



that appellants "take the position that they fall within the purview of [section 52.1] because the City, by enacting the ordinance, has attempted to interfere with their right to sell alcoholic beverages 'by intimidation and threats of police action, fines, and penalties...." However, the court explained that "an action brought under section 52.1 must allege that the plaintiff who claims interference of his or her rights also allege that this interference was due to his or her 'race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute' as set forth in [Civil Code] section 51.7." According to the court, appellants' failure to so allege constitutes a failure to state a cause of action.

Similarly, to state a claim under 42 U.S.C. section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. According to the Second District, appellants' "vague allegations of prospective commercial disadvantage fall far short of demonstrating the kind of discrimination that would...support an action under section 1983." Accordingly, the Second District affirmed the trial court's judgment, except as to appellants' second cause of action, as to which it reversed the trial court's judgment.

At this writing, the U.S. Supreme Court is reviewing the Tenth Circuit Court of Appeals' decision in *Adolph Coors v. Bentsen*, 2 F.3d 355 (1993), which held that the right to print beer labels containing alcoholic content is constitutionally protected by the first amendment. [14:4 CRLR 108; 14:2&3 CRLR 114-15] If upheld, the decision will nullify a federal law enacted in 1937 which prohibits such information on labels. According to federal regulators, the purpose behind the 1937 law was to avoid so-called "strength wars" which broke out among brewers after the repeal of Prohibition. The Coors company contends that the law unlawfully prohibits it from disseminating information to the public which it claims the public has a right to know and ought to know. However, the Treasury Department's Bureau of Alcohol, Tobacco and Firearms and *amicus curiae* Center for Science in the Public Interest counter that Coors' real motivation to provide the public with information regarding alcoholic content is solely to refute a public image that Coors' beer is weaker than other beers. The Supreme Court heard oral argument on November 30; at this writing, it has not yet rendered its decision.

## BANKING DEPARTMENT

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Pursuant to Financial Code section 99 *et seq.*, the State Banking Department (SBD) administers all laws applicable to corporations engaging in the commercial banking or trust business, including the establishment of state banks and trust companies; the establishment, operation, relocation, and discontinuance of various types of offices of these entities; and the establishment, operation, relocation, and discontinuance of various types of offices of foreign banks. The Department is authorized to adopt regulations, which are codified in Chapter 1, Title 10 of the California Code of Regulations (CCR).

The superintendent, the chief officer of the Department, is appointed by and holds office at the pleasure of the Governor. The superintendent approves applications for authority to organize and establish a corporation to engage in the commercial banking or trust business. In acting upon the application, the superintendent must consider:

(1) the character, reputation, and financial standing of the organizers or incorporators and their motives in seeking to organize the proposed bank or trust company;

(2) the need for banking or trust facilities in the proposed community;

(3) the ability of the community to support the proposed bank or trust company, considering the competition offered by existing banks or trust companies; the previous banking history of the community; opportunities for profitable use of bank funds as indicated by the average demand for credit; the number of potential depositors; the volume of bank transactions; and the stability, diversity, and size of the businesses and industries of the community. For trust companies, the opportunities for profitable employment of fiduciary services are also considered;

(4) the character, financial responsibility, banking or trust experience, and business qualifications of the proposed officers; and

(5) the character, financial responsibility, business experience and standing of the proposed stockholders and directors.

The superintendent may not approve any application unless he/she determines that the public convenience and advantage will be promoted by the establishment of the proposed bank or trust company; con-

ditions in the locality of the proposed bank or trust company afford reasonable promise of successful operation; the bank is being formed for legitimate purposes; the capital is adequate; the proposed name does not so closely resemble as to cause confusion with the name of any other bank or trust company transacting or which has previously transacted business in the state; and the applicant has complied with all applicable laws.

If the superintendent finds that the proposed bank or trust company has fulfilled all conditions precedent to commencing business, a certificate of authorization to transact business as a bank or trust company will be issued.

The superintendent must also approve all changes in the location of a head office; the establishment, relocation, or discontinuance of branch offices and ATM facilities; and the establishment, discontinuance, or relocation of other places of business. A foreign corporation must obtain a license from the superintendent to engage in the banking or trust business in this state. No one may receive money for transmission to foreign countries or issue money orders or travelers checks unless licensed.

The superintendent examines the condition of all licensees when necessary, but at least once every two years. The Department is coordinating its examinations with the Federal Deposit Insurance Corporation (FDIC) so that every year each agency examines certain licensees. New and problem banks and trust companies are examined each year by both agencies.

