Ga. Banking Brief: All The Notable Compliance Updates In Q2

By **Elizabeth Garner** (July 20, 2023)

In this Expert Analysis series, attorneys provide quarterly recaps discussing the biggest developments in Georgia banking regulation and policymaking.

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The Georgia General Assembly approved a number of banking and finance — or banking and finance-adjacent — bills during its 2023 session, which were signed into law during the spring of this year.

These new laws, which took effect on July 1 or will take effect on Jan. 1, 2024, tackle a broad range of issues from money laundering and consumer protection to a lengthy list of changes that can mostly be described as "cleaning up" Title 7 of the Official Code of Georgia Annotated, or O.C.G.A.

However, the most noteworthy updates — and the ones garnering the most attention — echo a trend gaining momentum in several other states by implementing certain commercial financial disclosure requirements.

S.B. 90

The most significant development of the recent legislative session for Georgia's banking and finance industry is the enactment of S.B. 90, which effectuates several substantial modifications to Title 10 of the O.C.G.A.[1]

At its core, S.B. 90 adds new Section 10-1-393.18 to the O.C.G.A., which requires that a provider of commercial financing transactions disclose certain terms of each commercial financing transaction prior to consummating any such transaction.[2]

A provider is identified in S.B. 90 as an entity that makes more than five commercial financing transactions in the state of Georgia during any 12-month period, and each provider must make the following required disclosures:[3]

- (A) The total amount of loan(s) made to the applicable business;
- (B) The total amount of funds actually disbursed to the applicable business — which is calculated by subtracting from item (A) above any fees owed to the provider, any amounts paid to a third party to satisfy outstanding debt, or any other amounts owed to a third party;
- (C) The total amount owed to the provider;
- (D) the total dollar cost of the transaction — which is calculated by subtracting item (C) above from item (A) above; and
- (E) The manner, frequency and amount of each payment, or, if payment amounts will vary, the manner, frequency and estimated amount of the initial payment.

With respect to item (E) above, S.B. 90 also requires that any relevant financing agreement include "a description of the methodology for calculating any variable payment amount and the circumstances that may cause a payment amount to vary."[4]

While the list of required disclosures is fairly straightforward, S.B. 90 also includes a laundry list of exceptions from the disclosure requirement, based on the type of provider or the type of financing transaction.

For example, the disclosure requirements do not apply to entities that are federally insured depository financial institutions, or any affiliate thereof or service corporation therefor; regulated under the federal Farm Credit Act, Title 12 of U.S. Code, Section 2001, and what follows; or licensed as a money transmitter in accordance with Article 4 of Chapter 1 of Title 7 of the O.C.G.A.[5]

Additionally, the disclosure requirements do not apply to a transaction that:

- Is secured by real property;
- Is characterized as a lease;
- Consists of purchase money obligations;
- Is composed of a loan equaling or exceeding $50,000 and made to a motor vehicle dealer or motor vehicle rental company, or an affiliate of any of the foregoing;
- Is being offered in connection with the sale or lease of a product or service manufactured, licensed or distributed by the provider entity, or such entity's parent or any of the parent's subsidiaries; or
- Exceeds $500,000.[6]

S.B. 90 also excludes from the disclosure requirements certain factoring transactions with respect to accounts receivable owed to a health care provider due to a personal injury of a patient treated by such a health care provider.[7]

S.B. 90 also establishes several restrictions regarding brokerage relationships, real property purchase solicitations and telephone solicitations.

With respect to brokerage relationships, S.B. 90 expressly prohibits brokers from collecting an advance fee from a business to provide brokerage services,[8] making "false or misleading representations or omit[ting] any material fact in the offer or sale of [their] services," even absent reliance by the counterparty, and making false or deceptive representations in their business relationships.[9]

S.B. 90 further modifies Chapter 6A of Title 10 of the O.C.G.A. to add limitations on brokerage engagements and options to enter into brokerage engagements, including by adding a definition for an "option to enter into a brokerage engagement."[10]

With respect to real property solicitations, S.B. 90 requires that any unsolicited written inquiry from an unlicensed person — i.e., a person or entity that is not licensed under the provisions of Chapter 19 of Title 15, or Chapter 40 or Chapter 41 of Title 43 of the O.C.G.A.

— that expresses such person's desire to purchase real property must conspicuously state that such inquiry is a solicitation only, and does not obligate the recipient property owner to respond.[11]

The conspicuousness requirements include font, size, placement and contrasting color.[12]

A violation of these requirements will be deemed an unfair or deceptive act or practice, giving rise to damages of the greater of the actual damages and $200 per violation.[13]

S.B. 90 also implements revisions to the definition of "telephone solicitation" set forth in Section 46-5-27 of the O.C.G.A. to exclude solicitations made by licensed persons from the restrictions set forth therein, among other minor changes.[14]

As with any significant piece of legislation, there are a few points of interest buried within — or missing from — S.B. 90.

First, S.B. 90 is silent as to whom its disclosures must be made. However, given that the intent of similar commercial disclosure laws enacted by other states is to provide information to small businesses that allows them to make informed decisions about the total cost of financing transactions, these disclosures most likely must be made to a prospective borrower.

It is important to note that S.B. 90 does not provide a prospective borrower with a private cause of action, or right to invalidate the underlying loan documents, solely based on a prospective provider's failure to comply with the new requirements.[15]

Only the attorney general has the authority to act on complaints under S.B. 90, with civil penalties of $500 per violation — or $20,000 for all violations arising from use of the same transaction documents or materials. And for any repeat offender, the penalties will be $1,000 per violation — or $50,000 for all violations arising from use of the same transaction documents or materials.[16]

Despite the likelihood that nonbank lenders that routinely make small loans to small businesses will be disproportionately affected by these new disclosure requirements, given the extensive list of carve-outs and exceptions, no provider that consummates commercial financing transactions in the state of Georgia should ignore the new rules.

