



Comptroller of the Currency  
Administrator of National Banks

US Department of the Treasury

ENSURING A SAFE AND SOUND  
NATIONAL BANKING SYSTEM  
FOR ALL AMERICANS

# Significant Legal, Licensing, and Community Development Precedents for National Banks, Annual

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## ACTIVITIES

### General Banking Activities

#### *Capital*

- *Conversion Factor for Asset-Backed Commercial Paper Liquidity Facility.* The following are eligibility requirements for assignment of a favorable credit conversion factor to asset-backed commercial paper (ABCP) liquidity facilities: (1) external ratings issued by Nationally Recognized Statistical Rating Organizations (NRSRO) must be published in accessible public form and monitored by the NRSRO; private ratings do not qualify; (2) if the liquidity facility supports privately rated or unrated asset-backed security, a bank may look through to the underlying assets if aging analyses and information on the relevant credit enhancements are available; (3) when the underlying assets are Organization for Economic Cooperation and Development central government-guaranteed assets, the liquidity would be deemed eligible; (4) in both cases, the risk weight would be subject to a 20 percent floor. OCC Interpretive Letter No. 1098 (March 1, 2008).
- *Investment in Fannie Mae and Freddie Mac Preferred Stock.* The federal banking and thrift regulatory agencies allowed banks, bank holding companies, and thrifts to recognize the effect of the tax change enacted in section 301 of the Emergency Economic Stabilization Act of 2008 (EESA) in their third quarter 2008 regulatory capital calculations. Section 301 of EESA provides tax relief to banking organizations that have suffered losses on certain holdings of Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) preferred stock by changing the character of these losses from capital to ordinary for federal income tax purposes. Although the EESA was not enacted until October 3, 2008, the agencies allowed banking organizations to recognize the economic benefits of the change in the tax treatment in the third quarter of 2008 for regulatory capital purposes. Attachment to OCC Bulletin 2008-31 (October 24, 2008). The agencies subsequently announced the extension of the applicability of the October 24, 2008, Interagency Statement on direct investments to certain indirect investments in Fannie Mae and Freddie Mac preferred stock. NR 2008-129 (October 31, 2008). The Treasury Department and the Internal Revenue Service issued Rev. Proc. 2008-64 on October 29, 2008, to provide banking organizations the tax benefit of treating gains and losses on certain indirect investments in Fannie Mae and Freddie Mac preferred stock as ordinary rather than

capital. Indirect investments in Fannie Mae and Freddie Mac preferred stock include certain adjustable rate preferred stock programs (such as auction pass-through certificates) and stock held by certain subsidiaries of financial institutions. NR 2008-129 (October 31, 2008).

- *Margin Loans.* National bank may use an alternative approach to calculate its capital requirement for certain eligible bank margin loans to customers for the purpose of buying or carrying margin stock. Under the alternative approach, the bank may assign a 10 percent risk weight to the principal amount of such loans provided that (1) the securities collateral of such loans are liquid and readily marketable; (2) the loans and associated collateral are marked to market daily; (3) the loans are subject to the initial margin requirements under Regulation T and daily margin maintenance requirements under NYSE Rule 431; and (4) the bank has conducted a sufficient legal review to conclude that it would be able to liquidate the collateral for the loans without undue delay, even in the event of the borrower's bankruptcy or insolvency. OCC Interpretive Letter No. 1104 (September 18, 2008).
- *Securities Lending and Conduit Securities Lending Transitions.* A national bank may use the value-at-risk (VAR) approach to calculate a bank's risk-based capital for securities lending and conduit securities lending transactions. To be an eligible transaction, the bank must be acting as agent or intermediary in a riskless principal transaction; the transaction must be fully collateralized; any securities borrowed, lent or taken as collateral are eligible for inclusion in the trading book and are liquid and readily marketable; any securities borrowed, lent or taken as collateral are marked-to-market daily; and the transactions are subject to daily margin maintenance requirements. Before the bank may use the VAR approach to determine its risk-based capital requirements for these transactions, the OCC Examiner-in-Charge must make a determination that the bank's VAR model and risk management practices comply with certain specified conditions. The bank also will be subject to ongoing supervisory review of its model. OCC Interpretive Letter No. 1105 (September 18, 2008).

