

BANKING

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Recent Developments

Bankruptcy Reform in Danger of Derailment

The Bankruptcy Reform Act of 1999, S. 625, ran into a hurdle on September 21 when Senate Democrats successfully defeated a cloture motion by seven votes. If passed, the motion would have restricted the length of the floor debate on the bill, and more importantly, the range of amendments that could be attached to the bill. The cloture vote was scheduled to hamper Democrats' attempts to attach a minimum wage increase amendment to the bill and also to restrict attempts to amend the bill to impose more stringent disclosure requirements for monthly credit card statements. Senate Republicans would rather address the minimum wage increase in an independent bill and forgo the disclosure requirement altogether.

Since neither side has enough votes to force through a partisan bill, the bill has been shelved for the remainder of this year's legislative session. The delay in the Senate contrasts with the House's efforts on bankruptcy reform. The House's bankruptcy reform bill, H.R. 833, which enjoys substantial banking industry support but also faces strong opposition from the Clinton Administration, was passed in May by nearly a 3 to 1 margin. [See *Banking, Legislation and Policy*, First Quarter 1999 for a summary of H.R. 833 as introduced.]

CONTENTS

Recent Developments

Bankruptcy Reform in Danger of Derailment.....	1
Federal Reserve Acts to Ensure Year-End Credit Needs Are Met.....	1

Summary of Federal Legislation

Enacted Legislation

Year 2000 Readiness and Responsibility Act.....	2
---	---

New Legislation

Credit Cost Reduction Act of 1999.....	2
Electronic Disclosures Delivery Act of 1999.....	2
Community Development Financial Institutions Technical Corrections Act.....	2
Economic Growth and Price Stability Act of 1999.....	2
Gambling ATM and Credit/Debit Card Reform Act.....	3
Fair Credit Full Disclosure Act.....	3
Foreign Money Laundering Deterrence and Anticorruption Act.....	3

Pending Legislation

Financial Services Modernization Act of 1999.....	3
Federalism Act of 1999.....	3

<i>Summary of Federal Regulations</i>	4
---	---

<i>Summary of Judicial Developments</i>	6
---	---

<i>Summary of Third District Developments</i>	7
---	---

Federal Reserve Acts to Ensure Year-End Credit Needs Are Met

On August 24 the Federal Open Market Committee (FOMC), the policy-making body of the Federal Reserve System, approved a number of measures to increase the System's flexibility in meeting

the demand for reserves at year-end. In particular, the FOMC voted to approve a temporary increase in the types of securities acceptable as collateral for repurchase transactions used to manage reserves in the banking system. Specifically GNMA, FHLMC, and FNMA

mortgage securities, along with STRIP securities of the U.S. Treasury, and coupon “stripped” securities of other government agencies would be useable as collateral through April 2000. The FOMC also voted to permanently authorize the Open Market desk to enter into 90-day

repurchase agreements. Previously, only repurchase agreements of up to 60 days were permissible.

Finally, the operation of a temporary Standby Financing Facility (SFF) was authorized until January 2000. Under the SFF, the New York Reserve Bank could

sell options on repurchase agreements to primary dealers that could be exercised at year-end. This would allow primary dealers the right to purchase reserves at a predetermined rate at year’s end.

SUMMARY OF FEDERAL LEGISLATION

Enacted Legislation

1. Year 2000 Readiness and Responsibility Act (H.R. 775). Introduced by Representative Davis (R-VA) on February 23, 1999.

Status: House and Senate agreed to Conference Report on July 1, 1999. Signed by the President on July 20, 1999, as Public Law 106-37. [See *Banking, Legislation and Policy*, Second Quarter 1999 for a summary of H.R. 775 as signed by the President.]

