UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE CLEARING HOUSE ASSOCIATION, L.L.C., Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Defendant.	No. 05 Civ. _____( ) **ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER**

UPON the Summons, the Complaint, the Declaration of Norman R. Nelson, executed June 15, 2005, the Declaration of David L. Moskowitz, executed June 14, 2005, the Declaration of Janet L. Burak, executed June 15, 2005, the Declaration of Adam R. Brebner, executed June 16, 2005 (collectively, the "Declarations"), and Plaintiff's Memorandum in Support of Motion for Preliminary Injunction and Temporary Restraining Order, it is hereby

ORDERED, that Defendant Eliot Spitzer, Attorney General of the State of New York, show cause before this Court, in courtroom __ of the United States Courthouse, 500 Pearl Street, New York, New York, on June __, 2005 at ___ _.m, why a preliminary injunction should not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the Defendant, his agents, and all persons acting in concert with them, pending the entry of a final judgment and decree in this action, from (1) investigating, requesting or issuing subpoenas for information concerning, or taking any

other action to enforce federal and state discrimination-in-lending laws against the national banks that are members of The Clearing House Association, L.L.C.[1] or their operating subsidiaries, with respect to their mortgage lending operations, or (2) otherwise exercising visitorial powers with respect to those banks and operating subsidiaries in violation of 12 U.S.C. § 484; and it is further

ORDERED, that:

1. Service of a copy of this Order, the Summons, the Complaint, the Declarations, and Plaintiff's Memorandum in Support of Motion for Preliminary Injunction and Temporary Restraining Order by hand delivery addressed to Dennis Parker, Bureau Chief, Civil Rights Bureau, Division of Public Advocacy, Office of the Attorney General, 120 Broadway, New York, NY 10271, and by facsimile and overnight courier to Eliot Spitzer, Attorney General of the State of New York, The Capitol, Albany, NY 12224-0341, on or before ___ __, _____ __, 2005, shall be deemed good and sufficient service thereof;

2. The Defendant shall serve any papers in opposition to Plaintiff's application for a preliminary injunction on Sullivan & Cromwell LLP, attorneys for the Plaintiff, 125 Broad Street, New York, NY 10004-2498, so that they are received on or before ___ __,_____ __, 2005; and

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[1] Bank of America, National Association; Citibank, N.A.; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; LaSalle Bank National Association; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

3. The Plaintiff shall serve any reply papers in further support of its application for a preliminary injunction by hand delivery to Dennis Parker, Bureau Chief, Civil Rights Bureau, Division of Public Advocacy, Office of the Attorney General, 120 Broadway, New York, New York 10271, and by facsimile and overnight courier to Eliot Spitzer, Attorney General of the State of New York, The Capitol, Albany, NY 12224-0341, so that they are received on or before ___ __, _____ __, 2005; and it is further

ORDERED that, sufficient reason being shown, pending the hearing on Plaintiff's application for a preliminary injunction, Defendant, his agents, and all persons acting in conjunction with them, are temporarily restrained, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, from (1) investigating, requesting or issuing subpoenas for information concerning, or taking any other action to enforce federal and state discrimination-in-lending laws against the national banks that are members of The Clearing House Association, L.L.C. or their operating subsidiaries, with respect to their mortgage lending operations, or (2) otherwise exercising visitorial powers with respect to those banks and operating subsidiaries in violation of 12 U.S.C. § 484.

SO ORDERED.

DATED: New York, New York
June __, 2005

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE CLEARING HOUSE ASSOCIATION, L.L.C., Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Defendant.	No. 05 Civ. _____ ( ) **DECLARATION OF ADAM R. BREBNER**

ADAM R. BREBNER declares:

1. I am a member of the bar of this Court associated with Sullivan & Cromwell LLP, attorneys for plaintiff The Clearing House Association, L.L.C. (the "Clearing House"). I make this declaration in support of the Clearing House's application for an order to show cause, temporary restraining order, and preliminary injunction.

2. Plaintiff seeks a temporary restraining order and preliminary injunction preventing Defendant from continuing an inquiry into, or commencing enforcement proceedings concerning, the lending practices of members of the Clearing House that are federally chartered national banks. As explained in the Memorandum of Law submitted herewith, the National Bank Act provides, "No national bank shall be subject to any visitorial powers except as authorized by Federal law. . . ." 12 U.S.C § 484(a). The Office of the Comptroller of the Currency (the "OCC") has issued regulations interpreting this statute to mean that "State officials may not . . . conduct[]

examinations, inspect[] or require[] the production of books or records of national banks, or prosecut[e] enforcement actions [against national banks], except in limited circumstances authorized by federal law." 12 C.F.R. § 7.4000(a)(1). Despite this clear federal law, the Defendant has commenced inquiries into the lending activities of several national banks and threatened to subpoena or bring enforcement proceedings against these banks. In this action, the Clearing House seeks injunctive relief on behalf of its members that are federally chartered national banks, and their operating subsidiaries, against the Defendant's actions in violation of the National Bank Act and the regulations promulgated by the OCC.

3. The Clearing House members and their operating subsidiaries will be irreparably injured in the absence of a temporary restraining order and preliminary injunction because their right to be free from the exercise of visitorial powers by state regulators will be destroyed by the very process of investigation and (potentially) litigation, no matter what the ultimate outcome on the merits. *See, e.g., First Union Nat'l Bank* v. *Burke*, 48 F. Supp. 2d 132, 149-50 (D. Conn. 1999) (finding irreparable injury sufficient to warrant the granting a preliminary injunction in a visitorial powers case because "the Commissioner's enforcement actions continue to displace the OCC's supervisory authority in a way that cannot be undone, since the exercise of such administrative authority by the Commissioner is mutually inconsistent with the OCC's exclusive authority"); *see also Nat'l City Bank of Indiana* v. *Boutris*, 2003 WL 21536818, at *7 (E.D. Cal. July 2, 2003) (State Commissioner's exercise of visitorial powers and enforcement of preempted state statute would cause irreparable harm); *Wells Fargo Bank, N.A.* v. *Boutris*, 252 F. Supp. 2d 1065, 1073 (E.D. Cal. 2003) (State

Commissioner preliminarily enjoined from exercising visitorial powers when bank's lending business would be disrupted and bank would face significant compliance costs).

4. As shown in the letters annexed to the Declaration of David L. Moskowitz, dated June 15, 2005, and the Declaration of Janet L. Burak, dated June 15, 2005, Dennis Parker, Bureau Chief, Civil Rights Bureau, Office of the Attorney General, is the attorney at the office of the Attorney General who has been directly in contact with the members of the Clearing House with respect to these matters and signed the letters that certain members of the Clearing House have received with respect to these matters. Accordingly, in the proposed order to show cause, we have suggested that the order to show cause, the summons, the complaint, and the papers in support of Plaintiff's application be served on Mr. Parker at his office at 120 Broadway, New York, NY 10271, as well as on the Defendant at his executive office at The Capitol, Albany, NY 12224-0341.

5. There has been no prior application for the same or any similar relief.

6. Attached hereto as Exhibit A is a true and correct copy of Hannah Bergman, *Spitzer: OCC is Blocking N.Y.'s Probe of Lenders*, AM. BANKER, May 19, 2005, No. 96, Vol. 170, at 1.

7. Attached hereto as Exhibit B is OCC Interpretive Letter 971 (Jan. 16, 2003), *available at* http://www.occ.treas.gov/interp/sep03/int971.doc.

8. Attached hereto as Exhibit C is OCC Advisory Letter 2002-9 (Nov. 25, 2002), *available at* http://www.occ.treas.gov/ftp/advisory/2002-9.doc.

9. Attached hereto as Exhibit D is a true and correct copy of Remarks by [Federal Reserve] Governor Edward M. Gramlich To the National Association of Real Estate Editors, Washington, D.C. (June 3, 2005), *available at* http://www.federalreserve.gov/boarddocs/speeches/2005/20050603/default.htm.

10. Attached hereto as Exhibit E is a true and correct copy of OCC News Release 2005-52, Acting Comptroller of the Currency Julie L. Williams Issues Statement Responding to New York Attorney General (May 19, 2005), *available at* http://www.occ.treas.gov/05rellst.htm.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 2005.

Adam R. Brebner

Exhibit A

www.americanbanker.com

Spitzer: OCC Is Blocking N.Y.'s Probe Of Lenders

■ BY HANNAH BERGMAN

WASHINGTON — The Office of the Comptroller of the Currency may have finally weighed in on New York Attorney General Eliot Spitzer's investigation of mortgage lending practices.

The OCC has not taken any formal actions, but Mr. Spitzer said in a speech here Wednesday that officials at the national bank regulator called his office two days earlier to say his investigation was cutting in on their jurisdiction.

Such a discussion would have broken the OCC's extended silence on whether it would assert its preemption power.

"Our investigation of whether or not banks are properly lending to minorities and women, they're trying to intercede on behalf of the banks, keeping us from getting the data we need," Mr. Spitzer said during his speech at the Center for American Progress. "As recently as two days ago I got a phone call from the very top of the OCC saying, 'We think you're preempting.' Well, I don't think we are, and we're going to find out in court someday."

American Banker reported Monday that many banking industry officials were anxious about the fact that the OCC had not said whether, or to what extent, national banks should cooperate with Mr. Spitzer's investigation.

Fair-lending complaints have gained momentum since more detailed data became available this spring under enhanced Home Mortgage Disclosure Act rules, and Mr. Spitzer's office has asked several banks for publicly reported data and other information.

See page 2

Federal Agencies 'Beaten Down and Neutered': Spitzer

Continued from page 1

"We're asking a whole bunch of different entities, who have different regulatory status, but there are certainly many that we've asked that we believe to be fairly within our regulatory purview," Mr. Spitzer told reporters.

