **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.

■ **Account Inactivity Fees** A.8808(Rules, Request of Bradley) Limits fees for bank account inactivity to five dollars. **(OPPOSE)** It has passed the Assembly.

■ **Bandit Barriers** A.9409(Nolan) Requires all bank teller stations or clerk windows at banks that operate ATMs in the State to be equipped with bandit barriers, bulletproof glass or plastic partitions. **(OPPOSE)** The bill is pending in the Assembly Banks Committee.

■ **Gift Cards and Gift Certificates** A.9752(Hayes) Prohibits the sale of gift cards and gift certificates that diminish in value due to dormancy. **(OPPOSE)** This bill is pending in the Assembly Consumer Affairs Committee.

■ **Universal Default** A.10212(P. Rivera) Prohibits a credit card issuer from increasing rates or fees because of a cardholder's failure to pay other debts in a timely fashion. **(OPPOSE)** The bill is pending on the Assembly Calendar, but has no Senate companion. It has gathered considerable press attention, however, and NYBA responded to numerous inquiries.

■ **Insurance Cancellation** A.10927(Rules, Request of Nolan) Fixes the date of cancelled bank-financed insurance and provides an electronic means for cancellation. **(OPPOSE)** This bill passed the Assembly.

■ **Payroll Card Limits** A.11010-A(Rules, Request of Nolan) Subjects bank-issued payroll cards to restrictions and limits. **(OPPOSE)** The bill has been reported from the Assembly Banks to the Codes Committee.

■ **Lessor Liability II** A.11793(Rules, Request of Tokasz) Creates a New York Leasing Liability Fund to which all automobile lessors in the State would be required to belong. The fund would assess each member an amount sufficient to purchase insurance to cover all existing and potential claims against leased automobiles in the State, with the assessment capped at $75 per vehicle. All lessors contributing to the fund would be relieved of liability for their leased vehicles. **(OPPOSE)** The bill is pending in the Assembly Transportation Committee.

Trust Legislation

■ **Commissions of Fiduciaries** S.1485(DeFrancisco)/A.2614 (Kaufman) Authorizes commissions of fiduciaries other than trustees to be based on all property held in a fiduciary relationship other than solely on real property. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Judiciary Committee.

■ **Transfer-on-Death Securities** S.2294(DeFrancisco)/A.6639(Weinstein)/ Establishes the registration of transfer-on-death securities, similar to Totten trusts in bank deposits. **(SUPPORT)** The bill passed the Assembly and is pending on the Senate Calendar.

■ **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.

■ **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.

■ **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. **(SUPPORT)** 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

■ **Tax and Insurance Payment Notices** S.262(Skelos)/A.6245(Weisenberg) Requires mortgage lenders to notify borrowers of the date when tax payments and insurance premiums are due after an escrow account for such payments is closed. The bill would also give borrowers over age 64 the right to designate a third party to receive the notice and create a private right of action against lenders that failed to provide the notice. **(OPPOSE)** NYBA filed a memorandum in opposition to the bill -- pointing out that it would create confusion for borrowers, that banks may not be in possession of the information required and that the third parties to whom notice might be given have no obligation to pay taxes or insurance premiums. The bill is pending on the Senate Calendar and in the Assembly Ways and Means Committee.

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

■ **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 Committee and was held in the Assembly Consumer Affairs and Protection Committee.

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

■ **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 is pending in the Senate and Assembly Judiciary Committee.

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

■ **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.

■ **Real Estate Agent Definition** S.4371-A(DeFrancisco)/A.10528-A (DiNapoli) Expands the requirement of licensing as a real estate agent or broker for finding, referring or procuring real estate. **(DO NOT OPPOSE)** NYBA strongly opposed this bill, offering an amendment to protect traditional banking and trust activities. The amendment was accepted. The bill passed the Senate and is pending in the Assembly Judiciary Committee.

■ **Revising Notices of Pendency** S.5045-A(Volker)/A.6031-A (Schimminger) 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 Codes and Assembly Judiciary Committees.

■ **Licensing** S.6026-A(Maltese)/A.8064-A(Rules, Request of Seddio) Requires the licensing of individual employees as mortgage loan originators. **(OPPOSE)** This bill is pending in the Senate Banks and Assembly Codes Committees.

■ **Mortgage Copy** S.2286-A(DeFrancisco)/A.9181(Sweeney) Penalizes mortgagees for failing to forward a time- and date-stamped copy of a mortgage discharge within 30 days for recording. **(SEEKING AMENDMENTS)** NYBA filed a memorandum in opposition to the original proposal and is working with the sponsor on alternatives. The bill 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)** The bill is pending in the Senate Codes Committee.

■ **Mortgage Broker Licensing** S.4389(Farley) Imposes criminal penalties on unlicensed mortgage brokers. (**DO NOT OPPOSE)** The bill passed the Senate.

■ **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 Broker Education** A.7947(Greene) Imposes initial and continuing education requirements on mortgage brokers. **(DO NOT OPPOSE, IF AMENDED)** NYBA is working to ensure that employees of banks and their affiliates are not covered. The bill passed the Assembly.

Miscellaneous Legislation

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

■ **Short-form Power of Attorney** S.991(Trunzo)/A.9669(LaValle) Requires all banks in the State to accept the short-form power of attorney and certain durable powers. **(SUPPORT, WITH AMENDMENTS)** The bill passed the Assembly and is pending in the Senate Banks Committee.

■ **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 in the Senate Finance Committee.

■ **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 is pending in the Senate Corporations, Authorities and Commissions Committee.

■ **Credit Union Sale 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.

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

■ **Public Deposits** S.3166(Parker)/A.11036(Rules, request of Tocci) Authorizes credit unions and thrift institutions to accept public deposits. **(OPPOSE)** The bill is pending in the Senate and Assembly Local Governments Committees.

■ **Local Government Investments** S.3249-D(Maziarz)/A.3873-C(DiNapoli) Authorizes local governments to invest in money market mutual funds, with counties with populations below 300,000 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 to potential key legislators. The bill is pending in the Senate Local Government Committee and was reported to the Assembly Rules Committee.

■ **Tax Allocation** S.4604-B(Skelos)/A.8500-A(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.

■ **Outsourcing** S.6040-C(Spano)/A.11682(Brodsky) Prohibits outsourcing by businesses receiving State developmental assistance. **(OPPOSE)** This bill passed the Assembly and is pending in the Senate Corporations, Authorities and Commissions Committee.

(Continued on next page)

■ **Money Transmitter Penalties** S.6380(Farley)/A.10872(Rules, Request of Nolan) A Banking Department bill, it imposes increased penalties on money transmitters for violations of the Banking Law. **(DO NOT OPPOSE)** It passed the Senate and has been reported from the Assembly Banks to the Codes Committee.

■ **Money Transmitters** S.6466(Farley)/A.10868(Rules, Request of Nolan) Authorizes money transmitters to engage in additional financial transactions. **(POSITION UNDER REVIEW)** A Banking Department bill, it is pending on the Senate and Assembly Calendars.

■ **Personal Removal** S.6468(Farley)/A.10871(Rules, Request of Nolan) A Banking Department bill, it increases authority for the Department to ban persons from involvement in financial services. **(POSITION UNDER REVIEW)** This bill is pending in the Senate Rules Committee and had its enacting clause stricken in the Assembly.

■ **Check Cashing Examination** S.6469(Farley)/A.10869(Rules, Request of Nolan) A Banking Department bill, it provides additional authority to examine and supervise check cashers. **(DO NOT OPPOSE)** This bill is pending in the Senate and Assembly Banks Committees.

■ **Refund Anticipation Loans** S.6866(Farley)/A.9961(Nolan) Regulates tax preparers who offer refund anticipation loans. **(OPPOSE)** This bill is pending in the Senate Banks Committee and on the Assembly Calendar.

■ **Check Cashers** S.6867(Farley)/A.11221(Rules, Request of Nolan) Clarifies licensing procedures for check cashers. **(DO NOT OPPOSE)** The bill is pending on the Senate Calendar and in the Assembly Banks Committee.

■ **IDA Accounts** S.6880(Alesi)/A.6530-A(Lafayette) Creates a new individual development account in the Excelsior Linked Deposit Program, and permits credit unions, among other financial institutions, to offer the account. **(OPPOSE)** NYBA filed a memorandum in opposition to the bill, pointing out that the new category of deposit is ill-defined and could eventually ruin the integrity of the Excelsior program. NYBA also noted the incongruity of New York placing taxpayer funds in institutions that are exempt from paying taxes, and pointed out that this account would be the first step in credit unions' gaining public deposits. After the bill was reported from the Senate Rules Committee, it was held at the sponsor's request. It is pending in the Assembly Small Business Committee.

■ **Bank Robberies** S.7123(Farley)/A.11213(Rules, Request of Nolan) A NYBA initiative, the bill creates the specific crime of bank robbery and increases the penalty. **(SUPPORT)** The bill passed the Senate and is pending in the Assembly Codes Committee.

■ **Credit Union Taxation** S.7126(Farley)/A.11212(Rules, Request of Nolan) Provides an exemption for State-chartered credit unions from sales and use taxes. **(OPPOSE)** The bill is pending in the Senate and Assembly Banks Committees.

■ **Exchange Rate Disclosure** S.7276(Mendez)/A.9653(Nolan) Requires that money transmitters prominently post currency exchange rates. **(DO NOT OPPOSE)** The bill passed the Assembly and is pending on the Senate Calendar.

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

■ **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.

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

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

■ **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 on the Senate Calendar.

■ **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.

■ **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.

■ **Discrimination Ratings** A.837(Greene) Requires rejection of branch, merger and other applications from banks that have been held to discriminate. **(OPPOSE)** The bill has been reported from the Assembly Banks Committee to the Assembly Codes 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 in the Assembly Rules Committee.

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

■ **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 arranged for several local bankers to contact the bill's sponsor.

■ **Bankruptcy** A.4996 (Kaufman) Increases exemptions in bankruptcy. **(OPPOSE)** This bill passed the Assembly.

■ **Excelsior Loans** A.5948(P.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)** This bill was reported from the Assembly Small Business Committee to the Ways and Means 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 Ways and Means Committee.