New Legislation

1. Credit Cost Reduction Act of 1999 (H.R. 2544). Introduced by Representative Metcalf (D-WA) on June 29, 1999.

Status: Referred to the Committee on Banking and Financial Services

This bill would amend the Fair Debt Collection Practices Act (FDCPA) by lessening restrictions on debt collecting practices. The collection agency would be explicitly permitted to engage in collection activities during the 30 days after an initial notice of collection has been sent to the consumer, unless the consumer requested an end to collection attempts during this time period. Current practice allows the consumer a 30-day initial ‘grace period’ during which the consumer can challenge the validity of the debt and the agency must suspend collection activities. A debt collector’s civil liability for a specific violation of the FDCPA would be capped at the lesser of \$500,000 or 1 percent of

the collector’s net worth, regardless of the number of class action suits arising from the violation. The bill would also set limits on fees paid to plaintiffs’ lawyers, including restrictions on the awarding of lawyer fees in cases where the consumer refuses a settlement offer that exceeds the final damages awarded. The bill would also instruct courts to eliminate liability for collection agencies that incur violations while following federal, state, or other applicable laws in good faith.

The bill would also provide new leeway to servicers of federally related mortgage loans who also act as debt collectors. They would be exempt from the requirement that debt collection agencies identify themselves as a collection agency and would have separate procedures for sending out debt validation statements.

2. Electronic Disclosures Delivery Act of 1999 (H.R. 2626). Introduced by Representative Roukema (R-NJ) on July 27, 1999.

Status: Referred to the Committee on Banking and Financial Services.

This bill would amend several consumer protection laws including the Truth in Lending Act, Equal Credit Opportunity Act, and the Fair Credit Reporting Act, to allow for the electronic communication of notices required under the respective statutes. The consumer receiving these notices would need to agree beforehand to receive the notices in this manner and would also be provided information on how to download electronic notices. The

Board of Governors is directed to further clarify the procedures for electronic communications.

3. Community Development Financial Institutions Technical Corrections Act (S. 1469). Introduced by Senator Conrad (D-ND) on July 30, 1999.

Status: Referred to the Committee on Banking, Housing, and Urban Affairs.

This bill would amend the Community Development Banking and Financial Institutions Act of 1994 to expand the type of communities that can be served by CDFIs. Specifically, the act would seek to increase rural areas’ access to development finance by including communities that fall outside of metropolitan statistical areas and that also experienced a substantial population loss between 1980 and 1990.

4. Economic Growth and Price Stability Act of 1999 (S. 1492). Introduced by Senator Mack (R-FL) on August 4, 1999.

Status: Referred to the Committee on Banking, Housing, and Urban Affairs.

This bill would repeal the Full Employment and Balanced Growth Act of 1978 and make long-term price stability the primary goal of the Board of Governors and the Federal Open Market Committee. The Board would be directed to develop an operational definition of price stability, estimate the length of time required to achieve this goal, and provide

annual reports to Congress on its success in promoting price stability.

5. Gambling ATM and Credit/Debit Card Reform Act (H.R. 2811). Introduced by Representative LaFalce (D-NY) on September 8, 1999.

Status: Referred to the Committee on Banking and Financial Services.

This bill would make it illegal to place an electronic terminal from which consumer credit can be accessed, such as an ATM, in the immediate area of a gambling establishment. The bill would allow a consumer to recover, from the terminal operator, funds accessed from the terminal that were lost as a result of gambling, in addition to punitive damages.

6. Fair Credit Full Disclosure Act (H.R. 2856). Introduced by Representative Cannon (R-UT) on September 14, 1999.

Status: Referred to the Committee on Banking and Financial Services.

This bill would amend the Fair Credit Reporting Act by requiring credit-reporting agencies to, at the request of the consumer, disclose all information in the consumer's file at the time of the request. This would include credit scores, risk scores, or predictors. Current law specifically exempts this information from being reported to consumers.

7. Foreign Money Laundering Deterrence and Anticorruption Act (H.R. 2896). Introduced by Representative Leach (R-IA) on September 21, 1999.

Related Bills: H.R. 240, H.R. 1471, H.R. 2905, and S. 1663.

Status: Referred to the Committee on Banking and Financial Services and the Committee on the Judiciary.

This bill would enact a variety of new measures in an attempt to make money laundering more difficult. Depository institutions would be prohibited from opening or maintaining accounts for a foreign entity without identifying all parties that have a beneficial interest in the account or verifying that the entity is publicly traded. Correspondent bank relationships with foreign banks would be prohibited if the foreign bank is not offering banking services to residents of its home country. The bill would authorize United States representatives to international financial institutions (IMF, World Bank, etc.) to vote against disbursements to countries that, in the opinion of the Treasury, have high levels of corruption and are not working toward implementing anti-corruption measures.