The superintendent licenses Business and Industrial Development Corporations which provide financial and management assistance to business firms in California.

Acting as Administrator of Local Agency Security, the superintendent oversees security pools that cover the deposits of money belonging to a local governmental agency in any state or national bank or savings and loan association. All such deposits must be secured by the depository.

James Gilleran resigned from his position as SBD Superintendent on September 30, in order to accept the position of Chair and Chief Executive Officer of the Bank of San Francisco. Chief Deputy Superintendent of Banks Stan M. Cardenas will serve as Acting Superintendent of Banks until Governor Wilson appoints a successor to Gilleran.

## MAJOR PROJECTS

**Federal Regulators Publish Revised CRA Regulations.** In December 1993, the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board,



the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision proposed new regulations to implement the federal Community Reinvestment Act (CRA). The purpose of the CRA is to implement the continuing and affirmative obligation of regulated financial institutions to help meet the credit needs of their communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations; the proposed regulations are intended to provide guidance on how the agencies assess the performance of institutions in meeting that obligation. In response to the initial rulemaking proposal, the agencies received over 6,700 comments, which they spent ten months reviewing. [14:2&3 CRLR 120]

On October 7, the four agencies published a revised rulemaking proposal, which they stated reflects comments received on the December 1993 proposal and the agencies' further internal considerations. In general, the agencies claimed that the revised proposal would provide guidance to financial institutions on the nature and extent of their CRA obligation and the methods by which that obligation will be assessed and enforced, emphasize performance rather than process, promote consistency in assessments, permit more effective enforcement against institutions with poor performance, and reduce unnecessary compliance burden while stimulating improved performance. As compared to the December 1993 proposal, the agencies contended that the revised proposal broadens the examination of performance, more explicitly considers community development activities, and makes other modifications and clarifications.

Like the original proposal, the revised proposal would eliminate the existing regulation's twelve assessment factors and substitute a performance-based evaluation system. The revised proposal makes explicit the assessment context against which the tests and standards set out in the proposed regulations would be applied, including consideration of demographic data about the community, information about community characteristics and needs, information about the institution's capacity and constraints, information about the institution's product offerings and business strategy, data on the prior performance of the institution, and data on the performance of similarly-situated lenders. It also gives particular attention to an institution's record of helping to meet credit needs in low- and moderate-income geographies, and emphasizes the institution's performance with respect to low- and moderate-income individuals and other areas and individuals where appropriate, given community characteristics and needs.

The revised proposal retains the lending, service, and investment tests as the primary method by which the agencies will assess the CRA performance of independent retail institutions with at least \$250 million in assets and affiliates of holding companies with at least \$250 million in bank and thrift assets; however, it changes how an institution's ratings on the three tests will be combined to produce the institution's overall composite rating. The revised proposal gives primacy to lending performance by requiring an institution to receive a "satisfactory" or better rating on the lending test in order to receive a "satisfactory" or better overall rating. At the same time, the rating system will be revised to increase the importance of the service and investment tests.

On November 21, SBD Acting Superintendent of Banks Stan Cardenas submitted his comments on the revised rulemaking proposal to the four agencies. Among other things, Cardenas stated that SBD "remains concerned that the CRA proposal will create safety and soundness problems for the California banking industry" and that "the revised CRA Proposal still does not strike the appropriate balance between safety and soundness requirements and community development concerns." Cardenas contended that the CRA proposal must be redrafted again to address the issues raised in his letter. SBD's specific concerns included the following:

- The effects of imposing the new data collection and reporting requirements on banks will be onerous, and will not be an effective means to ensure that a bank meets its CRA obligation. Individual loan files and lending policies must be examined to establish whether a decision was discriminatory.
- The lending, service, and investment tests remain vague and may be implemented inconsistently by examiners in the field.
- The proposed negative sanctions such as cease and desist orders and civil money penalties may encourage banks to ignore safety and soundness in order to comply with the proposed regulations; SBD also questioned whether statutory authority exists for imposing such sanctions.

