

IN THE SUPREME COURT OF OHIO

Ohio Neighborhood Finance, Inc.,	:	S. C. Case No. 2013-0103
	:	
Plaintiff-Appellant,	:	ON APPEAL FROM COURT OF
	:	APPEALS, NINTH APPELLATE
v.	:	DISTRICT
	:	
Rodney Scott,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 11CA010030
	:	

**REPLY BRIEF OF AMICUS CURIAE RICHARD F. KECK,  
FORMER DEPUTY SUPERINTENDENT AND CHIEF EXAMINER OF THE DIVISION  
OF FINANCIAL INSTITUTIONS OF THE OHIO DEPARTMENT OF COMMERCE,  
IN SUPPORT OF APPELLANT OHIO NEIGHBORHOOD FINANCE, INC.**

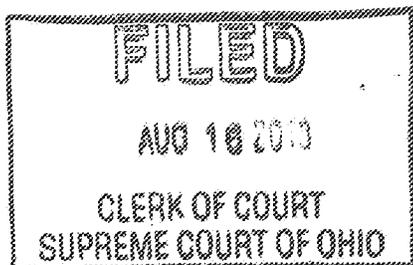
Darrell L. Dreher (0005935)  
Elizabeth L. Anstaett (0056024)  
Dreher Tomkies Scheiderer LLP  
2750 Huntington Center  
41 South High Street  
Columbus, Ohio 43215-6196  
(614) 628-8000  
(614) 628-1600 (fax)  
ddreher@dltlaw.com  
eanstaett@dltlaw.com

John W. Zeiger  
Stuart Parsell  
ZEIGER, TIGGES & LITTLE LLP  
3500 Huntington Center  
41 South High Street  
Columbus, Ohio 43215  
(614) 365-9900  
(614) 365-7900 (fax)  
zeiger@litohio.com  
parsell@litohio.com

*Counsel for Amicus Curiae Richard F. Keck,  
former Deputy Superintendent and Chief  
Examiner, Division of Financial Institutions,  
Ohio Department of Commerce*

*Counsel for Plaintiff-Appellant,  
Ohio Neighborhood Finance, Inc.*

Rodney Scott  
250 13th Street  
Elyria, Ohio 44035  
Pro se  
Defendant-Appellee



Joel H. Mirman  
The Mirman Law Firm, LLC  
5 East Long Street, Suite 200  
Columbus, Ohio 43215  
Telephone: (614) 395-1884  
[joel@themirmanlawfirm.com](mailto:joel@themirmanlawfirm.com)

*Counsel for Amici Curiae  
Norfleet (Bill) Rives and Daniel Oglevee*

Pierre H. Bergeron  
Colter L. Paulson  
SQUIRE SANDERS (US) LLP  
221 East Fourth Street  
Suite 2900  
Cincinnati, Ohio 45202  
Telephone: (513) 361-1238  
Facsimile: (513) 361-1201  
[pierre.bergeron@squiresanders.com](mailto:pierre.bergeron@squiresanders.com)  
[colter.paulson@squiresanders.com](mailto:colter.paulson@squiresanders.com)

*Counsel for Amicus Curiae  
The Ohio Chamber of Commerce*

Frederick E. Mills.  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
Columbus, OH 43215  
(614) 464-8395  
(614) 719-5279  
[femills@vorys.com](mailto:femills@vorys.com)

*Counsel for Amicus Curiae  
The Ohio Council of Retail Merchants*

Sara Bruce  
The Ohio Automobile Dealers Association  
655 Metro Place South, Suite 270  
Dublin, OH 43017  
(614) 923-2243  
(614) 766-9600

*Counsel for Amicus Curiae  
Ohio Automobile Dealers Association*

Julie K. Robie (Counsel of Record)  
[jrobie@lasclev.org](mailto:jrobie@lasclev.org)  
Katherine B. Hollingsworth  
[khollingsworth@lasclev.org](mailto:khollingsworth@lasclev.org)  
The Legal Aid Society of Cleveland  
1223 West Sixth Street  
Cleveland, OH 44113  
(216) 861-5500  
(216) 861-0704 (fax)