For example, consider a provider whose commercial financing transactions consummated in the state of Georgia are always, or almost always, secured by real property. This provider could enter into hundreds of such transactions in a 12-month period without triggering the disclosure requirements.

However, if that provider makes a single loan that is not secured by real property — and assuming no other exclusion is applicable — the provider must make the applicable disclosures because the provider has exceeded the baseline threshold of making five commercial financing transactions in a 12-month period.[17]

Finally, in an obvious effort to afford providers with more time to implement the new requirements, this new law did not become effective on the standard July 1 date, but instead will become effective on Jan. 1, 2024, in each case, with respect to transactions consummated on or after such date.[18]

Other Recent Legislative Updates

As referenced above, while S.B. 90 has received the most attention, a number of other banking and finance-related — or adjacent — bills were also passed this spring, running the gamut from civil to criminal issues.

S.B. 84

On the consumer front, Gov. Brian Kemp signed into law S.B. 84 on May 2, thereby amending the Georgia Uniform Securities Act of 2008 to add an entirely new article aimed at protecting disabled and elderly adults from financial exploitation.[19]

S.B. 84 obligates individuals who serve in "a supervisory, compliance or legal capacity for a broker-dealer or investment advisor" to notify the secretary of state of the state of Georgia if such an individual has reasonable cause to believe that a disabled or elderly adult has been or is being financially exploited — or financial exploitation has been attempted.[20]

Further, a detailed process is set forth in the text of S.B. 84 whereby such reporting individuals are expressly authorized to delay certain transactions for which a disabled or elderly adult is the beneficiary if such individual has reasonable cause to believe that the transaction, if consummated, may result in financial exploitation of the disabled or elderly adult.[21]

Notably, reporting individuals are shielded from civil liability for disclosures made and transaction delays resulting from their compliance with S.B. 84, but not for their participation in or aiding of a financial exploitation.[22]

However, it remains unclear whether a reporting individual would be shielded from liability for failing to report a financial exploitation that such reporting individual had, or should have had, reasonable cause to believe had occurred.

H.B. 219

On May 3, Kemp signed into law H.B. 219, which identifies the proper venue under Title 7 for prosecuting a criminal claim under Article 11 of Chapter 1 appearing in Title 7.[23]

Prior to the passage of H.B. 219, Article 11 included criminal penalties for violations of its provisions, but failed to specify the proper venue for prosecuting such crimes.

As signed into law, crimes under Article 11 that relate to the movement or transfer of digital or electronic money or currency may be prosecuted in a number of different counties where the accused exercised control over the currency that was the subject of the transaction, where any act was performed in furtherance of the transaction, or where an alleged victim resides.[24]

Article 1 of Chapter 8 appearing in Title 16 was similarly modified to add the latter two options identified above for determining the jurisdiction in which a crime involving the movement or transfer of digital or electronic money or currency or cryptocurrency[25] was committed.[26]

H.B. 55

Also on May 3, Kemp signed into law H.B. 55, which addresses a number of housekeeping matters for Title 7.[27]

Among the many changes implemented, some of the more noteworthy revisions include:

- An amendment to O.C.G.A. Section 7-1-511 that permits the board of directors of a bank or trust company to, unless the applicable articles of the organization provide otherwise, adopt a resolution, without shareholder action, to change the name of such a bank or trust company;[28]

- Amendments to Article 3 of Chapter 1 of Title 7 to broaden the investment and borrowing authority of credit unions, among other provisions relating to the powers and operation of credit unions;[29]

- Amendments to Chapter 1 of Title 7 to revise licensure requirements with respect to persons engaged in money transmission, check cashing, mortgage lending, and mortgage brokerage;[30] and

- The insertion of a wholly new Article 14 that sets forth requirements for foreign banks operating in the state of Georgia, including the licensure thereof.[31]

In summary, while the most recent legislative session in the state of Georgia did not trigger any seismic shifts in the banking and finance industry, there are certainly a handful of new and revised laws with which anyone involved in banking and finance in the state of Georgia should familiarize themselves, and where applicable, implement controls to ensure compliance.

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[1] S.B. 90, 157th Gen. Assem., Reg. Sess. (Ga. 2023).

[2] Of note, a provider is not required to make additional disclosures in connection with the amendment of an existing commercial financing transaction. Id. at 5.

[3] Id. at 4.

[4] Id. at 5-6.

[5] Id. at 4.

[6] Id. at 4-5.

[7] Id. at 5.

[8] Actual costs and expenses or payment for services rendered are not similarly restricted. Id. at 6-7.

[9] Id.

[10] Id. at 9-10.

[11] Id. at 8.

[12] Id.

[13] Id. at 8-9.

[14] Id. at 12-13.

[15] Id. at 7.

[16] Id.

[17] Id.

[18] Id. at 6, 13.

[19] S.B. 84, 157th Gen. Assem., Reg. Sess. (Ga. 2023).

[20] Id. at 2-3.

[21] Id. at 3-5.

[22] Id. at 5-6.

[23] H.B. 219, 157th Gen. Assem., Reg. Sess. (Ga. 2023).

[24] Id. at 1-2.

[25] Note that cryptocurrency was not included in the revisions made to Title 7 described above in this paragraph.

[26] H.B. 219, 157th Gen. Assem., Reg. Sess., 2 (Ga. 2023).

[27] H.B. 55, 157th Gen. Assem., Reg. Sess. (Ga. 2023).

[28] Id. at 6.

[29] Id. at 8-15.

[30] Id. at 15-75.

[31] Id. at 75-110.