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## Regulatory Update

**November 25, 2009**

Three items are covered in this Federal Legislative Update:

- 1) CBA's participation in the Independent Community Bankers of America's "legislative fly-in" for state associations
- 2) An update on the current status of the Financial Regulatory Reform Proposals (*I apologize in advance for the length of this section, but these are extremely important issues for the community banking industry that it is critical you take the time to fully understand.*)
- 3) Congressman Jack Kingston's conference call last week with the bankers in his district

### **CBA Attends ICBA "Legislative Fly-In" in Washington**

Community Bankers Association of Georgia (CBA) President and CEO Carolyn Brown and Steve Bridges, Executive Director of Legislative and Regulatory Affairs, spent Sunday through Wednesday of last week in Washington, D.C., attending an ICBA issues briefing for state community banking associations and meeting with elected officials from Georgia. Nineteen of CBA's sister state associations participated in this "Legislative Fly-In" in the nation's capitol.

Following the ICBA briefings on Monday, Carolyn and Steve meet with various members of the Georgia Congressional delegation to discuss issues relating to the various financial regulatory reform proposals in Congress. While we tried to meet with as many members of the delegation as we could schedule, we concentrated our efforts on meeting with the three current members of the House Financial Services Committee, Representatives Jim Marshall, David Scott and Tom Price, and the two Senators from Georgia. We were able to meet personally with all five of these Georgia delegation members and their banking legislative aides and/or other staff members.

**We updated the members of the Georgia delegation on the current status of the various regulatory reform proposals in Congress and various other banking proposals of concern to the community banking industry such as legislation on overdraft programs and interchange fees.** We related CBA's policy positions on these issues and the meetings with all of the members of the Georgia delegation went very well. We have already had follow-up offers from the offices of Representatives Marshall and Scott which could be helpful to community banks on regulatory reform and other community bank issues. **We certainly appreciate all of the members of the Georgia delegation and their staffs taking time to meet with us on short notice regarding issues important to the community banking industry.**

### **Briefing on Current Status of the Financial Regulatory Reform Proposals**

To keep you informed, we want to provide you with a **briefing on the current status of the various regulatory reform proposals currently in Congress and our current position, as communicated to the Georgia Congressional delegation, on the various proposals.** Hopefully you will find this briefing a useful guide to community bank

priorities, if you have the chance to see any of the Georgia Congressmen and Senators over the Thanksgiving Congressional break or later. Keep in mind, these proposals are quite extensive and the following, although it is somewhat lengthy, is only a very brief overview of some key provisions in these proposals:

### **House Side Proposals**

Chairman of the House Financial Services Committee (HFSC), Barney Frank, has been dealing with the various major issues included in the administration's regulatory reform agenda on a piecemeal basis in his committee. The creation of a Consumer Financial Protection Agency (CFPA), systemic risk and resolution authority for "too big to fail" institutions, legislation on derivatives and several other issues have been dealt with in separate bills in the House Committee process. However, Chairman Frank has indicated he plans to merge all of the bills together when they go to the floor.

**Consumer Financial Protection Agency (CFPA):** The HFSC has already passed legislation creating the CFPA as a new independent agency in the form of H.R. 3126. Under the legislation, the CFPA would have extremely broad rulemaking and regulatory powers over all types of financial products and services and over all types of entities offering such products and services. **When reviewing the key provisions and policy positions for community banks below, please keep in mind that there is a broad consensus in Congress that CFPA in some form is going to pass before the next election cycle. Every member of the Georgia delegation we have spoken with, whether Democrat or Republican and whether a supporter or a non-supporter of the CFPA concept, seems to agree on that point.**

- The CBA of GA and the ICBA would prefer Congress focus the CFPA strictly on the non-banks that caused many of the problems resulting in the current financial and economic crisis. We would prefer that the CFPA have no jurisdiction over banks; however, the administration and the leadership in Congress seems firm in their convictions that the CFPA should have some applicability to banks.
- One positive in the House CFPA bill is that jurisdiction for the Community Reinvestment Act (CRA) remains with the banking regulators.
- The HFSC added an ICBA-sponsored amendment exempting community banks with assets less than \$10 billion from primary CFPA enforcement and examination authority. Prudential regulators (the bank regulatory agencies) would maintain primary examination and enforcement authority for consumer protection laws for banks under the \$10 billion threshold. Further, the CFPA is precluded from charging community banks under \$10 billion any fees to fund the agency.
- While this \$10 billion carve out results in a much better CFPA bill for community banks than the original bill, it is certainly no panacea and leaves significant problems and issues for community banks as follows:
  - CFPA maintains the authority to write all the consumer protection rules. It is unclear the degree to which the banking regulators would even be allowed to have meaningful input into the rulemaking process as the bill is currently written.
  - CFPA basically maintains authority to oversee the enforcement efforts of the banking regulators and inform them when they think such efforts are insufficient, even for those banks under the \$10 billion threshold.
  - CFPA maintains back-up examination authority for consumer protection laws and regulations, even for those banks under the \$10 billion threshold.
- Given the above problems, CBA and ICBA are far from satisfied with and do not support the version of CFPA that passed out of the HFSC. Provided no opportunities arise to completely exempt community banks from CFPA jurisdiction, the minimum additional changes that are needed to the House version of CFPA are as follows:
  - The CFPA rulemaking authority in regard to community banks needs to be narrowed as much as possible. The CFPA should have such authority only for certain specified statutes. *Some ideas CBA has provided to the ICBA to further limit the CFPA rulemaking authority are to provide the bank regulators with exclusive authority for rulemaking for products and services that are*

