



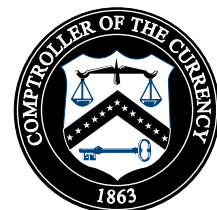
Comptroller of the Currency
Administrator of National Banks

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

APRIL 2010



Activities

General Banking Activities

Corporate Governance and Structure

Change in Bank Control Pursuant to Bankruptcy Reorganization. The OCC did not disapprove a change in control notice in connection with a proposed acquisition. The bank was a national trust bank engaged in the provision of fiduciary services to General Motors Corporation (GM) and its current and former employees. As part of the bankruptcy reorganization of GM, all of the shares of the bank's parent company were transferred to a newly formed parent corporation. The OCC required the newly formed parent to cause the bank to enter into a written operating agreement with the OCC. [Conditional Approval No. 909](#), Change in Bank Control Act Notice in Connection with the Proposed Acquisition of Promark Trust Bank, National Association, New York, New York by NGMCO, Inc., Wilmington, Delaware (July 2, 2009).

Conversion of a Colorado Federal Savings Bank and Merger. A federal savings bank owned by Bank of America Corporation applied to convert to a national bank charter. The OCC granted conditional approval for conversion of the FSB to a national bank charter and to Bank of America to acquire by merger the national bank resulting from the conversion. The transaction resulted in the retention of the bank's main office and branches and the main office of the FSB in Colorado as a branch, as well as several subsidiaries of the FSB. The OCC determined that the transaction met the age requirements of the Reigle-Neal Act, and stated that a bank's relocation from one state to another, and prior existence as a federal savings bank, did not affect its age. [Conditional Approval No. 900](#), Countrywide Bank, FSB and Bank of America, N.A. (April 23, 2009).

Conversion of a Federal Savings Bank and Merger. A federal savings bank, insured by the FDIC and wholly owned by Capital One Financial Corporation, applied to convert to a national bank and retain its main office and branches in Delaware, the District of Columbia, Maryland and Virginia. The OCC granted conditional approval for the conversion and for merger of the converted bank into Capital One, National Association. The OCC determined that the converted bank could retain all branches operated prior to the Gramm-Leach-Bliley Act on November 12, 1999, finding that relevant state statutory standards for the branch retentions were satisfied, and further that, following the merger, the acquiring bank could retain branches in Virginia, Maryland, the District of Columbia, and Delaware under state intrastate branching laws as applied to national banks with respect to the establishment of branches. The resulting bank could also retain entities owned by the FSB as operating, financial, and statutory subsidiaries, but was required to divest an indirect noncontrolling investment in limited liability companies formed by a consortium of custom home builders to assist in the group purchases of building supplies and material. [Conditional Approval No. 912](#), Applications to convert Chevy Chase Bank, F.S.B., McLean, Virginia, to a national bank and to merge the converted bank into Capital One, National Association, McLean, Virginia (July 14, 2009).

Emergency Purchase and Assumption under Bank Merger Act and Riegle-Neal Act. The OCC approved the purchase and assumption by a national bank in North Dakota of certain assets and liabilities of a failed bank in South Dakota. The national bank in North Dakota retained a branch of the failed bank in Minnesota and immediately resold the failed bank's other assets and liabilities to a national bank in South Dakota. The transaction qualified for immediate consummation under the emergency provisions of the Bank Merger Act. Similarly, the normal requirements for an interstate acquisition under the Riegle-Neal Act did not apply when the target bank had failed. [Corporate Decisions 2009-07](#) and [2009-08](#), First Dakota National Bank and Alerus Financial, N.A. (July 17, 2009).

Emergency Purchase and Assumption under Bank Merger Act and Riegle-Neal Act. The OCC approved the purchase and assumption by a national bank in Ohio of certain assets and liabilities of a failed bank in Indiana. The transaction qualified for immediate consummation under the emergency provisions of the Bank Merger Act. Similarly, the normal requirements for an interstate acquisition under the Riegle-Neal Act did not apply when the target bank had failed. The OCC also approved the Ohio national bank's purchase and assumption of certain assets and liabilities of a failed federal savings bank in Indiana and retention of its branches. Although the federal savings bank was not a "bank" for purposes of the Riegle-Neal Act, the interstate purchase and assumption was authorized by 12 USC 24(Seventh). Retention by the Ohio national bank of the failed federal savings banks branches in several states was also approved. Retention of branches in one state was authorized by 12 USC 36, while the FDIC used its authority under 12 USC 823(k) to approve the retention of branches in other states. [Corporate Decision 2009-17](#), First Financial Bank, N.A. (September 18, 2009).