■ **New Linked Deposit Program** A.8677 (Rules, Request of Magee) Establishes a linked deposit program for loans for environmental compliance. **(SUPPORT)** This bill passed the Assembly.

■ **Outsourcing** A.10114 (Nolan) Requires employees of banking organizations responding to customer calls on toll-free telephone lines to identify their location by city and state, or if overseas, by city and country. **(OPPOSE)** This bill is pending in the Assembly Banks Committee.

■ **Holocaust Assets** A.10194-A,A.10195, 10196 (Nolan) Regarding the accounts and assets of holocaust survivors and victims and their families. **(NO POSITION)** These bills have passed the Assembly.

■ **Banking Department Foreign Offices** A.10296(Nolan) Requires the Banking Department to reexamine the overseas operations centers of banks with offices in New York. **(NO POSITION)** This bill passed the Assembly.

■ **Banking Board** A.10297(Nolan) Restructures the Banking Board to include four legislative appointees. **(NO POSITION)** The bill is pending on the Assembly Calendar.

■ **Outsourcing Penalty** A.10764 (Casale) would prohibit the outsourcing of jobs by businesses receiving state developmental assistance. **(OPPOSE)** The bill is pending in the Assembly Economic Development Committee. ▼

STATE REGULATORY DEVELOPMENTS

Banking Board Actions

1. Checking Account Fees — On May 13, 2002, NYBA petitioned the Banking Department to promulgate a regulation that would permit New York State-chartered banks to have the authority to charge a daily fee to checking accounts that do not have overdraft protection privileges and yet have a negative balance. The Office of the Comptroller of the Currency (OCC), through an interpretive ruling set forth at 12 C.F.R. 7. 4002, has already given national banks the authority to charge such a fee. This NYBA petition is consistent with its goal of obtaining parity between State-chartered and national banks.

NYBA has 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 issued a bulletin, as well, which raises potential compliance problems with this type of program.)

NYBA's discussions with the Department culminated in the 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 that may be charged to consumers. The Banking Department has forwarded its proposed regulation to the Governor's Office of Regulatory Reform. NYBA plans to continue its dialogue with the Department on this important issue.

Most recently, the OCC and other federal financial regulators issued proposed interagency guidance relating to the responsible disclosure and administration of overdraft protection services. (See Federal Regulatory Developments at page 44).

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

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

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

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

Recent Developments: In January 2004, Banking Department Superintendent Diana Taylor issued an Industry Letter regarding the ability of banks and trust companies to underwrite municipal revenue bonds pursuant to current law. The letter interprets New York Banking Law to permit New York State-chartered banks to underwrite and invest in municipal revenue bonds subject to the Banking Law's lending limits in Section 103. The letter states that a bank's investment, underwriting and loan exposure must be aggregated for these purposes, and notes that because the limitations in the OCC's Part 1 "also must be followed by New York State-insured banks, in most cases New York banks may only underwrite and invest in municipal revenue bonds to the extent permitted in the OCC's Part 1." At an appearance at NYBA's Annual Bankers' Day in Albany in January 2004, Superintendent Taylor stated that the Department intends to propose regulations later this year in response to NYBA's "Wild Card" petition to authorize State-chartered banks to engage in revenue bond

underwriting without limit to the same extent as national banks.

Background: On March 16, 2000, NYBA filed a "Wild Card" petition with the New York State Banking Department requesting that State-chartered banks be provided the authority to underwrite municipal revenue bonds given to national banks by the Gramm-Leach-Bliley Act (GLBA). The petition cited 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 noted 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.

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

5. Wild Card Petition: Appraisal Requirements — In late March 1999, NYBA received a response from the Banking Department to its July 28, 1998 "Wild Card" petition seeking amendments to Banking Board regulations pertaining to appraisal requirements for loans secured by real estate made by State-chartered entities. In its response, the Department stated its belief that a "Wild Card" amendment was not required. The Department proposed making regulatory amendments that would eliminate any reference to appraisals in the relevant Banking Board regulations (specifically Parts 80, 82 and 84), and issuing an interpretive letter stating that the requirement found in Section 103(4) of the Banking Law for a "signed certificate of an appraiser appointed by the board of directors" would be satisfied by a written "evaluation of real property collateral that is consistent with safe and sound banking practices." While NYBA believes that this proposal is a significant improvement over current regulatory requirements, on April 7, l999, NYBA submitted additional comments which, if adopted, would result in greater parity between national and State-chartered banks. To date, NYBA's requested amendments have not been submitted to the Banking Board for approval or for public comment. ▼

NYBA IN COURT

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

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

KEY POINT: This case is important for several reasons. In calculating damages, the Surrogate cited the Court of Appeals and Appellate Division decisions in a key precedential decision, *In re Janes*, but the Surrogate's calculation departed from the method utilized in *Janes*. The award in *Janes* included compound interest on the damages, but deducted dividends and sale proceeds as and when they were received. In this case, however, the Court compounded the interest throughout the nearly 30-year accounting period, but deducted the dividends and sale proceeds only at the end of the period, dramatically increasing the effect of the compounding. If this decision is affirmed, it could have a significant impact on the amount of damage awards. The outcome of this case is also important, in that it examines whether provisions in the governing instrument, which allow for non-diversification of trust assets and provide

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that the trustees are not to be liable for such non-diversification, violates the standard of prudence set forth in EPTL Section 11-1.7. While the Surrogate found that the clause in question in this case did not violate EPTL Section 11-1.7, if the Appellate Division were to disagree it could nullify the intent of grantors and create unanticipated liability for trustees.

Background: The Dumont Will included a clause which acknowledged that the estate would consist primarily of Eastman Kodak Company stock, and providing that "neither my executors nor my said trustee shall dispose of such stock for the purpose of diversification of investment and neither they or it shall be held liable for any diminution in the value of such stock." Relying on the language of the will, the Trustee did not diversify the assets in the trust until late in the 30 years of the accounting period. The Trustee did not sell the stock despite a significant decrease in the price of Kodak stock in the 1970s, because it concluded that Kodak remained a sound investment and that the income was more than adequate for the needs of the beneficiary. The Trustee contended that it was essentially prohibited from selling the Kodak stock under those circumstances, because to do so would have been diversification, which was prohibited under the terms of the will. The Trustee sold the stock in 2001 and 2002 when it determined that developments in technology and the global economy were bringing about a substantial change in Kodak's business. The Surrogate disagreed, finding that notwithstanding the language in the will, Chase should have sold the stock on January 31, 1974, focusing largely on the decline in the stock price and what it characterized as a "lack of viable hope of long-term gain.." When assessing damages in this matter, the court agreed that the proper calculation of damages must take into account capital gains taxes which would have been incurred in 1974 had the stock been sold at that time. The Surrogate then imposed statutory interest, compounded throughout the nearly 30-year accounting period. The Surrogate, however, deducted the dividends and sale proceeds only at the end of the period, thus dramatically increasing the effect of the compounding.

Outlook: Briefs have yet to be submitted in this appeal, so it remains far too early to predict an outcome.

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

Recent Developments: On March 29, 2004, the Appellate Division, Second Judicial Department reversed the decision of the Westchester Surrogate, (see Background page 29) ruling that a "fiduciary who petitions the Surrogate's Court for a final judicial settlement of its account, who properly serves citations on all interested parties as defined in the governing statutes, who otherwise follows the procedure prescribed by law, and who obtains a decree finally settling its account is fully entitled to the protection" of a decree discharging it from future liability. The court stated that if the Westchester Surrogate's position was upheld, it would mean that fiduciaries who serve in multiple capacities would "never have the ability to obtain judgments that have fully preclusive effect." On May 12, 2004 the Estate of Pamela Creighton filed a motion for permission to appeal to the Court of Appeals, which motion has since been granted. NYBA then filed an *amicus brief* motion for leave to file this brief on October 29, 2004. The court granted NYBA's motion on November 18, 2004 and NYBA then filed its *amicus curiae* brief. The Objectants-Appellants have since filed their reply briefs to NYBA's *amicus curiae* brief. All of the main briefs have been filed and oral arguments are scheduled for February 10, 2005.

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 determined finally by the decree settling the estate and trust beneficiaries who are made parties to the estate accounting do not have the right to raise any of those issues in a trust accounting proceeding. Therefore, if the Appellate Division is reversed and the Surrogate's decision ultimately stands, it could have a significant impact on the practices of the fiduciary industry and the scope of fiduciary liability. NYBA has been granted leave to file an *amicus* brief in this case. Briefs are due in January 2005.

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.

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.

Outlook: The Appellate Division decision was a very positive one for the trust industry. If the Appellate Division is ultimately reversed, however, it will have a significant impact on the roles of executors and trustees in New York. Moreover, among other things, it would likely undermine the finality of numerous accounting decrees where a fiduciary has acted in a dual capacity.

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

Recent Developments: In this case, the plaintiffs sought to recover interest on funds that they paid into a mortgage escrow account maintained by a federally-chartered, Office of Thrift Supervision (OTS) regulated thrift that was acquired by a New York State-chartered, FDIC insured commercial bank. The United States District Court, Southern District, dismissed the plaintiffs' complaint without leave to amend, finding that New York's law requiring the payment of interest on mortgage escrow balances was preempted in this case, and further finding that the choice-of-law language, which was included in the pre-printed Fannie Mae-Freddie mortgage contract, did not incorporate the New York escrow statutes as contract terms.

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

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

The Flaggs sought to recover interest on funds that they paid into an escrow account maintained by Yonkers for the purpose of paying certain items such as real estate taxes and insurance premiums. The Flaggs alleged that Yonkers' failure to pay interest was a violation of New York State statutes requiring the payment of interest on escrow

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accounts, as well as a deceptive trade practice, a breach of contract and conduct that gives rise to a claim of unjust enrichment. The Flaggs also alleged that if the Home Owners Loan Act (HOLA) regulations preempt state laws purporting to govern escrow accounts, Yonkers' failure to pay interest in reliance on the HOLA regulations constitutes a "taking" of their property for which they are entitled to compensation under the Fifth Amendment to the United States Constitution.