### *Corporate Governance and Structure*

- *Acquisitions of Failed or Winding Down Institutions, In General.*
  - A national bank may purchase certain assets of and assume certain liabilities from a state bank affiliate that immediately beforehand acquired those assets and liabilities from the Federal Deposit Insurance Corporation (FDIC) as receiver of a failed state bank. Corporate Decision No. 2008-04 (September 5, 2008).
  - A national bank may acquire assets and liabilities from a failed thrift; acquire by merger a subsidiary of the failed thrift, and may sell certain assets and liabilities acquired from the failed thrift to another national bank. The national bank may also retain as branches the main offices and branches of the failed thrift where the FDIC Board, in approving the acquisition of the failed thrift by the national bank, invoked its authority under 12 USC 1823(k) to override any state laws that, as

applied to national banks, would prohibit, restrict, or lack authorization for the state bank to retain those offices as branches. Corporate Decision No. 2008-05 (September 25, 2008).

- A national bank may purchase certain assets and assume certain liabilities of a failed state bank, and retain its branches without being subject to sections 1831u(a)(4) and (5) and 1831u(b) of the Riegle-Neal Act, because such requirements do not apply to a transaction where the FDIC has provided assistance under 12 USC 1823(c), or one of the banks involved is in default or in danger of default. Corporate Decision No. 2008-07 (October 24, 2008).
- A national bank may receive a material noncash capital contribution to surplus from its holding company that acquired a failed thrift, providing the holding company agrees to indemnify the national bank for losses that may be incurred by the national bank in connection with the transferred assets. Conditional Approval No. 885 (November 6, 2008).
- A national bank may acquire the assets and assume the liabilities of a failed thrift, and may maintain its branches as authorized by 12 USC 36(c). Corporate Decision No. 2008-08 and Corporate Decision No. 2008-09 (November 21, 2008).
- *Inflatable Charters.* Through the filing of a change in bank control notice, the OCC will not disapprove a change in ownership or control of an existing national bank. Similar to the shelf charter concept, this is another tool used by the OCC to expand the pool of qualified bidders for troubled and failed national banks. New ownership’s plans could include repositioning the assets and liabilities of the bank through a purchase and assumption, downsizing, or relocating to a suitable market. The OCC imposed certain safeguards on the new owners and the bank in order to protect the safety and soundness of the national bank. Conditional Approval No. 872 (August 27, 2008).
- *Operating Subsidiaries, In General.*
  - A national bank may establish an operating subsidiary offering various services for customers engaged in capital gains tax-deferred exchanges of real and personal business or investment property, known as “like-kind exchanges,” under Internal Revenue Code 26 USC 1031. The subsidiary may provide advisory services, make referrals to third-party providers, and serve as a qualified intermediary or exchange accommodation titleholder. Financial and investment advisory services are permissible activities for national banks and their operating subsidiaries, and the referral of customers to third-party providers is a permissible finder activity. The provision of qualified intermediary and exchange accommodation titleholder services is considered incidental to the business of banking. Conditional Approval No. 869 (July 22, 2008).

- *Reorganizations, In General.*
  - A national bank and certain affiliates may combine and reorganize their banking and trust business lines to effect a separation of two principal business lines into two different institutions. Conditional Approval No. 859 (June 13, 2008).
  - A state Industrial Loan Company may convert to a national bank under 12 USC 35 and 214(a) so long as the industrial bank or industrial loan company is a banking institution under state law and is engaged in the business of receiving deposits. Conditional Approval No. 880 (September 21, 2008).
- *Shelf Charters.* The OCC will grant conditional, preliminary approval to a “shelf charter,” designed to facilitate new equity investment in troubled depository institutions. The charter remains inactive, or “on the shelf” until such time as the investor group is in a position to acquire a troubled institution. By granting the preliminary approval, the OCC expands the pool of potential buyers available to buy troubled institutions, and in particular the equity capital made available to bid on troubled institutions through the Federal Deposit Insurance Corporation’s bid process. The approval requires a streamlined business plan that describes how the acquired bank will be operated. The OCC can later grant conditional preliminary approval of a national bank charter, subject to certain conditions and to requirements that more detailed operating plans, satisfactory to the OCC, be submitted, if the bank targets a specific institution for acquisition. News Release 2008-137 (November 21, 2008). *See also* Conditional Preliminary Approval Letter (November 17, 2008).

