Commentary: It's the Banking Legislation, Stupid!

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Commentary: It's the Banking Legislation, Stupid
By Alvin C. Harrell

I. Introduction
Commentators analyzing President Bush's extraordinary 1992 election loss have frequently blamed such things as Bush's campaign style, "pandering to the religious right," or the diminution in major international threats to American military security. While an election campaign may involve many such factors, the best response to these arguments was reflected in the famous Clinton campaign sign in Arkansas: "It's the Economy, Stupid." But of course this is the easy part, for it is obvious that the economic recovery is not what it should be. The far better question is: why, in the face of low interest rates, low inflation, and stimulative record budget deficits, is employment and income growth so slow?

For many of us associated with the regulated financial system, the answer seems clear: The Bush administration shot itself (and the American economy) in the foot, not just once but three times, with FIRREA, the 1990 Crime Bill, and the FIDC Improvement Act. The resulting slowdown in bank and thrift lending offset the government's stimulative efforts and (Continued on page 113)

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doomed the Bush era to sluggish economic growth. While the general media have consistently ignored this simple fact, it is heartening to see increasing signs of recognition elsewhere that banking legislation and regulatory policy have had a dramatically adverse economic impact over the past four years.4

The results have been described as a litigation explosion5 and a regulatory overaction,6 but this is not entirely correct. Although, as discussed infra, litigation and supervision have played a role, to blame these factors entirely is to confuse causes and effects. In reality this is a legislative problem. When Congress enacted FIRREA, the Crime

One case in Iowa was pending prior to the district court’s decision Greenwood Trust. Iowa ex. rel Miller v. Morgan Whitney Trading group, No. 13167 (Dist. Ct. Linn County, Iowa amended complaint filed Jan. 22, 1990) (complaint against Safra Bank (California) regarding precomputed loans to finance precious metals contracts that were solicited by telephone; export and opt-out authority and various contractual provisions, including interest, late charges, attorneys’ fees, and Iowa disclosure notice, are being challenged), scheduling conference for setting trial date was scheduled for January 22, 1993.

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Control Act of 1990, and the FDIC Improvement Act, granting extraordinary new enforcement powers to the bank regulatory agencies, including massive new civil and criminal penalties, in many ways criminalizing the bank regulatory process, and eliminating any real due process for institution-affiliated parties, what did it expect would happen? Until these fundamental issues are addressed, it will take more than a new regulatory focus or a new public relations team to reinvigorate the American banking system.

II. Newsflash: Regulators Discover the Law of Unintended Consequences

Nonetheless there is reason for encouragement, as it has become apparent to more and more people that federal banking laws and policy have a chokehold on the American economy. Once the presidential election was over, various representatives of the banking agencies came forward to publicly acknowledge this phenomenon and to offer explanations for the resulting problems. These explanations have been widely aired in legal and industry association meetings, and in the business press. Some examples:

A. The Cost of the Deposit Insurance Bailout Justifies Anything

At one association meeting a panel of speakers laid out a long list of the disastrous banking law provisions included in recent federal legislation, and discussed the obvious adverse consequences. This was followed by a response from the legal counsel for a congressional committee, whose rebuttal was simply this: You are forgetting how much the S&L “bailout” cost - this tremendous cost justified anything the government might do. Yet, it does not seem clear just how the cost of bailing out insured depositors under a failed deposit insurance system justifies a new range of disastrous policies that are even more damaging to the economy.

B. The Government is Always Right and You Can’t Win Anyway, So Just Quit Fighting

At another association meeting a representative of one of the bank regulatory agencies posited that the agency is always fair and never makes an error in its examination and enforcement efforts, and hence private parties don’t really need to worry about their legal rights or the overwhelming powers of the banking agencies; in essence, private parties have no need to contemplate asserting independent legal rights in this context.7 In any event, it was said, private parties can’t win against the government, so why resist? Even the IRS hasn’t yet tried this approach (though Congress and some courts apparently embrace it wholeheartedly).

