The Court also noted that the government attempted to bolster its position by arguing that the labeling ban not only curbs strength wars, but also "facilitates" state efforts to regulate alcohol under the twenty-first amendment. The Court rejected this contention, concluding that the government's interest in preserving state authority is not sufficiently substantial to meet the above requirements, noting that even if the federal government possessed the broad authority to facilitate state powers, in this case the government has offered nothing that suggests that states are in need of federal assistance.

The Court also explained that a valid restriction on commercial speech must directly advance the governmental interest and be no more extensive than necessary to serve that interest, noting that this analysis basically involve a consideration of the fit between the legislature's ends and the means chosen to accomplish those ends. The Court agreed with the Tenth Circuit's finding that section 205(e)(2) fails to advance the interest in suppressing strength wars sufficiently to justify the ban. Specifically, the Court held that section 205(e)(2) cannot directly and materially advance its asserted interest because of the overall irrationality of the government's regulatory scheme: Although the laws governing labeling prohibit the disclosure of alcohol content unless required by state law, federal regulations apply a contrary policy to beer advertising. Like section 205(e)(2), these restrictions prohibit statements of alcohol content in advertising, but, unlike section 205(e)(2), they apply only in states that affirmatively prohibit such advertisements. The Court noted that as only eighteen states at best prohibit disclosure of content in advertisements, brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country. The Court concluded that "the failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars."

The battle continues in ***California Beverage Retailer Coalition v. City of Oakland***, No. 726329-3 (Alameda County Superior Court), in which the Coalition is challenging an Oakland city ordinance which establishes performance standards for licensed premises, requires merchants to post a notice of the standards, and provides that vandalism, drug sales, prostitution, and graffiti in violation of the standards are grounds for revocation of a nearby retailer's local permit to sell alcohol. *[15:1 CRLR 101; 14:4 CRLR 111; 14:2&3 CRLR 119]* On January 5, Alameda County Superior Court Judge James R. Lambden granted the Coalition's motion for summary adjudication of two causes of action which seek declaratory and injunctive relief based upon claims that the ordinance is preempted by the ABC Act (specifically, Business and Professions Code section 23790) and Article XX, section 22 of the California Constitution.

On January 25, the City of Oakland and seven intervenors filed a petition for writ of mandate with the First District Court of Appeal, asking that court to issue a peremptory writ of mandate directing the superior court to vacate and set aside its order granting the motion for summary adjudication. Among other things, the petitioners argued that no appellate court decision considers whether section 23790 precludes a city from enforcing an ordinance which sets up a public nuisance/crime enforcement mechanism against a preexisting alcoholic beverage sales establishment, and that there is ample case authority supporting the power of a city to regulate public nuisance and criminal activities connected with existing alcoholic beverage sales establishments.

On April 6, the Coalition filed its responsive brief with the First District, in which it argued that it is the state's prerogative to regulate alcoholic beverage licensees as it sees fit, and that municipalities may not intrude upon the right to sell alcoholic beverages through retroactive zoning ordinances. Petitioners filed their reply brief on May 4; at this writing, the First District has not yet ruled on the petition.

BANKING DEPARTMENT

Superintendent:
Conrad Hewitt
(415) 288-8800
Toll-Free Complaint Number:
1-800-622-0620

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; conditions 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 busi-

ness. 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.

On March 28, Governor Wilson appointed certified public accountant Conrad W. Hewitt as SBD Superintendent; Hewitt, of San Francisco, has been a managing partner at the Bay Area office of Ernst & Young since 1986. Hewitt, who will receive a salary of $102,799, began his duties in May.

MAJOR PROJECTS

Federal Regulators Approve New CRA Regulations. In April, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Board, and the Office of Thrift Supervision approved new regulations to implement the federal Community Reinvestment Act (CRA). The purpose of the CRA is to implement the 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 new regulations are intended to provide guidance on how the agencies assess the performance of institutions in meeting that obligation. *[15:1 CRLR 102–03; 14:2&3 CRLR 120]* On May 4, the four agencies jointly filed the final rules, which—according to the agencies—emphasize performance rather than process, promote consistency in evaluations, and eliminate unnecessary burden. According to the agencies, when compared to their previous proposals, the final rules reduce recordkeeping and reporting requirements and make other modifications and clarifications. Specific highlights of the final rules are as follows:

• The agencies removed two provisions from their previous proposals which produced considerable comment—the community reinvestment obligation provision, which stated that banks and thrifts have a specific affirmative obligation to help meet the credit needs of their communities, and the enforcement provision, which provided for penalties against banks and thrifts with "substantial noncompliance" ratings using the agencies' general enforcement powers under specified law.

• The final rules provide that an institution's CRA rating reflects its record of helping to meet the credit needs of its entire community; the agencies will take into account an institution's CRA record when evaluating various types of applications, such as applications for branches, office relocations, mergers, consolidations, and purchase and assumption transactions, and may deny or condition an application on the basis of the institution's record.