Atlantic moved to dismiss the complaint on the grounds that the HOLA Regulations explicitly preempt state laws purporting to govern escrow accounts unless the parties to the mortgage agree in writing that the lender will pay interest. The District Court agreed that the HOLA regulations preempt New York's escrow statutes. HOLA itself leaves any obligation to pay interest to the contract between the parties. The Court ruled that the choice-of-law language of the pre-printed Fannie Mae-Freddie mortgage contract did not incorporate the New York escrow statutes as contract terms. The Court also rejected the plaintiffs' contention that the payment of interest on escrow funds was a "settlement practice" under the Real Estate Settlement Procedures Act and therefore state escrow statutes were not preempted under RESPA's "savings" clause, which provides that state laws are not preempted to the extent they provide greater protection to the consumer. Finally, the District Court agreed that the plaintiffs could not assert a constitutional "taking" claim against the federal thrift because it was not a state actor but, rather, a private federally-chartered savings and loan association.

The District court dismissed the Flagg's complaint without leave to replead, and declined to address their motion for class certification as moot. The Flaggs filed a Notice of Appeal to the Second Circuit. Oral arguments took place in November 2004. The parties are awaiting a decision from the Second Circuit.

Outlook: If the District Court decision is overturned by the Second Circuit, it could have a significant impact on the lending industry. ▼

SIGNIFICANT LEGAL DECISIONS

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

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

The Department of Corporations appealed this ruling and final briefs were filed on January 16, 2004.

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 32). 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 that makes more than $1 million in first-lien residential mortgages in California

each year. Between 1996 and 2003 WFHMI held licenses to engage in real estate 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 vistorial 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 visitorial powers over WFHMI. While the Commissioner conceded that the OCC has exclusive visitorial power over national banks, he challenged the notion that the OCC has similar exclusive visitorial authority over operating subsidiaries of national banks. Wells Fargo argued that because the OCC is exercising federal visitorial 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 visitorial powers over WFHMI, and further agreed with the plaintiffs' contention that California's *per diem* statutes cannot be enforced against WFHMI as DIDMCA expressly preempts them.

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

In May 2004 the United States District Court for the District of Connecticut ruled in favor of Wachovia, thereby preventing the Connecticut State Banking Commissioner from applying state licensing requirements to Wachovia Mortgage. As these cases are being appealed, the impact remains to be seen.

Koons Buick Pontiac GMC v. Nigh (S. Ct. No. 03-377).

Recent Developments: On November 30, 2004 the United States Supreme Court ruled in an 8-to-1 decision, that damages for personal property loans under the Truth in Lending Act (TILA) are limited to a cap of $1,000 per claim.

Key Point: This decision puts to rest the question of whether a 1995 amendment to TILA had not only raised the statutory damages recoverable for TILA violations involving real property-secured loans, but had also removed the $1,000 cap on recoveries involving loans secured by personal property. This decision makes clear that the 1995 amendment left the limits prescribed for TILA violations involving personal property loans unaltered.

Background: In February 2000, a problematic used vehicle transaction resulted in litigation by the buyer/borrower against the vehicle dealer/lender for violation of TILA as well as a number of other claims. The District Court held that damages were not capped at $1,000 and the jury awarded the plaintiff over $24,000 in damages under TILA. On appeal, the lender argued that there is a statutory cap on damages - twice the finance charge, but not to exceed $1,000. The Fourth Circuit disagreed with the lender, and affirmed the lower court decision, holding that since the 1995 amendments to the statute, the $1,000 cap applied only to certain consumer lease arrangements. The Fourth Circuit held that the 1995 amendment not only raised the statutory damages recoverable for TILA violations involving real-property-secured closed end loans, it also removed the $1,000 cap on recoveries involving loans secured by personal property. The Court of Appeals also upheld the full uncapped damage award. Petition for *writ of certiorari* was filed on September 4, 2003 and oral arguments were held on October 5, 2004.

Outlook: This very positive decision for the banking industry, will result not only in a clear standard but will ensure that damages awarded under TILA will be capped on a broader array of claims. ▼

FEDERAL LEGISLATIVE DEVELOPMENTS

The 108th Congress adjourned on December 8. Although the House has passed numerous banking-related bills, which are detailed below, the Senate was largely inactive this year.

Deposit Insurance Reform

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

Senate Activity

Recent Developments: Virtually until the adjournment of the 108th Congress, negotiations continued between House Financial Services Committee Chairman Michael Oxley (R-OH) and Senate Banking Committee Chairman Richard Shelby (R-AL) on possible compromise legislation on deposit insurance reform. While the broad outline of the provisions contained in the House-passed bill, H.R. 522, was acceptable to the Senate leadership, negotiations ultimately broke down on the issue of coverage increases. The Senate, backed by the Treasury Department and Federal Reserve Board Chairman Alan Greenspan, opposed any coverage increase (with the possible exception of future indexation of deposit insurance coverage for inflation), while the House pressed for broader coverage increases.

NYBA's Policy Committee and Board of Directors has reaffirmed its support for deposit insurance reform, including increases in the general deposit insurance limit as well as specific coverage increases for municipal deposits and certain retirement funds. NYBA plans to continue to work with the Ohio Bankers Association in the 109th Congress to seek enactment of deposit insurance reform that includes such coverage increases.

Bankruptcy Reform

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

Recent Developments: Although substantive bankruptcy reform bills have passed both Houses of Congress by overwhelming margins, the single issue of restricting access to bankruptcy for the perpetrators of violence against abortion clinics held up final action on the bill. The House of Representatives once more passed broad bankruptcy reform legislation in January 2004, this time by a vote of 265 to 99, attaching the bill to a Senate-passed bill (S.1920) that would extend the family farm bankruptcy provisions of Chapter 12 of the Bankruptcy Code. The House also requested a conference with the Senate. However, the Senate was not willing to take up broader bankruptcy reform legislation without consideration of the Schumer-Hyde amendment to prevent perpetrators of abortion clinic violence from discharging legal damages through the bankruptcy process. New York Democratic Representatives Tim Bishop (Suffolk), Carolyn McCarthy (Nassau) and Joe Crowley (Queens) joined all voting New York Republicans in supporting final passage, while an unusually large number of non-voters included Reps. Gary Ackerman (D-Queens), Steve Israel (D-Suffolk), Greg Meeks (D-Queens), Tom Reynolds (R-Erie), and Louise Slaughter (D-Monroe)

Although negotiations on bankruptcy reform continued, no breakthroughs occurred and the issue will need to be revived in the 109th Congress. In fiscal 2004, however, the number of bankruptcy filings began to decline, a trend the banking industry hopes will continue.

The President also signed S.2864, a bill to renew authorization for Chapter 12 bankruptcy protection for farmers, separate from the overall bankruptcy reform bill. Chapter 12 expired on January 1, 2004 and was renewed retroactively to that date. Its new expiration date is June 30, 2005.

Real Estate Brokerage & Management

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

Recent Developments: As late as November, real estate brokerage interests pushed for a permanent ban on bank involvement in brokerage as part of the federal appropriations process. Legislation that had been reported from the Senate Appropriations Committee, but not considered on the Senate floor, contained such a permanent ban, while the House Appropriations Bill, which passed the full House in September, contained a one-year extension of the current moratorium (then scheduled to expire on September 30). NYBA joined with the national trade groups in opposing making the moratorium permanent, and the omnibus appropriations bill finally adopted by Congress in December and signed by the President shortly thereafter simply extended the moratorium until the end of the federal fiscal year, September 30, 2005. NYBA will continue to work to eliminate the moratorium.

In addition, during debate on the bill in the House, a strong effort was made, opposed by NYBA, to ban the use of Matricula Consular cards and similar forms of identification issued by foreign governments in complying with the PATRIOT Act and other "know your customer" rules. After an amendment

to ban the use of the cards was adopted in an Appropriations Committee Subcommittee and survived efforts to eliminate it in full Committee, NYBA joined with the national banking trade groups in opposition to the ban. The Association contacted every member of the New York Congressional delegation. When the Appropriations bill was considered on the floor of the House of Representatives, the House voted to adopt an amendment endorsed by NYBA that eliminated the restriction. NYBA supported the use of the *Matricula Consular* card, and similar foreign forms of identification, as an optional form of bank identification. The amendment, offered by Financial Services Chairman Michael Oxley (R-OH) and Ranking Member Barney Frank (D-MA), was approved on a 222-177 vote. Also approved, on a vote of 360-37, was an amendment by Rep. Sue Kelly (R-Westchester) to increase funding for the Financial Crimes Enforcement Network (FinCen).

Background: The omnibus appropriations bill enacted early in 2004 extended the moratorium on approval of authority for national banks and financial holding companies to offer real estate brokerage and management services until September 30, 2004. However, as budget discussions progressed, realtors attempted to extend the moratorium further, or even make it permanent.

Stand-alone legislation to prohibit rulemakings to authorize national bank and financial holding company involvement in real estate brokerage also continued to gather additional co-sponsors, with 255 sponsors (including 18 New Yorkers) in the House for H.R.111 and 28 co-sponsors, including New York's Hillary Rodham Clinton, in the Senate.

Small Business Administration (SBA)

Recent Developments: In September Congress passed and the President signed a bill (H.R. 5008) agreed to by unanimous consent that extended several expiring loan programs of the Small Business Administration until September 30, 2004. This gave Congress additional time to reauthorize the programs. However, Congressional and Administration negotiators ultimately could not agree on a continuing subsidy level for the 7(a) program. NYBA supported extending the SBA's 7(a) and 504 loan guarantee programs at their current levels. The Senate Appropriations Committee included a $70 million appropriation for the 7(a) loan program in the Commerce, Justice, State and Judiciary Appropriations bill. The House-passed bill had $79 million. However, negotiators could not reconcile the two bills.

In response, on October 1, the Small Business Administration (SBA) increased fees for the 7(a) guaranteed loan program. The record growth in the 7(a) program in recent years caused the SBA to recommend reform legislation, and the Administration moved the program to a "pay as you go basis." An amendment was included in both House and Senate appropriations bills that would have returned the fees to the lower level, but the appropriations legislation was not enacted. Among the fee increases were a guarantee fee rise from 1% to 2% and a reduction in the guarantee amount from $1.5 million to $1 million.