FDIC-Guaranteed Senior Unsecured Debt under the Temporary Liquidity Guarantee Program. The exemption from registration under Section 16.5(a) is applicable to FDIC-Guaranteed senior unsecured debt that matures on or before June 30, 2012, the expiration date of the FDIC's guarantee under the Temporary Liquidity Guarantee Program. The exemption would not apply to such debt with a maturity that extends beyond June 30, 2012. [OCC Interpretive Letter No. 1108](#) (January 26, 2009).

Interstate De Novo Branch Approval Based on Reciprocity Applicable to a Predecessor Bank. The OCC approved the establishment of a *de novo* branch in Rhode Island by a Delaware national bank. Because the Delaware national bank was the resulting bank of a merger that included a national bank in Maine, and Maine and Rhode Island allow reciprocal interstate branching, establishment of the branch was found to be permissible. [Corporate Decision 2009-19](#), TD Bank, N.A. (October 22, 2009).

Issuance of Common Stock below Par Value. A national bank may issue shares of its common stock at an issue price less than its par value. The assessment provisions of 12 USC 55 for a deficiency in capital do not apply to the transaction, provided that: (i) applicable corporate governance procedures permit such issuance, and (ii) the bank takes appropriate measures to ensure that any below par sale will not cause its capital stock to become impaired. [OCC Interpretive Letter No. 1112](#) (February 17, 2009).

Loan Restructure and Creation of Operating Subsidiaries. Through a merger, a national bank acquired large commercial loans outstanding to the affiliates of credit management corporation. The corporation serviced mortgage loans originated and purchased by the affiliates. The commercial loans were collateralized by the mortgage loans, other real estate owned (OREO) as the result of foreclosures, and stock of the credit management corporation. The bank proposed to restructure the commercial loans, which were under forbearance agreements, in order to acquire control over the underlying mortgages and underlying OREO, retaining the credit management corporation as the servicer. The bank's expectation was to be better able to mitigate potential loan losses, to benefit the affiliates' customers through loss mitigation strategies, and to realize tax benefits. The OCC issued a preliminary conditional approval for a series of transactions to result in the creation of three operating subsidiaries—a statutory trust to hold the bank's interest in the underlying mortgage loans and OREO; a limited liability company wholly owned by the bank's existing real estate investment trust, to receive net collections; and a OREO subsidiary to the limited liability company—and an associated nonmaterial noncash contribution from the bank's holding company. The approval was based in part on bank authority to take real estate in satisfaction of debts previously contracted. [Conditional Approval No. 895](#), The Huntington National Bank (March 31, 2009).

Shelf Charters. The OCC issued preliminary conditional approvals for a number of shelf charters, for the purpose of assuming liabilities and purchasing assets from the Federal Deposit Insurance Corporation (the FDIC) acting as the receiver of a depository institution. Because only chartered depository institutions may assume deposit liabilities from the FDIC, this structure provides investors in the bank holding company owning the shelf charter the opportunity to assume liabilities and purchase assets from the FDIC as receiver of a depository institution. Since the bank does not commence operations until after its bid for a particular institution is accepted by the FDIC, the specific size, scope, and activities of the bank are not determined until it acquires the business of a specific failed institution. OCC approvals are based upon the information provided by the bank, including the experience of proposed key management. A shelf charter must follow an organizing process that includes OCC review as it considers potential acquisition transactions. It is anticipated that the OCC will grant final approval for such a bank and will approve a purchase and assumption transaction under the Bank Merger Act the first time that the bank's bid to acquire a failed institution is accepted by the FDIC. Final approval and authorization for the proposed bank to open is not granted until all pre-opening requirements are met. The OCC requires a written Operating Agreement requiring the bank comprehensive business plan acceptable to the OCC. [Conditional Approval No. 905](#), Application to establish a new national bank, with the title of Carlile Bank, National Association (May 29, 2009); [Conditional Approval No. 917](#), Application to establish a new national bank, with the title of SJB National Bank (July 31, 2009); [Conditional Approval No. 922](#), NewBank National Association (August 28, 2009); [Conditional Approval No. 936](#), Application to establish a new national bank, with the title of Bond Street Bank, National Association (October 23, 2009).