## *Lending*

- *Abundance of Caution Exception in Real Estate Appraisal.* In order to use abundance of caution exception in real estate appraisal regulation, 12 CFR 34.43(a) (2), borrower’s ability to repay must be well supported by income or collateral other than real estate. Reaffirms position in OCC Interpretive Letter No. 569 that indirect real estate lending, e.g., taking as collateral promissory notes that are secured by real estate, is subject to the appraisal regulation. OCC Interpretive Letter No. 1107 (December 4, 2008).
- *Loans Secured by Liens on Real Estate.* A national bank that wishes to acquire loans from a securitization trust, which is in process of winding down, also may acquire for a moment-in-time Debt Previously Contracted (DPC) real estate from the trust. Prior to such acquisition, the national bank must have an agreement in place to re-sell the DPC real estate immediately to a third party. OCC Interpretive Letter No. 1097 (April 3, 2008).
- *Regulation O.* If loans that were made before the borrower became an executive officer of the bank exceed the amounts permitted by Regulation O, they are grandfathered and do not violate Regulation O. However, no new loans may be made until loan balances are brought within Regulation O’s limits. OCC Interpretive Letter #1096 (March 20, 2008).

## *Other Activities*

- *Payment Processor Guidance.* OCC supervisory guidance to national banks discussing due diligence, underwriting, and monitoring of entities that process payments for telemarketers and other merchant clients, in order to control strategic, credit, transaction, reputation, and compliance risks, including risks associated with customer complaints, returned items, and potential unfair or deceptive acts or practices. OCC Bulletin 2008-12, “Payment Processors: Risk Management Guidance” (April 24, 2008).

## **Securities Activities**

### *Derivatives*

- *Debt Cancellation Contracts Offered through Automobile Dealers.* A national bank is authorized to offer debt cancellation contracts (DCCs) to consumers through automobile dealers by 12 USC 24(Seventh) and 12 CFR part 37, and the DCCs are subject to the standards of part 37 as well. However, when a national bank’s DCC provides protection on a closed-end loan repayable in five years, the bank cannot collect the full cost of the DCC in monthly periodic payments over the first year of the loan. To comply with the periodic payment option under section 37.5, the bank must collect DCC fees in periodic payments (i) over the full 5-year term of the loan, or (ii) until such time as the loan is repaid. OCC Interpretive Letter No. 1095 (February 27, 2008).
- *Financial Intermediation Transactions-Risk Indices Associated with National Events and Catastrophes.* A national bank may act as a financial intermediary in customer-driven, perfectly matched, cash-settled derivative transactions referencing risk indices associated with designated types of natural events and catastrophes. The bank’s role is to negotiate a financial contract with one customer and an offsetting contract with a second customer. By engaging in the described activities, the bank will not be providing insurance in a state as principal, as generally prohibited by GLBA section 302. Before the bank may engage in the transactions, the bank must notify its Examiner In Charge (EIC), in writing, of the proposed activities and must receive written notification of the EIC’s supervisory no-objection. OCC Interpretive Letter No. 1101 (July 7, 2008).
- *Membership in National Securities Clearing Corporation Limited.* Letter concludes that the bank, via its Mumbai branch, may offer clearing services in India, as a custodian clearing member (CCM) of the National Securities Clearing Corporation Limited (NSCCL) when the banks’ exposure to the NSCCL for the defaults of other members is subject to the lending limit in 12 USC 84 (section 84). Before the branch may become an NSCCL CCM, the Bank must notify its Examiner In Charge (EIC), in writing, of the proposed activities and must receive written notification of the EIC’s supervisory no-objection. When a foreign exchange or clearinghouse does not limit a bank’s loss exposure to amounts below the section 84

limits, a national bank must comply with the procedures in the attached letter. OCC Interpretive Letter No. 1102 (October 14, 2008).

## COMPLIANCE

### *Consumer*

- *Illustrations of Consumer Information for Hybrid Adjustable Rate Mortgage Products.* Interagency guidance designed to illustrate the type of information to be provided to consumers on hybrid adjustable rate mortgage products, as contemplated in the interagency Statement on Subprime Mortgage Lending 72 *Federal Register* 37569 (July 10, 2007), including information about potential payment shock. The guidance sets out four illustrations consisting of (1) a narrative explanation of adjustable rate mortgage products (ARMs) with a reduced initial interest rate, and (2) three separate charts comparing such ARMs with fixed rate mortgage products. 73 *Federal Register* 30997 (May 29, 2008).
- *OCC Consumer Tips for Avoiding Foreclosure Rescue Scams.* OCC issuance identifying common types of foreclosure rescue schemes, providing guidance on steps consumers can take to protect themselves from such schemes, and setting forth information about how consumers can obtain legitimate assistance in helping to address their financial problems. OCC Consumer Advisory 2008-1 (May 16, 2008).
- *Servicemembers Civil Relief Act: Legal Requirements.* OCC issuance providing general information about the provisions of the Servicemembers Civil Relief Act (SCRA) that are most likely to affect national banks. The issuance also discussed revisions to the SCRA made by the Housing and Economic Recovery Act of 2008 that provide additional protections to servicemembers by extending the periods during which certain provisions apply. OCC Bulletin 2008-30 (October 24, 2008).