*offered exclusively by federally insured depository institutions and to limit the types of loans for which CFPA would have consumer protection rulemaking authority. The thought process for the “services exclusively offered by federally insured depository financial institutions” would be to exclude from CFPA jurisdiction all federal insured deposit account products, including overdraft services. The thought process on “limiting the types of loans over which the CFPA would have rulemaking authority” would be to perhaps specify that the CFPA could only cover residential mortgage loans and other loans made for consumer purposes and/or only cover loans less than a certain size. Hopefully, in this manner we could at least assure that the commercial loan portfolios of community banks would not be covered by CFPA jurisdiction.*

- The CFPA rulemaking authority for any statutes over which they maintain that authority should be joint rulemaking authority with the federal bank regulators. In that way the bank regulators will have equal authority from which to discuss, debate and write the rules applicable to community banks. Hopefully, this would help to maintain a sense of reasonableness in the rules.

### **Financial Stability Improvement Act (Regulatory Reform, System Risk Resolution, “Too Big to Fail,” etc.):**

The HFSC debated and considered amendments to the Financial Stability Improvement Act (H.R. 3996) last Thursday. The bill is expected to receive final passage by the HFSC on December 1, 2009. H.R. 3996:

- Establishes the Federal Reserve as the primary regulator for bank and non-bank financial firms that are considered to be systemic risk institutions (that are so large and/or so interconnected that they could pose a danger to the entire financial and economic system).
- Provides FDIC with the authority to serve as a systemic resolution authority for systemic risk institutions when they fail and prescribes the methods for resolving such “too big to fail” institutions.
- Merges the OTS into the OCC, but requires that a separate division of the OCC be established to supervise thrift institutions and maintains the thrift charter as a separate and distinct charter. It reportedly resolves issues regarding mutual institutions and “dividend waivers” for mutual thrift holding companies, which should allow mutual thrifts and mutual thrift holding companies to continue to operate under their current organizational structures.
- **CBA and ICBA supported amendments added to H. R. 3996 before passage by the HFSC include: (1) an amendment to permanently change the assessment base for deposit insurance premiums from domestic deposits to total assets minus tangible equity, and (2) an amendment to provide for a pre-funded systemic resolution fund (versus an after the fact resolution fund) available to unwind and resolve failed large financial companies whose collapse threatens the financial system and the national economy), with that fund being capped at \$150 billion and funded through assessments on all financial companies with over \$50 billion in total assets. The addition of both of these amendments, which were opposed by other national trade organizations, is a significant positive development for community banks. The change in the deposit insurance assessment base permanently establishes a more equitable system of deposit insurance assessment, requiring larger banks, who fund much of their balance sheets with something other than domestic deposits, to pay a larger portion of the total deposit insurance premiums. This is a more equitable system because bad assets are what generally cause bank failures, regardless of the source of funding for those assets. Every community bank and thrift in Georgia, except one with some unique circumstances, will pay lower deposit insurance assessments in the future if this amendment becomes law. This change in the assessment base is already included in the base text of the Dodd discussion draft of the regulatory reform legislation in the Senate. The establishment of a pre-funded systemic risk fund assures the availability of funds to resolve the failure of large systemic risk financial companies, thereby further assuring an end to “too big to fail” financial companies.**

**House Side Summary:** In regard to the CFPA, we would still prefer that community banks be completely exempted from CFPA jurisdiction. Short of that, it is critical that we narrow the authority of the CFPA to only specific statutes and obtain joint rulemaking authority for the banking regulators in regard to those statutes for which the CFPA

maintains jurisdiction. CBA feels reasonably comfortable with the current version of the Financial Stability Improvement Act, with the preservation of the thrift charter, with the fact that systemic risk institutions are addressed in a satisfactory manner and with the key priority amendments that were added in the HFSC last Thursday. It is our current understanding that Chairman Frank will try to bring the merged Regulatory Reform Bill to the House floor for a vote as early as the second week in December.