The Consumer Federation of America (CFA) was also critical of the revised proposal, contending that it fails to give proper weight to a bank's record of providing branch and deposit services in low-income and minority neighborhoods. According to CFA, a critical aspect of meeting the convenience and needs of a community, as the CRA requires, is the provi-

sion of deposit services; CFA argued that banks fail to satisfy this very basic and general obligation under the CRA if they do not provide branch and deposit services in the low-income and minority neighborhoods of their community. In fact, CFA contended that the revised proposal is actually a retreat from the original proposal on this issue. CFA suggested that in order to truly evaluate bank performance, the agencies should revise the proposed service test approach to provide that no bank may receive a passing composite rating unless it earns a satisfactory or better score under the service test; branch offices, or comparable facilities for delivering complete deposit-side services, should be the primary factor of the service test; and deposit services should be measured for success in terms of tangible results, such as whether there is an increase or decrease in new accounts in low-income and minority neighborhoods.

The four agencies received public comments on the revised proposal until November 21; at this writing, the agencies have not yet released final rules.

**CSBS Announces Strategy for Nationwide Banking and Interstate Branching.** On November 3, the Conference of State Banking Supervisors (CSBS) unveiled a strategy to adapt the state banking regulatory system to nationwide banking and interstate branching authorized by the Interstate Banking and Branching Efficiency Act of 1994. [14:4 CRLR 114] States may opt out of interstate branching by passing legislation, prior to 1997, prohibiting it for both state and national banks; however, states may not opt out of nationwide banking. According to CSBS, the Act requires fundamental changes in the current system of state bank supervision, regardless of individual states' decisions to opt in or out of certain provisions.

Accordingly, CSBS' Interstate Banking and Branching Strategy Task Force identified the following nine projects that state banking departments and CSBS must complete to help bring about necessary changes to the banking system:

- States must review their banking laws in light of the Act, including state laws on interstate banking and bank branching, foreign corporation registration, taxation, information sharing, personnel-sharing, and other issues.

- CSBS will develop a list of options available to the states in implementing interstate branching regulation and supervision, and will draft model laws for each option.

- CSBS will brief all state banking departments on the Act, its implications, and CSBS' strategic plan.



# REGULATORY AGENCY ACTION

- CSBS and state banking departments should jointly engage in a public information campaign on interstate branching.

- CSBS and state banking departments should jointly continue to research ways to improve service to intrastate banking organizations, including an investigation of new powers, the streamlining of chartering and other application procedures, and continuing to look for ways to reduce regulatory burden while maintaining safety and soundness.

- CSBS and state banking departments must ensure that all state banking departments have access to stable regulatory and financial resources so that they may maintain their current levels of supervision. According to CSBS, state banking departments must decide how to split resources between home and host states, and how to assess fees on interstate branching operations. CSBS will enlist the aid of the National Conference of State Legislatures, the National Governors Association, and the Federal Financial Institutions Examinations Council in this project.

- CSBS and state banking departments must develop a plan to ensure that professional standards within the state bank regulatory system are consistent and continue to improve; state bank examiners should be required to receive continuing education, and should be certified to ensure consistent performance levels across state lines.

- CSBS and state banking departments must agree on ground rules for the interstate supervision of banking and branching.

- CSBS and state banking departments must harmonize supervision of U.S. offices of foreign banks, as well as domestic banks.

**OCC Proposes Relaxation of Banking Regulations.** On November 28, the Office of the Comptroller of the Currency published notice of its intent to extensively revise and reorganize its rules for national bank corporate activities. The stated purpose of the proposal is to modernize and clarify its rules, reduce regulatory burden in connection with national bank corporate activities, and—consistent with statutory requirements—impose regulatory requirements only where needed to address safety and soundness concerns or accomplish other statutory responsibilities of OCC. According to OCC, the proposed revisions reduce regulatory burdens on national banks by eliminating many regulatory requirements that are neither essential to maintaining the safety and soundness of national banks nor needed to accomplish OCC's statutory responsibilities. The proposed regulations lay the

legal framework for federally-chartered banks to set up subsidiaries which may undertake any activity "incidental to or within the business of banking"—which may eventually include the sale of real estate, computer services, insurance, and even securities.