Wholesale Bank To Hold Deposits Generated from Deposit Sweep Arrangements. The OCC issued a preliminary conditional approval for the chartering of a wholesale bank to hold deposits generated from deposit sweep arrangements with its affiliated broker-dealers,

including Merrill Lynch, Pierce Fenner & Smith Inc. and, possibly, unaffiliated entities. Although the deposits that bank will hold will be beneficially owned by the individual brokerage customers, and will be covered by pass-through FDIC deposit insurance, the bank will have a direct contractual relationship in the form of a deposit agreement only with the broker-dealers that offer the deposit sweep product, not with the individual customers. The bank will also participate in various lending facilities offered by the Federal Reserve banks, primarily TAF (Term Auction Facility) and Fed Funds, to provide an additional source of funding for its affiliates. In addition, the bank will acquire mortgage loans (i.e., one- to four-family residential and home equity lines of credit) and/or mortgage-backed securities from its insured bank affiliate, Bank of America, N.A. (“BANA”), and hold them on its balance sheet in order to maintain the appropriate capital ratios. [Conditional Approval No. 899](#), Bank of America N.A., (April 23, 2009).

Capital

California Registered Warrants. The California Attorney General opined that these warrants are valid and binding obligations of the state. Interagency guidance states that because they share the same expected source of repayment, the warrants generally have the same credit quality characteristics as the state’s other general obligations. For risk-based capital purposes, general obligation claims on a state receive a 20-percent risk weight. As with any obligation issued by a jurisdiction, financial institutions should exercise prudent judgment and sound risk management practices with respect to the warrants. [Interagency Guidance on California Registered Warrants](#) (July 8, 2009).

Mortgage Loans Modified Under the Home Affordable Mortgage Program. The federal bank and thrift regulatory agencies issued a final rule providing that mortgage loans modified under the U.S. Department of the Treasury’s Home Affordable Mortgage Program (HAMP) will generally retain the risk weight appropriate to the mortgage loan prior to modification. The agencies adopted as final their interim final rule issued on June 30, 2009, with one modification. The final rule clarifies that mortgage loans whose HAMP modifications are in the trial period, and not yet permanent, qualify for the risk-based capital treatment contained in the rule. [74 Federal Register 60137](#) (November 20, 2009).

Risk-Based Capital Treatment for Bank’s Exposure to IntercontinentalExchange U.S. Trust (ICE Trust). As a result of their dealings with ICE Trust, national banks have three types of exposures: (1) counterparty credit exposure arising from cleared credit default swap transactions, (2) exposures from margin posted as collateral for the transactions, and (3) exposure from a required contribution to the clearinghouse guarantee fund. Because of the regulated nature of ICE Trust and other prudential factors, the OCC has determined that the risk-based capital treatment provided under the risk-based capital rules does not appropriately reflect the risks of transactions with ICE Trust. Therefore, the OCC has determined to use its reservation of authority at 12 CFR 3A(b) to apply a 20-percent risk weight to these three types of exposures, a risk weight the OCC believes more appropriately reflects the risk associated with these exposures. [OCC Interpretive Letter No. 1116](#) (May 6, 2009).

Lending

Exchange of Interest in Real Property Acquired in Satisfaction of a Debt Previously Contracted for Interest in an Entity that Would Dispose of the Real Property. A national bank may exchange an interest in real property acquired in satisfaction of a debt previously contracted for an interest in an entity that would dispose of the real property. Prior to making the exchange, (1) the bank’s directors must determine that the exchange is in the best interests of the bank and would improve the ability of the bank to recover, or otherwise limit, its loan loss, and (2) the bank must notify its supervisory office, in writing, of the proposed exchange and receive written notification of supervisory no-objection. [OCC Interpretive Letter No. 1118](#) (July 2, 2009).

