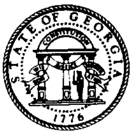


Department of Law
State of Georgia

THURBERT E. BAKER
ATTORNEY GENERAL

40 CAPITOL SQUARE SW
ATLANTA, GA 30334-1300

OFFICIAL OPINION

Steven D. Bridges, Commissioner
Department of Banking & Finance
2990 Brandywine Road, Suite 200
Atlanta, Georgia 30341-5565

John W. Oxendine, Commissioner
Department of Insurance
2 Martin Luther King, Jr. Drive
Room 704, West Tower
Atlanta, Georgia 30334

RE: The Gramm-Leach-Bliley Act preempts the provisions of O.C.G.A. § 33-3-23 restricting lending institutions, bank holding companies, and their subsidiaries and affiliates from selling insurance in municipalities with populations exceeding 5,000.

Dear Commissioner Bridges and Commissioner Oxendine:

You have asked for my official opinion regarding whether certain provisions of O.C.G.A. § 33-3-23 are preempted by the federal Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (the "Act"). Pursuant to Article VI of the United States Constitution, the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Thus federal law will preempt a conflicting State law. *English v. General Electric Co.*, 496 U.S. 72, 78 (1990); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

In its present form, O.C.G.A. § 33-3-23 provides in relevant part, "No lending institution, bank holding company, or any subsidiary or affiliate of either of the foregoing doing business in this state, or any officer or employee of any of the foregoing not including any director may directly or indirectly be licensed to sell insurance in any municipality within this state which has a population which exceeds 5,000, according to the latest United States decennial census . . . ."

O.C.G.A. § 33-3-23(b).[1] This Code section is inconsistent with portions of Section 104 of the Act.

The Act's stated intention is to "enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers . . . ." Pub. L. No. 106-102, 113 Stat. 1338 (1999). To that end, Congress has repealed the Glass-Stegall Act, which prohibited affiliations between banks and securities firms or insurance companies. Pub. L. No. 106-102, § 101(a), 113 Stat. 1338, 1341 (1999). The Gramm-Leach-Bliley Act, in contrast, permits banks to affiliate

---

[1] The Georgia General Assembly has recently passed House Bill 656, which amends O.C.G.A. § 33-3-23 to provide as follows:

> (a) For the purposes of this Code section, the term:
> (1) "Bank holding company" means the definition as set forth in Code Section 7-1-600 and in Section 2 of an act of Congress entitled the Bank Holding Company Act of 1956, as amended.
> (2) "Lending institution" means any domestic institution that accepts deposits from the public and lends money, including banks and savings and loan associations.
> (b) A lending institution, bank holding company, or subsidiary or affiliate of either of the foregoing doing business in this state, or any officer or employee of any of the foregoing, may be licensed to sell insurance, including but not limited to credit insurance, in this state and may engage in underwriting and act as an underwriter for credit life insurance and credit accident and sickness insurance subject to the provisions of this title and in conformity with rules and regulations promulgated by the Commissioner of Insurance.
> (c) Nothing in this chapter shall prohibit the purchase of mortgage guaranty insurance, also called credit loss insurance, by a lending institution from a mortgage guaranty insurance company directly or indirectly.
> (d) No lending institution, bank holding company, or any subsidiary or affiliate of any of the foregoing doing business in this state that was not in the business of selling title insurance on or before April 1, 2000, shall be permitted to sell title insurance.

Absent a veto by the Governor, House Bill 656 will become effective on July 1, 2000. *See* O.C.G.A. § 1-3-4.

with securities firms and insurance companies by forming a "financial holding company." 12 U.S.C. § 1843(k)[2]. Section 103 of the Act authorizes a financial holding company to engage in any activity that is "financial in nature." 12 U.S.C. § 1843(k). The activities of "[i]nsuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death" are specifically designated as financial in nature. 12 U.S.C. § 1843(k)(4)(B).

