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**MEMORANDUM**

August 1, 2003

To Our Clients and Friends

Re: OCC's Proposed Rule on National Bank Activities and Preemption of State Law

The Office of the Comptroller of the Currency ("OCC") has issued a proposed rule clarifying the applicability of state law to national banks and identifying types of state laws that are preempted, as well as types of state laws, that generally are not preempted in the areas of real estate lending, other lending, deposit-taking and other bank activities. Comments on the proposed rule are due 60 days after the proposed rule is published in the *Federal Register*.

The proposal represents an effort by the OCC to clarify the circumstances under which state laws and regulations apply to the activities and operations of national banks. The types of states laws that the proposed rules lists as pre-empted are those that the OCC finds obstruct, in whole or in part, or condition, national banks' exercise of powers granted under federal law. The types of state laws that are not pre-empted are those that the OCC finds do not regulate the manner or content of the business of banking authorized for national banks, but establish the legal structure that surrounds and supports the conduct of that business.

The proposed rule, which also applies to operating subsidiaries of national banks, includes a safety and soundness-based anti-predatory lending standard which states that a national bank shall not make a loan based predominantly on the foreclosure value of the borrower's collateral, without regard to the borrower's repayment ability, current and expected income, current obligations, employment status and other relevant financial resources.

**DEPOSIT-TAKING ACTIVITIES**

*Types of State Law Pre-Empted:* Those concerning abandoned and dormant accounts, checking accounts, mandated statements and disclosure requirements, funds availability, savings account orders of withdrawal, state licensing or registration requirements and special purpose savings services.

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*Types of State Law Not Pre-Empted:* Those concerning contracts, torts, criminal law, debt collection, acquisition and transfer of property, taxation, zoning and laws determined on a case-by-case basis by the OCC to have only an incidental effect on national bank deposit-taking operations.

### **LENDING**

*Types of State Law Pre-Empted:* Those concerning licensing, registration, filings or reports by creditors; ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, loan-to-value ratios; terms of credit (e.g., minimum payments, repayment schedules); escrow and similar accounts; security property; access to, and use of, credit reports; mandated statements, disclosure and advertising; disbursements and repayments; and rates of interest on loans.

*Types of State Law Not Pre-Empted:* Same as presented above for deposit-taking activities.

### **OTHER AUTHORIZED NATIONAL BANK ACTIVITIES**

*Types of State Law-Pre-Empted:* Any state law that obstructs, in whole or in part, or conditions, a national banks' exercise of powers granted under federal law. No specific types are listed.

*Types of State Law Not Pre-Empted:* Same as presented above for deposit-taking activities.

### **REAL ESTATE LENDING AND APPRAISALS**

*Types of State Law Pre-Empted:* Those concerning licensing, registration, filings, or reports by creditors; ability to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants; loan-to-value ratios; terms of credit; aggregate amount of funds that may be loaned upon the security of real estate; escrow and similar accounts; security property, access to, and use of, credit reports; mandated statements, disclosure and advertising; processing, origination, servicing, sale or purchase of, or investment or participation, in mortgages; disbursements and repayments; rate of interest on loans; due-on-sale clauses; and covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

*Types of State Law Not Pre-Empted:* Same as those presented above for deposit-taking activities plus those concerning homestead laws.

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The proposed rule can be found at [www.schwartzandballen.com/WhatsNew.htm](http://www.schwartzandballen.com/WhatsNew.htm).

If you have any questions concerning the proposed rule, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.