*Counsel for Amicus Curiae  
The Legal Aid Society of Cleveland*

Melissa Benson  
Southeastern Ohio Legal Aid Services  
11 East Second Street  
Chillicothe, OH 45601  
(740) 773-0012  
(740) 772-6886 (fax)  
[mbenson@oslsa.org](mailto:mbenson@oslsa.org)

*Counsel for Amicus Curiae  
Southeastern Ohio Legal Services*

Nichols DiNardo  
The Legal Aid Society of Southwest Ohio,  
LLC  
215 East Ninth Street, Suite 500  
Cincinnati, OH 45202  
(513) 362-2816  
(513) 241-7871 (fax)  
[ndinardo@lascinit.org](mailto:ndinardo@lascinit.org)

*Counsel for Amicus Curiae  
The Legal Aid Society of Southwest Ohio,  
LLC*

Amy E. Gullifer  
Cannizzaro, Bridges, Jillsky & Streng, LLC  
302 South Main Street  
Marysville, OH 43040  
(937) 644-9125  
(937) 644-0754  
[agullifer@cfbjs.com](mailto:agullifer@cfbjs.com)

*Counsel for Amici Curiae  
The Center for Responsible Lending and  
National Consumer Law Center*

Paul J. Minnillo  
Minnillo & Jenkins Co., LPA  
2712 Observatory Avenue  
Cincinnati, OH 45208  
Telephone: (513) 723-1600  
Fax: (513) 723-1620  
[pjminnillo@minnillojenkins.com](mailto:pjminnillo@minnillojenkins.com)

*Co-Counsel for Amici Curiae  
The Center for Responsible Lending  
And National Law Center*

Linda Cook  
Ohio Poverty Law Center, LLC  
555 Buttles Avenue  
Columbus, OH 43215  
(614) 221-7201  
(614) 221-7625 (fax)  
[lcook@ohiopovertylaw.org](mailto:lcook@ohiopovertylaw.org)

*Counsel for Amicus Curiae  
Ohio Poverty Law Center, LLC*

Stanley A. Hirtle  
Advocates for Basic Legal Equality, Inc.  
525 Jefferson Avenue  
Toledo, OH 430604  
(419) 255-0814  
(419) 259-2880 (fax)  
[shirtle@ablelaw.org](mailto:shirtle@ablelaw.org)

*Counsel for Amicus Curiae  
Advocates for Basic Legal Equality, Inc.*

Scott Torguson  
The Legal Aid Society of Columbus  
1108 City Park Ave.  
Columbus, OH 43206  
(614) 224-8374  
[storguson@columbuslegalaid.org](mailto:storguson@columbuslegalaid.org)

*Counsel for Amicus Curiae  
The Legal Aid Society of Columbus*

**TABLE OF CONTENTS**

	<u>Page</u>
REPLY .....	1
I. Amici Unfairly Attempt To Undermine Amicus Keck With False Insinuations.....	1
II. Amici Misrepresent MLA Law On Threats Of Criminal Prosecution, Which Law Forbids Such Tactics .....	2
III. Deliberate Action By The General Assembly To Allow Two Alternative Lending Authorities For Payday Loans Is Not A "Loophole" .....	4
IV. OAC 1301:8-3-07(G) Does Not Forbid Short-Term Loans Under The MLA .....	5
V. The Scott Loan Was Clearly An Interest-Bearing Loan .....	6
VI. Contrary To Legal Aid Amici's Claim, The Department Of Commerce Fully Enforces The Law To Protect Ohio Consumers .....	7
CONCLUSION.....	7
PROOF OF SERVICE.....	9

## REPLY BRIEF OF RICHARD F. KECK

The briefs submitted by the Legal Aid Society of Cleveland (and others) and by The Center for Responsible Lending and National Consumer Law Center (collectively, the "Legal Aid Amici") misrepresent a number of points requiring response by Amicus Richard F. Keck:

I. Amici Unfairly Attempt To Undermine Amicus Keck With False Insinuations

The brief submitted by the Legal Aid Society of Cleveland insinuates impropriety on Mr. Keck's part, asserting that he does not "explain why he was separated from employment at Commerce" and that "he fails to disclose the nature of his employment since his departure" from Commerce. Brief at 30. Also see footnote 22 at 24. Implicit is the suggestion that Mr. Keck left Commerce under a cloud and that Mr. Keck works for, or is compensated by, the payday loan industry.