Mortgage Modification and Foreclosure Avoidance Scams—Consumer Advisory. The OCC issued a consumer advisory to help homeowners avoid scams that claim to help them save their homes, but can cause them to lose their homes *and* their money. The advisory describes common types of mortgage modification and foreclosure rescue scams, and offers a list of warning signs that a person or company may be perpetrating one of these scams. The advisory also gives tips for consumers to protect themselves from these scams, provides a list of resources to contact for legitimate help, including information on U.S. government loan programs and counseling resources, and reminds consumers having difficulty paying their mortgages that they should always start by contacting their lender or servicer to discuss their options. [OCC Consumer Advisory 2009-1](#) (April 21, 2009).

Reverse Mortgage—Consumer Advisory. The OCC issued a consumer advisory to help consumers better understand reverse mortgages. The information developed for consumers discusses basic facts about reverse mortgages, which are complex, home-secured loans. The advisory provides basic “rules of thumb” for consumers who are considering a reverse mortgage—the advisory urges consumers to (1) investigate other alternatives in addition to reverse mortgages, (2) remember that reverse mortgages generally make more sense the longer the consumer remains in the home, and (3) be wary of anyone trying to sell other products along with a reverse mortgage. The OCC urges consumers to consult with a qualified, independent housing counselor before entering into a reverse mortgage. [OCC Consumer Advisory 2009-2](#) (September 24, 2009).

Volumetric Production Payment Loan Transaction. A volumetric production payment financing transaction is a permissible extension of credit. Before extending credit, the bank must notify its EIC, in writing, of the proposed activities and must receive written notification of the EIC’s supervisory no-objection. [OCC Interpretive Letter No. 1117](#) (May 19, 2009).

Other Activities

Lease of Personal Property to an Affiliate Under 12 CFR Part 23. When a bank acts as the lessor of personal property and the lease is subject to section 23A of the Federal Reserve Act and Federal Reserve Regulation W, the value of the transaction, i.e., the

amount of the covered transaction, is the book value of the leased property. The leased property may serve as collateral for purposes of section 23A and Regulation W. [OCC Interpretive Letter No. 1114](#) (April 9, 2009).

Fiduciary Activities

Fees for Admissions and Withdrawals from Model-Driven Funds. A national bank may continue to charge fees for admissions and withdrawals from its model-driven funds for a 90-day period following its affiliate's proposed acquisition of the benchmark indices used for the funds, provided that the bank continues to operate separately from the affiliate. The OCC agreed to review the matter after the acquisition to determine whether the bank could continue its activities after the 90-day period. [OCC Interpretive Letter No. 1119](#) (September 19, 2009).

Redemption Requests from Collective Investment Fund. A national bank may extend the time period allowable for satisfying redemption requests from participants in the bank's collective investment fund. The fund held primarily commercial real estate assets and, because of current economic and market conditions and the large volume of redemption requests the bank was unable to satisfy all the requests within the one year notice period required by the OCC. [OCC Interpretive Letter No. 1121](#) (June 18, 2009).

Securities Activities

Auction Rate Preferred Securities. A wholly owned subsidiary of a national bank may purchase and hold for its own account shares of certain preferred auction rate securities as investment securities for the purposes of 12 CFR 1, subject to certain enforceable conditions under 12 USC 1818. The subsidiary agreed to not exercise certain voting rights under the securities. The subsidiary and the bank were required to enter into an operating agreement with the OCC and an indemnification agreement with the bank's holding company. The subsidiary agreed to hold the securities for a limited period of time, after which the holding company will be required to repurchase the securities. The holding company agreed to indemnify the bank against certain potential losses in connection with these purchases. The bank must seek prior OCC supervisory no-objection before terminating, modifying, or amending the agreements described in the letter. [OCC Interpretive Letter No. 1115](#) (April 3, 2009); see also [OCC Interpretive Letter No. 1124](#) (November 3, 2009).

FDIC Temporary Liquidity Guarantee Program. The guarantee of a qualifying debt security by the FDIC under its Temporary Liquidity Guarantee Program transforms a qualifying security into a Type 1 security for purposes of 12 CFR 1. In cases where the security's tenor is coextensive with the term of the guarantee, the security qualifies as a Type 1 security. In cases where the security's tenor exceeds the term of the FDIC guarantee, the security does not qualify as a Type 1 security. [OCC Interpretive Letter No. 1109](#) (January 8, 2009).