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related subjects again for an updated look at these developments.\textsuperscript{14}

Financial institution failure has produced a number of new problems, but even more problems have been generated by financial institution customer insolvency. One is the dilemma faced when an institution sees a valuable resource for repayment, a customer's account, being depleted as the customer sinks into insolvency, but faces the question of whether there is a remedy against the automatic stay in bankruptcy.\textsuperscript{15} Another article in this symposium explores this developing area.\textsuperscript{16} And, as a previous footnote suggests,\textsuperscript{17} there may be other potential for liability in this context for financial institutions, as well as in many other contexts. Revised Articles 3 and 4 impact on these possibilities in several ways, and the result is that in some respects the risks may be increased,\textsuperscript{18} in some cases the rules are merely clarified,\textsuperscript{19} and in other instances the possible chances for liability are significantly decreased.\textsuperscript{20} An article in Part Two of this symposium will discuss this ever evolving area.\textsuperscript{21}

Article 4 was originally prepared at the dawn of automated check processing and of course long before the concept of check truncation.\textsuperscript{22} As a result, many of its rules were drawn with the presence of paper in mind. When automated processes developed, the rules had to be altered by agreement and, even so, certain risks were imposed.\textsuperscript{23} One of the primary objectives of the revision of Articles 3 and 4 was to update the legal rules for developments in practices and technology so that operations could be conducted with more certainty and less risk with resulting savings in costs and time. Dozens of provisions involve these goals. Merely one example involves truncation, which is facilitated but not mandated by new Articles 3 and 4.\textsuperscript{24} Many of these provisions, like truncation, should involve changes or additions to financial and customer agreements and to the operations reflected in those agreements. Two articles in this symposium deal with the impact of new Articles 3 and 4 on financial institution operations\textsuperscript{25} and a third deals with related issues involving joint deposit accounts.\textsuperscript{26}

Of course, Articles 3 and 4 apply to consumers as well as commercial parties. Rules designed to accommodate technology and practices, while they benefit all customers, may impact more heavily on consumers, since consumers cannot easily tailor the rule by agreement and may operate differently than commercial parties. Two articles\textsuperscript{27} deal with this issue, and question whether revised Articles 3 and 4 strike the proper balance. The insights gained from the experience with Articles 3 and 4 should allow refinements in balance or approach in the coming revisions of Articles 2 and 9, where consumer concerns also exist.

Overall, the articles in this symposium demonstrate that new UCC Articles 3 and 4 are balanced products which are fair for both institutions and customers. Since they remove impediments to efficient operations, which will lower costs and risks to the benefit of the payment system as a whole, rapid enactment of the new Articles is advisable and seems to be occurring.

\textsuperscript{14} Maucham, Impact of Bank Insolvency on the Rights of Parties in Commercial Instruments (scheduled for Part Two of this symposium, in the next issue). See also Revised UCC § 4-216 and comments.

\textsuperscript{15} Bankruptcy Code § 11 U.S.C. § 362. There may well be other problems with set-off, or something short of it like a "set-off," outside of bankruptcy, of the action taken could result in diminished, perhaps wrongful,チェック written on accounts. See Revised UCC § 4-402; John P. Roberts, Banker's Right of Set-Off: Overview and Analysis, in this issue; Law Procedure, 56 F.2d 535 (1st Cir. 1932); Kennedy’s Franchise Corp. v. Central Fed. Bank, 228 A.2d 741 (W.Va. 1967). This is an example of the familiar point from which so-called "mini-liability" clauses grew.


\textsuperscript{17} See note 15.

\textsuperscript{18} For example, the definition of "good faith" for new Articles 3 and 4 is broadened to include "the observance of reasonable commercial standards of fair dealing." Revised UCC §§ 3-103(a)(4) and 4-104(a). This could expand the possible scope of damages, for example. See Revised UCC § 4-505(a).

\textsuperscript{19} For example, Revised UCC § 3-307 clarifies the institution's responsibility with respect to checks involved with dishonors.

\textsuperscript{20} Revised § 3-103(a)(3) defines "ordinary case" so as to clearly permit automated check processing without risk of losing the protection of Revised UCC § 4-404 and 4-406 and so lessen the possibility institutions may bear the loss from fugitives and alterations that should have been presented or caught by a diligent creditor. See, e.g., Wilder Binding Co. v. Oak Park Trust and Savings Bank, 552 N.E. 2d 783 (Ill. 1990).


\textsuperscript{22} In check truncation, checks are kept at a point short of the payor bank, such as at the depository bank, and the information is transmitted electronically. The payor then acts on the electronic information. Paper handling is avoided so the process is faster and cheaper.

\textsuperscript{23} See Wilder Binding Co., 552 N.E. 2d 783, for an example.