• The scope of the final rules does not differ appreciably from the scope of the current CRA regulations or the agencies' previous proposals; the agencies historically have excluded from CRA coverage certain special purpose institutions, such as banker's banks, that are not organized to grant credit to the public in the ordinary course of business. Under the final rules, these institutions continue to be treated as special purpose banks and are excluded from coverage.

• The final rules define the term "community development" to mean affordable housing (including multifamily rental housing) for low- or moderate-income individuals; community services targeted to low- or moderate-income individuals; activities that promote economic development by financing businesses or farms that meet specified size eligibility standards or have gross annual revenues of $1 million or less; or activities that revitalize or stabilize low- or moderate-income geographies. According to the agencies, this definition of community development restricts qualifying activities to those that promote community welfare, while recognizing that community welfare can be promoted in diverse ways.

• The final rules permit the agencies to take into account any legal constraints placed on an institution in assessing performance.

• Under the final rules, the agencies will analyze the information an institution maintains on the credit needs of its community along with relevant information available from other sources. At the same time, the final rules do not establish a requirement that each institution prepare a "needs assessment" to be evaluated by the examiner as urged in some comments provided by financial institutions and community organizations. Under the final rules, the agencies will neither prepare a formal assessment of community credit needs nor evaluate an institution on its efforts to ascertain community credit needs. Instead, the agencies will request any information that the institution has developed on lending, investment, and service opportunities in its assessment area(s). The agencies will not expect more information than what the institution normally would develop to prepare a business plan or to identify potential markets and customers, including low- and moderate-income persons and geographies in its assessment area(s). This information from the institution will be considered along with information from community, government, civic, and other sources to enable the examiner to gain a working knowledge of the institution's community.

Update on OCC Proposal to Relax Banking Regulations. At this writing, OCC's proposal to extensively revise and reorganize its rules pertaining to national bank corporate activities could be finalized by the end of May. The proposed regulatory changes 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. *[15:1 CRLR 104]* According to the OCC, the purpose of the proposal is to modernize and clarify OCC's 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. At this writing, OCC is reviewing the comments submitted in response to its proposal.

CSBS Adopts Proposal for Nationwide Banking and Interstate Branching. On May 8, the Conference of State Banking Supervisors (CSBS) announced its adoption of guidelines for the supervision of state-chartered banks that operate across state lines. *[15:1 CRLR 103–04]* Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, states have until June 1, 1997, to "opt in" or to "opt out" of interstate branching; six states have already acted to allow interstate branching on or before June 1, 1997.

Since passage of the Act, SBD has been working through CSBS to develop guidelines for the supervision of state-chartered banks that operate across state lines. As adopted by CSBS, the guidelines lay out the responsibilities of "home states" (states in which a bank is chartered) and "host states" (states in which an out-of-state bank operates branches) in supervising state-chartered banks that operate across state lines; according to SBD, the purpose of the guidelines is to create a system of seamless supervision for multistate banking organizations that ensures safety and soundness and provides a single point of contact between the bank and its regulators.

Under the guidelines, a multistate bank will deal only with its "home state" regulator for almost all purposes, including safety and soundness and application procedures. The "home state" regulator of a multistate bank will assume the primary responsibility for determining the safety and soundness of the institution, and will handle applications for new facilities, mergers, new powers, and corporate matters. The home state regulator will consult with regulators from the bank's host states in these processes, and will coordinate the bank's supervision with the host states and the bank's federal regulator. The home state regulator will also actively participate in ensuring the bank's compliance with applicable host state laws.

SBD Issues Advisory Notice. On March 24, SBD reissued an advisory notice originally issued in February 1993 regarding fraudulent business schemes originating from individuals in Nigeria; according to SBD, it reissued the notice after becoming aware of several recent occurrences in California. In the notice, SBD stated that the fraudulent proposals are typically transmitted by letter; although the proposals are often poorly worded, SBD warns that they may be quite sophisticated. The proposals attempt to dupe contacted businesses to pay up-front fees in order to participate in schemes to share in enormous financial gain. According to SBD, features of a typical scheme are as follows:

- A business is contacted by someone claiming to be a functionary in a Nigerian government-run corporation, such as the Nigerian National Petroleum Company. The communication claims that the Nigerian agency has a large sum of money available in connection with an unfulfilled contract with one of the many former military and civilian governments that have been in power in recent years in Nigeria; the purported money usually amounts to millions of dollars.
- The communication proposes a way that the large sum of money may be used for personal gain, but states that in order to effect the scheme, it is necessary that sham documents be produced which make it appear that the money has been spent for legitimate goods and services.
- The communication proposes that the contacted business supply the necessary sham documents, such as blank invoices, company stationery, and the name and numbers of its bank accounts. In return for this information, the communication proposes to give the target a share of the money, usually 30%. Once the business indicates a willingness to participate in the scheme, a subsequent communication asks the business to send a fee or "commission" to cover the expense of transferring the "money" to the business' bank accounts.

