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Community Bankers Association of Georgia

## Executive Update and Regulatory Alert

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### COURT DECISIONS OF IMPORTANCE AND A REGULATORY ALERT

In an effort to keep you informed, below is a brief discussion of two court decisions, a lawsuit, and a recent regulatory proposal of importance to community banks. **First, we discuss a court decision and a lawsuit relating to P.O.D. accounts; next, we discuss a court discussion relating to sequence of payment for checking account transactions; and last, we discuss the FDIC's recent regulatory proposal on overdraft protection programs (comments due by Monday, September 27, 2010).**

#### Supreme Court Decision and Lawsuit Regarding P.O.D. Accounts

**In 2009, the Georgia Supreme Court ruled a corporation is not an eligible "payable on death" (P.O.D. payee) beneficiary.** The Department of Banking and Finance (DBF) Bulletin contained an Alert on this decision in April of 2010, but at the recent CBA Regulation and Taxation Meeting, it became apparent not all community bankers are aware of this situation. So, we are alerting you again.

The ruling was based on the fact that in the Georgia Banking Code, the beneficiary of a P.O.D. account must be a "person" as defined in O.C.G.A. 7-1-4 (26). "Person" is defined as "an individual, trust, general or limited partnership, unincorporated association (except a joint-stock association), or any other form of unincorporated enterprise." **In short, a P.O.D. beneficiary cannot be incorporated.**

Subsequent to the Supreme Court ruling, the **incorporated charity**, named as P.O.D. payee on the accounts in the Supreme Court case, has **filed suit against six financial institutions that used P.O.D. accounts naming the corporate charity as the beneficiary.** The lawsuit is based on the charity's claim the banks should bear the costs of the loss to the charity.

In view of the fact that the problematic code section is contained in the Banking Code, we approached the Department of Banking and Finance about including a change in the Department's 2011 Housekeeping Bill to allow corporations to be the beneficiary of a P.O.D. account. At the August Regulation & Taxation Meeting, the Department representative indicated it was the Department's intent to include such a provision in the DBF's 2011 Housekeeping Bill, although the legislative language for the change is not yet available.

**In the interim, we strongly encourage you to review your P.O.D. accounts for any exposure you may have in this area and discuss possible remedies with your legal counsel. Even if the legislative efforts to change this law are successful, keep in mind it will likely be July 1, 2011, before any such law change would become effective.**

#### Judge Orders Wells Fargo to Repay \$203M in Overdraft Fees

**A federal judge in California ruled Wells Fargo engaged in unfair and deceptive practices by changing its policy on processing checking account transactions.** The bank changed its policy from processing checks, debit transactions and bill payments in the order they took place **to processing these transactions from the highest dollar amounts to the lowest.** U.S. District Judge William Alsup said the policy change resulted in the bank charging improper overdraft fees, and the practice allowed Wells Fargo

to drive up overdraft fees to gouge customers. The judge ordered Wells Fargo to pay \$203 million to customers who were charged fees under this policy change from November 15, 2004, to June 30, 2008. He also ordered Wells Fargo to change the policy by November 30, 2010.

**In light of this case, we encourage you to take a look at your processing procedures for checking account transactions.** If you are using a procedure calling for the high to low sequence of payment, we urge you to discuss this situation with the bank's attorney. The Wells Fargo case is based on a California consumer protection law on unfair and deceptive practices, and there are differences of opinion among attorneys regarding the significance of this decision in other states. However, most other states, including Georgia, have general laws on "unfair and deceptive practices," which read similarly to the law in California.

### **Other Overdraft News: FDIC Seeking Comments on Overdraft-Protection Program Proposal**

The FDIC has proposed guidelines for public comment regarding overdraft programs that go well beyond the rules recently issued by the Federal Reserve Bank (FRB) dealing with the payment of ATM and point-of-sale transactions under such programs. The FDIC proposal expands on the FRB guidance by proposing to make their guidance applicable to all checking account transactions, including paper checks and ACH transfers, and would require banks to allow customers to "opt-out" of automatic overdraft programs for all types of checking account transactions.

The proposed guidance stems from an FDIC study which found a growing use of overdraft payment programs and a spike in consumer complaints to the FDIC related to such programs. The proposal focuses on finding effective ways for banks to monitor their overdraft programs for excessive or chronic use by customers as a form of short-term, high-cost credit instead of protecting against inadvertent overdrafts.

The guidance would require regular board oversight — including an annual review — of automated overdraft programs and steps to minimize the potential for customer confusion in marketing of overdraft programs. **In addition, the FDIC would expect institutions to set daily limits on customer overdraft costs, such as capping the amount of transactions carrying a fee, or putting a dollar limit on total fees charged in one day.** Institutions would also need to monitor automated programs to cut down on "excessive or chronic customer use." The agency said institutions should take action in cases where a customer's account is overdrawn and a fee is charged at least six times in a one-year period. Such action could include contacting the customer to discuss less costly account options and giving customers a "reasonable opportunity" to decide whether to keep their fee-based protection.

You may read the guidance and the FDIC Press Release related to the guidance at the following links. [Read FDIC Release.](#) [Read Guidance.](#)

**Again, comments are due by Monday, September 27, 2010. We urge you to read this guidance and comment as you deem appropriate.** Please email copies of your comments to [steve@cbaofga.com](mailto:steve@cbaofga.com).

If you have questions or comments on any of these issues, do not hesitate to contact us.

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