One of most substantive proposals would establish three categories of procedures for banks to follow in order to establish or acquire an operating subsidiary or commence a new activity in an operating subsidiary. The proposal includes an after-the-fact notice procedure, an expedited review procedure for eligible banks, and a standard application review procedure for other situations. Under the proposal, a national bank may establish an operating subsidiary that qualifies for the after-the-fact notice procedure without prior OCC approval. The bank must file a notice with the OCC within ten days after establishing or acquiring the subsidiary, or commencing a new activity in a subsidiary. To be eligible for the notice procedure, the national bank that owns the subsidiary must be "adequately capitalized" and must not have been deemed to be in "troubled condition," as defined; further, the subsidiary may only engage in specified activities. As part of its proposal, OCC is seeking comments on whether it should amend its regulations to state that a national bank must possess fiduciary powers as a precondition to providing investment advice, either in the bank or through an operating subsidiary. The proposal also states that unless otherwise provided by statute, regulation, or as determined by OCC, all provisions of federal banking laws and regulations applicable to the operations of the parent bank apply to the operations of the bank's operating subsidiaries; according to OCC, this revised standard would allow OCC to determine on a case-by-case basis whether an activity deemed to be within the business of banking or incidental to banking may be conducted in an operating subsidiary to an extent or in a manner different from the way the activity is conducted at the parent bank level. This might include activities that the parent bank is not allowed to conduct because of a specific restriction that applies to the parent bank but not necessarily to its subsidiaries.

In approving operating subsidiary applications, OCC will assure that the activities proposed to be conducted will not endanger the safety and soundness of the parent bank; under the proposal, OCC would retain authority to impose appropriate conditions in connection with approvals of operating subsidiary applications. Depending on the activity in question, and as needed in order to protect the safety and

soundness of the parent bank and prevent risks of conflicts of interest, OCC may impose conditions that limit transactions between the subsidiary and its parent bank, limit the amount of funds that may be invested in the subsidiary by the parent, require that the subsidiary's capital not be included when computing the bank's capital, apply special safeguards on transactions between the bank and third parties that transact business with the operating subsidiary, or implement other measures as appropriate.

The proposal would also reduce the required ownership percentage for an operating subsidiary from 80% to a majority of the subsidiary's voting stock; according to OCC, this reduction provides more flexibility for the operating subsidiary structure, while maintaining the requirement that the parent bank control its operating subsidiary. OCC is also soliciting comments on whether its rule on operating subsidiaries should include forms of control other than majority ownership of corporate stock, and interests in entities other than corporations, including limited liability companies.

Additionally, OCC's proposal would incorporate new standards and requirements of the Interstate Banking and Branching Efficiency Act of 1994 that apply when a national bank establishes a de novo branch in a state other than the bank's home state or a state in which the bank already has a branch. These requirements generally include compliance with certain nondiscriminatory state filing requirements and applicable community reinvestment laws. OCC also may only approve an application to establish such a de novo branch if the bank establishing the branch is adequately capitalized and adequately managed; OCC may approve an application to establish a de novo branch under the Act only if the state in which the bank proposes to establish the branch expressly permits such transactions.

The proposal would also incorporate new standards and requirements of the Act regarding interstate business combinations; these provisions would be effective in states that elect by statute to permit interstate business combinations. However, even if a state does not adopt a statute permitting an interstate business combination, a business combination involving the acquisition of all or substantially all of a bank through a merger, consolidation, or purchase and assumption transaction will be permissible in all states as of June 1, 1997, except if a state adopts a statute prior to that date expressly prohibiting these combinations. A business combination involving the acquisition of a branch



without also acquiring the bank must be permitted by state law even if the transaction is to occur after June 1, 1997.

At this writing, OCC is scheduled to receive public comments on its rulemaking proposal until January 30.

**SBD Reacts to Severe Flooding.** On January 12, Acting Superintendent Cardenas issued a proclamation pursuant to Financial Code section 3602 authorizing banks located in 34 California counties affected by severe flooding to close their offices; banks that closed offices under the authority of the proclamation could reopen them at the discretion of their officers. The Acting Superintendent also announced that banks needing to relocate offices or set up temporary offices in order to keep operating in the affected areas may do so without observing the normal application procedures; SBD requested that a bank taking these steps notify the Department promptly of its action either by telephone or by facsimile. The Acting Superintendent also urged banks to review their lending policies in order to grant appropriate latitude to existing customers and to expedite the extension of new credit to finance rebuilding. Finally, SBD announced that banks in the affected areas should contact the appropriate Assistant Deputy Superintendent for an extension of time should such an extension be needed to meet any state regulatory reporting requirement.