While innuendo may be an effective rhetorical device to attempt to undermine a person's credibility, it is inappropriate when used to cast knowingly untrue aspersions. As clearly stated in Mr. Keck's initial submission, he retired from employment with the Department of Commerce in 2009. His 20 years of service as Deputy Superintendent of Consumer Finance (2002-2007) and as the Chief Examiner for Consumer Finance in the Department of Commerce involved distinguished service under administrations of both political parties. And, to again be clear, it was Mr. Keck who elected to retire; he was not under any cloud or compulsion to do so; and he was not "separated from his employment."

The insinuation that Mr. Keck is being compensated by the payday industry goes beyond the boundaries of fair argument. Mr. Keck affirmatively reemphasizes that he is not an

employee of, nor has he been compensated by, any "payday" lender -- *ever*. The insinuations to the contrary simply go too far.

II. Amici Misrepresent MLA Law On Threats Of Criminal Prosecution, Which Law Forbids Such Tactics

Unfortunately, the briefs of the Legal Aid Amici are equally misleading in repeatedly implying that payday lenders licensed under the Mortgage Loan Act, R.C. 1321.51 to 1321.60 ("MLA"), regularly threaten to "refer for criminal prosecution those individuals whose [checking] accounts have insufficient funds to cover their borrowings" and otherwise "frequently employ intimidation and coercion to collect debts from consumers." Brief of The Center for Responsible Lending at 22, 31. Also see pp. 5 and 29. Contrary to these claims, the truth is that the MLA has one of the nation's strongest prohibitions against such threats by lenders.

Ohio amended the MLA in 2009 to directly incorporate the provisions of the federal Fair Debt Collections Practices Act ("FDCPA") into the MLA. Thus, since that time, the R.C. 1321.591 of the MLA has expressly provided:

No registrant or licensee shall fail to follow the practices set forth in the federal "Fair Debt Collection Practices Act," 91 Stat. 874, 15 U.S.C. 1692, as amended, notwithstanding the fact that the registrant or licensee is seeking to collect upon the registrant's own debt.

As the amendment states, the MLA goes even further than the FDCPA in precluding inappropriate collection threats or conduct. The federal act is only applicable to third party debt collectors, and not to the lenders who actually make the loan. But the MLA amendment extends the federal protections, applying all the prohibitions of the FDCPA directly to the MLA licensed lender "notwithstanding the fact that the [MLA] registrant or licensee is seeking to collect upon the registrant's own debt." So, in Ohio, the prohibitions of the FDCPA apply directly to all collection activity of every MLA licensed lender.

The FDCPA, of course, expressly precludes the type of threats the Legal Aid Amici allege:

A debt collector may not use any *false, deceptive, or misleading representation or means* in connection with the collection of any debt. Without limiting the general application of the foregoing, *the following conduct is a violation* of this section:

\* \* \*

(4) *The representation or implication that nonpayment of any debt will result in the arrest or imprisonment* of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

15 U.S.C. 1692e(4) (emphasis added). Thus, Ohio has among the nation's strongest prohibitions against improper threats of criminal prosecution as well as all other types of abusive collection activity.

And while the Department of Commerce does not directly examine MLA lenders for collection practices, it is responsible for responding to consumer complaints from MLA borrowers. Overall, during Mr. Keck's tenure, there were very few complaints relating to payday lenders and even fewer relating to their collection efforts. The rare exceptions were small operators which lacked the sophistication and knowledge of the law of larger companies such as Cashland. In short, during his tenure with the Department of Commerce, Mr. Keck never saw the type or degree of consumer "intimidation and coercion" the Legal Aid Amici allege. And even if an isolated occurrence were to exist, the MLA has the teeth to revoke the license of the violator.

III. Deliberate Action By The General Assembly To Allow Two Alternative Lending Authorities For Payday Loans Is Not A "Loophole"

The brief of the Center for Responsible Lending expressly states the theme of both Legal Aid Amici briefs: payday lenders have used MLA registration as "a *loophole* to allow [them] to continue conducting [their] payday lending business as usual [i.e., before the repeal of the Check Cashing Loan Act and adoption of the Short-Term Loan Act ("STLA") in 2008] in Ohio." Brief at 10 (emphasis added). But no matter how many times the Legal Aid Amici say it, the option to be licensed under the MLA is not a "loophole."

