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MEMORANDUM

August 1, 2003

To Our Clients and Friends

Re: OCC's Preemption Determination and Order on Georgia Fair Lending Act

Last January a national bank requested the Office of the Comptroller of the Currency ("OCC") to issue a determination or order that the Georgia Fair Lending Act ("GFLA") is preempted by the National Bank Act. The OCC has concluded that the provisions of the GFLA affecting national banks' real estate lending are preempted by federal law and is issuing an order providing that the GFLA does not apply to any national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia. However, the OCC declined to address the issue of whether federal law occupies the field of real estate lending by national banks such that no state real estate lending law applies to national banks and their operating subsidiaries. Rather, the OCC has initiated a rulemaking and is requesting comments on this issue in its proposed rule on national bank activities and state preemption.

The OCC gave the following reasons for its decision in the Determination and Order:

- National banks' authority to engage in real estate lending activities derives exclusively from federal law. Under applicable federal preemption principles, a state law may not modify a Congressional grant of power to national banks by limiting, conditioning, or otherwise impermissibly affecting a national banks' exercise of power.
- 12 U.S.C. § 371 precludes application of many provisions of the GFLA to national banks. The federal law grants real estate lending powers to national banks unconditioned by the application of any state's law. The text of the statute specifically gives the OCC authority to determine the "restrictions and requirements" that apply to national banks' real estate lending activities.

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- National banks' real estate lending standards are subject to a comprehensive federal regulatory framework that addresses the types of abusive and predatory practices that the GFLA seeks to prohibit. In addition, the OCC has recently issued guidance dealing with abusive and predatory practices.
- OCC regulations implementing national bank lending powers provide that certain types of state laws do not apply to national banks and thus already preempt certain provisions of the GFLA. Specifically, federal law preempts the GFLA provisions that modify a national bank's real estate lending authority by imposing limits or restrictions on the schedule for repayment of principal and interest or the term to maturity of a loan.
- 12 U.S.C. § 371 and OCC rules also preempt the GFLA provisions that impose conditions on, or otherwise impermissibly affect, a national bank's exercise of its real estate lending powers.
- Some provisions of the GFLA purport to limit the interest a national bank may charge for certain types of loans. However, the rate of interest that is permissible for national banks to charge is determined exclusively by federal law.
- Certain provisions of the GFLA purport to limit the non-interest fees a national bank may charge in connection with certain types of loans. These provisions are inconsistent with national banks' authority to establish non-interest fees pursuant to federal law.

The OCC also preempted the GFLA with respect to national bank operating subsidiaries. Activities conducted through operating subsidiaries are subject to the same terms and conditions that apply to the parent national bank.

The Preemption Determination and Order can be found at www.schwartzandballen.com/WhatsNew.htm.

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