

# 2011 Regulatory and Legislative Update

---

Robert D. Klingler  
robert.klingler@bryancave.com



## Specific Topics to be Covered

- TARP
- Small Business Lending Fund
- Legal Lending Limit
- Mortgage Broker Compensation
- Dodd-Frank Act
  - Overview
  - Applicable Provisions



BRYAN CAVE

## TARP Capital Purchase Program

- New Capital Investments ended December 31, 2009
- Total Investment was \$204.9 Billion
- \$30.9 Billion Outstanding at 2/8/11
- \$171.4 Billion Repaid through 2/8/11
- \$7.0 Billion in Warrant Proceeds through 2/8/11
- \$10.4 Billion in Dividend Payments through 2/8/11
- Over 700 Participants; Approx 140 Have Repaid
- Treasury Estimates \$20 Billion Profit

BRYAN CAVE

## Georgia TARP Recipients (26)

- Alliance – \$3 million
- Ameris – \$52 million
- CBB – \$3 million
- Citizens – \$8 million
- Colony – \$28 million
- CSRA – \$3 million
- Fidelity Southern – \$48 million
- First Intercontinental – \$6 million
- Gateway – \$6 million
- Georgia Commerce – \$9 million
- Georgia Primary – \$5 million
- Hamilton State – \$7 million
- Liberty Shares – \$17 million
- Metro City – \$8 million
- Midtown – \$5 million
- Mountain Valley – \$3 million
- One Georgia – \$6 million
- PeoplesSouth – \$12 million
- RCB Financial – \$9 million
- SouthCrest – \$13 million
- SunTrust – \$4.8 billion
- Synovus – \$973 million
- Queensborough – \$12 million
- Tifton – \$4 million\*
- United – \$14 million
- United Community – \$180 million

\* Subsidiary bank placed into Receivership by FDIC

BRYAN CAVE

## Non-Payment of Dividends

- Two Directors After Six Missed Payments
- Focus on Largest Investments
- Federal “Observers” After Five Missed Payments
- Head Hunters Engaged
- 19 Institutions Missing Six or More Payments
- 36 Additional Institutions Missing Four or More

BRYAN CAVE



BRYAN CAVE

## Small Business Lending Fund

- October 2009 – President First Announces Concept
- January 2010 – State of the Union Address
- June 2010 – House Adopts
- September 2010 – Senate Adopts and President Signs
- December 2010 – Treasury Publishes Application Form
- March 31, 2011 – Deadline to Apply
- ? – First Funds Provided to Banks

BRYAN CAVE

## Eligibility

- Asset Size < \$10 Billion
- Problem Banks Ineligible
- TARP CPP Participants
  - 100% Refinance
  - No more than one missed dividend
  - Warrants remain Outstanding
- Discretionary
- Private Matching Funds
- Lending Plan Required

## Terms of Investment

- Perpetual, Noncumulative Preferred (Tier 1)
- Senior to Common Stock
- Pari Passu with Most Senior Preferred Stock
- 5% of Risk-Weighted Assets
  - 3% if over \$1 Billion
  - 3% if Private Matching Funds required
- Dividends Adjusted Based on Small Business Lending
- Generally Non-Voting
- Appoint Two Directors after Six Missed Dividends  
(if >\$25 million investment)

## Small Business Lending

- Commercial and Industrial Loans
- Owner-Occupied Commercial Real Estate
- Agriculture Loans
- Loans Secured by Farmland
  
- Principal is \$10 million or less
- Borrower's Annual Revenue is \$50 million or less
- Excludes Portions Guaranteed by U.S. Government

## Dividend Rate

Lending Increase	Dividend Rate
Negative	7% (or 9% for TARP conversions)
0% up to 2.5%	5%
2.5% up to 5.0%	4%
5.0% up to 7.5%	3%
7.5% up to 10.0%	2%
10.0% or more	1%