The OCC did not respond directly to Mr. Spitzer's comments, but a spokesman said that after the Federal Reserve Board completes its HMDA data checks, "we fully expect to look carefully at the data for the institutions we supervise to see if there are any trends or actions we need to take."

Spitzer: His office's mortgage probe is "an early, early stage inquiry."

In his speech, Mr. Spitzer faulted the OCC, and executive branch agencies in general, for not protecting consumers enough and for overriding state officials' attempts to do so.

"They are not out there ensuring there's fairness, equity, integrity in the marketplace. They're preempting us so that we can't do what is reasonable," he said.

The preemption fight may go beyond the OCC.

On Monday, Mr. Spitzer and the attorneys general of six other states sent a letter to the Federal Deposit Insurance Corp., which is scheduled to hold a hearing next week on whether preemption could be established for state-chartered banks that operate in other states.

"Not only does the FDIC lack authority to adopt the rules requested ... [but] any such rules would undermine the states' sovereign authority to police their borders and protect their citizens," Mr. Spitzer wrote.

Whether or not he has jurisdiction, some national banks appear to be complying with his mortgage investigation.

At least one national bank has responded to the information requests, a spokeswoman in Mr. Spitzer's office said Wednesday, and the office anticipates others will also respond soon.

Mr. Spitzer said his office was asking lenders for "just enough data" to analyze. "This is an early, early stage inquiry."

This year, for the first time, the HMDA data includes the race, sex, and income range of borrowers receiving relatively high-rate loans. The data that banks have disclosed shows that minority borrowers have been far more likely than whites to receive such loans.

Mr. Spitzer's speech focused on the appropriate role of government in the market and when intervention is necessary to give the market more information to function correctly.

Over the past 20 years "the federal agencies have essentially been so beaten down and neutered, they've been rendered incapable of fulfilling their fundamental mandate," he said.

"They have not only been rendered incapable, but they have been sapped of the desire."

As examples of this, he cited his investigations of investment banking firms and of First Horizon National Corp.'s response to a consumer complaint his office received in late 2003.

First Horizon left a voicemail that said, "'Go away. You're a state agency. You have been preempted by the OCC,' " Mr. Spitzer said.

"This is now the world we're living in, when we simply call up a federal agency to say help, or call a bank to say stop trying to foreclose on this guy's house. ... They invoke a federal agency as protection against us, because we've been preempted by a federal agency that doesn't want us to protect consumers," he said.

Exhibit B

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Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #971
September 2003
12 USC 24(7)

January 16, 2003

Reginald S. Evans, Esq.
Chief Counsel
Pennsylvania Department of Banking
333 Market Street, 16th Floor
Harrisburg, PA 17101-2290

Subject: [***Op. Sub***]

Dear Mr. Evans:

This letter responds to your letter dated September 17, 2002, in which you ask a number of questions concerning the manner in which the Office of the Comptroller of the Currency ("OCC") supervises operating subsidiaries of national banks. Many of these questions relate specifically to the OCC's supervision of [ ] ("[***Op. Sub***]"), an operating subsidiary of [***NB***], [***City, State***] ("the Bank"). [***Op. Sub***] is incorporated in [***State2***].

The tenor of your questions suggests that Pennsylvania has the authority to supervise the activities of [***Op. Sub***] and, by implication, other operating subsidiaries of national banks. However, federal law and OCC regulations vest the OCC with exclusive "visitorial" powers over national banks and their operating subsidiaries.[1] Those powers include examining national banks, inspecting their books and records, regulating and supervising their activities pursuant to federal banking law, and enforcing compliance with federal or any applicable state law concerning those activities.[2] Federal law thus limits the extent to which any other governmental entity may exercise visitorial powers over national banks and their operating subsidiaries. Our response to your letter is provided to further the state's understanding of the OCC's supervision of national bank subsidiaries, but does not alter the jurisdiction established by federal law.

The OCC has urged state officials to contact the OCC if they have any information regarding allegations of violation of particular state laws by national banks or their subsidiaries.[3] In

[1] 12 U.S.C. § 484(a); 12 C.F.R. § 7.4006.

[2] Advisory Letter No. 2002-9 (Nov. 25, 2002); 12 C.F.R. § 7.4000(a)(2).

[3] Advisory Letter No. 2002-9 at 4.

addition, any consumer complaints concerning any part of the operations of any national bank or operating subsidiary, including the Bank and [***Op. Sub***], are referred to the OCC Customer Assistance Group ("CAG"), which is located in Houston, Texas. The CAG investigates the complaint, with the assistance of other OCC units where appropriate,[4] and recommends appropriate action.

The Nature and Scope of OCC Examinations

Many of your questions relate to the OCC's examination policies and procedures. For example, you ask questions concerning the scope of OCC examinations and the laws with which national banks and their operating subsidiaries must comply. The OCC conducts comprehensive examinations of a national bank's business, including its compliance with principles of safe and sound banking and its compliance with applicable laws. In addition, the OCC conducts targeted examinations that may cover one or more elements of a comprehensive examination, such as compliance with specific laws. The OCC has issued substantial guidance, which should provide more detailed answers to your questions. Copies of those materials are enclosed.

National banks have express authority to create operating subsidiaries, which may engage in any activity permissible to the parent bank itself.[5] Generally, an operating subsidiary is a corporation or similar entity, in which a national bank owns more than 50 percent of the voting interest, or otherwise maintains a controlling interest.[6] Because the activities of an operating subsidiary are limited to activities in which the parent bank could engage directly, an operating subsidiary is in practice a separately incorporated division or department of the parent bank. Thus, the OCC's standards in examining [***Op. Sub***] are the same standards that apply to OCC examinations of the Bank. Consistent with the guidance enclosed with this letter, the OCC's examination of [***Op. Sub***] addresses compliance with applicable laws, such as consumer protection laws, as well as compliance with standards of safe and sound banking.

[***Op. Sub***] engages in subprime mortgage lending. Because of the safety and soundness and compliance risks posed by these lending programs, the OCC has published additional guidance relating to subprime lending activities. The OCC relies on this guidance in examining [***Op. Sub***] and other subprime lenders and, therefore, applies the same standards to [***Op. Sub***] as it would to any national bank or operating subsidiary engaged in subprime lending activities. Copies of this guidance are enclosed for your reference.

In examining the lending function of a national bank or an operating subsidiary, the OCC typically reviews a sample of loans owned by the institution. This sample generally will include larger loans and loans that the institution has previously identified as problem loans. Through this review, the OCC will determine the quality of the loans (*e.g.*, the likelihood of repayment),

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[4] For example, attorneys in the Law Department may provide legal advice if the matter involves questions of law.

[5] *See* generally 12 C.F.R. § 5.34.

[6] 12 C.F.R. § 5.34(e)(2).

the adequacy and completeness of the information concerning the loan and the borrower, and whether the lending function is being carried out in compliance with applicable laws. The OCC evaluates the adequacy of all elements of the institution's business, including earnings, assets, management, liquidity, sensitivity to market risk, and information systems, as well as specialty areas such as any trust operations that may exist. The examination process is intended to provide a high level of assurance that each aspect of an institution's business is conducted on a safe and sound basis and in compliance with applicable laws.

[***Op. Sub***] generally does not retain the loans that it originates, but instead sells them in the secondary market shortly after origination. Based on those activities, the OCC reviews [***Op. Sub***]' lending function to determine compliance with all applicable laws and principles of safety and soundness.

Applicability of State Law

Some of your questions relate to the applicability of state (and federal) law to operating subsidiaries. For example, you ask whether state consumer protection laws apply to national bank operating subsidiaries. The OCC's regulations provide that state law applies to the operating subsidiary of a national bank "to the same extent that those laws apply to the parent national bank."[7] Questions about the applicability of state laws to national banks may be addressed in a variety of ways. In some cases, our regulations contain express provisions that address the applicability of state law to a national bank.[8] From time to time, the OCC also provides legal opinions that respond to specific requests and express our views about the applicability of particular state laws to national banks.[9] Preemption issues also may be resolved through litigation over the applicability of particular state laws to national banks.[10]

For example, courts have repeatedly recognized the essentially federal character of national banks,[11] and the Supreme Court has held that subjecting national banks' federally authorized activities to state regulation and supervision would conflict with their federally derived powers and with the purposes for which the national banking system was established.[12] In one such

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[7] 12 C.F.R. § 7.4006.

[8] *E.g.*, 12 C.F.R. §§ 7.5002(c) (furnishing products and services by electronic means), 34.4 (real estate lending), and 37.1(c) (debt cancellation contracts).

[9] *E.g.*, 66 Fed. Reg. 28,593 (May 23, 2001) (Michigan statute concerning motor vehicle loans); 65 Fed. Reg. 15,037 (March 20, 2000) (Pennsylvania statute concerning auctions and auctioneers).

[10] *The Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002); *Bank One Utah, N.A. v. Guttau*, 109 F.3d 844 (8th Cir. 1999).

[11] *See, e.g., Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("[n]ational banks are instrumentalities of the Federal government").

[12] *See Easton v. Iowa*, 188 U.S. 220, 229, 231-32 (1903), in which the Supreme Court explained:

decision, the Court noted that national banks are "instrumentalities" of the federal government and stated that "any attempt by a State to define [the] duties [of a national bank] or control the conduct of [the] affairs [of the national bank] is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created."[13]

Essential to the character of national banks and the national banking system is the uniform and consistent regulation of national banks by *federal* standards.[14] To that end, Congress vested in the OCC broad authority to regulate the conduct of national banks except where the authority to issue such regulations has been "expressly and exclusively" given to another federal regulatory agency. 12 USC 93a. State law could be applicable to national banks, however, in limited circumstances when it does not conflict or interfere with the national bank's exercise of its powers. Thus, for instance, one federal court recently noted that states retain some power to regulate national banks in areas such as "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."[15]

You also ask whether a litigant in a lawsuit against [***Op. Sub***] could pierce the corporate veil to recover damages from the Bank. This question would be more appropriately discussed in the context of litigation between [***Op. Sub***] and a customer or other third party involving a specific factual situation. In general, though, mere ownership of a subsidiary corporation does not result in liability on the part of the parent for acts of its subsidiary.