\textsuperscript{24} See Revised UCC §§ 3-501(4)(1), 4-110, 4-209(b), 4-406(a).


\textsuperscript{26} See R. David Whitaker, Special Considerations Related to Joint Deposit Accounts, in this issue.

\textsuperscript{27} See Mark Badria, Consumer Issues in Revised Articles 3 and 4 of the UCC (Sub B), Hiltbrand, Articles 3 and 4 in the California Legislature: A New Focus on Consumer Protection in Uniform Law Proposals, both in this issue.

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\textbf{C. The Law of Unintended Consequences}

In an article in the \textit{American Banker},\textsuperscript{3} former OTS Director Timothy Ryan offered this observation: "Sometimes government actions have unintended consequences."\textsuperscript{9} Nonetheless, Mr. Ryan explained that it is all OK because, after all, Congress and the regulators are only human. Perhaps this will now be recognized as a new defense available to institution-affiliated parties who are being subjected to agency enforcement actions.

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dated “lifeline” banking accounts) may be justified under these circumstances.37

IV. Conclusion

Of the four questions posed at the beginning of this article, only numbers one and four have been fully discussed. While these represent the more practical of the issues involved, other, more policy-oriented issues are also implicated and deserve attention. Such issues have already been addressed elsewhere and this discussion will not be repeated here.38


The drafters of the Article 3 and 4 revisions made a conscious decision to focus on the accommodation of technological change and to update the text of the UCC in the context of judicial trends. As a result many consumer protection issues relating to deposit and bank account transactions remain to be addressed in the 1990s. In order to address these issues, it may be necessary to bypass the UCC via other state law or by further federalizing the payment system.

D. The Mandate

In a Wall Street Journal article39 Mr. Ryan noted another reason for the bank regulatory chokehold on the economy: “[The American people] wanted rigorous law enforcement. Congress demanded action. The press vilified wrongdoers, urging swift and certain retribution... I received a clear mandate to punish S&L crooks.”41 All of this is of course true, though the public outrage was itself partly the product of a Congressional and media campaign apparently designed to shift responsibility for the failure of deposit insurance. No doubt it would be too much to expect a senior regulator to swim against this kind of political tide, although it would seem that someone in the Bush administration might have seen where it was all headed. And one might have hoped that at least a few members of Congress would have remembered something about economic consequences and Constitutional due process, instead of rushing to join the political lynch-mob.

E. We Are All Equally at Fault

One of the mysteries of the Bush era banking law disaster has been the role of Federal Reserve Board Chairman Alan Greenspan. Did this astute economist really believe those cheerful pronouncements he made during the Bush years, first denying the existence of a credit crunch and then confidently announcing that it could be dealt with solely by monetary policy?42 Was he really unaware of what FIRREA and its progeny were doing to the banking system and the economy? Or was he giving private counsel that was quite different from his public posture, and which went unheeded in the Bush administration? We may never know, but once the election was over Mr. Greenspan publicly discovered the credit crunch and its “debilitating” effect on the economy.43 His explanation? Congress, the regulators, the administration, and bankers are all at fault and must change their ways.44 Although Mr. Greenspan’s observations have been among the most engaging of any made by those associated with the Bush or Clinton administrations, and are always couched in the terms of political tact and understatement appropriate to a central banker, the fact remains that everyone is not equally at fault. Lending patterns did not suddenly change without reason; surely the bankers (and other institution-affiliated parties) who have been justly frightened into a risk-averse posture cannot be blamed for the legislation that put them there. Even the regulators are not entirely to blame, for they can be expected to use the powers that Congress gives them, especially when they are being harassed daily by Congress and the press. In the final analysis the fault lies with Congress and the President, and can only be fixed by them.

III. Are Community Development Banks the Answer?

The Clinton administration is to be commended for recognizing that entrepreneurial bank lending is essential to the health of the economy.45 The banking law policies of the Bush era clearly impaired the entrepreneurial spirit of this crucial industry, and a recognition of this fact by key policymakers surely represents some progress.

But the real question is how to fix the problem without repeating the mistakes of the past. Unfortunately, the Clinton proposal for a system of community development banks bears an eerie resemblance to

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10. See Timothy Ryan, supra note 5.

11. Id.


2. Direct Return of Dishonored Items

Old Article 4 does not provide for direct return of dishonored items; Regulation CC specifically provides for direct return. Revised Article 4 deletes the previous rule at old section 4-212(2) that precluded direct returns.