Derivatives

Derivative Transactions Referencing Longevity Indices. A national bank may act as a financial intermediary in customer-driven, perfectly matched, cash-settled derivative transactions referencing longevity indices. The derivatives involve making financial payments based on the performance of indices that track mortality and longevity data of national populations. 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 Gramm-Leach-Bliley Act section 302. Before the bank may engage in the transactions, the bank must notify its Examiner-in-Charge, in writing, of the proposed activities and must receive written notification of the EIC's supervisory no-objection. [OCC Interpretive Letter No. 1110](#) (January 30, 2009).

Membership in IntercontinentalExchange Clear Europe (ICE Europe) Credit Default Swap Clearinghouse. It is permissible for a national bank to become a credit default swap self-clearing member of ICE Europe, provided the bank has established a comprehensive risk management framework to govern the risks associated with membership, and obtains a written Examiner-in-Charge supervisory no-objection. The bank's exposure to ICE Europe is subject to the lending limit in 12 USC 84 or any lower limit set by the EIC. [OCC Interpretive Letter No. 1122](#) (July 30, 2009).

Membership in IntercontinentalExchange U.S. Trust (ICE Trust). A national bank is permitted to become a clearing member of ICE Trust, a clearinghouse for over-the-counter credit default swaps. The bank's exposure to the ICE Trust for the defaults of other members is subject to the lending limit in 12 USC 84 or any lower limit set by the Examiner-in-Charge. Before the bank may become an ICE Trust clearing member, the bank must establish a comprehensive risk management framework to govern the risks associated with its membership, and receive a written supervisory no-objection from its EIC. Other national banks may rely on the letter to become clearing members of ICE Trust, but must obtain prior written EIC approval. [OCC Interpretive Letter No. 1113](#) (March 4, 2009).

Compliance

Community Reinvestment Act (CRA) Questions and Answers. The federal financial institution regulatory agencies issued new and revised *Interagency Questions and Answers Regarding Community Reinvestment* that, among other things, encourage financial institutions to participate in foreclosure prevention programs that have the objective of providing affordable, sustainable, long-term loan restructurings or modifications for homeowners who are facing foreclosure on their primary residences. The questions and answers also address activities undertaken by a majority-owned financial institution in cooperation with a minority- or women-owned financial institution or a low-income credit union. [74 Federal Register 498](#) (January 6, 2009).

Frequently Asked Questions on Identity Theft Rules. Six federal agencies issued a set of frequently asked questions and answers (FAQs) to help financial institutions, creditors, users of consumer reports, and issuers of credit cards and debit cards comply with federal regulations on identity theft and address discrepancies. The FAQs provide guidance on numerous aspects of the rules on identity theft “red flags” and notices of address discrepancies, which implement sections of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). These rules were issued jointly on November 9, 2007, including information on which types of entities and accounts are covered, establishment and administration of an Identity Theft Prevention Program, addressing validation requirements applicable to card issuers, and the obligations of users of consumer reports upon receiving a notice of address discrepancy. [OCC Joint News Release 2009-65](#) (June 11, 2009)

Model Privacy Notice Form. Federal regulatory agencies issued a final model privacy notice form to make it easier for consumers to understand how financial institutions collect and share information about consumers. Under the Gramm-Leach-Bliley Act (GLB Act), institutions must notify consumers of their information-sharing practices and inform consumers of their right to opt out of certain sharing practices. The Financial Services Regulatory Relief Act of 2006 amended the GLB Act to require the agencies to propose a succinct, easy-to-read, and comprehensible model form that allows consumers to easily compare the privacy practices of different financial institutions. The model form can be used by financial institutions to comply with these requirements. The final rule provides that a financial institution that chooses to use the model form obtains a “safe harbor” and will satisfy the disclosure requirements for notices. The rule also removes, after a transition period, the sample clauses now included in the appendices of the agencies’ privacy rules. [74 Federal Register 62890](#) (December 1, 2009).