First, the STLA was never intended to preempt or trump the two other statutory authorizations permitting short-term single installment lending in Ohio. Both the Small Loan Act, R.C. 1321.01 to 1321.20 ("SLA") and the MLA were on the books when the Check Cashing Loan Act, R.C. 1315.35-.44 ("CCLA") was repealed and the STLA was enacted effective September 1, 2008. As explained in detail in Mr. Keck's initial brief (see pages 4-5), the General Assembly was fully aware that lenders could switch to licensing under the SLA or MLA when the CCLA was repealed. But the General Assembly chose to do nothing to preclude lenders from doing so. Indeed, the Department even prepared proposed language that would have precluded payday loans by MLA or SLA registrants -- language the General Assembly declined to adopt. Given the facts, there is simply no basis for claiming registration of payday lenders under the MLA is a "loophole"; rather, it is an option the General Assembly expressly knew existed and intended would be available to such lenders. But that option imposed significant limitations on the fees they could charge.

Second, the statement that lenders operating under the MLA "continue to conduct [their] payday lending business as usual" is grossly inaccurate if it refers to "business as usual" under

the repealed CCLA. The shift from the greater fees available under the CCLA to the significantly reduced fees under the MLA has substantially reduced the cost of payday loans in Ohio. And, as a result of this fee reduction, approximately 40% of CCLA licensed locations in Ohio ceased business and closed. The limitation on fees under the MLA, as compared to those available under the CCLA, was anything but "business as usual." Rather, it was the reform the General Assembly coalesced around as it adopted H.B. 545 that included the STLA.

IV. OAC 1301:8-3-07(G) Does Not Forbid Short-Term Loans Under The MLA

The Legal Aid Amici are also off base in claiming that one of the Department's regulations, Ohio Adm. Code 1301:8-3-07(G)(2), forbids loans under the Mortgage Loan Act that have a term that is shorter than ninety days. This is simply not true. Rather, this rule expressly applies to *only* "non-amortized or partially amortized" loans, and single installment payday loans such as that at issue in this case, are neither.

The Department promulgated Rule 1301:8-3-07(G) to provide borrowers with advance notice of certain *changes* in scheduled loan payments, but only where those changes are applicable. Subparagraphs (G)(1) and (G)(3), respectively, require prior notice of a change in interest rate and the adjustment from a fixed to a variable rate during the loan term. Subparagraph (G)(2) -- the one the Legal Aid Amici focus on -- requires prior notice of maturity for "non-amortized or partially amortized" loans because these types of loans entail a change in scheduled loan payments: a lump sum payment of principal upon maturity after earlier scheduled payments of interest only (non-amortized loans), or a lump sum payment of interest plus a principal payment that is less than necessary to pay off the entire principal balance on the due date (partially amortized loans). In these limited circumstances, Rule 1301:8-3-07(G)(2)

requires advance notice of the loan's maturity date because a lump sum payment that is different than the earlier scheduled payments becomes due upon maturity.

Single installment payday loans are neither non-amortized nor partially amortized; by definition the entire principal amount is due on the agreed payment date. There is no circumstance in which the regular scheduled payments, or the lump sum payment of principal upon maturity, can change. Ohio Adm. Code 1301:8-3-07(G)(2) therefore is completely inapplicable to a single installment payday loan such as that of Appelle Mr. Scott.

V. The Scott Loan Was Clearly An Interest-Bearing Loan

The Legal Aid Amici also miss the mark in asserting that the MLA loan made to Mr. Scott is a "precomputed loan" as defined in R.C. 1321.51(G). Rather, the loan agreement signed by Mr. Scott is clearly an "interest-bearing loan" as defined in R.C. 1321.51(F), not a precomputed one.

By definition, a precomputed loan always expresses a borrower's debt as a fixed amount of both principal and interest, regardless of prepayment, because it assumes that "all scheduled payments will be made when due." R.C. 1321.51(G). A debtor's promise to pay a precomputed loan typically reads: "I promise to pay you the Total of Payments shown above in consecutive monthly installments according to the Payment Schedule shown above." This leaves no room for payment adjustment in the event the borrower makes any prepayments.