3. Payable-Through Drafts

Under Regulation CC, payable-through banks are treated as payor banks for purposes of the expedited return and notice of dishonor requirements. Article 4 treats a payable-through bank as a collecting bank for purposes of the expedited return and midnight deadline requirements.

4. Remote Data Processing Centers

Under old Article 4 it is not clear whether delivery of an item to a remote data processing center constitutes presentment to the payor bank for purposes of the midnight deadline. In contrast, Regulation CC expressly provides that delivery to an off-premises processing center constitutes presentment to the payor bank. The Article 4 revisions do not expressly resolve this conflict which arguably remains a matter of state law for many purposes.\(^\text{112}\)

5. Truncation

Regulation CC expressly authorizes truncation. Revised Article 4 also embraces this trend. In both instances the matter is left to agreement of the parties.

6. Indorsements

Regulation CC provides strict indorsement standards. Old Article 4 allows virtually any contractual form of transfer, and this is reaffirmed in the revisions. The Article 3 provisions are likewise very liberal in both versions of the Code.\(^\text{117}\)

7. Comparative Fault

Regulation CC introduced the concept of comparative fault into the check collection process. In contrast, old Article 4 places all of the loss on one party or another, based on whose negligence most contributed to the loss. In many circumstances revised Articles 3 and 4 apportion the amount of liability on the basis of comparative fault. The result is a system of statutory liability for payor banks missing the midnight deadline under Article 4, coupled with a mixed system of comparative fault and liability for actual damages under the new Articles 3 and 4 and Regulation CC.\(^\text{121}\)

IV. Conclusion

Funds availability, bank deposits, and the collection of checks represent an ever changing environment for banking institutions, as a result of technological advances and legal and regulatory changes. Banks should continually review their operations in an effort to improve or alter procedures, as necessary, to minimize potential liability. These types of analyses should be performed on an ongoing basis due to the anticipated continuing developments in this area of the law. The uncertain relationship between UCC Article 4 and Regulation CC suggests a particular need for proper procedures to avoid inadvertent liability for a violation of this confusing matrix of applicable laws.

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107. C.F.R. § 229.90(b); old UCC § 4-212(2) and rev. § 4-214(b); Miller & Harrell supra note 1, para. 4.04(3)[1], n. 453.
108. See C.F.R. §§ 229.36(a) and 229.71(r); See also Miller & Harrell supra note 1, para. 4.04(3)[3].
109. See UCC § 3-1421(b); Miller & Harrell supra note 1, para. 8.04(3)[3].
110. See id.; Miller & Harrell supra note 1, para. 8.04(3)[3] and Safe. See, e.g., Security Bank & Trust Co., 773 F.2d 111 (6th Cir. 1985), supra, note 1, para. 10.01(3)[2] and para. 3.02(1) [13]. Revised Article 3 typically speaks of the rights of the party "suited to enforce the instrument" (see, e.g., §§ 3-303, 3-304, 3-414, and 3-104), thereby suggesting the availability of any means of transfer valid in a matter of contract law.
111. See C.F.R. § 229.36(b).
112. There remains a viable argument under revised Article 4 that remote data processing centers should be treated as collecting banks at some circumstances. See Miller & Harrell supra note 1, para. 8.04(3)[3].
113. See 12 C.F.R. § 229.36(c), supra note 1, para. 8.04(3)[3].
114. See, e.g., Miller & Harrell supra note 1, para. 8.04(3)[3].
115. See UCC §§ 3-203.4 and 3-206. Negotiation of order paper still requires indorsement. See UCC § 3-201(b).
116. See UCC § 9-416; Miller & Harrell supra note 1, para. 8.04(3)[3].
117. See 12 C.F.R. § 229.36(a) supra note 1, para. 8.04(3)[3].
118. See UCC § 3-203; § 4-206. Negotiation of order paper still requires indorsement. See UCC § 3-201(b).
119. See, e.g., 3-303, 3-304, 3-406.
120. See §§ 3-404(a), 3-406(b), 3-406(c). Miller & Harrell supra note 1, para. 4.04(3)[3], para. 7.03, para. 9.03(4).
121. See §§ 3-406, 4-406; 12 C.F.R. § 229.36(c) and the Regulation CC Commentary: Miller & Harrell supra note 1, para. 8.02, para. 8.03, para. 8.04, and para. 9.03.