## Legal Lending Limit



BRYAN CAVE

## Legal Lending Limit

- Georgia Code Section 7-1-285
- 15% of Capital Base (or 25% with collateral)
- Amended in 2010 to address Loan Renewals
- Renewals permitted following reasonable efforts, unless:
  - New funds are advance to borrower
  - Borrower is changed
  - Department determines renewal undertaken as means to evade lending limit

BRYAN CAVE

## Statutory Interpretation

- February 2010 – Georgia Department of Banking and Finance gives informal guidance that renewals are only permitted for “performing loans”
- September 2010 – DBF proposes revisions to Rule 80-1-5-.01 to clarify that only “performing loans” may be renewed if then in violation of legal lending limits
- November 2010 – DBF withdraws proposed rules and confirms that it no longer interprets the statute to require renewed loans to be performing.

BRYAN CAVE

## Waiver?

- FDIC Complaint
- Board set a limit of 35% of Tier 1 Capital.
- Granted “waivers of the lending limit.”
- No.

You're from the same firm-- you can't represent both sides!

Sure we can--we have waivers AND we hate each other way more than we hate lawyers at other firms.



BRYAN CAVE



## Mortgage Broker Compensation

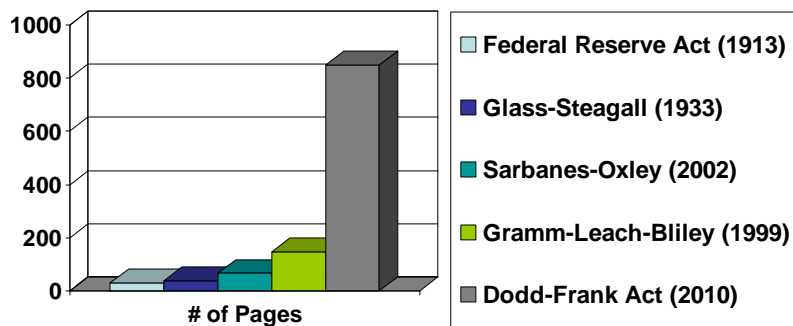
- New Truth in Lending Act rules
- Effective April 1, 2011
- Separate from Dodd-Frank Changes
- Prohibits payment of compensation based on any of the loan's terms, except as a fixed percentage of total loan amount
- Applies to all "Loan Originators"



## Dodd-Frank Wall Street Reform and Consumer Protection Act

- Signed into law July 21, 2010
- 67 Mandated Studies and Reports
- 243 Rulemakings
- Expect 5,000+ pages of Implementing Regulations
- Two primary goals:
  - lower systemic risks
  - enhance consumer protections

## Comprehensive (or at least Large)



## A New Stress Test for Banks



BRYAN CAVE

## High Level Overview

- Financial Stability Oversight Counsel
- Orderly Liquidation Authority
- Regulation of Hedge Funds
- Federal Insurance Office
- Volcker Rule
- Revised Derivatives Regulation
- Investor Protections and Credit Rating Agency Reforms
- Limitations on Federal Reserve Authority
- Executive Compensation Reforms
- Disclosures re: Congo Conflict Minerals
- No Reform of Fannie or Freddie

BRYAN CAVE

## New Capital Rules Forthcoming

- Risks related to activities to affect required capital ratios
- Counter-cyclical capital requirements
- “Source of Strength” regulations
- Studies
  - Smaller Institution Access to Capital
  - Hybrid Capital Instruments

## Higher Capital Requirements?

Metric	Current	Future (?)
Leverage	5%	8%
Tier 1 Risk-Based	8%	10%
Total Risk Based	10%	12%

## The Collins Amendment

- Eliminates Tier 1 Treatment for Newly Issued Trust Preferred Securities (after May 19, 2010)
- Banks > \$15 billion  
3 year phase-out beginning 2013
- Banks < \$15 billion  
Fully Grandfathered
- Small Bank Holding Company Policy Statement  
Effectively exempts Banks < \$500 million