In addition, the bill would set a penalty of five years imprisonment for anyone who knowingly tries to conceal or misrepresent the identity of a person in connection with a transaction with a financial institution. Finally, financial institutions that report a possible violation of law to a government agency would be shielded from any liability that might arise as a result of the disclosure.

Pending Legislation

1. Financial Services Modernization Act of 1999 (S. 900). Introduced by Senator

Gramm (R-TX) on April 28, 1999. Related bills: H.R. 10, H.R. 665, H.R. 823, S. 753.

Status: Senate appointed conferees on July 22, 1999. House appointed conferees on July 30, 1999. [See *Banking, Legislation and Policy*, First Quarter 1999 for a summary of S. 900 as introduced.]

2. Federalism Act of 1999 (H.R. 2245). Introduced by Representative McIntosh (R-IN) on June 16, 1999. Related bills: S. 1214.

Status: Referred to the Committee on Government Reform, Committee on Rules, and the Committee on the Judiciary.

This bill would require Congress and all federal agencies to make and publish an assessment of any proposed law or rule that would preempt a state or local government's authority. In producing this assessment, the federal agency would be required to consult with any state or local officials who would potentially be affected by the proposed rule. The assessment would be required, among other things, to: 1) identify any provision of the proposed rule or law that would specifically preempt a state's authority; 2) explain the reason for preemption; and 3) estimate those costs that would be incurred by the state or local government if the law or rule became applicable.

Current Congressional attempts to craft a compromise over banks' powers to sell insurance are examples of the types of legislative acts that would trigger the provisions of the bill.

Board of Governors of the Federal Reserve System

Availability of Funds and Collection of Checks (7/13/99)

Withdrew a proposed rule that would have shortened the maximum time that banks could place holds on the proceeds of checks deposited into a customer's account. The proposal would have shortened the maximum hold time from five days to four for most non-local checks. For further information, see 64 *Federal Register*, pp. 37708-13. (Regulation CC).

Extension of Credit by Federal Reserve Banks (8/2/99)

Issued a final rule establishing a lending program to address liquidity concerns centering on the century date change period. The rule calls for making credit under the Special Liquidity Facility (SLF) available from October 1, 1999, until at least April 7, 2000. Borrowings would be collateralized and the borrowing rate would be 1.5 percentage points above the Federal Open Market Committee's targeted federal funds rate. The banks would not be required to seek alternative funding sources before borrowing from the SLF, and the use of such funds would not be restricted as they are under adjustment credits for the discount window. In particular, there would be no requirement that the funds be repaid expeditiously. The SLF will be available mainly to financial institutions judged by the Federal Reserve Bank to be in sound financial condition. Foreign bank branches and agencies would also be eligible to borrow from the SLF if approved by the Reserve Bank. This rule will be effective October 1, 1999. For further information, see 64 *Federal Register*, pp. 41765-70. (Regulation A).

Equal Credit Opportunity (8/16/99)

Issued a proposal to make several substantive changes to Regulation B, which implements the Equal Credit Opportunity Act (ECOA). Among other changes, the proposal would allow, but not require, creditors to record applicant information such as race, gender, religion, marital status, and age on non-mortgage credit applications. Regulation C already requires creditors to record and retain such information for home mortgage applications, although creditors would still be prohibited from using the characteristics as criteria for granting credit. The Board also proposes to require creditors to retain records concerning preapproved credit solicitations for 25 months. For example, the creditor would be required to record the criteria used to select potential customers and the text of the solicitation mailing. Finally, the proposal would lengthen, from the current 12 months to 25 months, the retention period for certain records currently required. Comments must be received by November 10, 1999. For further information, see 64 *Federal Register*, pp. 44582-631. (Regulation B).