In contrast, like other interest-bearing loans under the Mortgage Loan Act, the loan agreement with Mr. Scott expressly states that interest is computed only on "the principal outstanding" at any given time and that "[p]artial or full prepayment of the Principal Amount of this loan will reduce the amount of interest that will accrue." So, for Mr. Scott's loan – unlike a precomputed loan – when the outstanding principal balance changes from time to time (as is the

case when a borrower prepays), interest must be computed, charged and collected based on the resulting, lower principal balance. This is the hallmark of an interest-bearing loan.

VI. Contrary To Legal Aid Amici's Claim, The Department Of Commerce Fully Enforces The Law To Protect Ohio Consumers

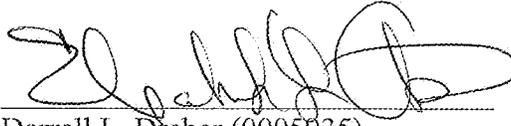
Finally, the claim of the Legal Aid Society of Cleveland, Brief at 33, that the longstanding interpretations and enforcement positions of the Department of Commerce are not "agency action entitled to deference" because the Department has "under-enforced" the law is just plain wrong. Not surprisingly, the writers simply allege "under-enforcement"; they offer *no* facts to support their claim. The reason is clear: there are no facts to support such a claim.

During the period when Mr. Keck was Chief Examiner, the Department of Commerce conducted literally hundreds of annual examinations of Ohio payday lenders. The provisions of the MLA and other finance statutes were rigorously examined as issues came up. Conclusions as to statutory construction were reviewed with both Department of Commerce lawyers and those of the Attorney General. When violations were found, the law was regularly but consistently enforced. The staff of the Department was always committed to thorough but fair enforcement of all of Ohio's consumer finance protections. The suggestion to the contrary does a disservice to the people of the Department who are the ones really protecting Ohio's payday borrowers.

CONCLUSION

Amici Keck hopes this Reply will assist the Court in sorting through the inaccurate statements offered by the Legal Aid Amici. In the end, Mr. Keck asks that the long-time positions of the Department of Commerce, that single installment loans are permitted by the express wording of the MLA and that the STLA was never intended to preempt or usurp licensing of payday lenders under the MLA, be given the deference to which they are entitled -- because they are correct.

Respectfully Submitted,



Darrell L. Dreher (0005935)

Elizabeth L. Anstaett (0056024)

DREHER TOMKIES SCHEIDERER LLP

2750 Huntington Center

41 S. High Street

Columbus, OH 43215

Telephone: (614) 628-8000

Facsimile: (614) 628-1600

[ddreher@dtlaw.com](mailto:ddreher@dtlaw.com)

[eanstaett@dtlaw.com](mailto:eanstaett@dtlaw.com)

Attorneys for Amicus Curiae Richard F. Keck,  
former Deputy Superintendent and Chief Examiner,  
Division of Financial Institutions, Ohio Department  
of Commerce

## PROOF OF SERVICE

I certify that a copy of this Reply Amicus Brief was sent by ordinary U.S. mail on

\_\_\_\_\_, 2013 to:

John W. Zeiger  
Stuart Parsell  
ZEIGER, TIGGES & LITTLE LLP  
3500 Huntington Center  
41 South High Street  
Columbus, Ohio 43215  
(614) 365-9900  
(614) 365-7900 (fax)  
zeiger@litohio.com  
parsell@litohio.com

*Counsel for Plaintiff-Appellant,  
Ohio Neighborhood Finance, Inc.*

Rodney Scott  
250 13th Street  
Elyria, Ohio 44035  
Pro se  
Defendant-Appellee

Julie K. Robie (Counsel of Record)  
[jrobie@lascleve.org](mailto:jrobie@lascleve.org)  
Katherine B. Hollingsworth (0087579)  
[khollingsworth@lascleve.org](mailto:khollingsworth@lascleve.org)  
The Legal Aid Society of Cleveland  
1223 West Sixth Street  
Cleveland, OH 44113  
(216) 861-5500  
(216) 861-0704 (fax)

*Counsel for Amicus Curiae  
The Legal Aid Society of Cleveland*

Melissa Benson  
Southeastern Ohio Legal Aid Services  
11 East Second Street  
Chillicothe, OH 45601  
(740) 773-0012