When negotiations on the final omnibus appropriations bill were completed in November, no agreement could be reached on appropriations for the Small Business Administration's 7(a) guaranteed loan program. As a result, the program remains funded by the increased fees adopted by the SBA on October 1. The higher fees seem likely to drive many borrowers to the SBA 504 program.

Background: In January 2004, the SBA shut down the 7(a) SBA loan guarantee program for an indefinite period. After announcing the first week in January that it would cap the size of loan guarantees for 7(a) loans at $750,000, effective January 8, 2004, the SBA was overwhelmed with new applications. The Administration announced that: "Applications that have not been processed will be returned to the lender if SBA has possession of the original loan application. If the application was faxed to a processing center, SBA will cancel the application, but will not send the application back to the lender." NYBA and the national banking trade groups worked with Congress and the Administration to restore the loan guarantee program, and in mid-January, the SBA received an emergency authorization to resume making small business loans guaranteed under the 7(a) program. However, loan guarantees were capped at $750,000 (down from the normal $2 million) and the emergency authorization was insufficient to make loans beyond the end of January.

As soon as Congress returned on January 20, 2004, House Small Business Committee Chairman Don Manzullo (R-IL) announced a plan to restore the

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SBA's 7(a) guaranteed loan program to its full guarantee level without raising fees on small businesses. The proposal, which was embodied in legislation shortly thereafter, would have restored the $1 million loan guarantee (from the current $750,000) and allowed loans in excess of the guarantee to be piggybacked on. The proposal would also have enhanced the SBA Express loan guarantee program and assured that the 7(a) program could continue to operate at its full guarantee level at least through next year.

The SBA then unveiled its proposal to restore the 7(a) loan guaranty program to full strength. Under the proposal, the Express Loan Guaranty Program, currently subject to a $250,000 statutory limit, but with a guaranty percentage of only 50%, rather than the up to 85% available under the regular 7(a) program, would be greatly enhanced and many loans that traditionally would have entered the regular 7(a) program would be channeled into it. NYBA expressed concern that the proposal would not provide adequate security for many larger bank SBA-guaranteed loans, and continued to work toward a solution.

As negotiations for a longer extension of the SBA loan guarantee programs continued, both Houses passed a stop-gap measure to maintain full funding for the 7(a) program and to extend the 504 program. The bill, H.R.3915, maintained existing SBA loan programs, the 504 program until May 21 and the 7(a) program until April 2. The programs had been scheduled to expire on March 15. NYBA wrote House Speaker J. Dennis Hastert (R-IL), with copies to all members of the New York delegation, urging that the 7(a) program be permanently restored to full funding.

NYBA worked with the national banking trade groups and New York Congressional offices on the 7(a) program, urging that any new fees not adversely affect small business borrowers. However, H.R.4062 was characterized as a short-term solution to the growing demands on the 7(a) program.

In April 2004, President Bush signed into law legislation to restore the full loan limits for the SBA's 7(a) guaranteed loan program. The new law (H.R.4062, co-sponsored by New York Representative Nydia Velazquez (D-Brooklyn), ranking member of the House Small Business Committee) eliminates the current loan cap of $750,000; provides the SBA more than $12.5 billion in additional lending authority; and extends both the 7(a) and 504 loan programs through the end of the current fiscal year, September 30, 2004. The law increases the ongoing fee for 7(a) loans from 25 to 26 basis points; imposes a new upfront fee of 70 basis points on piggy back or combination loans; permits the SBA to retain 25 basis points of the traditional lender fee for loans under $150,000; permits lenders to use the SBA Express Program, currently limited to loans up to $250,000, for loans up to $2 million; and raises the loan guarantee limit from $1 million to $1.5 million with a new 375 basis point fee for loans above the old guarantee limit. However, many of the issues that caused the 7(a) loan program to be restricted or shut down for part of the year remained. NYBA continued to work with the national banking trade groups to maintain full funding for the program in the 2004-2005 fiscal year.

Expanded MMDA & Interest on Business Checking

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

Recent Developments: In the Senate, legislative consideration continues to be 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 disagree 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 2003 introduced S.1967, the Interest on Business Checking Act. The bill would immediately increase from six to 24 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 did not take any further action on this issue and it carried over to the 109th Congress.

Government Sponsored Enterprises (GSEs)

Recent Developments: The adjournment of the 108th Congress found GSE legislation unfinished. However, continuing accounting and governance issues at the GSEs, including the announcement by the SEC of a potential $9 billion loss due to accounting problems at Fannie Mae, assure that the issue will resurface next year. Both Chairman Shelby of the Senate Banking Committee and Chairman Oxley of the House Financial Services Committee have identified GSE reform as one of their most important agenda items for the 109th Congress.

Background: 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 in 2003 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 Shelby 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).

In February 2004, Senate Banking Committee Chairman Richard Shelby (R-AL) announced his intention to introduce legislation to move the regulation of government-sponsored entities (GSEs) to a new independent federal regulator. Addressing several of the key policy issues concerning the move, Sen. Shelby stated his intention that the regulator be outside of the Treasury Department, have jurisdiction over the Federal Home Loan Banks as well as Fannie Mae and Freddie Mac, and have the authority to set and change minimum capital standards. New York Federal Home Loan Bank President Al DelliBovi, speaking with NYBA's Board of Directors during the association's Annual Meeting in Albany in January, stated the preference of the New York Bank for just such a regulator.

The Senate Banking Committee held several hearings on the appropriate regulation of Government-Sponsored Enterprises (GSEs) during which Federal Reserve Board Chairman Alan Greenspan expressed concern with regard to potential safety and soundness issues attendant on the level of outstanding debt securities issued by Fannie Mae and Freddie Mac. Chairman Shelby indicated that he did not entirely share those concerns and stated his intention to draft legislation to address both regulatory and safety and soundness issues regarding the GSEs.

On March 26, Chairman Shelby presented legislation to regulate the housing GSEs (Fannie Mae, Freddie Mac and the Federal Home Loan Banks). The bill, the Federal Housing Enterprise Regulatory Reform Act of 2004, establishes a new, independent federal regulatory agency, replacing the Federal Housing Enterprise Oversight and the Federal Housing Finance Boards. The agency would have the authority to set safety and soundness standards, including capital requirements, establish the mission of the GSEs and place the GSEs into receivership if they fail. However, the bill did not move.

OCC Preemption

Recent Developments: The OCC's final rule amending parts 7 and 34 of its regulations makes clear that, pursuant to the National Bank Act, state laws regulating loan terms, imposing conditions on lending and deposit relationships, and requiring state licenses are preempted as to national banks. The

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regulation also includes two new provisions designed to prevent abusive or predatory practices, stating that national banks may not make consumer loans based predominantly on the foreclosure value of a borrower's collateral and further providing that national banks shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act in connection with their lending activities. In its comment letter on the OCC's initial proposal regarding these amendments to parts 7 and 34, NYBA stated its strong support of the dual banking system and noted its belief that the proposed clarifying provisions were consistent with this longstanding policy and could have a positive impact on both nationally and State-chartered banking institutions in New York – particularly in light of New York's "wild card" law. The OCC's final regulation regarding its visitorial powers clarifies that the OCC has exclusive authority to examine, supervise and regulate national banks and that state officials are not authorized to do so, except where another federal law authorizes them to do so.

Significant efforts were made in 2004, both in Washington, D.C. and several state Legislatures, to overturn the OCC regulations. The House Financial Services Subcommittee on Oversight and Investigations, chaired by New York Rep. Sue Kelly, held a hearing in January on the new regulations at which New York State Superintendent of Banks Diana Taylor testified that the rules put the dual banking system at risk. Additional hearings were held through the winter and spring in the Senate Banking and House Financial Services Committee. In April 2004, Senator John Edwards (D-NC) introduced two resolutions that, if approved by the Congress and signed by the President, would have had the effect of overturning the OCC regulations. Additionally, legislation to overturn the OCC regulations was introduced in the House of Representatives in the spring. Although no action was ultimately taken in the 108th Congress to overturn the OCC regulations, the issue may return in the 109th Congress. For additional background information, see the July 6, 2004 edition of the *Banking Journal.*

Miscellaneous

• In June 2004, Congress passed a NYBA-supported bill, S.2238, the **Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004**. President Bush signed the bill in June, which became effective immediately. S.2238 reauthorizes the National Flood Insurance Program (NFIP), administered by the Federal Emergency Management Agency (FEMA), through 2008. The Program had been scheduled to expire on September 30. Reforms in the law will address the problem of repetitive loss properties through flood mitigation.

• President Bush in September 2004 signed into law a bill (H.R. 1308) to extend a number of **tax provisions** that expire at the end of 2004. In addition to extending the 10% tax bracket, relief from the marriage penalty tax and $1,000 per child tax credit, the bill also retroactively renews $13 billion worth of corporate tax benefits that expired in 2003, including the research and development tax credit, expensing of "Brownfields" remediation costs, authority to issue, and advance refunding of, New York Liberty Zone bonds, Archer Medical Savings Accounts, disclosure of tax information for student loan repayment, and disclosures relating to terrorist activities.

• Congress also passed in October and President Bush signed into law H.R. 4520, the **tax reform bill** passed at the end of the Congressional session. The bill provides $142 billion in new, mostly corporate, tax benefits and eliminates certain tax credits for manufacturers that were found illegal by the World Trade Organization. Among the provisions applicable to banks are an expansion of eligibility for Subchapter S status, favorable language on the treatment of domestic and foreign leases with tax-exempt entities and incentives for employee retirement savings.

The Subchapter S expansion provisions would treat up to three generations of one family as a single shareholder, increase from 75 to 100 the maximum number of allowable Subchapter S shareholders, include IRAs as eligible shareholders, and exclude investment securities income from the passive income test. The bill also enhances eligibility criteria for Renewal Communities and the New Markets Tax Credit; temporarily taxes income repatriated from foreign operations at 5.25%; and allows taxpayers to deduct state and local taxes instead of income taxes for 2004 and 2005.

• President Bush signed into law H.R. 5186, the **Taxpayer-Teacher Protection Act of 2004**, a bill which is intended to eliminate the fixed 9.5% guaranteed interest rate for certain holders of student loans and replace it with a floating rate. The bill also increases

allowable debt forgiveness for certain teachers in high poverty schools.