> [Federal legislation concerning national banks] has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and numerous as the states. ... [W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

See also Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32 (1996) (the powers of national banks are "grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law").

[13] *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368, 369 (1923). *See also Bank of America*, 309 F.3d at 561 (state attempts "to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties").

[14] Such standards may be embodied explicitly in OCC regulations, or in other federal law, including various federal consumer protection laws, such as the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the Federal Trade Commission Act. *See* 15 USC 1601 *et seq.*; 12 USC 4301 *et seq.;* 15 USC 1693 *et seq.*; 12 USC 2601 *et seq.*; 15 USC 1691 *et seq.*; 15 USC 45. However, whether or not the OCC has specifically addressed a national bank activity in a regulation, all national bank operations must be conducted in a safe and sound manner, in accordance with the OCC's supervisory standards.

[15] *Bank of America*, 309 F.3d at 559.

OCC Supervision of [***Op. Sub***]

The OCC examines national banks and their operating subsidiaries on a regular basis. Federal law requires that the OCC examine national banks, such as the Bank, at least once every 12 months.[16] However, the OCC may examine an institution more frequently if warranted by the institution's asset size, condition, or other factors. For example, the largest national banks have on-site examination teams conducting continuous examinations. Thus, while it is impossible to predict the exact timing of OCC examinations of [***Op. Sub***] in the future, it appears very likely that the OCC will continue to conduct an examination of [***Op. Sub***] at least every 12 months, consistent with the federal statutory schedule for examining the Bank.

The OCC generally prepares letters transmitting the examination findings to [***Op. Sub***] and the Bank. Those letters are the equivalent of examination reports and, therefore, are considered confidential. Examination reports, along with other bank examination information, are exempt from disclosure under the Freedom of Information Act.[17] This information is also subject to a limited privilege from discovery in third-party litigation.[18] These protections reflect the sensitive nature of bank examination information and support the longstanding policy of the OCC not to provide examination reports to third parties. Typically, the OCC will make confidential bank examination information available to state bank regulatory agencies if they demonstrate a specific regulatory need for the examination information (*e.g.*, merger of a national bank into a state bank, where the state bank regulator must approve the transaction), and if the state agency has entered into an appropriate information sharing/confidentiality agreement with the OCC governing use of the information.

I hope the foregoing has been of assistance to you in understanding the nature of the OCC's supervision of [***Op. Sub***]. If you have any questions concerning this letter, please contact Frederick Petrick, Counsel, Litigation Division, at 202-874-5280, or Mary Ann Nash, Counsel, Legislative & Regulatory Activities Division, at 202-874-5090.

Sincerely,

/s/ *Julie L. Williams*

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

Enclosures

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[16] 12 U.S.C. § 1820(d)(1). If a bank has less than $250,000,000 in assets and is in good condition, the OCC need only examine it at least once every 18 months. 12 U.S.C. § 1820(d)(4).

[17] 5 U.S.C. § 552(b)(8).

[18] *In re Subpoena Duces Tecum Served Upon the Comptroller of the Currency and the Secretary of the Board of Governors of the Federal Reserve System*, 967 F.2d 630 (D.C. Cir. 1992).

Exhibit C

OCC ADVISORY LETTER

Comptroller of the Currency
Administrator of National Banks

Subject: Questions Concerning Applicability and Enforcement of State Laws: Contacts From State Officials

TO: Chief Executive Officers of all National Banks, Department and Division Heads, and All Examining Personnel

PURPOSE

This advisory letter describes the general principles that apply in determining whether a state law is applicable to a national bank. It also describes the statutory authority of the OCC to regulate national banks, to examine national banks for compliance with federal and applicable state laws, and to enforce these laws. Finally, it advises national banks to consult with the OCC if state officials contact them concerning the potential application of a state law, or if these officials seek information concerning a national bank's operations.

BACKGROUND

Recently, we have been asked for guidance on the role of state officials in the enforcement of state laws that may affect national bank operations. The applicability of state laws to national banks and their operating subsidiaries -- and the authority to enforce those laws -- raise complex issues of both federal preemption and the statutory authority of the OCC as the supervisor and regulator of national banks.[1] Due to the often complex nature of the determinations regarding the application and enforcement of state law in a particular instance, this advisory letter notifies national banks to consult with the OCC on such matters. In addition, it encourages state officials to contact the OCC when they have information that would be relevant to the OCC in its supervision of national banks and their compliance with applicable laws, or if they seek information from national banks. We appreciate the interest of state officials in these issues, and this advisory is designed to summarize the standards that are applicable in this area.

[1] In most instances, the OCC is responsible for enforcing federal laws that apply to national banks or to their operating subsidiaries. However, some federal statutes also specifically give enforcement authority to state attorneys general. See, *e.g.*, 15 USC 1681s(c) (Fair Credit Reporting Act). Even in these instances, issues may arise as to the appropriate role of a state official with respect to a national bank's activities. Thus, the procedures discussed in this advisory letter should also be followed by national banks in instances involving any state attorney general enforcement action under federal law.

Applicability of State Laws to National Banks

The National Bank Act was enacted in 1864 to create a new system of nationally chartered banks that would operate independently of state regulation.[2] Since that time, courts have recognized the essentially federal character of national banks,[3] and the Supreme Court has repeatedly held that subjecting national banks' federally authorized activities to state regulation and supervision would conflict with their federally derived powers and with the purposes for which the national banking system was established.[4] In one such decision, the Court noted that national banks are "instrumentalities" of the federal government and stated that "any attempt by a State to define [the] duties [of a national bank] or control the conduct of [the] affairs [of the national bank] is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created."[5]

Essential to the character of national banks and the national banking system is the uniform and consistent regulation of national banks by *federal* standards.[6] To that end, Congress vested in the OCC broad authority to regulate the conduct of national banks except where the authority to issue such regulations has been "expressly and exclusively" given to another federal regulatory agency. 12 USC 93a. State law could be applicable to national banks, however, in limited circumstances when it does not conflict or interfere with the national bank's exercise of its powers. Thus, for instance, one federal court recently noted that states retain some power to regulate national banks in areas such as "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."[7]

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[2] *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002) (citing Cong. Globe, 38th Cong., 1st Sess., 1451 (1864)).

[3] *See, e.g., Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("[n]ational banks are instrumentalities of the Federal government").

[4] *See Easton v. Iowa*, 188 U.S. 220, 229, 231-32 (1903), in which the Supreme Court explained:

> [Federal legislation concerning national banks] has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and numerous as the states. ... [W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

See also Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32 (1996) (the powers of national banks are "grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law").

[5] *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368, 369 (1923). *See also Bank of Am.*, 309 F.3d at 561 (state attempts "to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties").

[6] Such standards may be embodied explicitly in OCC regulations, or in other federal law, including various federal consumer protection laws, such as the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the Federal Trade Commission Act. *See* 15 USC 1601 *et seq.*; 12 USC 4301 *et seq.;* 15 USC 1693 *et seq.*; 12 USC 2601 *et seq.*; 15 USC 1691 *et seq.*; 15 USC 45. However, whether or not the OCC has specifically addressed a national bank activity in a regulation, all national bank operations must be conducted in a safe and sound manner, in accordance with the OCC's supervisory standards.

[7] *Bank of Am.*, 309 F.3d at 559.

Supervision of National Banks and Enforcement of Applicable Laws

In addition to uniform federal standards for regulation of national banks, Congress provided for a complementary system of uniform federal oversight of the activities of national banks as an integral component of the national banking system. Exclusive federal oversight, uniform federal regulation, and state law preemption constitute three essential and distinctive elements of the national bank charter.[8]

Congress provided that the uniform federal standards that would govern national banks – and state laws, where federal law makes them applicable – would be enforced by a single, federal supervisor, the OCC. By statute, national banks generally are not subject to any visitorial powers except as authorized by federal law:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized. [9]

12 USC 484(a). The OCC is specifically authorized under the National Bank Act to "examine every national bank as often as the Comptroller of the Currency shall deem necessary," and OCC examiners have the power to "make a thorough examination of all the affairs of the bank." 12 USC 481. Thus, except in specialized instances where federal law makes provision for another regulator to have a role, the OCC's visitorial powers are exclusive with respect to activities that are authorized or permitted for national banks under federal law or regulation, or by OCC issuance or interpretation.

Congress reaffirmed the OCC's exclusive visitorial powers in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. Pub. L. 103-328, 108 Stat. 2338 (1994). Congress provided in that legislation that specified types of laws of the "host" state in which a national bank has an interstate branch are applicable, *unless* federal law preempts their application to national banks. However, Congress stated that "[t]he provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency." 12 USC 36(f)(1)(B).[10]

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[8] Moreover, OCC regulations provide for comparable treatment of national bank operating subsidiaries. The OCC's regulations state: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 CFR 7.4006. In addition, 12 CFR 5.34(e)(3) provides that "[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."

[9] "Visitorial" powers generally refer to the power to "visit" a national bank to examine the conduct of its business and to enforce its observance of applicable laws. *See, e.g., Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (the word "visitation" means "inspection; superintendence; direction; regulation") (internal quotations omitted). Section 484 provides an exception to the OCC's exclusive visitorial authority for state examiners inspecting for compliance with state unclaimed property or escheat laws upon reasonable cause to believe the bank has failed to comply with those laws. 12 USC 484(b).

[10] *See also National State Bank v. Long*, 630 F.2d 981, 989 (3rd Cir. 1980) ("[E]nforcement of the state statute is the responsibility of the Comptroller of the Currency rather than the State Commissioner.")