**Mergers.** On September 8, SBD approved an application to merge Mineral King National Bank of Visalia with and into ValliWide Bank of Fresno. On September 16, SBD effected an application to merge the Bank of Anaheim with and into California State Bank in Covina, and to operate the head office of Bank of Anaheim as a branch office of California State Bank. On September 26 and October 31, respectively, SBD approved and effected the application to merge Sacramento Savings Bank with and into First Interstate Bank of California. On October 3, SBD approved an application to merge United American Bank of Westminster with and into Guaranty Bank of California; the Department effected the application on October 14. On October 7, SBD effected the application to merge WestCal National Bank of San Mateo with and into Mid-Peninsula Bank of Palo Alto. On November 4, SBD effected the merger of Coddling Bank in Rohnert Park, with and into National Bank of the Redwoods in Santa Rosa. On November 23, SBD approved an application to merge Bank One, Fresno with and into ValliWide Bank of Fresno; the Department effected the merger on December 2. On December 9, SBD ap-

proved an application to merge Sacramento First National Bank with and into Business and Professional Bank.

**New Banks.** On September 29, SBD approved the application of Citizens Bank of Nevada County to open a new bank in Nevada City. On December 9, the Department approved an application by Karen Masterson of Morrison & Foerster to establish B&P Interim State Bank in Woodland.

**Cease and Desist Order.** In December, SBD announced that the Superintendent issued an order to cease and desist from doing business in California without a license to Richard Stockstad, The Wellington Bank of Commerce, and the Wellington Bank of Commerce, U.S. Representative Office in Los Angeles. All persons who have communicated with any of the above are asked to contact SBD.

## DEPARTMENT OF CORPORATIONS

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**T**he Department of Corporations (DOC) is a part of the cabinet-level Business, Transportation and Housing Agency and is empowered under section 25600 of the California Code of Corporations. The Commissioner of Corporations, appointed by the Governor, oversees and administers the duties and responsibilities of the Department. The rules promulgated by the Department are set forth in Division 3, Title 10 of the California Code of Regulations (CCR).

The Department administers several major statutes. The most important is the Corporate Securities Act of 1968, which requires the "qualification" of all securities sold in California. "Securities" are defined quite broadly, and may include business opportunities in addition to the traditional stocks and bonds. Many securities may be "qualified" through compliance with the Federal Securities Acts of 1933, 1934, and 1940. If the securities are not under federal qualification, the commissioner must issue a "permit" for their sale in California.

The commissioner may issue a "stop order" regarding sales or revoke or suspend permits if in the "public interest" or if the plan of business underlying the securities is not "fair, just or equitable."

The commissioner may refuse to grant a permit unless the securities are properly and publicly offered under the federal se-

curities statutes. A suspension or stop order gives rise to Administrative Procedure Act notice and hearing rights. The commissioner may require that records be kept by all securities issuers, may inspect those records, and may require that a prospectus or proxy statement be given to each potential buyer unless the seller is proceeding under federal law.

The commissioner also licenses agents, broker-dealers, and investment advisors. Those brokers and advisors without a place of business in the state and operating under federal law are exempt. Deception, fraud, or violation of any regulation of the commissioner is cause for license suspension of up to one year or revocation.

The commissioner also has the authority to suspend trading in any securities by summary proceeding and to require securities distributors or underwriters to file all advertising for sale of securities with the Department before publication. The commissioner has particularly broad civil investigative discovery powers; he/she can compel the deposition of witnesses and require production of documents. Witnesses so compelled may be granted automatic immunity from criminal prosecution.

The commissioner can also issue "desist and refrain" orders to halt unlicensed activity or the improper sale of securities. A willful violation of the securities law is a felony, as is securities fraud. These criminal violations are referred by the Department to local district attorneys for prosecution.

The commissioner also enforces a group of more specific statutes involving similar kinds of powers: the Personal Property Brokers Law (Financial Code section 22000 *et seq.*), Franchise Investment Law (Corporations Code section 31000 *et seq.*), Security Owners Protection Law (Corporations Code section 27000 *et seq.*), California Commodity Law of 1990 (Corporations Code section 29500 *et seq.*), California Credit Union Law (Financial Code section 14000 *et seq.*), Industrial Loan Law (Financial Code section 18000 *et seq.*), Escrow Law (Financial Code section 17000 *et seq.*), Check Sellers, Bill Payers and Proraters Law (Financial Code section 12000 *et seq.*), Securities Depository Law (Financial Code section 30000 *et seq.*), Consumer Finance Lenders Law (Financial Code section 24000 *et seq.*), Commercial Finance Lenders Law (Financial Code section 26000 *et seq.*), Knox-Keene Health Care Service Plan Act of 1975 (Health and Safety Code section 1340 *et seq.*), and the Workers' Compensation Health Care Provider Organization Act of 1993 (Labor Code section 5150 *et seq.*).