School-Based Savings Programs. The OCC encourages national bank participation in financial literacy initiatives such as school-based bank savings programs, which can qualify for positive consideration under Community Reinvestment Act requirements. “School-Based Bank Savings Programs: Bringing Financial Education to Students,” [Community Developments Insights](#) (April 2009).

Enforcement Actions

Bank Secrecy Act Violations. The FinCEN and the OCC each assessed concurrent civil money penalties of \$5 million against a federal branch of a foreign bank for alleged violations of the Bank Secrecy Act (BSA). A previously issued cease and desist order mandated a look-back of wire transfers, demand drafts, and pouch items processed by the branch. The cease and desist order and the civil money penalty were based on the branch’s failure to maintain a compliance program reasonably designed to assure and monitor compliance with the record-keeping and reporting requirements of the BSA, and other related BSA-compliance violations. Specifically, the branch did not adequately identify, research, report, and monitor suspicious activities occurring through the branch’s funds transfers, pouch activity, demand draft services, and correspondent relationships, and did not adequately audit and independently test such activities. The

branch also failed to conduct sufficient due diligence on its foreign correspondents. *In the matter of Doha Bank, New York*, [Enforcement Action No. 2009-056](#) (April 20, 2009).

Investments

Community Development Investments

Fund for Construction of Agricultural Facilities. A national bank may make an investment in a community and economic development entity that funds construction of agricultural-product receiving bins, which will increase the tax base and produce jobs in a low- and moderate-income area. [Community Development Investment Letter 2009-2](#) (January 6, 2009).

Fund for Construction of Rent-to-Own Affordable Rental Housing. A national bank may make an investment in a community and economic development entity, which will use new markets tax credits, for the construction of a rent-to-own affordable housing complex in a low- and moderate-income area. [Community Development Investment Letter 2009-5](#) (June 17, 2009)

Fund to Construct Industrial Facility on Indian Reservation. A national bank may make an investment in a community and economic development entity that constructs an industrial facility that will produce jobs on an Indian reservation in a low- and moderate-income area. [Community Development Investment Letter 2009-3](#) (March 9, 2009).

Fund to Renovate and Lease a Residential Drug and Alcohol Treatment Center. A national bank may make an investment in a community and economic development entity, which uses new markets tax credits, for the renovation and lease of a residential drug and alcohol treatment center in a low- and moderate-income area. [Community Development Investment Letter 2009-4](#) (June 17, 2009).

Investment in Fund for Solar-Energy-Producing Facilities. A national bank may make an equity investment to acquire a membership interest in a fund (the company) established as a limited liability company that will sign a master lease for a solar-energy project financed by the company. The managing member of the company is a renewable-energy utility company that designed, insured, and maintained customized solar systems for industrial, commercial, and municipal enterprises. The investment primarily benefits low- and moderate-income areas [Community Development Precedent Letter 2009-01](#) (February 17, 2009).

Stabilizing Communities. National banks may use a variety of funding and financing tools, such as the Department of Housing and Urban Development's Neighborhood Stabilization Program and the new markets and low-income housing tax credit programs to facilitate the sale of foreclosed properties. Stabilization activities may qualify for consideration under the Community Reinvestment Act. "Property Disposition: Exploring Different Approaches for Preserving Affordable Housing Opportunities," [Community Developments Insights](#) (March 2009).

Preemption

American Bankers Association v. Brown. The Supreme Court denied *certiorari* in a Ninth Circuit Court of Appeals case. The American Bankers Association sought review of the Ninth Circuit's decision reversing the federal district court. The district court had concluded that express preemption provisions of the Fair Credit Reporting Act preempted the California Financial Information Privacy Act in its entirety, allowing affiliates to share any information without regard to information-sharing limitations imposed by state law. The Ninth Circuit interpreted the term "information" to mean only information that met the definition of "consumer report" in the Fair Credit Reporting Act. [*American Bankers Association v. Lockyer*, 541 F.3d 1214 \(9th Cir. 2008\)](#), *cert. denied*, 129 S.Ct. 2893 (June 29, 2009).

