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MEMORANDUM

January 8, 2004

To Our Clients and Friends

Re: OCC Final Rules Concerning State Preemption and Visitorial Powers

The Office of the Comptroller of the Currency (“OCC”) has issued two final rules that clarify the extent to which the operations of national banks are subject to state laws and the OCC’s exclusive visitorial powers with respect to national banks. The final rule on preemption also contains new anti-predatory lending standards to prevent abusive lending practices. National banks, as well as their operating subsidiaries, are subject to these rules. However, financial subsidiaries of national banks are not.

The rules, which are similar to the proposed rules contained in the August 5th issue of the *Federal Register*, do not authorize any new powers or activities for national banks. The rules are effective thirty days after publication in the *Federal Register*.

STATE PREEMPTION AND PREDATORY LENDING

State Preemption

The final rule states that except where made applicable by Federal law, state laws that “obstruct, impair, or condition” a national bank’s ability to fully exercise its

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lending, deposit taking and other operational activities are not applicable to national banks. The rule specifies the following types of state laws as preempted:¹

- Real estate lending
Laws 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.
- Non-real estate lending
Laws 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
- Deposit-taking
Laws addressing abandoned and dormant accounts, checking accounts, disclosure requirements, funds availability, savings account orders of withdrawal, state licensing or registration requirements and special purpose savings services.

Types of state laws that are not preempted are those that form the legal infrastructure that makes it practicable to exercise a national bank power or that have only an incidental effect on the exercise of powers of national banks. Specific types of state laws that are not preempted are those dealing with contracts, torts, criminal law, rights to collect debts, acquisition and transfer of property, taxation, and zoning and for real estate landing, homestead laws.

The above lists of state laws are not exhaustive, and OCC reserves the right to address other state laws on a case-by-case basis to determine whether they are preempted under the standards contained in this final rule.

¹ The types of laws that are preempted are virtually identical to those listed as preempted with respect to federal thrifts in existing regulations of the Office of Thrift Supervision.

Anti-Predatory Lending

The final rule:

- Expressly prohibits national banks when making loans from engaging in unfair or deceptive practices within the meaning of Section 5 of the Federal Trade Commission Act;
- Prohibits the making of any type of consumer loan (i.e., a loan made for personal, family, or household purposes) based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its term. A bank may use any reasonable method to determine a borrower's ability to repay; and,
- Clarifies that this anti-predatory lending standard is not intended to prohibit legitimate collateral-based loans, such as reverse mortgages, when the borrower understands that it is likely or expected that the collateral will be used to repair the debt.

VISITORIAL POWERS

The final rule clarifies the OCC's existing regulation on its exclusive power to supervise national banks. The final rule:

- Clarifies that the OCC's exclusive visitorial authority applies to the content and conduct of national bank activities authorized under Federal law. This authority, however, does not extend to those areas that have nothing to do with the business of banking, such as fire codes, environmental laws, etc.
- Clarifies that the "vested in the courts" exception contained in the existing regulation² pertains to the power of the judiciary and does not grant state or other government authority rights they do not otherwise possess to examine or supervise a national bank by resorting to judicial actions.

The final rules can be found at http://www.schwartzandballen.com/whats_new.html.

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

²"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." 12 U.S.C. 484 (a).