After paying the fee, the target is, of course, unsuccessful in acquiring its share of the money and is obviously reluctant to report the matter to law enforcement authorities. SBD is aware of one business which paid a $515,000 fee in order to participate in one such scheme.. Businesses receiving such proposals are advised to exercise extreme caution and contact the Embassy of Nigeria in Washington, D.C.

Bank Closures. On January 20, the SBD Superintendent took possession of Guardian Bank in Los Angeles, and ordered that it be liquidated; the Superintendent then appointed FDIC as receiver of Guardian Bank, and FDIC accepted the appointment. FDIC then entered into a purchase and assumption agreement with Imperial Bank in Inglewood, under which Imperial Bank will assume all the insured deposits of Guardian Bank; Guardian Bank's three offices will not reopen.

On March 3, the SBD Superintendent took possession of First Trust Bank in Ontario, and ordered that it be liquidated; the Superintendent then tendered to FDIC the appointment as receiver of First Trust Bank, and FDIC accepted the appointment. FDIC then entered into a purchase and assumption agreement with First Interstate Bank of California, under which First Interstate will assume all the insured deposits of First Trust Bank.

Enforcement Action. On February 17, SBD announced that the Superintendent issued a warning to cease and desist from doing business in California without a license to one office of Western State Bank in La Verne and two offices of Western State Bank in Los Angeles; according to SBD, Western State Bank is not authorized to transact business under any name which contains the word "bank" and which indicates the business is that of a bank pursuant to the California Financial Code. SBD also noted that the Western State Bank involved in the cease and desist orders is not associated with Western State Bank in Duarte, which is a licensed entity in California.

Also on February 17, SBD announced that the Superintendent issued a warning to cease and desist from doing business without a license to John Barton and Anna Barton, doing business as and on behalf of Reiss Trust Company in Pleasant Hill. According to SBD, these individuals and Reiss Trust Company are not authorized to transact business under any name which contains the word "trust" and which indicates the business is that of a trust company.

On February 22, the Orange County Superior Court issued a temporary restraining order against Izalco Express Services of Costa Mesa; SBD sought this action after an examination of Izalco—which is authorized to accept money in its capacity as an agent of American Express Travel Related Services, Inc., for transmission abroad through the MoneyGram program—disclosed that the company was accepting deposits from customers.

LEGISLATION

AB 706 (Caldera). The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (P.L. No. 103-328) provides for interstate banking and branching. *[14:4 CRLR 134]* As amended May 3, this bill would authorize any bank organized under state law to establish branch offices, within or outside the state, upon approval of the Superintendent of Banks, and would authorize a bank organized under the laws of another state to establish branches in this state upon approval of the Superintendent, but only under specified circumstances. This bill would authorize any bank organized under the laws of this state to act as an agent of any bank, wherever located, all of the outstanding voting shares of which are owned by a bank holding company that owns all of the outstanding voting shares of the bank organized under the laws of this state, for the conduct of any lawful activity, or to appoint any such bank as its agent to engage in any lawful activity.

This bill would also repeal the California Interstate (National) Banking Act, which regulates foreign bank holding company activities in California (including acquisitions, mergers, and consolidations), and instead enact provisions regulating interstate banking involving bank holding companies. It would generally prohibit the acquisition, without the prior approval of

the Superintendent, by a bank holding company of a bank in this state if the bank holding company controls any depository institution that maintains branches in this state and after the consummation of the acquisition the bank holding company and its depository institution subsidiaries would control 30% or more of the total amount of deposits of insured depository institutions in this state.

The bill would generally make it unlawful for a bank holding company whose home state is other than this state to acquire control of any bank in this state unless the bank to be acquired will have been in existence for no less than five years as of the date of acquisition, except in specified instances. The bill would impose various restrictions upon mergers by banks in this state and other banks, as specified. *[A. Appr]*

AB 1482 (Weggeland). The Riegle-Neal Interstate Banking and Branching Efficiency Act will become effective on September 29, 1995, one year after being signed into law by President Clinton; the Act will allow interstate bank branching, mergers, transactions, and acquisitions. AB 1482, as amended April 24, would amend state law regulating banks and S&Ls to make it conform it to the new federal law. *[A. Appr]*

AB 393 (Burton). Existing law prohibits an operator of an automated teller machine from imposing a surcharge upon the usage of that machine for customers using an access device not issued by that operator unless the surcharge is clearly disclosed prior to completion of the transaction. As introduced February 14, this bill would prohibit an operator of a point of sale transfer device that locates the device at a retailer, to facilitate electronic fund transfers in connection with retail sales, from imposing a fee on a retailer for the use of the point of sale transfer device by a customer of the retailer. *[A. B&F]*