## Retroactive Increase to \$250,000



## Noninterest Bearing Accounts

- Unlimited Insurance for Noninterest Bearing Transaction Accounts (and IOLTA accounts)
- December 31, 2010 through December 31, 2012
- Similar to TLGP's Transaction Account Guarantee
  - All Institutions – no voluntary opt-out
  - No additional assessments
  - No coverage for NOW accounts paying *de minimis* interest
- Regulation Q guidance on Fee Waivers in Lieu of Interest
- Separately, Interest on Checking Permitted July 21, 2011

## FDIC Insurance Assessments

- Assessment base changed from insured deposits to “average assets minus average tangible equity”
  - Generally favorable to institutions funded with deposits
  - Assessments on goodwill, FHLB borrowings, fed fund advances
  - Increased competition for deposits(?)
- Minimum reserve ratio from 1.15% to 1.35%
  - Funded by institutions > \$10 billion
- Required to reach minimum by September 30, 2020
- Cap on reserve ratio removed

## Affiliate Transaction Changes

- “Covered Transactions” Expanded
- Statutory requirements for asset transactions with insiders
  - Market terms
  - Prior approval by noninterested directors, if >10% capital
- Include credit risk associated with derivatives, swaps and repurchase agreements in lending limits

## De Novo Branching

- Interstate branching permitted
- Business opportunity?
- Reduces value of charter
- Increases number of potential branch acquirers



## The Bureau

- Regulatory Authority for All “Federal Consumer Protection Laws”
- Direct Supervisory and Examination Authority for Banks >\$50 Billion in Assets
- Transfer Date – July 21, 2011



BRYAN CAVE

## Federal Consumer Protection Laws

- Truth in Lending
- Truth in Savings
- SAFE Mortgage Licensing
- RESPA
- EFTA
- ECOA
- Fair Credit Billing Act
- Home Owners Protection Act
- Fair Debt Collection Practices
- Gramm-Leach Privacy
- HMDA
- HOEPA
- Consumer Leasing Act
- Alternative Mortgage Transactions Parity Act

BRYAN CAVE



## Mortgage Reforms

- Mortgage Originators
  - Duty of Care Standard; Personal Liability
  - Compensation Controls
  - Prohibit Steering to Inappropriate Products
- Minimum Residential Mortgage Standards
  - Determination of a “Reasonable Ability to Repay”
  - Affirmative Defense without Time Limit
  - Exception for “Qualified Mortgages”

## Qualified Mortgages

- No Negative Amortization, Interest Deferral, or Balloon Payments
- Income and Assets Verified and Documented
- Underwriting based on Principal Payments, Taxes and Insurance (at maximum rate during first five years for ARM loans)
- Compliance with Debt-to-Income Ratios
- Total Points & Fees  $\leq 3\%$
- Term  $\leq 30$  Years

## The Durbin Amendment

- Reasonable and Proportional Interchange Fees
- Prohibitions Against Exclusivity Arrangements
- Proposed Rules Issued December 16, 2010



## Reasonable and Proportional Interchange Fees

- Application
  - Excludes Credit Cards and Government Benefits Cards
  - General Use Prepaid Cards vs. Reloadable Prepaid Cards
  - Cards Issued by Banks <\$10 Billion in Assets
- Preventing Fraud vs. Fraud Losses and Costs Incurred Dealing with Fraud
- Proposed Cap: 12 cents per transaction

## Prohibitions Against Exclusivity Arrangements

- Broader Application
- Greater Merchant Flexibility
- Alternative Network Processing
  - Proposed Alternative A: two non-affiliated networks
  - Proposed Alternative B: two non-affiliated networks for each mode of acceptance (PIN or signature)

BRYAN CAVE

## Office of Thrift Supervision

- Transfers Powers, Duties and People of OTS
- July 21, 2011
- Federal Thrifts → OCC
- State Thrifts → FDIC
- Thrift Holding Companies → Federal Reserve
- CFPB Director replaces OTS Director on FDIC Board
- Thrift Charter nominally preserved



BRYAN CAVE



*"These new regulations will fundamentally change the way we get around them."*

BRYAN CAVE

## Bank Bryan Cave

[www.bankbryancave.com](http://www.bankbryancave.com)

- Free
- Can Sign-up for E-mail Updates

BRYAN CAVE