## ENFORCEMENT ACTIONS

- *Bank Officers Involved in Mortgage Fraud.* After the OCC issued a notice of charges, a former bank vice president consented to a prohibition order and agreed to pay a \$10,000 civil money penalty for his alleged participation, in exchange for cash payments, in a mortgage fraud scheme involving straw borrowers and fraudulent documentation that caused bank loss of approximately \$2 million. *In the matter of David S. Eisenberg, California National Bank, Calif.*, Enf. Action No. 2008-128 (October 20, 2008). In addition, after issuing a notice of charges, the OCC issued a cease and desist order by consent against a former bank manager who allegedly participated in a mortgage fraud scheme involving falsified loan applications and nominee loans. *In the matter of Cheryl Thornhill, Union Planters Bank, N.A., Memphis, Tenn.*, Enf. Action No. 2008-175 (December 18, 2008).

- *Bank Secrecy Act Noncompliance.* The FinCEN and the OCC each assessed concurrent civil money penalties of \$15 million against a federal branch of a foreign bank for alleged violations of the Bank Secrecy Act, which the bank agreed to pay under a consent order. The bank had a history of noncompliance with OCC cease and desist orders relating to Bank Secrecy Act deficiencies and required termination of wire transfers, dollar drafts, and pouch transactions. *In the matter of United Bank of Africa PLC, New York, N.Y.*, Enf. Action No. 2008-029, (April 22, 2008).
- *Telemarketers and Third-Party Processor Relationships.* The OCC entered into a formal agreement with a large bank that agreed to pay a \$10 million civil money penalty and reimburse consumers who may have been harmed by payment processor for telemarketers that had account relationships with the bank. The OCC took action after it concluded that the bank had engaged in unsafe and unsound practices during the course of its relationships with the payment processors, and unfair practices within the meaning of the Federal Trade Commission Act. As a result of the OCC's action, the bank issued checks totaling more than \$150 million to more than 740,000 consumers. The bank also agreed to contribute an additional \$8.9 million to consumer education programs and to adopt policies and procedures to prevent future unsafe and unsound practices. *In the matter of Wachovia Bank, N.A., Charlotte, N.C.*, Enf. Action Nos. 2008-027 and 2008-028, bank civil money penalty and formal agreement (April 24, 2008); Enf. Action No. 2008-159, amended formal agreement (December 8, 2008).
- *Violations of the Home Mortgage Disclosure Act.* The OCC assessed a \$7,500 civil money penalty against a community bank, by consent, for alleged participation in violations of the Home Mortgage Disclosure Act that occurred before the bank converted to a state charter in May 2007. *In the matter of Crown Bank, N.A., Ocean City, N.J.*, Enf. Action No. 2008-011 (February 19, 2008).

## INVESTMENTS

- *Investment in Fund for Solar Energy-Producing Facilities.* A national bank may invest in limited liability entities each of which will develop, acquire, install, and maintain solar energy-producing facilities and provide electricity for specified properties. Because the bank indicates that its investment in the fund will primarily benefit low- and moderate-income individuals and areas in California, the bank's investment complies with the public welfare requirements of 12 CFR Part 24. Community Development Investment Letter No. 2008-1 (July 31, 2008).

## PREEMPTION

- *Fiduciary Powers.* A national bank is authorized under federal law to be appointed, and accept any appointment, to act in a fiduciary capacity permitted to state fiduciaries in North

Carolina without obtaining any express qualification or otherwise qualifying under North Carolina law. OCC Interpretive Letter No.1103 (September 18, 2008).