SB 616 (Marks). Existing law requires banks and other financial institutions to maintain certain information concerning charges and interest on accounts, and to make that information available to the public. Existing law also requires banks and other financial institutions to furnish depositors with statements concerning charges and interest on accounts, as specified. As amended May 4, this bill would prohibit a supervised financial organization, defined to include banks, savings associations, savings banks, and credit unions, from charging and collecting deposit item return fees applicable to consumers who deposit checks that are subsequently not honored due to insufficient funds. *[S. FI&IT]*

SB 855 (Killea), as amended April 17, would provide that, whenever by statute or regulation there is extended to national banks doing business in this state any right, power, or privilege that is not authorized with respect to state banks or trust companies, the Superintendent may, by regulation, extend to banks or trust companies that right, power, or privilege. It would provide for the adoption of these regulations as emergency regulations.

Existing law provides that no bank, officer, director, employee, or agent shall give a preference to any depositor or creditor except as expressly authorized by law. This bill would eliminate the prohibition as to a preference to a creditor.

Existing law provides for reports to the Superintendent as to the financial condition of banks. This bill would eliminate a requirement that these reports be published in a newspaper.

Existing law provides that no bank shall acquire, hold, extend credit on the security of, or extend credit for the purpose of acquiring or carrying, any security of the bank or of any controlling person of the bank. This bill would provide that notwithstanding that prohibition, and subject to the prior approval of the Superintendent, a bank may purchase, redeem, or otherwise acquire its own shares. *[A. B&F]*

LITIGATION

Los Angeles National Bank v. Bank of Canton, 31 Cal. App. 4th 726 (Jan. 19, 1995), involves the interpretation of California Uniform Commercial Code (UCC) section 4302, which requires a bank to give notice of dishonor or refusal to pay a check by midnight of the day following receipt of the check, otherwise known as the "midnight deadline" rule; in this case, over $2 million in losses was sustained when two individuals, Tony Lam and Peter Wong, cashed 28 worthless checks written on an account issued by the Bank of Canton of California (BOC) over a period of three days at the Monterey Park branch office of Los Angeles National Bank (LANB). The main issue presented is which bank should bear the loss; the trial court granted summary judgment in favor of LANB based upon BOC's failure to meet the midnight deadline.

Two days after cashing the last batch of checks for Lam and Wong, LANB officials realized that there were, at that time, no funds in Lam and Wong's account and that the checks would be returned. LANB processed the checks in the usual manner prescribed by the California Uniform Commercial Code, which involved depositing them at the Federal Reserve Bank. The Federal Reserve made a provisional settlement to LANB's account for the checks, and presented the checks to BOC for final payment. At that point, BOC was required by section 4302 to pay the checks or notify LANB by midnight of the following banking day that it would not honor them. LANB contended that BOC did not notify LANB or return any of the 28 checks to LANB until after the midnight deadline had passed.

In a previous holding in this same proceeding (*LANB I*), the Second District Court of Appeal considered the construction of section 4302 and concluded that the rule of strict liability afforded by section 4302 displaces the defense that a bank's own negligence caused its loss. The Second District further noted that the UCC, for the most part, does not look at actual fault. "Instead, it places responsibility on the party which ordinarily would be in the best position to prevent the loss....Such a result accomplishes two purposes: first, it increases the efficiency and fraud-resistance of the banking system by placing upon those best able to guard against it the responsibility for preventing fraud..., and, second, it speeds the resolution of disputes by establishing clear rules of liability which do not depend heavily upon the specific facts of individual instances of fraud...."

Nevertheless, BOC contended that by virtue of LANB's own actions, it should not escape liability for the worthless checks notwithstanding BOC's failure to meet the midnight deadline. Based on *LANB I*, however, the Second District held that failure to meet the midnight deadline makes the payor bank strictly liable to the depository bank notwithstanding the fact that it may also have fault. In rejecting BOC's contentions, the Second District again stated that "[s]trict liability is the law relating to these transactions." On April 13, the California Supreme Court denied BOC's petition for review.

On January 20, the plaintiffs filed a notice of appeal in ***Badie v. Bank of America***, No. 944916, following San Francisco Superior Court Judge Thomas Mellon's dismissal of this test case which challenges BofA's policy requiring that customer disputes over deposit and credit card accounts be sent to binding arbitration. *[14:4 CRLR 115; 14:2&3 CRLR 123; 13:2&3 CRLR 124]* According to the plaintiffs' attorney, the appeal will be based on two issues: the constitutional right to trial by jury or judge, and the uneven bargaining power between large institutions and individual consumers. At this writing, the parties' briefs have not yet been filed.