

March 12, 2004

David G. Sorrell, 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 relied on a legal opinion issued by the Georgia Attorney General's Office (AG opinion), dated December 5, 2003, to challenge this office's determination that the Georgia Fair Lending Act (GFLA) is preempted by the Federal Credit Union (FCU) Act. As explained below, we stand by our letter to you dated November 10, 2003. OGC Legal Opinion 03-0412.

First, the AG opinion contends our November 2003 opinion is inconsistent with our legal opinion issued in July 2002 and takes exception to NCUA changing its analysis based on recent case law. Previously, this office had concluded that provisions in the GFLA covered by HOEPA were not preempted. OGC Legal Opinion 02-0649, dated July 29, 2002. In May 2003, NCUA took another look at this issue and based on recent case law, reversed its earlier determination that the FCU Act does not preempt state law provisions covered by HOEPA. OGC Legal Opinion 03-0165, dated May 23, 2003. We believe it is appropriate for the agency to revise its legal position in light of new and relevant case law.

Second, the AG opinion challenges NCUA's reliance on *American Bankers Association v. Lockyer*, 239 F.Supp. 2d 1000 (E.D. Cal. 2002), as support for our position that "NCUA's lending regulation preempts any state law, including one affecting aspects of lending primarily regulated by TILA, that regulates rates terms of repayment and other conditions of loans and lines of credit." OGC Legal Opinion 03-0165. The AG opinion states that the basis for preemption in the *American Bankers Association* case was in "large part because the NCUA had previously issued an opinion letter finding that state law was preempted by the FCUA." Although the court referenced a prior OGC legal opinion, that was not the basis for preemption. The California statute imposed credit cost disclosure requirements, an area NCUA's lending regulation does not directly preempt. Nevertheless, because the onerous disclosure requirements were only triggered if an FCU did not require a minimum 10% monthly repayment, the basis for preemption was that the statute had the effect of regulating the terms of repayment. *American Bankers Association* 239 F.Supp. at 1019. This was because the statute had the effect of coercing lenders into charging a 10% minimum monthly repayment or face increased disclosure requirements. *Id.*

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Similarly, because the provisions of the GFLA are directed at high cost home loans, and those loans are defined in terms of annual percentage rate and the amount of points and fees, an FCU must either change its rates or other terms and conditions of its loans or be subject to GFLA. In reliance on *American Bankers Association*, we explained in OGC Legal Opinion 03-0412 that §701.21(b)(1) preempts the provisions covered by HOEPA.

Finally, the AG opinion states that our position renders the first sentence of §701.21 (b)(3) meaningless. 12

C.F.R. §701.21(b)(3). The AG opinion only addresses the part of the sentence that states the Board does not intend to preempt state laws that are primarily regulated by federal laws other than the FCU Act. It ignores the first, qualifying portion of the sentence that states “[e]xcept as provided in paragraph (b)(1) of this section.” Id. Because we have determined that “paragraph (b)(1)” applies to the GFLA, an analysis under §701.21(b)(3) is not necessary. In addition, we note that our revised legal opinion takes into consideration the analysis in American Bankers Association of the so-called “savings clause” in the Truth in Lending Act (TILA) and its relation to the provision of NCUA’s regulation regarding preemption of matters governed primarily by other federal law, 12 C.F.R. §701.21(b)(3).

Thus, the express language of the savings clause indicates that its anti-preemptive effect is limited to TILA. The text provides no indication that the savings clause reaches beyond TILA to control the preemption analysis applicable under any other federal laws, including the federal banking laws.

239 F.Supp. at 1009. We also direct your attention to two recent OGC legal opinions on this issue available on our website. OGC Legal Opinion 03-1106, dated January 28, 2004, and OGC Legal Opinion 04-0147, dated February 10, 2004.

Sincerely,

Sheila A. Albin  
Associate General Counsel

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03-1242