- *Fiduciary Powers.* A national bank is authorized under federal law to conduct fiduciary activities in the states of Georgia and South Carolina notwithstanding state laws that purport to limit the bank's ability to do so by requiring, among other things, that the bank be federally insured and have a physical presence in the state. Letter also concludes that the bank may deposit the amount of securities required pursuant to federal law and the OCCs' regulations rather than a conflicting amount required under Florida law. OCC Interpretive Letter No. 1106 (October 10, 2008).
- *Interest Rates and Fees.* Interest rates and fees constituting interest that may be imposed under 12 USC 85 by a national bank operating subsidiary permissibly may be based on the usury laws of the parent bank's home state under circumstances where parent bank may charge home state rates, even though the operating subsidiary has no offices in that home state. OCC Interpretive Letter No. 1100 (May 5, 2008).
- *Non-Accountholder Fee To Cash an Official Check.* A national bank is authorized pursuant to 12 USC 24(Seventh) and 12 CFR 7.4002 to establish and charge a fee to a non-accountholder customer for the service of cashing an official check. OCC Interpretive Letter No. 1094 (February 27, 2008).

## REGULATION

- *Bank Purchases of Asset-Backed Commercial Paper from Money Market Mutual Funds.* The OCC published an interim final rule, effective until January 31, 2009, recognizing the substantial protection from risk provided to national banks under the Federal Reserve System's special lending facility. Under that facility, depository institutions may borrow on a nonrecourse basis from the Federal Reserve Bank of Boston, if the depository institution uses the loan proceeds to purchase asset-backed commercial paper (ABCP) from money market mutual funds. Under the rule, the ABCP purchased by the bank as a result of its participation in the special lending facility will be subject to a 0 percent risk weight for purposes of risk-based capital requirements. (September 19, 2008). The rule applies to ABCP purchased before January 30, 2009. 73 *Federal Register* 55704 (September 26, 2008).
- *Deduction of Goodwill from Tier 1 Capital.* OCC published a final rule permitting a banking organization to reduce the amount of goodwill it must deduct from tier 1 capital by any associated deferred tax liability. Under the final rule, the regulatory capital deduction for goodwill would be equal to the maximum capital reduction that could occur as a result of a complete write-off of the goodwill under generally accepted accounting principles (GAAP). The final rule is in substance the same as the proposal issued in September. The final rule will be effective 30 days after publication in the *Federal Register*. However, banking

organizations may adopt its provisions for purposes of regulatory capital reporting for the period ending December 31, 2008. (December 16, 2008) *73 Federal Register* 79602 (December 30, 2008).

- *Lending Limit Exception for Temporary Funding Arrangements in Emergency Situations.* The OCC issued an interim final rule to add a provision to its part 32 lending limits regulation addressing temporary funding arrangements in emergency situations. The rule allows the OCC to establish a special lending limit for loans and extensions of credit that: (i) the OCC determines are essential to address emergency situations, such as critical financial markets stability; (ii) are of short duration; (iii) will be reduced in amount in a time frame and a manner acceptable to the OCC; and (iv) do not present unacceptable risk to the lending bank. Approval is conditioned upon the imposition of supervisory oversight and reporting measures that the OCC determines appropriate. 12 CFR part 32; *73 Federal Register* 14922 (March 20, 2008).
- *Public Welfare Investments.* The OCC published an interim final rule to implement the changes to national banks' public welfare investment authority enacted in the Housing and Economic Recovery Act of 2008 (HERA), which was signed into law on July 30, 2008. This provision in HERA restored national banks' full authority to make investments designed primarily to promote the public welfare, including in low- and moderate-income communities, or other areas targeted by a governmental entity for redevelopment, and other investments that would receive consideration under the OCC's Community Reinvestment Act regulations as a "qualified investment." *73 Federal Register* 46532 (August 11, 2008).
- *Reduction of Unnecessary Burden, Including After-the-fact Notice Procedures Applying to National Bank Subsidiaries.* The OCC published a final rule to reduce unnecessary regulatory burden and revise and update various OCC regulations. The rule included measures updating and revising the qualifying standards and after-the-fact notice procedures that apply to national bank operating subsidiaries. It also expanded the list of operating subsidiary activities that are permissible upon filing an after-the-fact notice. Other revisions reduced the burden associated with applications for fiduciary powers and intermittent branches, with change in bank control notices, and with requirements to make securities filings. The final rule also included other measures to incorporate previously published interpretive opinions concerning, for example, electronic banking activities, and to harmonize the OCC rules with rules issued by other federal agencies, to update OCC rules to reflect recent statutory changes, and to make technical and conforming amendments to improve clarity and consistency. *73 Federal Register* 22216 (April 24, 2008).
- *Securities Offering Disclosure Rules.* The OCC amended its securities offering disclosure rules to eliminate the general requirement that a national bank in organization include audited financial statements as part of a public offering of its securities. The OCC may still request audited financial statements in specified circumstances. *73 Federal Register* 12009 (March 6, 2008).