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some policy errors of the very recent past, including the narrowly focused and heavily regulated structure of the savings and loan system that failed so miserably in the 1970s and 1980s. For roughly 50 years, dating from formation of the Federal Home Loan Bank Board in the early 1950s, the thrift industry was treated as a heavily regulated Congressionally piggy bank, used for off-budget funding of housing activities deemed to be socially or politically desirable. Precluded from competing on equal terms with other lenders, thrifts were micromanaged by Congress and the regulators to an absurd degree, often to appease the powerful housing lobby.\(^\text{17}\)

With essentially an unlimited claim on the government's deposit insurance "fund" (in reality a claim against U.S. taxpayers), the result was inevitable.

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16. As noted previously in this journal, the S.A.L. problems of the mid- to late 1980s resulted in part from a monumental gamble (touted to a large degree by the Congress and the regulators) designed to save the industry from fundamental structural problems that had rendered it virtually insolvent by 1989. See, e.g., Akin, C. Harrell, Commentary on FIREL: What Would George Bailey Think?, 44 Consumer Fin. L.Q. Rep. 215 (1990). The industry was treated as a heavily regulated Congressional piggy bank, used for off-budget funding of housing activities deemed to be socially or politically desirable. Precluded from competing on equal terms with other lenders, thrifts were micromanaged by Congress and the regulators to an absurd degree, often to appease the powerful housing lobby.\(^\text{17}\)

17. (Continued from previous column)
agreement, pursuant to revised section 4-403.

F. Change in Ownership

Because a joint account is owned by all the tenants, whether jointly or in common, the institution should not accept instructions from one owner of an account to change the account ownership (except that with respect to accounts held by tenants in common, the estate of a deceased tenant can be safely substituted). The account owner wishing to appropriate the funds should be required to withdraw them and place them in another account. This procedure is authorized by UCC section 4-401.

G. Third Party Claims

From time to time, an account may be subject to an ownership claim by a third party, who is not named as an owner of the account in the institution’s records. These types of claims can land the depository institution in the middle of a lengthy dispute between claimants to the deposit, and expose the institution to claims for damages if it takes any action detrimental to the third-party claim after receiving notice of the claim, under the doctrine of “constructive trust.” However, this is not applicable to all types of third party claims, and some states have statutes that protect financial institutions from liability for most third party claims.

Under one version of this statute, a bank does not have notice of a third-party claim to an account unless (1) the bank is served with a restraining order or injunction, (2) the adverse claimant delivers a bond indemnifying the bank for losses from recognition of the adverse claim, or (3) if the named depositor was allegedly acting in a fiduciary capacity, the adverse claimant provides an affidavit to the bank setting forth the fiduciary relationship. Until notice of the claim is given in the prescribed manner, the constructive trust theory does not apply.

Typically the constructive trust doctrine does not apply, even after notice, if the bank has previously changed position in reliance on its understanding of the account ownership (e.g., has taken a security interest in the account as part of a lending transaction). If the financial institution is not protected by such a statute, then interpleader will usually be available. In either case, the institution may wish to freeze the account for some period of time upon receiving notice of an adverse claim.

H. Stop Payment Orders

Prior to the revision of Article 4, the UCC did not make it clear whether any one owner of an account could stop payment on items written by another owner of that account. Revised section 4-403 of the UCC states that any owner or authorized signer on an account may place a stop payment on any item drawn on that account. In a state which has not adopted the revisions, similar language could be provided in the deposit agreement.

IV. Suggested Terms for Deposit Accounts

- Virtually all of the problems described above can be avoided by careful wording of the deposit agreement and judicious use of an “authorized signer only” designation on the signature card. The agreement should clearly state the types of joint accounts available and describe, in general terms, the rights that attach to each type of account. Joint tenancy accounts should be clearly stated to include a right of survivorship. If an account owner wishes another party to have access to the account without granting ownership rights, this may be accomplished by making the other party an authorized signer. The institution should determine whether or not it wishes to permit tenancy in common accounts.

The deposit agreement should also clearly state that the bank may setoff against the joint account irrespective of the ownership interest of the various account holders, and that any owner or authorized signer can issue a stop payment on any item. The agreement should also permit the account to be charged with any overdraft, and it can be written to render all joint owners liable for overdrafts. It should permit the institution to pay out any funds in the account in the event of garnishment, and agree, for any accounts held by tenants in common or joint tenants without survivorship, that the bank is not obligated to permit withdrawals, after notice of a tenant’s death, until it receives a court order establishing ownership. There should also be provisions (i) indemnifying the institution for expenses resulting from third party claims, (ii) permitting the institution to decline any instructions with respect to a change in ownership, and (iii) permitting a freeze in the event of a third-party claim.