• In December, Congress passed and President Bush signed legislation (S. 2845) to **reform the nations' intelligence community** and implement the recommendations of the 9/11 Commission. Among other provisions, the bill would facilitate the flow of information with regard to terrorism financing between government agencies and the private sector and strengthen anti-money laundering laws.

• President Bush signed S. 150, the **Internet Tax Nondiscrimination Act**, which reinstates the moratorium on state and local taxation of the Internet, which had expired on November 1, 2003. The new moratorium is retroactive and expires on November 1, 2007.

• In October, the House passed H.R. 5011, legislation designed to protect military personnel from abusive, misleading or inappropriately high-priced **financial products and services**. While the bill was not considered in the Senate, it is expected to receive attention next year.

• In addition, the House passed H.R. 4634, a bill strongly supported by NYBA that would extend until 2007 the **Terrorism Risk Insurance Act**, due to expire next year. The bill increases mandatory risk retention and insurer deductibles and was co-sponsored by Rep. Sue Kelly (R-Westchester) and Steve Israel (D-Suffolk). NYBA will pursue this legislation in the 109th Congress when the Treasury Department is expected to release its recommendation on whether the law should be extended. A GAO study has already recommended extension.

• The House passed several other bills that were not taken up in the Senate, but on which further action is expected. They include:

- H.R. 3574, a bill to restrict the ability of the **Securities and Exchange Commission** to require that employee stock options be expensed. Only options granted to the five highest paid employees of larger public companies more than three years old would not be subject to the restriction. A similar bill (S. 1890) was pending in the Senate. In December FASB finalized the stock option rule.
- H.R. 4600, the **Junk Fax Prevention Act** of 2004, that would restore the "established business relationship" exception to the prohibition on unsolicited commercial faxes which the FCC adopted in 2003, also passed the House. Absent this legislation, the prohibition, scheduled to go into effect on January 1, would significantly limit the ability of businesses to communicate with their established customers. The Senate Commerce Committee approved a similar bill (S. 2603), but the FTC delayed implementation of the rule.
- H.R. 4571 the **Lawsuit Abuse Reduction Act**, requiring courts to sanction lawyers who engage in frivolous litigation. A filibuster in the Senate prevented consideration of the bill.

• Senate Democrats completed **Leadership and Committee assignments** in December for the 109th Congress that begins in January. New York Senator Charles Schumer (D), deciding to forego a rumored campaign for Governor in 2006, was elected Chairman of the Democratic Senatorial Campaign Committee - a post that will make him a senior leader of the Democrats in the Senate - and appointed to a coveted spot on the Senate Finance Committee, the first New Yorker on the Committee that controls taxes, social security, Medicare and other critical issues since the retirement of the late Sen. Daniel Patrick Moynihan in 2000. Sen. Schumer retains his positions on the Banking Committee, Judiciary Committee, and Rules Committee. Senator Hillary Rodham Clinton remains on the Armed Services Committee, Health, Education, Labor and Pensions Committee, and Environment and Public Works Committee, and was added to the Aging Committee.

In the House, Representative Tom Reynolds (R-Williamsville) was re-elected Chairman of the National Republican Congressional Committee, the fourth ranking leadership position in the House. Representative Louise M. Slaughter (D-Monroe) was chosen Ranking Member on the Rules Committee.

Two open seats in the House of Representatives were filled in the November election. State Senator John R. (Randy) Kuhl, Jr. has retained the 29th Congressional District seat of retiring Congressman Amo Houghton for the Republicans, while in the Buffalo area, Assemblyman Brian Higgins (D) took the 27th Congressional District seat of retiring Rep. Jack Quinn (R) for the Democrats. Both Representatives-elect will receive their Committee assignments when the Congress reconvenes in January 2005. ▼

FEDERAL REGULATORY DEVELOPMENTS

Overdraft Protection

At the federal level, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System, the FDIC, the Office of Thrift Supervision (OTS), and the National Credit Union Administration have issued proposed interagency guidance relating to the responsible disclosure and administration of overdraft protection services. The proposal identifies concerns raised by institutions, financial supervisors and the public regarding such programs. To address these concerns, the proposal: (i) seeks to ensure that adequate policies and procedures are adopted to address the risks associated with overdraft protection services; (ii) alerts institutions offering these services to the need to comply with all applicable federal and state laws; and (iii) sets forth examples of best practices. (The deadline for comments was August 6, 2004. To date, a final version of this interagency guidance has not been released.) Additionally fair lending issues have been raised regarding the manner in which customers are invited to participate in this type of program. There have even been concerns raised in several jurisdictions regarding the possible criminality of some of these programs if they are deemed to be encouraging consumers to overdraft their accounts.

Importantly, however, the United States Supreme Court ruled in April of 2004, that over the limit fees can reasonably be characterized as a penalty for defaulting on a credit agreement, and thus are not included within the "finance charge" definition in Regulation Z. In its decision, the Court held that the statutory language in the Truth in Lending Act (TILA) was ambiguous, and thus the Federal Reserve Board's regulation implementing TILA is binding in the courts. In upholding the Regulation Z interpretation, the Court reinforced the deference often given to regulations, saying that "judges ought to refrain from substituting their own interstitial lawmaking for that" of the 'Federal Reserve Board.

Gift Cards

The Federal Deposit Insurance Corporation (FDIC) has published for comment a proposed rule that would clarify the meaning of "deposit" as that term relates to funds at insured depository institutions underlying stored value cards. The proposal is designed to provide guidance as to when funds underlying stored value cards will satisfy the definition of "deposit" at section 3(l) of the Federal Deposit Insurance Act.

The FDIC sought comments on whether it should adopt a regulation under which funds would be "deposits" unless "(1) the institution itself has issued the cards against a pooled "reserve account" representing multiple cardholders; and (2) the institution maintains no supplemental records or subaccounts reflecting the amount owed to each cardholder." The deadline for comments was July 15, 2004. The FDIC is currently considering the comments it received. (See State Legislative Developments at page 5 for background on what is happening at the State level regarding the gift card issue.)

Privacy - Disposal of Consumer Information/ Identity Theft

President George W. Bush signed the Fair and Accurate Credit Transactions 'Act of 2003 (FACT Act). The FACT Act made permanent the FCRA's provisions that preclude states from legislating in several key areas affecting information sharing. (Without the passage of the FACT Act, these provisions would have expired at the end of 2003.) The legislation also prohibits sharing non-public personal information with affiliates unless customers, with certain important exceptions, have been provided a right to opt out. The legislation additionally includes enhanced identity theft notification and credit history repair procedures, and provides new disclosure requirements for credit reports and credit scores. It also gives all consumers the right to free copies of their credit reports.

Subsequent to the passage of the FACT Act, the federal bank and thrift regulatory agencies have announced several interagency proposals implementing various sections of the Act. The agencies, however, announced on November 24, 2004, that institutions will not have to comply with provisions requiring rulemaking or guidance until such rulemaking or guidance is finalized. Provisions covered by this announcement include red flags, disposal of consumer report information, risk-based pricing, accuracy and integrity, consumer disputes of furnisher information, and reconciling addresses. Provisions not requiring the publication of existing rules or guidance took effect December 1, 2004. However, the agencies have said that they will take into account the diffi-

culties associated with developing compliance procedures, "together with all relevant circumstances, including the good faith efforts made by each institution to comply with these provisions when considering whether to bring enforcement actions".)

In this regard, the agencies on December 21, 2004 announced final interagency rules to require financial institutions to adopt measures for properly disposing of consumer information derived from credit reports. The rules, which implement Section 216 of the FACT Act, take effect on July 1, 2005. They require institutions to make modest adjustments to their information security measures.

The Federal Trade Commission also has issued a final rule on the proper disposal of consumer report information and records. The rule, which requires covered entities to take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal, takes effect on June 1, 2005. The FTC Disposal Rule applies to any person over whom the FTC has jurisdiction that, for a business purpose, maintains or otherwise possesses such consumer report information. The standard for disposal is flexible, in order to allow covered entities to determine what measures are reasonable based on the "sensitivity of the information, the costs and benefits of different disposal methods, and relevant changes in technology over time."

The Federal Trade Commission in November also released final regulations on some of the identity theft provisions of the Fair and Accurate Credit Transactions Act (FACT Act). The rules provide further definition of the terms "identity theft" and "identity theft report"; specify the duration of active duty alerts; and set forth the appropriate proof of identity needed by consumers to block fraudulent trade lines in their consumer reports, place or remove fraud or active duty alerts, or truncate their Social Security number in their file disclosures. The regulations were effective December 1, 2004.

Community Reinvestment Act (CRA) Regulations

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

Recent Developments: In a surprising divergence of views, the Office of Thrift Supervision in July voted to increase to $1 billion, irrespective of holding company affiliation, the size of thrift institutions that would qualify for the streamlined CRA examination. Late in August, the FDIC voted to publish for 30-days' comment a proposed regulation that would increase to $1 billion (from the current $250 million) in assets the size threshold for State non-member banks to be eligible for the streamlined Community Reinvestment Act examination. The proposal would also eliminate the current provision that precludes banks of any size that are affiliated with holding companies with more than $1 billion in assets from taking advantage of the streamlined examination. The proposal would also impose a new standard requiring examination of community development lending, services and investments as part of the streamlined exam for banks with assets between $250 million and $1 billion. The OCC and Federal Reserve Board had already indicated their intention not to increase the size qualification for the streamlined examination, creating a significant potential disparity.

The Office of Thrift Supervision then requested comment on a proposal to modify the definition of community development in its CRA regulations to include responding to natural disasters and to encourage lending, investments and services in underserved rural communities.

In response to strong opposition from community groups to its proposal, the FDIC in September extended the comment period from September 20 to October 20. NYBA filed its comments with the FDIC strongly supporting the proposal and noting that the proposal was not an exemption from the CRA law or examination. The Association pointed out that, even at the higher threshold, more than 98% of the banking assets in New York State would continue to be subject to the full-scope CRA exam, but that the exam imposes significant compliance burdens on the banking industry. NYBA also supported the FDIC's proposal to include activities in rural areas in the community development standard for CRA exams and did not object to the imposition of a required community development test for banks from $250 million to $1 billion in assets subject to the streamlined examination. In a grassroots contact notice, the Association also urged bankers throughout the State to write the FDIC in support of the proposal.

