

November 10, 2003

David G. Sorrell, Acting Commissioner
Georgia Department of Banking and Finance
2990 Brandywine Road, Suite 200
Atlanta, GA 30341-5565

Re: NCUA Preemption of the Georgia Fair Lending Act.

Dear Mr. Sorrell:

You have asked the Office of General Counsel to review the revised Georgia Fair Lending Act (GFLA) and advise you as to any claims of preemption. Before GLFA's amendment earlier this year, we had already considered it and concluded that the National Credit Union Administration's (NCUA's) lending regulation preempted various provisions and that certain other provisions might be preempted by the Truth in Lending Act (TILA) but that determination rested with the Federal Reserve Board. OGC legal opinion 02-0649, dated July 29, 2002. Based on recent judicial interpretation, we now take the position that any state law that affects the rates, terms and conditions of the loan is preempted by the Federal Credit Union Act and our lending regulation. 12 C.F.R. §701.21.

The original GFLA restricted the ability of FCUs to charge certain fees and engage in certain practices for three categories that it defined as "home loans," "covered home loans," and "high cost home loans." The amount of interest and charges for points and fees determined the category. All "home loans" were subject to certain restrictions on the terms of credit and loan related fees, such as prohibiting the financing of credit insurance, debt cancellation or suspension coverage, and limiting late fees and payoff statement fees. "Covered loans" were subject to further restrictions on the number of times a loan could be refinanced and the circumstances in which a refinancing could occur. "High cost home loans" were subject to all of these restrictions, plus numerous other disclosure requirements and restrictions on the terms of credit and loan related fees. Creditors had to disclose to borrowers that the loan was high cost and provide to borrowers certain loan counseling before making the loan. Restrictions on the terms of credit and loan related fees included prohibiting prepayment penalties, balloon payments, negative amortization, increases in the interest rate after default, advance payments from loan proceeds, fees to modify, renew, extend, amend, or defer a payment, and accelerating payment at the creditor's sole discretion.

On March 7, 2003, the GFLA was amended, eliminating the "covered home loan" category, but retaining all of the GFLA restrictions on "high cost home loans."

The amendments did not change the civil liability provisions applicable to loan originators, but did limit purchaser or assignee liability.

The amended GFLA provides that, if it is determined to be preempted by federal law for federally chartered institutions, the comparable state-chartered institution will also not be subject to the GFLA. We note that both the Office of Thrift supervision (OTS) and the Office of the Comptroller of the Currency (OCC) have determined that the GFLA is inapplicable to federal thrifts and banks and, therefore, it is also inapplicable to state-chartered thrifts and banks.

Previously, we determined that we would preempt conditions on the types of loans or limitations on fees for loans not covered by Home Ownership and Equity Protection Act, which amended the TILA. GC 02-0649. Based on recent judicial interpretation, our view is that NCUA's lending regulation preempts any state law, including one affecting aspects of lending primarily regulated by the provisions of the Truth in Lending Act,

that regulates the rates, terms of repayment and other conditions of loans and lines of credit. Case law and our analysis are discussed more fully in OGC Legal Opinion 03-0165, dated May 23, 2003, available on our website.

GFLA's various requirements and restrictions were primarily directed at "high cost home loans." As noted above, a "high cost home loan" is defined in terms of annual percentage rate and the amount of points and fees. As such, an FCU must either change the rates and fees of its loans or be subject to the requirements of a "high cost home loan" under GFLA. So, in addition to the provisions of the GFLA we determined were preempted in GC 02-0649, we also conclude that the provisions covered by HOEPA are preempted by the FCU Act and our lending regulation. These provisions include prohibitions regarding negative amortizations, increased interest rates, advance payments and certain lending practices. GA. CODE ANN. §§7-6A-4; 706A-5. Because these provisions regulate the rates, terms of repayment and other conditions of the loan, they are specifically preempted under federal law. 12 C.F.R. §701.21(b)(1).

You specifically raise the issue of the authority of the Georgia Attorney General and Georgia Commissioner of Banking and Finance's authority to enforce the GFLA against federal credit unions. NCUA has the sole authority to take enforcement actions against FCUs. 12 C.F.R. §701.21(b)(4). The FCU Act contains a pervasive scheme for NCUA examination and supervision of FCUs, including enforcement powers. The FCU Act is so comprehensive in this area as to preclude state action. The FCU Act states that "FCUs shall be under the supervision of the Board" and "[e]ach FCU shall be subject to examination by, and for this purpose shall make its books and records accessible to, any person designated by the Board." 12 U.S.C. §1756. The FCU Act grants the NCUA Board comprehensive examination power over both FCUs and federally-insured state-chartered credit unions (FISCUs). 12 U.S.C. §1784. By contrast, states have no corresponding power to examine FCUs. In recognition of NCUA's exclusive jurisdiction in this area, NCUA's regulations provide that the Board "retains exclusive examination and enforcement jurisdiction over Federal credit unions" and violations of "applicable state laws related to the lending activities of a Federal credit union should be referred to the appropriate NCUA regional office." 12 C.F.R. §701.21(b)(4).

Sincerely,

Sheila A. Albin
Associate General Counsel

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