City of Cleveland v. Ameriquest Mortgage Services, Inc. The district court issued a decision on May 15, 2009, granting the defendants' motion to dismiss the city's state law nuisance claim against mortgage securitizers, including several national banks. Although the OCC filed an amicus brief supporting national banks' argument that the state law nuisance action was preempted by federal law, the court dismissed the city's complaint on state law grounds. The city has filed an appeal that is pending before the Sixth Circuit Court of Appeals. *City of Cleveland v. Ameriquest Mortgage Services, Inc.*, 621 F.Supp.2d (N.D. Ohio 2009), *appeal docketed*, No.09-3608 (6th Cir. May 27, 2009).

Cuomo v. Clearinghouse Association. On June 29, the U.S. Supreme Court delivered its decision in the case of *Cuomo v. Clearing House Association*. The case involved an attempt by the New York State Attorney General to obtain non-public information from national banks in connection with an investigation over alleged fair lending violations. The banks and the OCC argued that the state's demand was an illegal encroachment on the OCC's exclusive "visitorial" powers to inspect, examine, supervise, and regulate. The Supreme Court agreed with the OCC that the New York Attorney General could not proceed as he had attempted to do, but clarified the scope of the OCC's exclusive visitorial powers and concluded that those powers would not block a state law-enforcement official from bringing an action in court against a national bank to enforce a non-preempted state law. [*Cuomo v. Clearinghouse Association*, 557 U.S. ____ \(2009\)](#).

Miller v. Bank of America. The California Supreme Court upheld the lower appellate court decision reversing a trial court class-action judgment that granted monetary and injunctive relief to account-holders whose overdrafts and overdraft fees had been recouped by the bank from subsequently deposited public benefit payments (such as SSI benefits). The California Supreme Court held that this common account balancing practice did not violate California law. The U.S. Department of Justice, which represented the OCC, the U.S. Treasury, and the U.S. Social Security Administration, filed an amicus brief arguing that the state law was preempted by the National Bank Act and OCC regulations and would have adverse consequences for Treasury and Social Security programs. *Miller v. Bank of America*, 46 Cal.4th 630, 207 P.3d 531, 94 Cal.Rptr.3d 31 (Cal. 2009).

Regulations

Accuracy and Integrity Provisions of the FACT Act. The OCC and other federal agencies published final rules and guidelines implementing section 312 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) regarding the accuracy and integrity of information furnished to consumer reporting agencies. The final rules also implemented a provision of the FACT Act that provided consumers with a broad right to directly dispute inaccurate consumer report information with furnishers of the information. 74 [*Federal Register* 31484](#) (July 1, 2009).

Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments. The final rule expands national banks' authority to make public welfare investments consistent with recent amendments to 12 USC 24(Eleventh). It authorizes a national bank and its subsidiaries to make public welfare investments directly or indirectly if the investments primarily benefit low- and moderate-income individuals, low- and moderate-income areas, or other areas targeted by a governmental entity for redevelopment, or if the investment would receive consideration under 12 CFR 25.23 (the Community Reinvestment Act regulations) as a "qualified investment." The final rule became effective upon publication. The final rule implements a provision of the Housing and Economic Recovery Act of 2008 that restores the public welfare investment test to reflect the standard that was in effect prior to enactment of the Financial Services Regulatory Relief Act of 2006. 74 [*Federal Register* 15657](#) (April 7, 2009).

Risk-Based Capital Guidelines—Money Market Mutual Funds. The final rule extends the risk-based capital treatment of a previously issued interim final rule for asset-backed commercial paper (ABCP) purchased by national banks pursuant to the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility (ABCP Lending Facility) established by the Federal Reserve. The ABCP Lending Facility enables depository institutions to borrow on a nonrecourse basis from the Federal Reserve Bank of Boston if the depository institution uses the loan proceeds to purchase high-quality ABCP from money market mutual funds. The Federal Reserve established the ABCP Lending Facility on September 19, 2008, and extended it to October 30, 2009. The final rule, which applies to ABCP purchased pursuant to the ABCP Lending Facility, recognizes that the nonrecourse basis of the loan protects the bank from the credit and market risks of the purchased ABCP. Under the final rule, a national bank may assign a zero percent risk weight to the ABCP purchased by the bank. 74 [*Federal Register* 13336](#) (March 27, 2009).