The OCC's regulations also set forth the agency's exclusive visitorial authority, providing that, subject to limited exceptions, only the OCC may exercise visitorial powers with respect to national banks. 12 CFR 7.4000(a)(1). These exclusive visitorial powers include:

1. examination of a bank,
2. inspection of a bank's books and records,
3. regulation and supervision of activities authorized or permitted pursuant to federal banking law, and
4. enforcing compliance with any applicable federal or state laws concerning those activities.

12 CFR 7.4000(a)(2)(i - iv).

PROCEDURE

The OCC recognizes that state officials may from time to time possess information that would be valuable to the OCC in connection with its oversight of national banks, or may seek to obtain information from national banks concerning their operations. Given the complexity of issues that can arise with respect to whether a state law is applicable to national bank operations, the enforcement of any such laws, or the propriety of disclosure of information concerning a national bank's operations, the OCC has established the following procedure to address circumstances when state officials raise issues concerning potential violations of laws by national banks, including when state officials may seek information from a national bank about its compliance with any law or for other purposes:

- **State officials are urged to contact the OCC** if they have any information to indicate that a national bank may be violating federal or an applicable state law or if they seek information concerning a national bank's operations. The OCC will review any such information and, if appropriate, take supervisory action, which may include an enforcement action, if it concludes that a national bank has violated an applicable law.

- **National banks should contact the OCC** if they are contacted by a state official seeking information from the bank that may constitute an attempt to exercise visitation or enforcement power over the bank. National banks are encouraged to consult with the OCC as soon as possible following the initial contact by a state official on whether such request may conflict with the federal standards applicable to the regulation and supervision of national banks. Following such consultation, the OCC may want to contact the state official directly to discuss the state's inquiry and to obtain any information that the state might possess that may be relevant to the OCC's supervision of the bank.

OCC Contacts:

- Director, Enforcement and Compliance Division, at (202) 874-4800 (for inquiries by state officials and questions about this Advisory Letter)
- Director, Community and Consumer Law Division, at (202) 874-5750 (for inquiries by state officials and questions about this Advisory Letter)
- The OCC District Counsel for the district in which the bank is headquartered (for inquiries by state officials)
- Director, Legislative and Regulatory Activities Division, at (202) 874-5090 (for questions about preemption and visitorial powers generally)

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

Exhibit D

The Federal Reserve Board

Remarks by Governor Edward M. Gramlich

To the National Association of Real Estate Editors, Washington, D.C.
June 3, 2005

HMDA Data and Their Effect on Mortgage Markets

Thank you for the invitation to speak today. I am particularly pleased to accept an invitation to address the National Association of Real Estate Editors. Journalists are critical in helping the public understand the economics of the mortgage market, which has become more accessible, yet also more complex than ever. Your ability to demystify the mortgage market and identify trends greatly improves the public's understanding of the housing market--the market for one of the most important financial transactions an individual will ever undertake.

I also note that your readership includes real estate professionals--another group of individuals who play a crucial role in the efficient operation of the housing market. Homeowners often rely on recommendations from their realtors when looking for financing. Realtors must understand the role they play in making credit markets work, and in promoting sustainable homeownership opportunities for individuals.

In our society, homeownership is the most common step one can take toward accumulating wealth. Home equity, built over time, has also become an important source of cash for other investments, including educational expenses. Moreover, homeownership strengthens communities by turning residents into investors with an ownership interest in the places they live. Recently, homeownership rates have reached record levels, thanks, in large measure, to technological innovations that allow for risk-based pricing of loans, along with the rapid growth of the subprime mortgage market.

This brings me to the topic I want to discuss today: the recent release of pricing information collected under the Home Mortgage Disclosure Act (HMDA). As you are aware, HMDA requires that large mortgage lenders report their lending activities to the Federal Reserve Board and its sister agencies. The Board validates and ultimately compiles the data into a format that is made available to the public. The public can then use this information to evaluate whether lenders are serving their communities, enforcing laws prohibiting discrimination in lending, and providing private investors with information to guide investments in housing. Generally, for-profit lenders that have offices in metropolitan areas and that have more than $34 million in assets, or whose mortgage lending represents 10 percent of their lending originations, must report under HMDA.

In my remarks today, I will first review the history of HMDA as a backdrop for the new HMDA pricing data. The Federal Reserve is still editing these data, but I will also provide a preview of what they are likely to show.

HMDA History in Brief

The regulations implementing HMDA require that lenders disclose aspects of their home mortgage application and lending activities, including the applicant's or borrower's race, ethnicity, sex, and income. Also reported are characteristics of the loan, such as the amount

and purpose, and the location of the property securing the loan. But it was not always this way.

When HMDA was originally enacted in the mid-1970s, the only information required to be reported was the number and dollar amount of loans, by census tract. Congress, concerned about the role that financial institutions' lending policies might play in the deterioration of our cities, designed HMDA to combat the practice known as "redlining," in which institutions took deposits but did not lend in their local communities. Initially, HMDA data simply helped the public and regulators track where an institution was lending and, more important, where it was not.

Not until the late 1980s did the data collection expand to include race, sex, and income levels for each loan application, along with whether the application was approved or denied. By then, the issue was whether minority borrowers were denied mortgage loans more frequently than white borrowers and whether those disparities reflected discrimination in mortgage underwriting.

Today, after significant changes in the mortgage market brought on by technological advances, deregulation, and financial innovation, the credit availability question is no longer limited to whether minority borrowers have access to credit but, rather, at what price that credit is available. Moreover, there are new questions about whether the price of credit always reflects the lender's risk or cost, or whether it is tied in any way to the race or sex of the borrower.

The technological changes have led to strong growth in the subprime mortgage market. In general, this growth appears to be a positive development. Homeownership is at record highs among low-income and minority borrowers, many of whom would not have qualified for mortgages several years ago, and most of whom have been able to make their mortgage payments. At the same time, the increase in mortgage lending among lower-income and minority borrowers has been accompanied by reports of abusive, unethical, and, in some cases, illegal lending practices. I am sure you are aware of the concern about whether consumers have the ability to shop for mortgages and to avoid unfair or deceptive lending arrangements.

Taking these concerns and public comments into consideration, the Federal Reserve determined that information on loan prices was critical to gaining insight into the functioning of the higher-cost mortgage market. In the Board's amendments to the regulation that implements HMDA, Regulation C, we attempted to expand the HMDA data to permit evaluation of this market. The same amendments also required recording of information about the lien status of the loan, whether it was for manufactured housing, and whether it was subject to the Home Ownership Equity Protection Act.

The new data were first reported for loans originated in 2004. Although the edited aggregate HMDA data will not be available until September 2005, lenders, as of March 31, are required to make their individual data available to anyone who submits a request. Some community organizations have already obtained and analyzed the data of some large lenders and have published reports indicating they believe that the data reveal discrimination in pricing. Simultaneously, the Federal Reserve, together with the other agencies that make up the Federal Financial Institutions Examination Council and the Department of Housing and Urban Development, has been explaining to financial institutions and to the public the uses and limitations of the pricing data and how these data will be used by bank examiners.

General Data Issues

The collection of HMDA data is premised on two distinct assumptions. The first is that the mortgage markets work more efficiently when information is publicly available. HMDA data have been used to identify credit demand that might otherwise have been overlooked. The analysis and conclusions drawn from the data have also encouraged the establishment of partnerships between lenders and community organizations to meet credit needs.

The other assumption is that data improve compliance with, and enforcement of, fair lending and consumer protection laws. The HMDA data are the first point of reference for fair lending examinations conducted by the Federal Reserve and the other banking regulators. Government agencies use HMDA data to assist in evaluating lender compliance with anti-discrimination laws--particularly the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA)--as well as other consumer protection laws. The data help examiners identify institutions, loan products, or geographic markets that show disparities in the disposition of loan applications by race, ethnicity, or other characteristics that require investigation under the fair lending laws. With the addition of price data for higher-priced loans, the agencies will be able to more easily identify price disparities that require investigation. If disparities are found to violate the ECOA or FHA, certain federal agencies are authorized to compel lenders to cease discriminatory practices and, among other remedies, obtain monetary relief for victims.

The public disclosure of price information under HMDA--in the form of spreads between the annual percentage rate (APR) on a loan and the rate on Treasury securities of comparable maturity--is designed to ensure that the data continue to be useful in improving market efficiency and legal compliance. The APR represents the cost of credit to the consumer and captures the contract-based interest rate on a loan as well as the points and fees that consumers pay up front, converted to a percentage rate. But since these fees have to be amortized over the term of the loan to calculate the APR, and since interest rates vary over time, even the APR can be difficult to use as a basis of comparison across loans.

Because of interest-rate fluctuations, the HMDA rules require lenders to report the difference between the APR and the rate on Treasury securities of comparable maturity for any loans with rate spreads that exceed prescribed thresholds. For first-and second-lien loans, the thresholds are 3 percentage points and 5 percentage points above the Treasury security of comparable maturity, respectively. These particular thresholds were chosen to exclude the reporting of the vast majority of prime-rate loans and include the vast majority of the subprime-rate loans, minimizing the burden of the data collection on lenders while providing information on that portion of the market where concern about consumer abuse is most prevalent.

Although the addition of the price data significantly increases the robustness of HMDA data, the data alone do not prove discrimination. Instead, the data will be used as a screen to identify any aspects of the higher-priced end of the mortgage market that warrant closer scrutiny. The new HMDA data are clearly limited: they do not include credit scores, loan-to-value ratio, or consumer debt-to-income ratio--all factors relevant to the cost of credit. Because these important determinants of price are missing, one cannot draw definitive conclusions about whether particular lenders discriminate unlawfully or take unfair advantage of consumers based solely on a review of the HMDA data. The new data will be useful to examiners in identifying particular loan products or geographic areas with significant pricing disparities and establishing one or more focal points for a pricing analysis that would include a review of all the factors relevant to a particular institution's pricing decisions.

