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**MEMORANDUM**

November 10, 2004

To Our Clients and Friends

Re: Authority of a Federal Savings Association to Perform Banking  
Activities Through Agents Without Regard to State Licensing Requirements

The Office of Thrift Supervision (“OTS”) has issued a General Counsel’s opinion that provides that when a federal savings association uses unaffiliated third-party agents to perform marketing, solicitation and customer service activities related to the association’s products and services, the agents are not subject to state licensing or registration requirements. The OTS opinion represents an extension of the agency’s pre-emption rulings to cover certain activities of unaffiliated third-party agents that are conducted on behalf of federal savings associations.

**AGENT ACTIVITIES**

The OTS opinion states that the savings association that initiated the inquiry uses unaffiliated third parties to market and solicit customers for the institution’s deposit, loan and other services. While the agents are independent contractors and exclusive agents of the association, the association controls their performance of activities on behalf of the institution. The agents do not open accounts, accept deposits or payments nor approve loans. Under the laws of certain states, the activities engaged in by the agents may require registration or licensing under laws applicable to mortgage lenders, loan brokers, deposit brokers and broker-dealers.

The OTS indicates that a state may not put operational constraints on a federal savings association by restricting the association’s ability to market its products and services regardless of the means by which the association chooses to conduct its activities. The OTS concludes that if state licensing and registration requirements restrict the authority of federal savings associations to market their products and services through third parties, the restrictions are an impermissible interference with

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the associations' powers and the OTS' regulatory authority. Accordingly, the OTS General Counsel concluded that such laws do not apply to the association nor to its agents.

### **CONDITIONS**

The opinion provides that federal savings associations that wish to use agents to market their products and services must first consult with the appropriate OTS Regional Office and submit a business plan that provides information on how the arrangement with the agents will be structured and carried out. The opinion also sets forth several operating conditions with which associations must comply.

A copy of the OTS General Counsel opinion can be found on our web site at [http://www.schwartzandballen.com/whats\\_new.html](http://www.schwartzandballen.com/whats_new.html).

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