The FDIC and OTS are now considering the comments they received.

Background: In January 2004, the four federal bank regulatory agencies proposed significant changes in CRA. Among other provisions, the proposal

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would permit banks of up to $500 million in assets (from the current $250 million), irrespective of the size of their holding companies, to use the streamlined small bank CRA examination. NYBA has urged that banks up to $1 billion in assets be classified as small banks for CRA purposes and the ABA has joined NYBA in making this case. In addition, the release proposed that evidence of certain discriminatory, illegal or abusive lending practices could be used as factors in considering bank CRA ratings.

NYBA's CRA Committee, Legislative and Regulatory Policy Committee and Board of Directors reviewed the proposal, and in April 2004, NYBA filed comments with the four federal bank regulatory agencies supporting an increase in the asset size of banks that qualify for the streamlined bank examination currently available only for banks with assets under $250 million in holding companies that do not exceed $1 billion in assets. NYBA urged that the size limit be increased to $1 billion and strongly supported the elimination of the $1 billion holding company asset limit. NYBA noted that a $1 billion standard would continue to subject more than 98% of the bank assets in New York to the more rigorous full-scope CRA examination, while permitting an additional 70 insured financial institutions to be reviewed under the streamlined examination procedure. NYBA also urged that, before approving an amendment to the regulations that would permit the agencies to use evidence that institutions engaged in certain discriminatory, illegal or abusive credit practices to adversely affect the institution's CRA rating, the agencies adopt appropriate and specific guidelines to advise institutions what conduct will result in an adverse rating impact. In addition, NYBA urged that the agencies minimize the burden of the public CRA files and include "modifications" in the types of real property loans eligible for CRA credit.

Risk-Based Capital

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

Recent Developments: In October 2004, Federal banking regulators issued proposed supervisory guidance with a request for comments on internal ratings-based systems for retail credit risk for regulatory capital. Issued in anticipation of the publication next year of a proposed rulemaking on the Basel II risk-based capital system, the proposal complements proposed supervisory guidance issued for comment last year on credit risk requirements and the Advanced Measurement Approaches for computing operational risk capital requirements. The proposed retail guidance includes many supervisory standards that may ultimately become part of the proposed minimum capital requirement to be issued next year. Although the proposal will affect only large and internationally active banks, other qualifying banks may choose to opt in to the arrangement and competition with banks not covered by the new requirements may be affected. NYBA has established a new Chief Financial Officer Committee to review these and similar proposals.

Background: In June 2004, the Basel Committee on Banking Supervision released its document "International Convergence of Capital Measurement and Capital Standards: A Revised Framework." The Framework (also known as Basel II), which has been a continuing project of the Basel Committee, with participation by the United States banking and thrift agencies (Agencies), was designed to secure international convergence on revisions to regulations and standards governing the capital adequacy of internationally active banking organizations. Basel II will form the basis on which the Agencies and representatives of the other Basel Committee member countries, develop proposed revisions to existing capital adequacy regulations and standards.

The Agencies anticipate that only a small number of large, internationally active United States banking organizations will be required to use Basel II. Prior to implementation, it is expected that banks using the Basel II-based regulations will first be subject to a year of "parallel running," in which they use advanced approaches in tandem with the current risk-based capital regime, beginning in 2007. The Agencies anticipate that Basel II will become fully effective in the United States in January 2008. The Agencies are also reviewing potential revisions to the risk-based capital standards by which banks not subject to Basil II are governed. They seek to assure that smaller banks are not subject to competitive disadvantages as a result of Basel II.

Accounting for Loan Participations

Recent Developments: On July 27, 2004, the Financial Accounting Standards Board (FASB) reversed its decision to preclude loan participations from receiving accounting treatment as "sales." Under its new decision, loan

participations may continue to qualify as sales so long as 1) it would be highly remote that any set-off rights could be exercised, and 2) the transaction is judged to be a true sale at law. The FASB Board met in August to discuss further clarification of these two conditions. At that meeting, the Board reaffirmed its decision to reverse its staff and permit loan participations to continue to be accounted for as sales so long as the sales meets the criteria of true sales at law. It then decided to issue specific rules defining a "true sale at law." It is considering eight items in the definition, including: no guarantee of repayment by the selling bank; the participation matures with the asset sold; repayment passes through directly to the purchaser with the exception of servicing fees or retained interests; the participation purports to be a sale; lead bank's actions as agent for participants circumscribed; no commingling of collections by the lead bank for any significant period of time; minimal discretion in the lead bank as servicer; and benefits of set-off are passed through pro rata to the participants. Weight would be provided in the definition to each of the items, with the existence of a greater number tending to confirm the existence of a true sale at law. NYBA is working with the ABA to respond to FASB's concerns.

Background: The Financial Accounting Standards Board (FASB) is reviewing whether loan participations can continue to qualify for accounting treatment as sales. The issue is critical to many banks because of lending limit, capital requirement, credit risk and customer retention concerns. On February 11, 2004, FASB made a tentative decision that, because of the rights of setoff in the event of the default of a purchasing bank and the FDIC's right, in some circumstances, to require buyback of loan participations sold, loan participations may not be effectively "isolated" from the selling bank. However, responding to strong concerns expressed by the banking industry, FASB decided in March 2004 to delay consideration of the proposal to eliminate the accounting treatment of loan participations as sales. It is seeking input from the banking industry on the appropriate accounting treatment of participations. NYBA joined an ABA-formed working group to provide input on this important issue.

In May 2004, federal bank regulators filed a joint letter with FASB on the accounting standards governing loan participations. The regulators stated that a change in current FASB rules on loan participations "would result in financial reporting that is less relevant and less transparent." FASB now plans to issue a proposal on the issue this Summer.

Anti-tying Regulations

On August 29, 2003, The Federal Reserve Board 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, 2003, 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.

Miscellaneous

- In late July, the Federal Reserve Board released final amendments to Regulation CC to implement the **Check Clearing for the 21st Century (Check 21) Act**. The amendments outline the Check 21 Act requirements that apply to banks, provide model disclosures and notices relating to substitute checks, and set forth bank endorsement and identification requirements for substitute checks. In its comment letter to the Federal Reserve Board on this issue, NYBA sought an exception to the requirement in the proposal to encode substitute checks in MICR ink. The request was made in order to address a problem unique to New York and Massachusetts, where state law requires that banks must offer a consumer account where the paid original checks are returned with the customer's statement. The commentary on the final rule addresses this concern. The rule became effective October 28, 2004.

- Immediately prior to the new Check 21 law becoming effective on October 28, the Federal Reserve issued new **guidelines for non-imageable items**, such as return items, forward

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items and savings bonds. Failure to follow the new guidelines will result in the depositor assuming all liability for any subsequent losses. The Fed also released two new consumer guides yesterday on changes resulting from the new law. *The Consumer Guide to Check 21 and Substitute Checks* provides information on the effects of the new law and how to resolve any problems that may arise from the receipt of substitute checks. *What You Should Know About Your Checks* provides a broader outline of how check processing has changed.

• The Federal Reserve Board has begun the process of reviewing Regulation Z implementing the **Truth-in-Lending Act** by issuing a notice of proposed rulemaking with regard to the provisions of Reg Z that cover open-end or revolving credit. The proposal requests comment on the format and content of credit disclosures and the substantive consumer protections provided under the Regulation. Comments are due by March 28.

• The Federal Reserve Board requested comments on the adequacy of **debit card disclosures**. An issue that has generated considerable interest among New York Members of Congress, including Senator Charles Schumer and Representative Anthony Weiner, disclosure of the cost of a PIN-based debit transaction at the point of sale, has thus far appeared technologically impractical. The Fed is particularly interested in the distinction between PIN-based and signature-based point-of-sale debit transactions.

• In July, the Architectural and Transportation Barriers Compliance Board (The Access Board) published final revised guidelines for compliance with the **Americans with Disabilities Act and Architectural Barriers Act**. The guidelines define appropriate access to buildings, facilities and services required for compliance with the Acts. Among other provisions are explicit guidelines on access to ATM machines (Section 707 of the guidelines), including a new requirement that all ATM machines be speech enabled and provide the same opportunity for privacy for all individuals. The new guidelines replace the guidelines that have been in effect since 1991 and became effective on September 21, 2004. The Department of Justice issued an advance notice of proposed rulemaking in late October 2004, asking for comment on procedures necessary to implement the proposed guidelines. The comment period expires in January 2005.

• In August, FDIC Vice Chairman John Reich stated in an e-mail to American Bankers Association (ABA) President and CEO Don Ogilvie that the **Sarbanes-Oxley Act** contains no requirements for non-publicly traded financial institutions with assets under $500 million. Expressing concern that FDIC examiners may be misinterpreting the Act, Vice Chairman Reich reaffirmed that "there should be no insistence by FDIC personnel in the field that this act requires [non-public banks] to do anything. It doesn't."

• The **FDIC Board of Directors** voted in mid-November to maintain the deposit insurance premium assessment rates charged to insured banks and thrift institutions unchanged for the first half of 2005. The FDIC projected that the reserve ratio for the Bank Insurance Fund (BIF) (currently 1.33%) could decline slightly by mid-year 2005, but should remain well above the Designated Reserve Ration of 1.25%. The reserve ratio for the Savings Association Insurance Fund (SAIF) was projected to remain unchanged at 1.34%.

• In August, the ABA filed a letter, strongly supported by NYBA, with the Financial Accounting Standards Board (FASB) and its Emerging Issues Task Force, urging the EITF to take immediate action to postpone the application of EITF Issue 03-1, "**The Meaning of Other-Than-Temporary Impairment and Its Application to Certain Investments.**" At issue was whether debt securities that are below market must be permanently written down (through earnings). As a result of this and similar letters, FASB voted to delay the September 30 effective date of a proposal from its Emerging Issues Task Force (EITF) for debt securities. The agency also delayed the application of the proposal, titled the Meaning of Other-Than-Temporary Impairment and Its Application to Certain Instruments (EITF 03-1), for equity securities and securities based on foreign exchange.