### **Senate Side Proposal**

Chairman of the Senate Banking Committee, Christopher Dodd, has released what is being referred to as a discussion draft of his Senate side Regulatory and Financial Reform Proposal. Dodd's discussion draft is a comprehensive proposal (1,126 pages long) dealing with all of the various issues dealt with piecemeal in the HFSC, all in one bill. The bill does not have a bill number at this point. Chairman Dodd originally set a fast track schedule for marking up this bill but slowed the process after initial Senate Banking Committee hearings last Thursday, when senators from both sides of the aisle raised significant concerns with the bill. There is much to dislike in the Dodd discussion draft from a community banking perspective. In fact, aside from the fact that the Dodd draft includes the permanent change in the deposit insurance assessment base from domestic deposits to total assets minus tangible equity, there is very little to like. The following attempts to outline our major concerns with the Dodd discussion draft:

**Single Regulator:** The Dodd draft would create a new national bank regulatory agency, a single federal banking czar, to regulate all federally-insured financial institutions. The OTS and the thrift charter would cease to exist and the regulatory examination and supervisory powers of the FDIC and the FRB would be transferred to the new federal banking czar. **Obviously, the mutual thrift charter and mutual thrift holding company structure are fully at risk under this bill. Also, despite rhetoric by Dodd personally and in the discussion draft to the contrary, the dual chartering system would be severely threatened and likely eventually cease to exist under the Dodd bill.** All state chartered banks would be examined and supervised by the new single federal banking agency and state chartered institutions would be charged the same fees for that federal supervision as their nationally chartered counterparts, plus continue to have to pay state exam fees. **The position of the CBA and the ICBA is that the current system of bank regulation should remain in tact to the greatest extent possible, similar to the current House bill. The thrift charter, including the mutual thrift holding company structure, should be preserved and the dual chartering system should be preserved over the long term from a practical viewpoint, not just provided lip service.**

**CFPA:** The Dodd draft places all banks under the full jurisdiction of the CFPA for all consumer protection laws, including jurisdiction for the enforcement of the CRA. Obviously, the position of the CBA and the ICBA would be the same regarding the CFPA, as discussed above, in regard to the House version of the CFPA. We would prefer that the CFPA only cover non-bank firms, with jurisdiction on consumer protection laws remaining exclusively with the federal bank regulators for community banks, but short of that, we need CRA to remain with the federal bank regulators, the \$10 billion community carve out for community banks, plus further narrowing of the CFPA jurisdiction to specific statutes and joint rulemaking authority for the bank regulators on those statutes.

**System Risk:** While the issue of systemic risk is addressed in Dodd's draft, it would do so in significantly different ways than the House version through the creation of a Council to oversee system risk institutions. There is no provision for a pre-funded systemic risk fund and there is no provision to allow the systemic risk agency to downsize systemic risk financial companies or require them to divest of certain activities when deemed necessary to protect the financial system and the national economy. Obviously, we would prefer the Senate Bill to deal with system risk issues in a fashion similar to the current House version.

**Senate Side Summary:** As outlined above, there is little for community banks to like in the Dodd discussion draft. It will now be December before the Senate Banking Committee gets back to this bill, maybe even the second or third

week of December. The timing of when the Senate completes its work on the health care legislation could impact when this legislation will begin to be further addressed. **In its current form, we would be totally opposed to the bill.** Neither of Georgia's Senators is on the Senate Banking Committee, but they are in full agreement that there should not be a rush to judgment on this legislation, just to get something on the books.

### **Congressman Kingston's Conference Call**

On Wednesday of last week, Congressman Jack Kingston held a conference call for the bankers in his district to discuss and receive their feedback on the various financial and regulatory reform proposals, as well as, other banking legislation in Congress. We appreciate Congressman Kingston and his staff allowing Steve Bridges to sit in on that call. We also appreciate Norah Jones on the Congressmen's staff remaining in close contact with CBA on banking issues. During the call, **Congressman Kingston expressed his concern with many of the reform proposals and especially with the creation of a Consumer Financial Protection Agency (CFPA) that would have jurisdiction over banks. He also stated, however, that there is a lot of concern that some form of the CFPA legislation is going to pass without banks being totally exempted. He said there is good reason for such concern because the administration and the Democratic leadership definitely want a broad-based CFPA bill to pass and they have the votes.**

Carolyn Brown and Steve Bridges also met with Congressman Kingston and Norah Jones while in Washington last week. We had a good discussion about the various reform proposals and other pending banking legislation, including legislation related to overdraft programs. **We also thanked Congressman Kingston for signing on as a co-sponsor of H. R. 2897 by Representative Luis Gutierrez, which is the stand alone bill which would change the deposit insurance assessment base from domestic deposits to total assets less tangible capital and which would create a pre-funded system risk fund for use in unwinding large systemically risky financial companies.**

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