Electronic Disclosures (9/14/99)

Proposed rules that would, in general, permit the electronic delivery of required disclosures by creditors to consenting consumers. The proposed rule also sets standards for electronic disclosures, including the requirement that customers be able to download the information and be given adequate notice of any electronic disclosures made on a creditor's website. Certain types of transactions would still require paper disclosure. For example, a consumer who initiates a transaction in person must

receive initial disclosure in writing. The type of disclosures that the proposal would affect are those concerned with equal credit opportunity, electronic fund transfers, consumer leasing, truth in lending, and truth in savings. Comments must be received by October 29, 1999. For further information, see 64 *Federal Register*, pp. 49688-99 (Regulation B), 49699-713 (Regulation E), 49713-22 (Regulation M), 49722-40 (Regulation Z), and pp. 49740-52 (Regulation DD).

Issued an interim rule that would allow depository institutions to send required periodic statements concerning yields, fees, and other terms to its depositors in electronic form. This would be permissible provided the consumer agrees to receive notices in this manner. This rule became effective September 1, 1999. For further information, see 64 *Federal Register*, pp. 49846-8. (Regulation DD).

Office of Comptroller of the Currency

Management Interlocks (9/24/99)

Together with the Federal Reserve Board, Federal Deposit Insurance Corporation, and Office of Thrift Supervision, issued a joint final rule revising the regulations addressing management interlocks. Under certain conditions, federal law bars management officials from serving concurrently with two unaffiliated depository institutions or holding companies (depository organizations). The new rule would establish a procedure for adjusting the current thresholds that prohibit a management official of a depository organization with assets over \$2.5 billion to serve as an official of an unaffiliated depository organization with assets exceeding \$1.5 billion. These thresholds are pegged to the Consumer Price Index and would change only in

amounts greater than \$100 million.

The new rule also provides criteria for exemptions to the interlock rule. Specifically, if a depository organization: 1) primarily serves low- or moderate-income areas; 2) is controlled by members of a minority group or women; 3) has been chartered for less than two years; or 4) is deemed to be in a troubled condition, a management interlock could be granted for a three-year period. The time frame could be modified by the agency. Finally, the new rule would allow for interlocks provided that the relevant depository organizations, on a combined basis control less than 20 percent of the deposits in an MSA or community. This rule will become effective January 1, 2000. For further information, see 64 *Federal Register*, pp. 51673-81.

Federal Deposit Insurance Corporation

Assessments (9/8/99)

Issued a proposal to make several changes to the depository institution insurance assessment procedure. Currently, the FDIC uses call report data for the quarter ending six months before the assessment period to calculate a bank's capital, which is used to determine the bank's assessment. The proposal would allow the FDIC to use call report data for the quarter ending three months

before the beginning of the assessment period. For example, the insurance assessment for the semiannual period beginning July 1 would be determined by the institution's quarterly call report ending March 31. The FDIC is also proposing to notify banks of their assessment 15 days earlier than at present. Finally, the proposal would allow institutions 90 days to seek a review of their risk classification, rather than the current 30 days. Comments must be received by October 25, 1999. For further information, see 64 *Federal Register*, pp. 48719-21.

Asset and Liability Backup program (9/17/99)

Confirmed as final the interim rule requiring asset and liability backup programs for deposit account and loan account information at financial institutions with less than "Satisfactory" Y2K ratings. The interim rule was issued on June 9, 1999, and appears in *Banking, Legislation and Policy*, Second Quarter 1999. This rule became effective September 17, 1999, and will be terminated on June 30, 2000. For further information, see 64 *Federal Register*, pp. 50429-39.

Restrictions on the Purchase of Assets (9/21/99)

Gave notice of proposed rulemaking regarding the sale of assets held by the FDIC in the course of liquidating a depository institution under Section 20 of the Resolution Trust Corporation Completion Act of 1993. The rule would clarify who could not purchase the assets of a failed institution owing to fraudulent behavior or to unsafe and unsound banking practices leading to substantial losses for an insured depository institution. Comments must be received by December 20, 1999. For further information, see 64 *Federal Register*, pp. 51084-7.

Office of Thrift Supervision

Letters of Credit, Suretyship, and Guaranty (8/26/99)

Issued a final rule clarifying the ability of federal savings associations to act as guarantors, for example to issue letters of credit or check overdraft facilities. This permission to offer guaranties is not specifically addressed by the Home Owners Loan Act or current regulations, although the OTS and its predecessor, the Federal Home Loan Bank Board, have recognized this ability in the past. This rule became final on October 1, 1999. For further information, see 64 *Federal Register*, 46560-5.