The Board did consider adding other data elements relevant to pricing to the HMDA collection. For each possible new data item, we weighed the potential benefits and costs. On

the basis of that analysis and careful consideration of public comments, we decided not to add more factors. In addition to the cost to lenders of collecting additional data, more data being made publicly available would create very real privacy concerns. As it stands, many of the HMDA data fields are unique and can be matched with other information to determine the identity of individual borrowers. Given the costs and limitations of collecting additional data, we felt that the potential for further privacy losses outweighed the usefulness of the additional data.

It is always possible that banks could disclose additional information on their own, but even this is questionable from a legal standpoint. The recent Fair Credit Reporting Act limits financial institutions' ability to share consumer reports (such as credit scores) with third parties.

Regardless, the new data still offer the public and supervisory agencies charged with enforcement of the fair lending laws a better screening tool than was previously available. Until now, in determining whether a lender is discriminating in its pricing decisions, examiners have relied on several factors: the relationship between loan pricing and compensation of loan officers or brokers; lender policies giving loan officers broad pricing discretion; the use of empirically based and statistically sound risk-based pricing systems; disparities among prices quoted or charged to applicants who differ in their protected characteristics (such as race); and consumer complaints alleging price discrimination. These data will still be used, but the APRs will make the high-cost loan assessments much more precise.

Although discussions of the new HMDA pricing data have just begun, some outcomes should be anticipated. First, a debate will continue about what the HMDA data say about the lending practices of individual institutions. Some community groups have already publicized their analysis of the data provided by individual institutions, and those institutions have responded. The attorney general for New York is also reviewing the data of several institutions. I anticipate that these inquiries and the conclusions drawn from them will continue for several months.

Second, lenders can gain an increased awareness of the lending and pricing practices of their organizations, and of their competitors, through analysis of HMDA data. As a result, lenders may take opportunities to compete in areas where the data show concentrations of high-priced lending. Competitive pressures in such markets should increase efficiency in pricing, ensuring that prices for mortgages are commensurate with risk and do not just reflect an absence of competition.

Third, new and strengthened collaborations should emerge among lenders, community groups, realtors, and other participants in the real estate market. As lenders seek to enter new markets, or to better serve their existing markets, the groups that have an intimate knowledge of their communities will be viewed as valuable partners.

Finally, increased importance will be placed on the value of financial education to help consumers shop for and obtain the mortgage loan that represents the best price and terms for their financial situation and needs. The broad array of mortgage loan products makes choosing difficult, even for those with financial savvy. The choices are substantially more confusing for those with credit-impaired histories or those who are unfamiliar with the different types of financial service providers and products. Consumers are often bewildered by the mortgage credit process, and the consequences of poor choices or misunderstanding or misinformation can have lasting effects on their financial well-being.

An Early Look at the Data

As I said earlier, as of March 31, lenders have been required to make their individual HMDA data available. Many press reports have discussed these data and there is already a vigorous debate about what the data do, and will, show.

The Federal Reserve is now editing the data, and its reports will not be complete until September. Until then, we can only provide a broad preview of the overall picture. In 2004, some 8,800 lenders reported 37 million loan applications, compared with 8,100 lenders with 42 million loan applications in 2003. The drop in the number of loan applications reflects the slowing of the refinance market last year. The increase in the number of lenders is partly the result of the expanded coverage of the Board's amendments, but it could also suggest increasing competition in the home mortgage industry.

Regarding subprime lending, back in 1994 the subprime market, defined as high-cost mortgage loans, amounted to $35 billion, or 5 percent of total mortgage originations. By 2004, the subprime market had exploded to $530 billion, or 19 percent of total mortgage originations. The annual subprime market growth rate over this time was a whopping 27 percent.

The initial data also suggest that prevalence of higher-priced loans differs notably across racial and ethnic groups. As some press accounts have implied, the data indicate that blacks and Hispanics are more likely to take out higher-priced loans than non-Hispanic whites, and that Asians are the least likely to have higher-priced loans. These preliminary data also seem to indicate that the actual prices paid by those taking out higher-priced loans are about the same for different racial groups.

Until the editing process is complete, more details cannot be provided. Needless to say, everyone will have an opportunity to review the final data when they are released in September.

Conclusion

In closing, I cannot emphasize enough the importance of your role. By understanding the potential usefulness and limitations of the data, and conveying those messages clearly, we can promote a more efficient market and compliance with anti-discrimination laws without unfairly tarnishing the reputations of particular lenders. No one will be served if lenders are unwilling to enter, or remain in, certain higher-priced segments of the market. The most effective way to lower the cost of credit to higher-risk borrowers is to promote a competitive marketplace. And one of the most effective ways of ensuring competition is to make data available.

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Exhibit E

NEWS RELEASE

Comptroller of the Currency
Administrator of National Banks

NR 2005-52

FOR IMMEDIATE RELEASE
May 19, 2005

Contact: Kevin Mukri
(202) 874-5770

Acting Comptroller of the Currency Julie L. Williams Issues Statement Responding to New York Attorney General

WASHINGTON – Acting Comptroller of the Currency Julie L. Williams issued the attached statement today in response to comments by New York Attorney General Eliot Spitzer.

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The Office of the Comptroller of the Currency was created by Congress to charter national banks, to oversee a nationwide system of banking institutions, and to assure that national banks are safe and sound, competitive and profitable, and capable of serving in the best possible manner the banking needs of their customers.

Statement by Acting Comptroller Julie L. Williams
In Response to Comments By Eliot Spitzer

I was surprised and disappointed to see what I had understood to be a personal conversation recounted as part of a speech delivered by Attorney General Spitzer. I did indeed call Attorney General Spitzer. The purpose of my reaching out to him was to determine how each of us could fulfill our respective roles in overseeing laws that protect against lending discrimination in an efficient and complementary fashion. We had agreed to talk further.

Last year, many months before the Attorney General became involved in this issue, I made absolutely clear that if the OCC receives evidence – from Home Mortgage Disclosure Act (HMDA) reports or any other credible source – suggesting that violations of the fair lending laws might be taking place at an institution under our jurisdiction, we will increase the level of our supervisory oversight accordingly, and that if we discover that discriminatory practices have in fact taken place, we will respond appropriately and forcefully.

Also, last year, we began a process of reviewing preliminary HMDA data. That process has continued this year as additional data have become available and data integrity checks are being completed, and we are undertaking the extensive statistical analysis necessary to evaluate that data. Based on that analysis, if additional work is needed, including case-by-case reviews of credit decisions on individual borrowers, we will do it. If our work shows that supervisory action is needed, we will take it.

If Attorney General Spitzer is suggesting by his public comments that he would undertake duplicative work in connection with institutions currently under review by the OCC, that activity would potentially disrupt and certainly impede our ability to conduct our exam work promptly and efficiently – a result neither of us should want.

Such activity by the Attorney General also would be inconsistent with the Attorney General's own position about his jurisdiction. In litigation filed in Federal courts, the Attorney General has acknowledged that *several* federal laws at least preclude state officials from examining or taking administrative enforcement measures against national banks.

According to published reports, the Attorney General believes that federal agencies have been "beaten down," and "neutered," so that they are incapable of fulfilling their fundamental mandate, and have been "sapped of the desire" to do so. Let me be very clear, on behalf of the OCC, that I completely reject that characterization. And let me also be very clear that the OCC is absolutely committed to assuring that the national banking system is free of lending discrimination of any sort.

Citizens of all states in the nation are best served when the resources of government are deployed most efficiently and effectively. This should be our mutual goal. For our part, we at the OCC will continue to seek a constructive dialogue with Attorney General Spitzer to assure that as we pursue our respective work, lending standards by banks and non-banks alike are free of the stain of discrimination. The OCC will take whatever steps are needed to assure that the lending practices in the national banking system are reviewed thoroughly, carefully and fairly.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLEARING HOUSE ASSOCIATION, L.L.C., Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Defendant.	No. 05 Civ. _____ ( ) **DECLARATION OF NORMAN R. NELSON**

NORMAN R. NELSON declares:

1. I am the General Counsel of The Clearing House Association, L.L.C. (the "Clearing House"). I make this declaration on personal knowledge, except as expressly set forth below, in support of the Clearing House's application for a preliminary injunction and temporary restraining order.

2. The Clearing House (formerly named The New York Clearing House Association L.L.C.) is an association of leading commercial banks and the nation's oldest bank association and forum. It is affiliated with The Clearing House Payments Company L.L.C., which provides payment, clearing, and settlement services to its member banks and other financial institutions.

3. The members of the Clearing House include eight federally chartered national banks organized under the National Bank Act: Bank of America, National Association; Citibank, N.A.; HSBC Bank USA, National Association;

JPMorgan Chase Bank, N.A.; LaSalle Bank National Association; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

4. The Clearing House is dedicated to protecting the rights and interests of its members, as well as advancing the interests of the domestic commercial banking industry. Among other things, it is interested in ensuring stability and certainty in the regulatory environment in which its member banks operate.

5. The Clearing House frequently presents the views of its members on important public policy issues affecting the commercial banking industry by, among other things, issuing comment letters on various proposed regulatory actions. Through its activities and publications, the Clearing House has contributed to the formation of federal banking policy.

6. The Clearing House has previously appeared as *amicus curiae* in numerous federal court actions involving issues of federal regulation of banks and banking policy, including *American Bankers Association* v. *Lockyer*, No. 04-16334 (9th Cir., filed August 9, 2004), and *Wachovia Bank, N.A.* v. *Burke,* 319 F. Supp. 2d 275, 285-88 (D. Conn. 2004).