Paul J. Minnillo  
Minnillo & Jenkins Co., LPA  
2712 Observatory Avenue  
Cincinnati, OH 45208  
Telephone: (513) 723-1600  
Fax: (513) 723-1620  
[pjminnillo@minnillojenkins.com](mailto:pjminnillo@minnillojenkins.com)

*Co-Counsel for Amici Curiae  
The Center for Responsible Lending  
And National Law Center*

Linda Cook  
Ohio Poverty Law Center, LLC  
555 Buttles Avenue  
Columbus, OH 43215  
(614) 221-7201  
(614) 221-7625 (fax)  
[lcook@ohiopovertylaw.org](mailto:lcook@ohiopovertylaw.org)

*Counsel for Amicus Curiae  
Ohio Poverty Law Center, LLC*

Stanley A. Hirtle  
Advocates for Basic Legal Equality, Inc.  
525 Jefferson Avenue  
Toledo, OH 430604  
(419) 255-0814  
(419) 259-2880 (fax)  
[shirtle@ablelaw.org](mailto:shirtle@ablelaw.org)

*Counsel for Amicus Curiae  
Advocates for Basic Legal Equality, Inc.*

Scott Torguson  
The Legal Aid Society of Columbus  
1108 City Park Ave.

(740) 772-6886 (fax)  
[mbenson@oslsa.org](mailto:mbenson@oslsa.org)

*Counsel for Amicus Curiae*  
*Southeastern Ohio Legal Services*

Nichols DiNardo  
The Legal Aid Society of Southwest Ohio,  
LLC  
215 East Ninth Street, Suite 500  
Cincinnati, OH 45202  
(513) 362-2816  
(513) 241-7871 (fax)  
[ndinardo@lascinit.org](mailto:ndinardo@lascinit.org)

*Counsel for Amicus Curiae*  
*The Legal Aid Society of Southwest Ohio, LLC*

Amy E. Gullifer  
Cannizzaro, Bridges, Jilisky & Streng, LLC  
302 South Main Street  
Marysville, OH 43040  
(937) 644-9125  
(937) 644-0754  
[agullifer@cfbjs.com](mailto:agullifer@cfbjs.com)

*Counsel for Amici Curiae*  
*The Center for Responsible Lending and*  
*National Consumer Law Center*

Frederick E. Mills  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
Columbus, OH 43215  
(614) 464-8395  
(614) 719-5279  
[femills@vorys.com](mailto:femills@vorys.com)

*Counsel for Amicus Curiae*  
*The Ohio Council of Retail Merchants*

Columbus, OH 43206  
(614) 224-8374  
[storguson@columbuslegalaid.org](mailto:storguson@columbuslegalaid.org)

*Counsel for Amicus Curiae*  
*The Legal Aid Society of Columbus*

Joel H. Mirman  
The Mirman Law Firm, LLC  
5 East Long Street, Suite 200  
Columbus, Ohio 43215  
Telephone: (614) 395-1884  
[joel@themirmanlawfirm.com](mailto:joel@themirmanlawfirm.com)

*Counsel for Amici Curiae*  
*Norfleet (Bill) Rives and Daniel Oglevee*

Pierre H. Bergeron  
Colter L. Paulson  
SQUIRE SANDERS (US) LLP  
221 East Fourth Street  
Suite 2900  
Cincinnati, Ohio 45202  
Telephone: (513) 361-1238  
Facsimile: (513) 361-1201  
[pierre.bergeron@squiresanders.com](mailto:pierre.bergeron@squiresanders.com)  
[colter.paulson@squiresanders.com](mailto:colter.paulson@squiresanders.com)

*Counsel for Amicus Curiae*  
*The Ohio Chamber of Commerce*

Sara Bruce  
The Ohio Automobile Dealers Association  
655 Metro Place South, Suite 270  
Dublin, OH 43017  
(614) 923-2243  
(614) 766-9600

*Counsel for Amicus Curiae*  
*Ohio Automobile Dealers Association*

A handwritten signature in black ink, appearing to read 'Richard F. Keck', written over a horizontal line.

One of the Attorneys for  
Amicus Curiae Richard F. Keck, former Deputy  
Superintendent and Chief Examiner, Division of  
Financial Institutions, Ohio Department of  
Commerce

48274