SUMMARY OF JUDICIAL DEVELOPMENTS

On August 11, The U.S. Court of Appeals for the Eleventh Circuit gave bank trustees in general and BankAmerica, in particular, a boost by ruling that NationsBank (now BankAmerica) could not be held liable for environmental damages to a property simply because the bank served as a trustee for that property. Instead, it must be proven that the bank negligently caused or contributed to the release of hazardous substances on the site.

The case, (*Canadyne-Georgia Corporation v. NationsBank, N.A.*, No. 97-9357, 8/11/99), originated in 1996 when Canadyne, a chemical company, sued BankAmerica to recover the clean up and resident relocation costs, mandated by the Environmental Protection Agency, of a Fort Valley, Georgia, site. The site was purchased from Woolfolk Chemical Works, Ltd. (WCW) in 1977. A bank purchased by NationsBank, Fulton National Bank of Atlanta, had served as fiduciary for a trust that owned WCW in addition to making loans to the company. During the period of the bank's trusteeship, WCW's plant released hazardous chemicals onto the grounds.

Canadyne filed suit in the U.S. District Court for the Middle District of Georgia in 1996 under the Comprehensive Environmental Response Compensation

and Liability Act of 1980 (CERCLA). Canadyne asserted that during the time of contamination, the bank (as trustee) served as owner of the property and, more importantly, that the bank was negligent in taking no actions to prevent the release of hazardous materials onto the site. In 1997, the district court dismissed the case on the grounds that as a fiduciary, the bank could not be considered an owner of the property. Canadyne appealed this decision.

The Eleventh Appellate Court, in sending the case back to the district court, opined that under Georgia law, the bank was in fact an owner of WCW, but that this was insufficient grounds for establishing the bank's liability under CERCLA. In addition to establishing ownership, the plaintiff must prove that BankAmerica's negligence resulted in the contamination of the site. The Appeals Court expressed the opinion that for Canadyne to "... [prove] negligence ... Canadyne must present evidence that the Bank took particular negligent actions that caused or contributed to the release of hazardous substances . . . the negligence exception requires some action because the Bank had no duty to prevent someone else from releasing hazardous substances."

On September 2, 1999, the U.S. Court of Appeals for the Eighth Circuit held that an out-of-state national bank could operate automated teller machines (ATMs) in Iowa despite a state statute restricting such activities by out-of-state banks. The court, in *Bank One Utah, N.A. v Guttan*, 8th Circuit, No. 98-3166, 9/2/99, cited a 1996 amendment to Chapter 12 of the U.S. Code that clarified that ATMs were not considered bank branches. Federal law requires national banks to comply with state rules with respect to bank branching. Since ATMs are not considered branches, the court opined that the Iowa statute could not be enforced against Bank One Utah. The case originated in 1997 when Bank One Utah, N.A. (BOU), a national bank based in Utah with no branches in Iowa, began to place ATMs within stores in Iowa. In December of that year, the Iowa superintendent of banking, took one retailer to state court to force cessation of the ATM operations. BOU removed the machines and filed suit in the U.S. District Court for the Southern District of Iowa asking for an injunction against the state's attempts to restrict its ATM operations. The district court refused to give the injunction and so BOU appealed the decision to the Appellate Court.

SUMMARY OF THIRD DISTRICT DEVELOPMENTS

New Jersey

On July 1, 1999, the Senate passed A2393, clearing the bill for presentation to Governor Whitman. If enacted, the bill would redefine automatic teller machines as communication terminals as opposed to their current designation as branches.

The bill would permit a bank board director's minimum required bank shareholdings to be valued at market value and would also permit the directors to delegate the authority to appoint officers to the bank president, so long as the appointed officer position is neither chairman nor president. The bill places a

two-year limit on banks' liability to depositors for fraudulent withdrawals and also requires depositors to challenge errors in bank statements within six years. Finally, the bill would remove the prohibition on state banks insuring land titles.