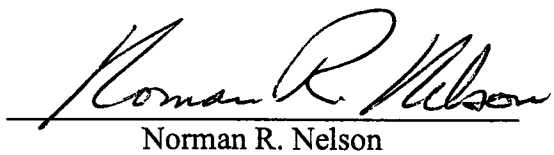
7. As shown by the Declarations of Janet L. Burak and David L. Moskowitz, submitted in support of the application, in letters dated April 19, 2005 from Mr. Dennis Parker, the Bureau Chief of the Civil Rights Bureau of the New York Attorney General, to HSBC USA, National Association, and Wells Fargo & Co., the ultimate parent company of Wells Fargo Bank, National Association, the Defendant stated that he had commenced a preliminary inquiry into the lending practices of the

banks regarding potential violations of federal and state anti-discrimination laws, and the Defendant requested that, in lieu of a formal subpoena, the bank "voluntarily" provide the Defendant with further information regarding its loans and lending practices.

8. I am informed and believe that on April 20, 2005, the Defendant sent a letter to JP Morgan Chase & Co., the parent company of JPMorgan Chase Bank, N.A., that was substantially the same as the letters to HSBC Bank USA, National Association, and Wells Fargo Bank, National Association.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 2005.



Norman R. Nelson

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE CLEARING HOUSE ASSOCIATION, L.L.C., Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Defendant.	No. 05 Civ. _____( ) **DECLARATION OF DAVID L. MOSKOWITZ**

DAVID L. MOSKOWITZ declares:

1. I am Executive Vice President and General Counsel of Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. ("Wells Fargo Bank"). Wells Fargo Bank is a member of The Clearing House Association, L.L.C. ("The Clearing House"). I make this declaration on personal knowledge, except as expressly stated below, in support of The Clearing House's Motion for Preliminary Injunction and Temporary Restraining Order.

2. Wells Fargo Bank is a federally chartered national bank organized and existing under the National Bank Act. Wells Fargo Bank and its operating subsidiaries provide a wide variety of banking services to retail and commercial clients.

3. The business of Wells Fargo Bank and, to a limited extent, its operating subsidiaries includes residential mortgage lending throughout the United States, including New York. Wells Fargo Bank's mortgage lending program is designed to

promote home ownership and, consistent with the Community Reinvestment Act, includes mortgage lending to less creditworthy borrowers. As a matter of prudent and sound lending practice, loans to borrowers with different risk factors bear different interest rates.

4. Pursuant to the National Bank Act, the mortgage lending business of Wells Fargo Bank and its operating subsidiaries is regulated by the Office of the Comptroller of the Currency ("OCC"). Wells Fargo Bank and its operating subsidiaries are subject to extensive ongoing regulation, supervision, examination, and enforcement by the OCC with respect to compliance with both federal and state laws.

5. Section 484 of the National Bank Act provides that national banks are not subject to visitorial powers except as authorized by federal law. Reflecting this clear congressional intent, the interpretive regulations promulgated by the OCC provide:

> State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law.

12 C.F.R. § 7.4000.

6. By letter dated April 19, 2005, a true and correct copy of which is attached as Exhibit A, the Office of the Attorney General for the State of New York ("Defendant") informed Wells Fargo & Co., the ultimate parent company of Wells Fargo Bank ("Wells Fargo") that, based on certain loan data reported pursuant to the Home Mortgage Disclosure Act ("HMDA"), Defendant had commenced a preliminary inquiry into the lending practices of Wells Fargo regarding potential violations of federal and state anti-discrimination laws. Defendant requested that, in lieu of a formal subpoena,

Wells Fargo "voluntarily" provide Defendant with information regarding its loans and lending practices.

7. Defendant's request sought two categories of information. First, Defendant asked that Wells Fargo produce all data contained in Wells Fargo's HMDA Loan Application Register ("LAR") for loans and applications during 2004 related to property located in the State of New York for calendar year 2004. Second, Defendant requested a variety of non-public material and information concerning Wells Fargo's residential real estate lending operations (the "lending information") including (1) a list and explanation of all variables that determined Annual Percentage Rates ("APRs") on 2004 HMDA-reportable loans, and related "formulas or algorithms," (2) extracts of every computer database that reflects loan conditions, pricing and "other variables" for 2004 HMDA-reportable loans, (3) all documents reflecting analysis or examination of racial or ethnic disparities in the 2004 HMDA data, (4) a list and explanation of all HMDA-reportable loan products, and (5) all policies and procedures concerning discretionary and/or exception pricing on HMDA-reportable loans.

8. Under Regulation C of HMDA (12 C.F.R. § 203.5(c)), Wells Fargo is obligated to make modified HMDA LAR data available to the public upon request, and Wells Fargo responded to the first category of document requests by providing the modified LAR to Defendant on May 2, 2005.

9. With respect to the second category, on May 16, 2005 Wells Fargo produced the lending information requested by Defendant for its non-bank subsidiaries and informed Defendant that it would provide lending information with respect to Wells Fargo's national bank subsidiaries directly to the OCC, their regulator.

10. On May 19, 2005, I wrote to the OCC on behalf of Wells Fargo Bank and, as required by OCC Advisory Letter 2002-9, described in detail the specific categories of information sought by Defendant. I stated that Wells Fargo Bank was prepared to respond to any additional OCC requests for information in connection with the OCC's ongoing review and analysis of Wells Fargo Bank's HMDA data.

11. On information and belief, the OCC and its sister federal agencies are closely reviewing and analyzing the HMDA data as part of their ongoing review and examination of federally regulated financial institutions' compliance with federal and state laws, including anti-discrimination laws.

12. On May 19, 2005, I received a telephone call from Dennis Parker, the Bureau Chief of the Civil Rights Bureau of the New York Attorney General. Mr. Parker told me that Defendant was "probably" going to subpoena the lending information from Wells Fargo Bank since Wells Fargo Bank had not voluntarily provided the lending information. At that time, Mr. Parker told me that Defendant was in ongoing discussions with the OCC regarding jurisdictional issues with respect to Defendant's inquiries into potential discriminatory lending.

13. On June 6, 2005, I had another telephone conversation with Mr. Parker. Mr. Parker told me that Defendant and the OCC had not been able to reach agreement on the exercise of jurisdiction, and once again asked Wells Fargo Bank to produce the lending information. Mr. Parker told me that if Wells Fargo Bank did not produce the lending information to Defendant, Defendant would either subpoena the lending information or file an action in New York State Court against Wells Fargo regarding Wells Fargo Bank's lending practices. Mr. Parker said that Defendant was

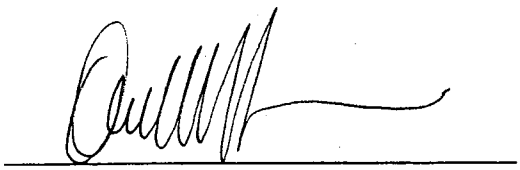
committed to continuing its inquiry and that it would be proceeding to issue a subpoena or file an action "within the next few days" unless Wells Fargo Bank produced the lending information. Mr. Parker also told me that the documents and lending information requested in Defendant's April 19 letter represented only the first stage of Defendant's inquiry and that Defendant anticipated requesting substantial additional documents and information as its inquiry continued.

14. Wells Fargo Bank and its operating subsidiaries commit considerable resources to ensuring their compliance with myriad applicable federal and state laws and regulations, including fair and responsible lending laws and the Community Reinvestment Act. Wells Fargo Bank undergoes continuous regulation, supervision, examination and monitoring by the OCC, and is subject to the OCC's enforcement jurisdiction with respect to both federal and state law. It is also subject to special targeted examinations relating to laws governing consumer protection, including anti-discrimination statutes. By seeking to inspect the books and records of Wells Fargo Bank and to otherwise exercise visitorial powers over Wells Fargo Bank, Defendant

threatens to increase—and if not enjoined will increase—the compliance burden faced by Wells Fargo Bank in a manner expressly prohibited by federal law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 2005.



David L. Moskowitz

Exhibit A

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

DIVISION OF PUBLIC ADVOCACY
Civil Rights Bureau

April 19, 2005

BY OVERNIGHT MAIL

Richard M. Kovacevich
President and CEO
Wells Fargo & Company
P.O. Box 6995
Portland, OR 97228

Law Department
San Francisco 48987 APR 22 2005

FAXED to David Garfield
APR 22 2005

James M. Strother
Executive Vice President and General Counsel
Wells Fargo & Company
633 Folsom Street, 7th Floor
San Francisco, CA 94107-3600

Re: 2004 HMDA Data

Dear Mr. Kovacevich and Mr. Strother:

We understand that the loan data required to be reported pursuant to the Home Mortgage Disclosure Act ("HMDA") are currently available for calendar year 2004. Recent revisions to Federal Reserve Board Regulation C require additional data to be collected and reported, including the annual percentage rate ("APR") and rate spread for certain higher-cost loans.

Published reports analyzing Wells Fargo's 2004 HMDA data suggest that African-American and Hispanic borrowers are substantially more likely than white borrowers to receive higher-cost loans from your institution. These racial and ethnic disparities are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.

We have commenced a preliminary inquiry into this matter to determine the causes of these disparities. In lieu of issuing a formal subpoena, we write to request that Wells Fargo voluntarily provide our office with certain information regarding its HMDA reportable loans and applications.

First, we ask that you produce all data contained in the HMDA Loan/Application Register ("LAR") for loans or applications related to property located in the State of New York for calendar year 2004. Please provide data for Wells Fargo as well as all of its subsidiaries and units; submit these data in an electronic, computer-readable format, preferably on an ASCII diskette or CD/ROM; and include the data dictionary for the LAR, as well as any other information or instructions necessary to analyze and decipher any coding or information contained in the LAR.

