

Legislative Highlights

Hearing on Resolution Authority Asks Who's "Too Big to Fail"

The House Judiciary Committee held a hearing on Oct. 22 on bankruptcy and nonbankruptcy alternatives for failing nonbank financial institutions. The hearing addressed concern that recent failures of large financial institutions has led to a policy of government bailouts, or an expectation of a government bailout. Two main alternative proposals are currently under consideration. One put forth as part of the Obama administration's financial reform proposals would establish a special resolution regime under which the Secretary of the Treasury, with the approval of the president and agreement of the regulatory authorities, could apply an expanded FDIC-like resolution process to any financial firm if its failure would have "serious adverse effects on the financial system or the economy." The firm would be placed into conservatorship or receivership and the government could provide the firm with loans, purchase its assets or guarantee its liabilities. The alternative would have the failing financial firm go through a bankruptcy process designed specifically to deal with some of the financial firm's assets and liabilities. The bankruptcy proposal in H.R. 3310 is an example of such an approach. The conceptual idea is that the bankruptcy would permit important financial transactions to continue without significant disruption during bankruptcy. Prof. **David Skeel** (University of Pennsylvania Law School and former ABI Resident Scholar) testified in support of H.R. 3310 over the expanded FDIC resolution authority. "The prospect of bankruptcy dramatically reduces moral hazard, is much less likely to distort corporate governance, forces a needed restructuring and requires all parties to bear the consequences of the default," he said. The issue will be a focus of ABI's Legislative Symposium in Washington, D.C., on Nov. 16-17 (see p. 99).

New Consumer Financial Protection Agency Advances

The House Financial Services Committee has approved legislation to create a Consumer Financial Protection Agency (CFPA), providing a victory for the Obama administration in its push to

revamp the financial regulatory system and a defeat for much of the banking lobby that fought aggressively to kill it. The final vote broke almost exactly along partisan lines, ending days of debate where moderate Democrats were able to limit the scope of the bill, which will take consumer protection duties from federal banking regulators and give them to a new agency with broad rule-making, examination and enforcement powers. The measure includes additional oversight for payday lenders, check-cashing outlets and remittance providers. However, the agency would not have oversight of insurance and securities. The bill was further limited in two significant ways: It excludes most banks and credit unions from primary enforcement and examination by the new agency, and the CFPA can take an enforcement action only if the primary bank regulator does not. The final action came after national banks won a limited pre-emption of state consumer laws, if the Office of the Comptroller of the Currency determines that state law "significantly interferes" with the business of banking. The panel also approved an amendment that would exclude providers of credit insurance—such as title and private-mortgage insurance—from regulation by the CFPA. Credit unions pushed heavily for the exemption, arguing that such services face strong regulation at the state level. Consumer groups say those products carry a low loss ratio, resulting in customers being overcharged in their policies. The compromise would allow the CFPA to target such products but do so through the lender that sells them to the consumer, rather than through the insurer that provides them as part of a package for such products as car loans, credit cards or mortgages.

Dodd, Maloney Introduce Bill to Curb Overdraft Fees

Bank customers who overdraw their checking accounts would get new protections from excessive penalties under legislation introduced by Senate Banking Committee Chairman Chris Dodd (D-Conn.). Several major banks, in anticipation of congressional action, have already said they will start letting customers opt out of overdraft programs, and others have said that they will

lower their fees (expected to total \$38.5 billion this year). Dodd's bill would require banks to get customers' consent before enrolling them in an overdraft protection program for ATM and debit card transactions, limit the number of overdraft fees banks can charge to one per month and six per year, require that fees be proportional to the cost of processing the overdraft and require customers to be notified by e-mail, text or traditional mail when they overdraw their accounts. Rep. Carolyn Maloney (D-N.Y.) has introduced similar legislation in the House.

Senate Panel Considers Easing Rules for High Medical Debt Filers

The Senate Judiciary Subcommittee on Administrative Oversight and the Courts held a hearing Oct. 20 on legislation to carve out an exception for people whose medical bills were the main cause of their financial distress. Those consumers meeting the classification of "medically distressed debtors" under legislation S. 1624, the "Medical Bankruptcy Fairness Act," sponsored by subcommittee chair Sen. Sheldon Whitehouse (D-R.I.), would be allowed to waive the BAPCPA-required means test and credit counseling requirements, protect their homes from creditors with an exemption of \$250,000 and be given the option of paying attorneys' fees when they are on firmer financial ground after completing the bankruptcy. Some studies have claimed that more than 60 percent of all personal bankruptcies are caused by medical debt, though witnesses from the American Enterprise Institute and the Hudson Institute questioned the methodology and conclusion of such studies. Whitehouse's approach was backed by Elizabeth Edwards, a cancer patient and wife of former North Carolina Sen. John Edwards, and Prof. **John Pottow** of the University of Michigan Law School. Sen. Jeff Sessions (R-Ala.), the committee's ranking member, disagreed with the bill's elimination of an income-related test for medical debtors only. The House Judiciary Committee Subcommittee on Commercial and Administrative Law held an earlier hearing on its version of the legislation (H.R. 901) on July 28. The

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provision may be folded into the larger health insurance legislation now pending in Congress.

Bernanke Airs Concern on Speeding Up Credit Card Law

Federal Reserve Chairman Ben Bernanke said that speeding up the effective date of new credit card rules to Dec. 1 from next year (as in H.R. 3639) may result in “unintended consequences” for banks. “Card issuers must be afforded sufficient time for implementation to allow for an orderly transition and to avoid unintended consequences, compliance difficulties and potential liabilities,” Bernanke said in a letter to Rep. Spencer Bachus (R-Ala.). The credit card law, which takes effect in stages, will require banks to apply payments to higher-rate balances first, limit rate increases and ban practices such as “universal

default” or raising rates based on a missed payment with another lender. Most of those rules are set to begin Feb. 22, while others, such as limits on gift-card fees, are scheduled to start Aug. 22. Ignoring Bernanke, the House Financial Services Committee on Oct. 22 approved the Dec. 1 start date, signaling disapproval to the banks over reports that lenders were jacking up rates and fees in advance of the effective date.

Report Calls on Administration to Re-Examine Foreclosure Mitigation Program

The Congressional Oversight Panel released a report in October saying that the Treasury Department should re-examine the Home Affordable Modification Program because it “is targeted at the housing crisis as it

existed six months ago, rather than as it exists right now.” The panel, led by Harvard University Prof. **Elizabeth Warren**, found that the program is tailored only to certain mortgages, leaving out others such as interest-only loans that will reset and adjustable-rate mortgages with payment options. It also does nothing to address those who are at risk because of job loss. Sen. Jack Reed (D-R.I.) has sponsored a bill that would fund grants for states and localities to establish mandatory mediation programs between borrowers and lenders, authorize \$7 billion to states to offer homeowners’ grants or subsidized loans and require lenders to evaluate whether the borrower is eligible for an affordable modification before initiating a foreclosure. Reed may try to attach his measure to a major overhaul of the nation’s financial regulatory system. ■

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