The Act provides for continued state regulation of the business of insurance. 15 U.S.C. § 6701. However, the broad authority of the States to regulate insurance is expressly limited under Section 104 of the Act, which provides, "In accordance with . . . Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may . . . prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or cross-marketing activity." 15 U.S.C. § 6701(d)(2)(A).[3] Notwithstanding this

---

[2] A "financial holding company" is a "bank holding company" that meets certain additional requirements. 12 U.S.C. § 1841(p). The term "bank holding company" is defined as "any company which has control over any bank or over any company that is or becomes a bank holding company . . . ." 12 U.S.C. § 1841(a). Georgia law provides an identical definition of "bank holding company." See O.C.G.A. §§ 33-3-23(a); 7-1-600(2); 7-1-605(2). Therefore, any entity that qualifies as a bank holding company under Georgia law would be eligible to form a financial holding company in order to avail itself of the benefits of the Act.

[3] Section 104 of the Act also contains a specific nondiscrimination provision, which states as follows:

> (e) NONDISCRIMINATION. Except as provided in any restriction described in subsection (d)(2)(B), no State may, by statute, regulation, order, interpretation, or other action, regulate the insurance activities authorized or permitted under this Act or any other provision of Federal law of a depository institution, or affiliate thereof, to the extent that such statute, regulation, order, interpretation or other action--
>
> > (1) distinguishes by its terms between depository institutions, or affiliates thereof, and other persons engaged in such activities, in a manner that is in any way adverse to any such depository institution, or affiliate thereof;
> >
> > (2) as interpreted or applied, has or will have an impact on depository institutions, or affiliates thereof, that is substantially more adverse than its impact on other persons providing the same

provision, the Act lists certain "safe harbors" wherein States may continue to restrict the sale of insurance by banks and their affiliates. 15 U.S.C. § 6701(d)(2)(B). Since O.C.G.A. § 33-3-23 does not fall within one of the safe harbors, it must be analyzed under the *Barnett* standard.

In *Barnett*, the United States Supreme Court found that a federal statute authorizing banks to sell insurance in small towns preempted a Florida statute prohibiting such sales. The Court reasoned that "the State's prohibition of those activities would seem to 'stan[d] as an obstacle to the accomplishment' of one of the Federal Statute's purposes . . . ." 517 U.S. at 31. The Court determined that Congress had not intended to condition its grant of authority on the approval of State law. Id. at 37.

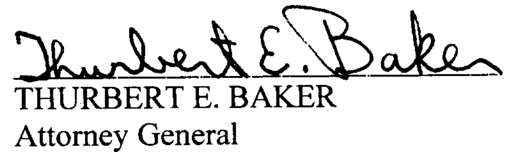
Here, Congress has incorporated the *Barnett* standard into the Act, and has further stated its intent to preempt any State law that would "prevent or significantly interfere with" a financial holding company's ability to engage in the sale of insurance as authorized under the Act. Enforcement of the "population of 5,000" provision contained in O.C.G.A. § 33-3-23(b) would effectively prohibit banks from selling insurance in a large portion of the State of Georgia, thereby presenting a "significant interference" with activities authorized by the Act. Therefore, it is my official opinion that the Gramm-Leach-Bliley Act preempts the provisions of O.C.G.A. § 33-3-23 restricting lending institutions, bank holding companies, and their subsidiaries and affiliates from selling insurance in municipalities with populations exceeding 5,000.

> products or services or engaged in the same activities that are not depository institutions, or affiliates thereof, or persons or entities affiliated therewith;
>
> (3) effectively prevents a depository institution, or affiliate thereof, from engaging in insurance activities authorized or permitted by this Act or any other provision of Federal law; or
>
> (4) conflicts with the intent of this Act generally to permit affiliations that are authorized or permitted by Federal law between depository institutions, or affiliates thereof, and persons engaged in the business of insurance.

15 U.S.C. § 6701(e). However, the nondiscrimination provision applies only to State action taken after September 3, 1998. 15 U.S.C. § 6701(d)(2)(C)(ii).

Issued this 26th day of April, 2000.

Sincerely,



THURBERT E. BAKER
Attorney General

Prepared by:

KRISTIN L. MILLER
Assistant Attorney General

TEB/KLM
126417

OFFICIAL OPINION