Second, in order to determine whether any disparities in loan pricing are justified by legitimate business considerations, we ask that you provide the following material:

a) A list and explanation of all variables that determined the APRs for 2004 HMDA reportable loans (e.g., credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates.

b) An extract of every computer database containing basic loan conditions (e.g., term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans. Please provide the extract(s) in an electronic, computer readable format, on an ASCII diskette or CD/ROM.

c) All documents reflecting any analysis or examination of racial or ethnic disparities with respect to Wells Fargo's 2004 HMDA reportable loans and applications conducted either by or on behalf of Wells Fargo.

d) A list of all HMDA reportable loan products, and an explanation of the features of each product.

e) All policies and procedures concerning the circumstances under which the APR offered to a loan applicant may depart (upward or downward) from the rate determined by application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans.

Please provide us with responsive data and information by May 3, 2005. We will then let you know whether we need any further information to conduct our analysis. If you have any questions, please contact me at (212) 416-8240.

Sincerely yours,

Dennis D. Parker
Bureau Chief

Burak Decl.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLEARING HOUSE ASSOCIATION, L.L.C., Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Defendant.	No. 05 Civ. _____ ( ) **DECLARATION OF JANET L. BURAK**

JANET L. BURAK declares:

1. I am the Senior Executive Vice President, General Counsel, and Corporate Secretary of HSBC Bank U.S.A., N.A. ("HSBC Bank"). HSBC Bank is a member of The Clearing House Association, L.L.C. (the "Clearing House"). I make this declaration on personal knowledge and on knowledge I obtained in my capacity as General Counsel and Corporate Secretary for HSBC Bank, except as expressly set forth below, in support of the Clearing House's Motion for a Preliminary Injunction and Temporary Restraining Order.

2. HSBC Bank is a federally chartered national bank organized and existing under the National Bank Act. It has its main office in Delaware with a management presence in New York, New York. HSBC Bank and its operating subsidiary, HSBC Mortgage Corporation USA ("HSBC Mortgage"), provide a wide variety of banking services to retail and commercial clients. The business of HSBC Bank

and HSBC Mortgage includes residential mortgage lending throughout the United States, including in New York.

3. Pursuant to the National Bank Act, the residential lending business of HSBC Bank and HSBC Mortgage is regulated by the Office of the Comptroller of the Currency ("OCC"). HSBC Bank and HSBC Mortgage are subject to extensive ongoing regulation, supervision, examination, and enforcement by the OCC with respect to compliance with both federal and state laws. Other affiliated companies owned by HSBC Bank's holding company — which are neither national banks nor operating subsidiaries of national banks — are subject to regulation or examination by state regulators.

4. By letter dated April 19, 2005, a true copy of which is attached as Exhibit A, Defendant the Attorney General for the State of New York ("NYAG") informed HSBC Bank that, based on certain loan data reported pursuant to the Home Mortgage Disclosure Act ("HMDA"), the Defendant has commenced a preliminary inquiry into certain lending practices. The Defendant asked that HSBC Bank cooperate "voluntarily" with the inquiry by providing information regarding its loans and lending practices, but expressly indicated that the requests for information were "[i]n lieu of issuing a formal subpoena." On information and belief, several other national banks that are members of the Clearing House received similar requests from the Defendant on or around April 19, 2005.

5. The Defendant's request sought two categories of documents. First, the NYAG asked that HSBC Bank and all of its subsidiaries and units produce all data contained in their HMDA Loan Application Register ("LAR") for loans and applications related to property located in the State of New York for Calendar Year 2004.

Second, the Defendant requested a variety of non-public material concerning HSBC's residential real estate lending operations (the "lending information"), including (1) a list and explanation of all variables that determined Annual Percentage Rates ("APRs") on 2004 HMDA-reportable loans, and related "formulas or algorithms"; (2) extracts of every computer database that reflects loan conditions, pricing and "other variables" for 2004 HMDA-reportable loans; (3) all documents reflecting analysis or examination of racial or ethnic disparities in the 2004 HMDA data; (4) a list and explanation of all HMDA-reportable loan products; and (5) all policies and procedures concerning discretionary and/or exception pricing on HMDA-reportable loans.

6. Under Regulation C of HMDA (12 C.F.R. § 203.5(c)), HSBC Bank is obligated to make modified HMDA LAR data available to the public upon request. Accordingly, HSBC Bank produced the first category of document requests by providing the modified LAR to the NYAG for HSBC Bank and all related entities. HSBC Bank also transmitted considerable lending information on behalf of affiliates other than itself and HSBC Mortgage on June 14, 2005.

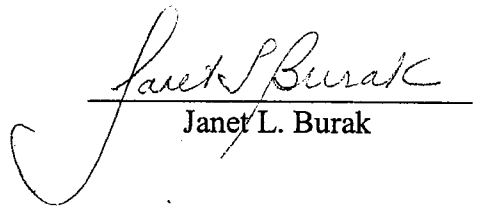
7. The actions of the Attorney General's Office, particularly its request for detailed lending information from HSBC Bank and HSBC Mortgage, are generally of a type that HSBC Bank and HSBC Mortgage would expect in connection with an OCC visitorial examination. HSBC Bank and HSBC Mortgage are addressing their HMDA data, and other relevant information, with the OCC in keeping with its supervisory processes.

8. Most of the information requested by the Attorney General's Office is highly confidential, either because it involves trade secrets or proprietary

information that could cause HSBC Bank and HSBC Mortgage significant commercial harm if released, or because it involves detailed personal information about HSBC customers that could cause serious personal privacy violations if released.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 2005.



Janet L. Burak

Exhibit A

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

DIVISION OF PUBLIC ADVOCACY
Civil Rights Bureau

April 19, 2005

BY OVERNIGHT MAIL

Martin J.G. Glynn
President and CEO
HSBC Bank USA, N.A.
452 Fifth Avenue, 10th Floor
New York, NY 10018

Janet L. Burak
General Counsel
HSBC Bank USA, N.A.
452 Fifth Avenue, 7th Floor
New York, NY 10018

Re: 2004 HMDA Data

Dear Mr. Glynn and Ms. Burak:

We understand that the loan data required to be reported pursuant to the Home Mortgage Disclosure Act ("HMDA") are currently available for calendar year 2004. Recent revisions to Federal Reserve Board Regulation C require additional data to be collected and reported, including the annual percentage rate ("APR") and rate spread for certain higher-cost loans.

Published reports analyzing HSBC's 2004 HMDA data suggest that African-American and Hispanic borrowers are substantially more likely than white borrowers to receive higher-cost loans from your institution. These racial and ethnic disparities are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.

We have commenced a preliminary inquiry into this matter to determine the causes of these disparities. In lieu of issuing a formal subpoena, we write to request that HSBC voluntarily provide our office with certain information regarding its HMDA reportable loans and applications.

First, we ask that you produce all data contained in the HMDA Loan/Application Register ("LAR") for loans or applications related to property located in the State of New York for

calendar year 2004. Please provide data for HSBC as well as all of its subsidiaries and units; submit these data in an electronic, computer-readable format, preferably on an ASCII diskette or CD/ROM; and include the data dictionary for the LAR, as well as any other information or instructions necessary to analyze and decipher any coding or information contained in the LAR.

Second, in order to determine whether any disparities in loan pricing are justified by legitimate business considerations, we ask that you provide the following material:

a) A list and explanation of all variables that determined the APRs for 2004 HMDA reportable loans (e.g., credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates.

b) An extract of every computer database containing basic loan conditions (e.g., term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans. Please provide the extract(s) in an electronic, computer readable format, on an ASCII diskette or CD/ROM.

c) All documents reflecting any analysis or examination of racial or ethnic disparities with respect to HSBC 's 2004 HMDA reportable loans and applications conducted either by or on behalf of HSBC.

d) A list of all HMDA reportable loan products, and an explanation of the features of each product.

e) All policies and procedures concerning the circumstances under which the APR offered to a loan applicant may depart (upward or downward) from the rate determined by application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans.

Please provide us with responsive data and information by May 3, 2005. We will then let you know whether we need any further information to conduct our analysis. If you have any questions, please contact me at (212) 416-8240.

Sincerely yours,

Dennis D. Parker
Bureau Chief

Complaint

H. Rodgin Cohen (HC7168)
Gandolfo V. DiBlasi (GD5913)
Michael M. Wiseman (MW3209)
Robinson B. Lacy (RL8282)
SULLIVAN & CROMWELL LLP
125 Broad Street,
New York, New York 10004
(212) 558-4000
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLEARING HOUSE ASSOCIATION, L.L.C., Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Defendant.	No. 05 Civ. _____( ) **COMPLAINT**

Plaintiff, The Clearing House Association, L.L.C. (the "Clearing House"), alleges:

SUMMARY OF THE ACTION

1. The National Bank Act provides, "No national bank shall be subject to any visitorial powers except as authorized by Federal law. . . ." 12 U.S.C. § 484(a). The Office of the Comptroller of the Currency (the "OCC") has issued regulations interpreting this statute to mean that "State officials may not . . . conduct[] examinations, inspect[] or require[] the production of books or records of national banks, or prosecut[e] enforcement actions [against national banks], except in limited circumstances authorized by federal law." 12 C.F.R. § 7.4000(a)(1). Despite this clear

federal law, the Defendant has commenced inquiries into the lending activities of several national banks and threatened to subpoena or bring enforcement proceedings against these banks. In this action, the Clearing House seeks injunctive relief on behalf of its members that are federally chartered national banks, and their operating subsidiaries, against the Defendant's actions in violation of the National Bank Act and the regulations promulgated by the OCC.

2. The Clearing House does not challenge the authority of the Defendant over other companies that are not chartered by the federal government. Nor does the Clearing House assert that the Defendant has been unreasonable or unfair in his enforcement efforts against such other companies. Rather, this action presents a purely legal issue regarding the primacy of federal law with respect to national banks.

JURISDICTION AND VENUE

3. This is an action under the National Bank Act, 12 U.S.C. § 21 *et seq*. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the laws of the United States.