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President Clinton’s proposal for a system of community development banks sounds strikingly similar to this failed approach. Of course community development bank insti-
tution-affiliated parties would still be subject to the full range of post-FIRREA civil and criminal penalties, and it might be argued that these penalties will scare away the kinds of crooks that ruined the thrift industry. But in large measure the thrift industry was ruined by a

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5. Free Withdrawal By Slip - unlimited free withdrawals by slip.
6. Free Deposits - unlimited free deposits.
7. Account Maintenance Charge - not more than $3.00 per cycle.
8. Check Printing Charge - not more than on regular accounts.
9. ATM & Other Charges - not more than on regular accounts.

A nonconforming Account must have features "substantially equivalent" to those described above.

D. Account Disclosures

First, the application for a NJCC Account cannot solicit information different from that provided on regular checking account applications. Second, the "account agreement" must reflect terms and conditions consistent with the Account features listed above. Consequently, it seems that special Account agreements must be created.

Third, the CCAA requires that periodic statements be provided on NJCC Accounts on at least a quarterly basis. Fourth, institutions must prepare lobby notices and information handout materials that explain the material features and limitations of its NJCC Account. The regulations further require that institutions provide "reasonable in-person information and assistance" to customers regarding NJCC Accounts and "related financial services."²⁸


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narrow structure, strict regulatory regimen, and undiversified loan portfolios, not by crooks.¹⁸

The post-FIRREA penalties and regulatory powers, however, will probably succeed in scaring away qualified officers and directors who might otherwise be willing to join any movement to enhance old-fashioned community banking. Only those who are largely ignorant of the risks, or who have been financially unsuccessful and have nothing to lose, can rationally sign on to a modern effort to make "character" loans to marginal borrowers using FDIC-insured funds. There surely is also a risk that a number of community development bank charters and management positions will be awarded to judgment-proof political loyalists who will be more than happy to spread uncollectible loans around the community using somebody else’s money.¹⁹ If so the results again will be inevitable.

VI. Potential Solutions: Deregulation and Capital Standards

As discussed supra, just about everyone who follows such thing now realizes that Congress and the Bush administration overreacted badly to the insolvency of the deposit insurance funds, and that the resulting punitive legislation induced a contraction in lending that has impaired economic growth since August 1989.²⁰ It is encouraging to those of us concerned about the future of the economy and the private banking system that the Clinton administration seems to understand this better than the Bush administration did.²¹ But it remains to be seen whether this recognition will be translated into the specific legislative changes needed to reinvigorate the American financial system, or whether these good intentions will again sink into a morass of counterproductive regulation and legislation. Moreover, while most of the Bush-era banking legislation was hopelessly short-sighted and counterproductive, some of the Bush-era policies will have positive effects in the long run (though typically they were imposed in ways that caused unnecessary pain) and should be retained.

Unwinding this public policy disaster and restoring an entrepreneurial spirit to American bank lending, without paving the way to even greater taxpayer losses in the future, will require enlightened deposit insurance

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¹⁸ See, e.g., J.R. BARTH, THE GREAT SAVINGS AND LOAN Debacle (AFI Press 1991); E.L. KANE, THE S&L INSURANCE: HOW DID IT HAPPEN? (Harvard Univ. Press 1989); Harrell, Commentary on FIRREA, supra note 16; Stephen K. Hohler, Required for the Thrift Industry, 44 Consumer Fin. Serv. Rev. 34 (1991). This was conveniently ignored during the debate on the S&L "bailout," and no doubt will also be ignored while a similar system of new banks is created.

¹⁹ See, e.g., Big Ideas for Little Banks, Dec. 3, 1992, at A14. Interestingly, Rep. Joseph F. Kennedy II (D. Mass.) (Chair of the House Banking Committee's subcommittee on consumer credit and insurance) seems to share this skepticism, along with an appreciation for the counter-productive effects of the regulatory burden. Unfortunately his solution (forcing banks to make more CRA loans) sounds a lot like racial credit quotas. See Jim McCain, Final Warning of President's Development Bank Concept, Amer. Banker, Jan. 28, 1991, at 22; Joseph Kennedy, Taking a Sigh for Sure, supra note 4, at 10 ("in a bank of such size and such a size ought to have certain goals").