In October, NYBA sent out a grassroots action alert to member banks to generate comment letters to FASB on the proposal. The request for comment letters explained that the issue is whether securities classified as available for sale (AFS) with market value below cost or book value must be permanently written down through earnings. NYBA is arguing that such securities should not be required to be permanently writ-

ten down as a result of changes in value that are due solely to interest rate fluctuations.

• The Federal Trade Commission (FTC) proposed a rule under the **Fair and Accurate Credit Transactions Act** intended to improve notices of consumers' right to opt-out of prescreened solicitations for credit or insurance. The proposal would require marketers to include a "layered" notice in all prescreened solicitations, such as pre-approved credit card offers. October 28 was the comment deadline.

• The **Securities and Exchange Commission** (SEC) further extended, until March 31, 2005, the effective date for compliance with certain broker registration requirements in the Gramm-Leach-Bliley Act (GLBA). The SEC published proposed Regulation B in June 2004 to define the limited exemptions from registration as a broker available to banks with the repeal of the complete exemption for banks in GLBA. The Regulation was to have been effective November 12. However, the Commission has not completed the review of comments received on the proposal and has not issued the rule in final form. The Commission stated that it "does not expect banks to develop compliance systems to meet the terms of the 'broker' exceptions until the Commission amends its rules."

• The Securities and Exchange Commission announced that it is postponing the requirement that certain **accelerated filers** (those with market capitalization under $700 million) include in their annual reports both a management report and auditor report on the effectiveness of internal controls over financial reporting. The delay applies to companies with fiscal years ending between November 15, 2004 and February 28, 2005.

• The Comptroller of the Currency has adopted a **new regulation** to require that national banks file annual reports for their operating subsidiaries that deal directly with consumers but are not subject to functional regulation. The first report will be due on January 31, 2005.

Personnel Changes

• In September, Comptroller of the Currency **John D. ("Jerry") Hawke, Jr.** announced that he would retire on October 13, when his term of office expired. First Senior Deputy Comptroller and Chief Counsel Julie Williams became Acting Comptroller when his resignation became effective.

• The FDIC has announced that **Scott D. Strockoz** has been appointed Deputy Regional Director of Compliance for the New York region. ▼

ELECTRONIC – DISCOVERY ("E-DISCOVERY"): BEST PRACTICES FOR REDUCING RISK AND BURDEN IN EMPLOYMENT LITIGATION

By: Cheryl Saban & Glenn S. Grindlinger
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A former employee threatens to sue your bank, claiming you terminated his employment because of his race and in retaliation for his complaints about illegal banking practices. You are confident his claims are frivolous; there was good cause for his termination and it was well documented. You reject his $75,000 settlement demand and he sues. You retain outside counsel to vigorously defend the complaint. Discovery commences. A few months later, you learn from your outside counsel that the bank has received a demand for "all e-mails related to the former employee". You decide to fight this onerous request. Another few months go by, and the court orders your bank to produce the requested documents — all e-mails related to the former employee. You immediately communicate the court's order to your Information Technology ("IT") department. You learn then, for the first time, that "most of these e-mails were on the 'old system'", which was converted soon after the former employee left the bank, and are no longer accessible. IT also informs you that it ***may*** *be able to recover some of the required e-mails from back-up tapes, but even if this is possible, "this task will take hundreds of hours and cost as much as $500,000." Your outside counsel informs you that the court may sanction the bank for destroying relevant documents. You begin to question your decision to fight the former employee's complaint.*

Such horror stories are becoming

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more common, especially in employment cases where discovery often revolves around e-mails and other electronic documents. Already burdensome and costly, responding to e-discovery demands in a disorganized and untimely fashion can have disastrous consequences. On the other hand, advance preparation and a well-coordinated response starting from the first sign of litigation can significantly reduce the burden, cost and risk of e-discovery.

This article briefly describes an employer's e-discovery obligations, and recommends several "best practices" for managing electronic data that will best position a company to respond to e-demands.

Legal Obligations & Responsibilities

Electronic data has been discoverable under the Federal Rules of Civil Procedure ("Federal Rules") since 1970.[2] For most of this time, parties have ignored electronic data. In recent years, however, with the advent of e-mail and other computer-generated files, e-discovery has exploded.

Currently, under Federal Rule 34, if a document is reasonably related to a claim or defense in the litigation, whether it is in paper or electronic form, it is subject to production.[3] Thus, the judicial system requires parties to demonstrate good faith efforts to locate discoverable electronic data and to inform their adversaries of such data.[4] Failure to do so can result in negative consequences, including sanctions, adverse inferences and, in rare cases, judgment against the party who fails to comply with its discovery obligations.

Soon after a lawsuit is filed in federal court, even in the absence of a formal request, parties must exchange information about the existence and location of relevant electronic documents.[5] These documents are discoverable, even if they were never printed and only exist in an electronic format. As with paper documents, parties have a continuing duty to investigate the existence of relevant electronic documents on which they intend to rely or that are demanded by the opposing party.

Generally, in federal court, the party responding to a document request must pay for the cost of the response, unless the request is unduly burdensome.[6] Recognizing that the production of electronic documents can be extremely expensive and time consuming, courts have struggled to find a balance between the need for a party to have access to relevant information and the cost of producing documents that may contain such information.[7]

A leading case on e-discovery is *Zubulake v. UBS Warburg LLC.*[8] Laura Zubulake sued the bank that employed her, claiming gender discrimination and retaliation under Title VII and analogous New York State and City laws. During discovery, Zubulake demanded that the bank produce all documents, including electronic documents, "concerning any communication by or between bank employees and plaintiff." While the bank produced some electronic documents in response to this request, it objected to producing any e-mails from back-up tapes, estimating that to do so would cost hundreds of thousands of dollars.

A federal district court judge held that Zubulake was entitled to discover the relevant e-mails from the backup disks, but concluded that the cost of retrieving these e-mails should be shifted to her if it imposed an undue burden or expense on the bank. To determine which party should bear the cost of production, the *Zubulake* court created the following seven-factor balancing test, placing greater emphasis on the first two factors:

(1) The extent to which the request is specifically tailored to discover relevant information;

(2) The availability of such information from other sources;

(3) The total cost of production, compared to the amount in controversy;

(4) The total cost of production compared to the resources available to each party;

(5) The relative availability of each party to control costs and its incentive to do so;

(6) The importance of the issues at stake in the litigation; and

(7) The relative benefits to the parties of obtaining the information.

Based on these factors, the *Zubulake* court shifted 25% of the cost of producing the e-mails on back-up tapes to the requesting party (Zubulake), and ordered the producing bank to pay 75% of the cost of production.[9]

Many federal courts have applied the *Zubulake* test or variations of the test.[10] However, at least one New York State court judge has refused to do so on the grounds that New York civil procedure, unlike federal procedure, requires the party seeking discovery to pay for the cost of production.[11]

Parties, who attempt to avoid the cost of producing e-data, run the risk of incurring sanctions that can cost more than the actual production. Courts are empowered to fashion a wide range of sanctions for failure to comply with e-

discovery obligations. Generally, failure to comply falls into two categories: discovery abuses and spoliation. Discovery abuses include negligence in production, untimely production and incomplete or inaccurate disclosures. Spoliation is the willful destruction or alteration of evidence or the failure to preserve documents in pending or reasonably foreseeable litigation.[12] For such discovery failures, courts have imposed three types of penalties. In some cases, parties have received monetary sanctions.[13] For example, one party was ordered to pay almost $3 million for failing to retain e-mail under a court order requiring the preservation of relevant documents.[14] In other cases, courts have instructed jurors to draw an adverse inference – requiring jurors to infer that the documents destroyed by a party supported their adversary's case.[15] And one New York court went so far as to issue a default judgment against a defendant union in a defamation case, because the e-mails requested by the plaintiff in discovery became unavailable due to the union's delay in complying with a court order to produce this data.[16]

Best Practices

In light of the complexities and constantly evolving nature of e-discovery, it is important for companies to develop a system whereby they can easily obtain, review, catalog and produce electronic documents. Below are some of the "best practices" that employers should adapt in order to prepare themselves for litigation.

A. Adopt an Effective Document Retention Policy

An ounce of prevention is worth a pound of cure. Employers can take proactive steps to avoid burdensome and costly production by implementing and enforcing an effective document retention policy. Such a policy formalizes a company's protocol for destroying and saving documents, specifying in the normal course of business when documents are saved and when documents are destroyed.

A data retention policy should be in writing. It should provide for the monthly or semi-monthly deletion of e-mails that are not archived for business purposes and scheduled periodic recycling of back-up tapes. Such a policy can substantially reduce the cost of complying with e-discovery. One court faced with allocating between the parties the cost of restoring 93 back-up tapes acknowledged this, noting that if the defendant had complied with its data retention policy, which called for recycling the back-up tapes every 45 days, "the e-mail issue would have been moot."[17] Where a company can identify the e-documents it can access (i.e. only documents for the prior 45 days), it can avoid costly and distracting litigation over whether the e-documents are accessible.

An effective document retention policy must also take into account federal and other laws that may require the retention of certain categories of documents for a specific period of time. And, the destruction of e-data under such a policy must be immediately suspended, when it becomes apparent such data may be subject to discovery in a pending or threatened litigation.

B. Comply with the Data Retention Policy

It is not enough that an employer create a document retention policy; it must also follow the policy. This is important because the destruction of documents on an *ad hoc* basis can lead a judge or jury to conclude that the documents were intentionally destroyed to avoid discovery. Thus, educating employees about the company's document retention policy and duty to purge documents is critical.

C. Carefully Organize Electronic Data

Electronic data should be organized so that it will be easy to identify, retrieve and, thereby, produce responsive information. Electronic data should be categorized in a manner that makes most sense to the individual company, taking into account the company's culture, needs and size. IT professionals should be an integral part of this process, especially to determine how and to what extent data is stored, as well as the manner in which outdated data should be purged.