4. Venue in this district is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claim occurred in this district. In particular, the Defendant's letters requesting documents from the national banks originated from the Defendant's executive office in this district and two of the three letters at issue were addressed to offices of banks within this district.

THE PARTIES

5. The Clearing House is an association of leading commercial banks, organized as a limited liability company under Delaware law, with its main office at 100

Broad Street, New York, New York. The Clearing House is dedicated to protecting the rights and interests of its eleven members, eight of which are federally chartered national banks, as well as advancing the broader interests of the domestic commercial banking industry. At least three of the national bank members of the Clearing House, HSBC Bank USA, National Association ("HSBC Bank"), JPMorgan Chase Bank, National Association ("JPMorgan Chase Bank"), and Wells Fargo Bank, N.A. ("Wells Fargo Bank"), are subject to the Defendant's inquiry and requests for lending information. Accordingly, the Clearing House has associational standing to bring this action on behalf of its members.

6. Defendant Eliot Spitzer is sued in his official capacity as Attorney General for the state of New York. He maintains executive offices at The Capitol, Albany, New York and at 120 Broadway, New York, New York, the office that has been principally involved in the events or occurrences forming the subject matter of this action.

DEFENDANT'S VIOLATIONS OF THE NATIONAL BANK ACT

The National Banks

7. HSBC Bank, JPMorgan Chase Bank, and Wells Fargo Bank (collectively, "the Clearing House Members") are each chartered pursuant to the National Bank Act, 12 U.S.C. § 21 *et seq.* Pursuant to regulations promulgated by the OCC, 12 C.F.R. §§ 5.34, 34.1, 7.4006, they carry on parts of their banking businesses through separately incorporated operating subsidiaries, which are treated for regulatory purposes as divisions of the national banks.

8. Either directly or through their operating subsidiaries, the Clearing House Members each engage in residential mortgage lending. Their mortgage lending programs are designed to promote home ownership and, consistent with the Community Reinvestment Act, include mortgage lending to less creditworthy borrowers. As a matter of prudent and sound lending practice, loans to borrowers with different risk factors bear different interest rates.

9. Beginning in 2004, pursuant to Regulation C promulgated under the Federal Home Mortgage Disclosure Act ("HMDA"), large mortgage lenders have been required to report certain lending data to the OCC, the Board of Governors of the Federal Reserve System, and other federal banking agencies. For first- and second-lien loans, lenders are required to report particular information relating to loans that are 3 percentage points and 5 percentage points above the Treasury securities of comparable maturity, respectively. Lenders are required to disclose, among other things, the loan applicant's or borrower's race, ethnicity, sex, and income.

The New York Attorney General's Inquiry

10. By letter from Mr. Dennis Parker, the Bureau Chief of the Civil Rights Bureau of the New York Attorney General, dated April 19, 2005, the Defendant informed Wells Fargo & Co., the ultimate parent company of Wells Fargo Bank ("Wells Fargo") that, based on 2004 HMDA data, the Defendant had commenced a preliminary inquiry into the lending practices of Wells Fargo regarding potential violations of federal and state anti-discrimination laws. The Defendant requested that, in lieu of a formal subpoena, Wells Fargo "voluntarily" provide the Defendant with further information regarding its loans and lending practices.

11. The Defendant's request sought two categories of information. First, Defendant asked that Wells Fargo produce all data contained in Wells Fargo's HMDA Loan Application Register ("LAR") for loans and applications during 2004 related to property located in New York. Second, Defendant requested a variety of non-public material and information concerning Wells Fargo's residential real estate lending operations (the "lending information") including (1) a list and explanation of all variables that determined Annual Percentage Rates ("APRs") on 2004 HMDA-reportable loans, and related "formulas or algorithms," (2) extracts of every computer database that reflects loan conditions, pricing and "other variables" for 2004 HMDA-reportable loans, (3) all documents reflecting analysis or examination of racial or ethnic disparities in the 2004 HMDA data, (4) a list and explanation of all HMDA-reportable loan products, and (5) all policies and procedures concerning discretionary and/or exception pricing on HMDA-reportable loans.

12. By letter from Mr. Parker dated April 19, 2005, the Defendant informed HSBC Bank that he had commenced a similar inquiry concerning HSBC Bank and made substantially the same requests to HSBC Bank.

13. By letter from Mr. Parker dated April 20, 2005 to JP Morgan Chase & Co., the parent company of JPMorgan Chase Bank, Defendant stated that he had commenced a similar inquiry concerning JPMorgan Chase Bank and made substantially the same requests to JPMorgan Chase Bank.

14. Federal law obligates banks to make HMDA LAR data available to the public upon request. 12 C.F.R. § 203.5(c). Accordingly, the Clearing House Members have produced the first category of information to Defendant.

15. The second category of information sought by the Defendant is, however, nonpublic lending information that the Clearing House Members are not required to disclose to state officials. Accordingly, the Clearing House Members have not produced this information to Defendant.

16. On May 19, 2005, Wells Fargo Bank was told by Mr. Parker that Defendant was "probably" going to subpoena the lending information from Wells Fargo Bank since Wells Fargo Bank had not voluntarily provided the lending information. At that time, Mr. Parker told Wells Fargo Bank that the Defendant was in ongoing discussions with the OCC regarding jurisdictional issues with respect to the Defendant's inquiries into potential discriminatory lending.

17. On June 6, 2005, Mr. Parker told Wells Fargo Bank that the Defendant and the OCC had not been able to reach agreement on the exercise of jurisdiction, and once again asked Wells Fargo Bank to produce the lending information. Mr. Parker told Wells Fargo Bank that if it did not produce the lending information to the Defendant, the Defendant would either subpoena the lending information or file an action in New York State Court against Wells Fargo Bank regarding Wells Fargo Bank's lending practices. Mr. Parker said that the Defendant was committed to continuing its inquiry and that it would be proceeding to issue a subpoena or file an action "within the next few days" unless Wells Fargo Bank produced the lending information.

18. Mr. Parker also told Wells Fargo Bank that the documents and lending information requested in the Defendant's April 19 letter represented only the first stage of the Defendant's inquiry and that the Defendant anticipated requesting substantial additional documents and information as its inquiry continued.

19. On information and belief, the Defendant's stated intention to subpoena the requested information or file a state court action in the immediate future if the information is not produced applies equally to HSBC Bank and JPMorgan Chase Bank.

20. The Defendant has publicly declared that he intends to proceed with his investigation into the lending practices of national banks despite being told by the OCC that he is impinging on the OCC's exclusive supervisory jurisdiction over national banks.

21. Under the National Bank Act and other federal banking laws, the OCC has licensing, regulatory, supervisory, examination, and enforcement authority with respect to national banks' compliance with both federal and state laws. *See* 12 U.S.C. §§ 24(Seventh), 93(a), 481, 1818(b); *see also* 12 C.F.R. § 7.4000.

22. In furtherance of the exclusivity of this authority, a provision of the National Bank Act, now codified as 12 U.S.C § 484(a), provides:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

This provision is a cornerstone of Congress' stated intent, as demonstrated by the legislative history of the National Bank Act, to ensure that national banks were not subject to supervision by state authorities.

23. 12 U.S.C. § 484(b) was added in 1982 to provide a limited exemption to this exclusive federal regulatory, supervisory, and examination jurisdiction of national banks, but it applies only "to ensure compliance with applicable State

unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."

24. The OCC's regulations interpreting section 484 provide:

> Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided [in the OCC's regulation interpreting 12 U.S.C § 484(b)]. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."

12 C.F.R. § 7.4000(a)(1). The OCC's regulation defines "visitorial powers" to include "Examination of a bank"; "Inspection of a bank's books and records"; "Regulation and supervision of activities authorized or permitted pursuant to federal banking law"; and "Enforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. § 7.4000(a)(2).

25. The protections afforded to national banks from state licensing, regulation, supervision, examination, and enforcement apply equally to the operating subsidiaries of national banks. *See* 12 C.F.R. § 7.4006; *see also* 12 C.F.R. §§ 5.34 and 34.1.

26. The national bank members of the Clearing House and their operating subsidiaries commit considerable resources to ensuring their compliance with myriad applicable federal and state laws and regulations, including discrimination-in-lending laws and the Community Reinvestment Act. They undergo continuous regulation, supervision, examination, and monitoring by the OCC, and are subject to the OCC's enforcement jurisdiction with respect to both federal and state law. They are also

subject to special targeted examinations relating to laws governing consumer protection, including discrimination-in-lending laws and the Community Reinvestment Act. By seeking to inspect the books and records of the Clearing House Members and to otherwise exercise visitorial powers over them, the Defendant threatens to increase—and if not enjoined will increase—the compliance burden faced by the Clearing House Members in a manner expressly prohibited by federal law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, The Clearing House Association L.L.C., demands judgment against Defendant Eliot Spitzer, in his official capacity as Attorney General of the State of New York:

A. Preliminarily and permanently enjoining the Defendant, his agents, and all persons acting in concert with them from (1) investigating, requesting or issuing subpoenas for information concerning, or taking any other action to enforce federal and state discrimination-in-lending laws against, the national banks that are members of the Clearing House, or their operating subsidiaries, with respect to their mortgage lending operations, or (2) otherwise exercising visitorial powers with respect to those banks and operating subsidiaries in violation of Section 484 of the National Bank Act;

B. Granting plaintiff such other and further relief, including costs, as this Court may deem just and proper.

Dated: New York, New York
June 16, 2005

SULLIVAN & CROMWELL LLP

By: _____

H. Rodgin Cohen (HC7168)
Gandolfo V. DiBlasi (GD5913)
Michael M. Wiseman (MW3209)
Robinson B. Lacy (RL8282)
Adam R. Brebner (AB0914)
125 Broad Street,
New York, New York 10004
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Attorneys for Plaintiff