It is interesting to note that the proposal to charter a new range of community development banks is contrary to an apparent regulatory trend designed to encourage consolidation within the industry on grounds that there are already too many banks. See, e.g., Bill Dickinson, Bank Start-Ups Dip to 38 Year Low, Sun. GLOBE, Feb. 21, 1993, at C6 ("the vast majority of regulators in the country think there are too many banks and they want fewer banks").

²⁰ See, e.g., supra notes 4-7 and 15; Paul S. Nadler, Gann-Shy Lenders Hurt Banking, Amer. Banker, Dec. 21, 1992 at 4.

²¹ See, e.g., Robert M. Gerson, Clinton Lending Increase More Crucial Than Stimulus, Amer. Banker, Dec. 16, 1992 at 1; See also Harper and Bazzie, Causes Claus Regulatory Initiative To Ease the Crunch on Bank Lending, and other citations supra at notes 4-7 and 15.
Even if consumers have better factual information, it does not follow that these facts will be studied and acted upon. The acquisition of information involves costs in time, and perhaps in money. Empirical studies of consumer behavior have repeatedly demonstrated that consumers base their decisions about purchases on product-related rather than contract-related considerations.\textsuperscript{307} This behavior is not irrational. Shifting from one banking institution to another involves significant transaction costs. (Reflect on the last time you moved your business from one banking institution to another.) The considerable research on selection of a bank shows that convenience is the dominant consideration, and that among the convenience factors location is the most important fact. Given an existing choice of a bank or thrift that is optimum for a consumer, it is also true that other institutions are less desirable to that person. Thus an alternative has to be a lot better than the present choice to cause a consumer to change from one banking institution to another. (To use an everyday analogy, consider how good a sale at a grocery store has to be to get you to drive across town instead of going to the store where you regularly shop.) Since location and other convenience factors are central to the choice of a provider of banking services, product information (even about price) may not be a major factor in many consumer decisions.

Twenty-five years of experience with TIL should lead one to have the most modest expectations for the benefits of account information disclosure to consumers. Two leading consumer law scholars concluded, after a careful and detailed study of TIL: "Behavioral scientists, public opinion research, consumer research, and our common sense tells us the same thing: consumer behavior in a particular transaction is almost certainly not going to be affected by a TIL disclosure statement, notwithstanding the quality of that statement."\textsuperscript{308} The sad truth about TIL is that the hope for benefits have not been attained because they are unattainable.

On behalf of TIS, is should be said that clear and concise disclosure of important account information may be helpful to some consumers, and perhaps the cost will be less than is generally anticipated. After all, the terms and conditions under which accounts are offered to consumers are banks and thrifts are already disclosed in the deposit contract, albeit perhaps not always in the manner most helpful to the customer. Still, savings customers are probably more sophisticated in these matters than Congress recognizes, and it may logically be doubted that much will be gained as a result of TIS.

The major flaw of TIL, and the fear with respect to TIS, is the complexity of the regulation, the cost of compliance, and the risk of litigation, not disclosure. The focus should be on sensible administrative enforcement, not judicial remedies. That way consumers will be the beneficiaries, not the legal profession. At least with respect to banks and thrifts, clear directions about the conduct required, reasonable evaluation of disclosures in the course of regular examinations, and sparse use of presently authorized sanctions should be quite sufficient to bring about adequate levels of compliance in a short period of time. If this approach is adopted, it is at least possible that the modest benefits of TIS will be accompanied by equally modest compliance and litigation costs.


Commentary:

It's the Banking Legislation, Stupid

(Continued from page 180)

1. Provisions that increased the penalties for failed bankers and excessively expanded the enforcement powers of the regulatory agencies. These provisions have greatly diminished Constitutional due process protections for anyone associated with a regulated financial institution, and have unnecessarily criminalized the bank regulatory process, thereby discouraging healthy risk-taking by bankers.\textsuperscript{22}

2. Regulatory compliance and consumer transactions. Many compliance requirements unnecessarily increase the regulatory burden on financial institutions without providing any significant benefits to consumers. In addition they increase the potential for technical violations that cause no real harm but can be seized on as a basis for


23. (Continued from previous column)