D. Take Steps to Ensure E-Data Preservation

Once an employer reasonably anticipates litigation, such as when a demand letter is received from a former employee's attorney, the employer should preserve relevant evidence, including e-data. This is especially important if the employer wishes to avoid sanctions, such as a negative jury instruction that would allow the jury to conclude the destroyed e-mails contained information adverse to the employer. Litigants are free to determine how this task can best be accomplished, but recommended actions include:

- ***Issuing a "litigation hold" at the outset of a litigation, or when-***

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ever litigation is reasonably anticipated, in order to ensure the preservation of relevant documents. This would include suspension of routine document retention and destruction policies. It would also include instructing employees that they may not destroy relevant documents, including e-mails, and that they should save all documents, whether paper or electronic, that may relate to the claims against the employer or any aspect of the charging party's employment. A document retention notice to this effect should be sent to all employees who may be involved in the litigation.

- ***Promptly communicating directly with key players likely to have relevant information, clearly advising them of their duty to preserve data.*** This would include determining how these employees maintain their e-data files and instructing them to retain all relevant electronic information, including e-mails related to the employee's charge or employment.
- ***Following up with key players to ensure they turn over to counsel for production all relevant electronic information.***
- ***Communicating with IT personnel to make certain all sources of potentially relevant information are identified and placed on hold.***
- ***Identifying and securing all relevant back-up media from a company's computer system, including back-up data for "key players."*** This could include, for example, back-up tapes for the plaintiff's supervisor or human resources specialist. Such action will avoid the cost of restoring this information, which in a typical employment case can often cost $200,000 for one year of e-mails.
- ***Running a system-wide keyword search and preserving each hit.*** This should be considered as a precaution where a company is too large to effectively control document retention for individual users. The company would not be required to review this information, but it would be accessible if it were ever ordered to produce such information.
- ***Periodically reminding employees of the prohibition against destroying relevant documents***

E. Collaboration with the IT Department

Managers and human resources professionals must work closely with the IT department before litigation arises so that when a suit is filed the company is prepared to respond in an appropriate manner. Convening an e-discovery team to meet periodically could ensure that all parts of a corporation are working together on this issue. Such a team should include members of senior management as well as employees of the human resources, IT and legal departments. The e-discovery team would address, among other things, the company's document retention policy, the method and manner of storing and destroying electronic files, and electronic data that is routinely requested in litigation.

Conclusion

Six months after you read this article, you receive a letter from another former employee threatening to bring another totally frivolous lawsuit. You immediately circulate a "hold" letter to all employees. You retain outside counsel who promptly meets with the key players to identify and preserve all relevant documents (including e-mails) and instructs these employees, in writing, that they may not destroy any information related to the former employee. Outside counsel also confers with your IT department, and is pleased to learn that your new data retention program calls for the destruction of data every 45 days. Outside counsel directs IT to preserve certain back-up tapes. Your outside counsel then inquires as to whether you want to consider a settlement offer to avoid the cost, time commitment and adverse e-discovery rulings the bank incurred in the earlier employment discrimination lawsuit. You decline, confident that you are now wiser and better prepared to vigorously defend these new claims, whatever e-discovery brings..[18]

(Endnotes)

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The American Lawyer named Paul Hastings the #1 Employment Litigation Firm in 2004.

[2] *See* Federal Rule of Civil Procedure 34. For convenience, this articles focuses on the Federal Rules of Civil Procedure. State court rules also hold electronic data to be discoverable information. *See e.g.* New York Civil Practice Law and Rules ◊ 3101(a); New Jersey Court Rules 4:10-2.

[3] The extent of a party's e-discovery

obligations differs in many state courts.

[4] *See* Federal Rule of Civil Procedure 26.

[5] *Id*

[6] *See Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358 (1978).

[7] *See, e.g., Portis v. City of Chicago*, No. 02-C-3139, 2004 WL 2812084 (N.D.Ill. Dec. 7, 2004); *Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2004 WL 1895122 (N.D.Ill. Aug. 10, 2004); *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D.Wis. 2004); *Multitechnology Servs., L.P. v. Verizon Southwest f/k/a/ GTE Southwest Inc.*, No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 (N.D.Tex. Jul. 12, 2004); *OpenTV v. Liberate Technologies*, 219 F.R.D. 474 (N.D.Cal. 2003); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Chimie v. PPG Indus., Inc.*, 218 F.R.D. 416 (D.Del. 2003).

[8] The court issued five decisions on e-discovery in *Zubularke v. UBS Warburg LLC*, commonly referred to as Zubulake I-V. These decisions can be found at *Zubularke V,* No. 02 Civ. 1243 (SAS), 2004 WL 1620866 (S.D.N.Y. Jul. 20, 2004);*Zubulake IV,* 220 F.R.D. 212 (S.D.N.Y. 2003)*; Zubulake III,* 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubularke II,* No. 02 Civ. 1243 (SAS), 2003 WL 21087136 (S.D.N.Y. May 13, 2003); and *Zubulake I,* 217 F.R.D. 309 (S.D.N.Y. 2003). All the Zubulake facts and holdings described in this article are reported in these decisions.

[9] *See Zubulake III.* The court limited the cost shifting to the cost of restoring and retrieving the backup tapes. It did not shift responsibility for the legal fees the bank's lawyers incurred reviewing the e-documents for responsiveness. *See also Wiginton v. CB Richard Ellis (Class of female employees ordered to pay 75% of the cost to restore and search back up tapes of employer's e-mails for documents relevant to their nationwide sexual harassment claim, where vendor estimated the cost would be as much as $250,000 to restore and search back-up e-mail for 11 offices)*

[10] *See, e.g., Portis v. City of Chicago*; *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp; OpenTV v. Liberate Technologies*

[11] *See e.g., Lipco Electrical Corp. v. ASG Consulting Corp.*, No. 8775/01, 2004 WL 1949062 (N.Y. Sup. Ct., Nassau Cty. Aug. 18, 2004). The presumptions in New York state and federal court on this issue are polar opposites. In New York State court, unlike federal court, the presumption is that the party requesting the documents must pay for the costs of the response, although in practice, this does not always occur.

[12] A party seeking sanctions based on the spoliation of evidence must establish, among other things, that the party having control over the evidence had an obligation to preserve it at the time it was destroyed, that the evidence was destroyed with a "culpable state of mind" and the destroyed evidence would support a party's claim or defense. *Bynie v. Town of Cromwell,* 243 F.3d 93 (2d Cir. 2001). Relevance may be assumed where destruction is intentional or willful, rather than negligent. *See Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99 (2d Cir. 2002)

.[13] *See United States v. Philip Morris USA Inc.*, 327 F. Supp .2d 21 (D.D.C. 2004); *Zubulake v. UBS Warburg LLC,* No. 02-CV-1243 (SAS), 2004 WL 1620866 (S.D.N.Y. Jul. 20, 2004); *GTFM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 CIV 7724 (RPP), 2000 WL 1693615 (S.D.N.Y. Nov. 9, 2000)

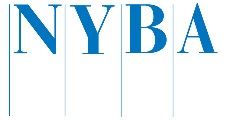
[14] *See United States v. Philip Morris USA Inc.*

[15] *See Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002); *Zubulake v. UBS Warburg LLC*, No. 02-CV-1243 (SAS), 2004 WL 1620866 (S.D.N.Y. Jul. 20, 2004).

[16] *Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees & Restaurant Employees Int'l. Union*, 212 F.R.D. 178 (S.D.N.Y. 2003); *see also, QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (2004) (defendant's answer stricken and judgment awarded to plaintiff after defendant delayed in producing to plaintiff contents of his computer hard drive and once computer hard drive was produced, it was apparent that the hard drive had been re-formatted so that all information was effectively erased).

[17] *Murphy Oil v. Fluor Daniel, 2002 US Dist LEXIS 3196 (EDLa February 19, 2002).*

[18] Nothing in this article is intended to serve, or should be construed, as legal advice. If you have any questions about the subject matter, please contact Cheryl Saban at cherylsaban@paulhastings.com or Glenn Grindlinger at glenngrindlinger@paulhastings.com. Both Ms Saban and Mr. Grindlinger can also be reached at (212) 318-6000. ■



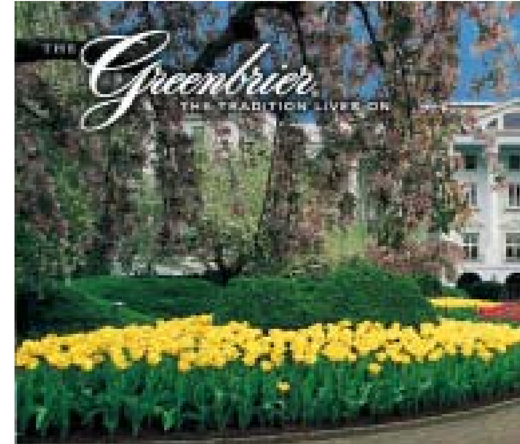
New York Bankers Association

2005 Leadership Summit

May 15 - 17, 2005

The Greenbrier

White Sulphur Springs, West Virginia



PROGRAM

Sunday, May 15, 2005

4:00 p.m.	Board of Directors' Meeting
6:00 p.m.	Chairman's Reception
7:00 p.m.	Dinner on Your Own

Take advantage of The Greenbrier's fine restaurants and the area's many offerings this evening at dinner.

Monday, May 16, 2005

7:30 a.m.	Breakfast on Your Own
	Main Dining Room
8:30 a.m. - 12:00 noon	Business Session & Spouses' Program
Reception & Dinner	Kate's Mountain Lodge
	The Greenbrier

Tuesday, May 17, 2005

7:30 a.m.	Breakfast on Your Own
	Main Dining Room
8:30 a.m. - 12:00 noon	Business Session & Spouses' Program
1:00 p.m.	Golf Tournament
Reception & Dinner	The Golf Club
	An informal gathering at The Greenbrier's Golf Club

Why You Should Attend

NYBA's Leadership Summit is designed to provide New York's senior banking executives with the latest in strategies for profitability, performance and the overall management of successful financial institutions.

The award-winning Greenbrier has been hosting guests in gracious style since 1780 and today is one of the world's top-rated golf resorts.

For more information, please contact Mary K. Robb, Senior Vice President, at (212) 297-1662 or mrobb@nyba.com. Registration forms are available at www.nyba.com, education & meetings, major meetings section.