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March 19, 2009

The Honorable Patrick J. Leahy
Chair, Committee on The Judiciary
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

via facsimile
(202) 224-3479

**Re: *Miller v. Bank of America*, No. S.149178 (Cal Supreme Court)
Amicus Position of The United States Department of Justice**

Dear Senator Leahy:

I am the principal trial and appellate counsel in an important statewide consumer class action that concerns the rights of more than one million elderly and disabled Californians who receive Social Security benefits. Specifically, the case challenges the right of the Bank of America to collect overdraft and other bank debts from recipients' electronically deposited Social Security deposits. The certified class consists of all California residents who had, or will have, a checking or savings account with the Bank of America into which Social Security benefits have been directly deposited by the federal government.

The *Miller* case presents fundamental issues of national policy governing the ability of national banks acting as creditors to take those exempt funds as payment of debts in the form of overdraft fees. Throughout this litigation, the U.S. Department of Justice has sided with large national banks engaged in predatory behavior towards the most vulnerable people in the United States. The banks encourage low income elderly and disabled people to write checks on accounts with insufficient funds; then the banks seize the incoming exempt Social Security and disability benefits that are directly deposited into those accounts to collect overdraft fees of \$32 per check up to \$160 per day. The Justice Department under the Bush administration has consistently sided with Bank of America and the banking industry in arguing that banks are immune from generally applicable state consumer protection laws designed to protect these very "social safety-net" benefit payments, and that state consumer protection laws are preempted by federal banking laws.

During the Bush Administration, the U.S. Department of Justice sought status as *amicus curiae* before the California Court of Appeal to argue on the side of the Bank of America that federal law preempts this, and any other attempt to enforce California's consumer laws barring predatory banking practices. Once the case was accepted for review by the California Supreme Court in 2007, the Justice Department again sought *amicus* status and filed an extensive *amicus* brief with the Court. Soon after the *Miller* case was noticed for hearing before the California Supreme Court last week, Howard S. Scher, a career attorney with the Appellate Branch of the Civil Division of the Department of Justice, filed an application with the California Supreme Court on behalf of the United States for leave to present oral argument and to divide argument time with the Bank of America.

First, it is important to note that the Obama Administration does not yet have in place the key individuals who would play an important role in reviewing the Administration's policy with regard to the preemption of state consumer protection laws. Clearly, there has been no opportunity for a comprehensive review to take place. The nomination of the Solicitor General is pending, and no individual has yet been named to serve as the Deputy Assistant Attorney General in charge of the Appellate Branch of the Civil Division. No one has been nominated to serve as either the General Counsel in the Treasury Department or as the Director of the White House Office of Information and Regulatory Review. Key appointees have not been named in the Office of the Controller of the Currency or the Social Security Administration. Consequently, while I am not requesting withdrawal of the Justice Department's *amicus* brief previously filed with the California Supreme Court, I do not believe that a single attorney should be allowed to potentially influence the California Supreme Court's determination of the important preemption issues at stake in the *Miller* litigation. I intend to respond promptly to Mr. Scher's application to present oral argument before the California Supreme Court on April 7.

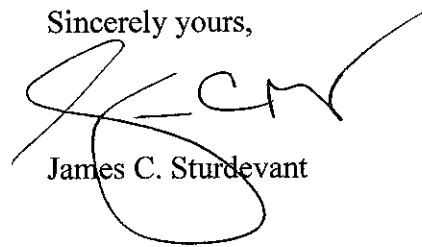
Second, I believe it is my responsibility to bring to your attention a potential conflict of interest that exists with respect to Anthony West, the individual nominated by the Obama Administration to serve as the Assistant Attorney General for the Civil Division in the Justice Department. I have respect and admiration for Mr. West but he is currently a partner at the law firm of Morrison & Foerster in San Francisco. Morrison & Foerster has represented Bank of America from the time the *Miller* litigation commenced in August, 1998 to the present, at both the trial and appellate levels, although Mr. West has not personally been involved in the matter. I would hope that he would indicate his recusal from this case as soon as possible.

Recent decisions of the United States Supreme Court in the cases of *Altria Group, Inc. v. Good*, 555 U.S. ---, 129 S. Ct. 538 (2008) and *Wyeth v. Levine*, 555 U.S. ---, --- S. Ct. ---, 2009 WL 529172 (Mar 4, 2009) have altered the landscape with respect to the preemption of state consumer protection laws. At the same time, the news every day is filled with stories of public outrage about the conduct of America's largest financial institutions, including the Bank of America, and resentment over the multi-billion dollar

bailouts that have been required to keep the doors open. In this light, it seems unlikely that the position of the Bush Administration advanced in the *Miller amicus* briefs, supporting the Bank of America's predatory banking practices, would be adopted by the Obama Administration at the expense of millions of elderly and disabled Americans who subsist on their monthly social security and other public benefits.

I urge you to hold a hearing promptly to question the Department of Justice as to why, given the change in administrations, it is aggressively defending the predatory behavior of large banks which seek to seize exempt social security and disability funds from elderly and disabled low-income Americans.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'JCS', with a large, sweeping flourish underneath.

James C. Sturdevant

JCS/ar
Enclosure

cc: Ed Pagano (*via email*)
Chief of Staff
433 Russell Senate Office Building
United States Senate
Washington, DC 20510