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**MEMORANDUM**

December 23, 2020

To Our Clients and Friends

Re: OCC Issues Interpretation of Preemption Standards

The Office of the Comptroller of the Currency has issued an interpretation codifying its preemption standards and establishing procedural requirements for preemption actions relating to state consumer financial laws under 12 U.S.C. § 25b (“Section 25b”).

The interpretation states that the procedural requirements of Section 25b apply only to a regulation or order that concludes that a state consumer financial law is preempted pursuant to the *Barnett* standard, that is, where the state law prevents or significantly interferes with the exercise of national bank powers.<sup>1</sup> The procedural requirements will not apply when the OCC concludes that a state consumer financial law is preempted because it has a discriminatory effect on national banks, a state law is preempted by other federal law, or a state law other than a state consumer financial law is preempted. In assessing whether a state consumer financial law will be preempted, the OCC will use the substantial evidence standard in the Administrative Procedure Act and APA case law. The interpretation acknowledges that *Skidmore*<sup>2</sup> rather than *Chevron*<sup>3</sup> deference will apply to any OCC conclusion that federal laws preempt state law.

The OCC interprets the requirement that it publish quarterly a list of preemption determinations that are in effect as applicable only to determinations it makes under the *Barnett* standard. The OCC states that it will review all preemption determinations every five years. Additionally, the interpretation concludes that OCC preemption determinations relating to interest rates national banks may charge are not subject to Section 25b’s procedures.

A copy of the OCC’s interpretation is available on our website at <http://schwartzandballen.com/news.html>

For more information, please call Gilbert Schwartz, Robert Ballen, Heidi Wicker, or Victor Razon at (202) 776-0700.

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<sup>1</sup> *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996).

<sup>2</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>3</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).