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Sonny Perdue
Governor

David G. Sorrell
Acting Commissioner

Declaratory Ruling

To: **Georgia State-chartered Credit Unions**

From: **Commissioner David G. Sorrell** David G. Sorrell

Re: **Preemption of GAFLA by NCUA and Effect on state chartered credit unions**

Date: **August 10, 2004**

The Department of Banking and Finance has exchanged correspondence with National Credit Union Administration (NCUA) through their General Counsel on the subject of preemption of the Georgia Fair Lending Act (GAFLA). We have received three letters from Ms. Sheila Albin, who is the General Counsel for NCUA, dated November 10, 2003 (OGC Legal Opinion 03-0412), March 12, 2004 (OGC Legal Opinion 03-1242), and July 13, 2004. Based on 12 C.F.R. 790.21 of the Federal Credit Union Act (FCUA), the Office of General Counsel of the NCUA has determined that the FCUA preempts the GAFLA in its entirety.

The Department has reviewed these documents and has consulted with its counsel, the office of the State Attorney General, on their effect. We conclude that federal law has been determined by the authorized federal agency to preempt the applicability of GAFLA for federal credit unions. Therefore, pursuant to O.C.G.A. §7-6A-12 of the GAFLA, which was effective March 7, 2003, the GAFLA shall not apply to state chartered credit unions according to the effective dates below.

Credit unions are cautioned, however, that should any part of these Opinions from the NCUA be overturned, clarified, or revised, then state credit unions will be subject to those provisions to which federal credit unions are subject.

In OGC Legal Opinion 02-0649, a letter not addressed to this department, the NCUA preempted most but not all of the GAFLA. To the extent GAFLA was preempted by that opinion, it is preempted for state credit unions. Since the Act that gave parity preemption was not in effect until March 7, 2003, those preemptions are effective on that date. In OGC Opinion 03-0412 the NCUA revised their preemption to declare that all of GAFLA was preempted. As of that date, November 10, 2003, all of GAFLA (or the remainder that was not preempted by the first opinion) is preempted for state credit unions.

The Department continues to be concerned about abusive or predatory lending practices and we will be communicating further with state chartered credit unions regarding safety and soundness issues and fair business practices in this area.

Questions about this preemption should be directed to George A. Reynolds, Senior Deputy Commissioner (770-986-1629) or Leslie A. Bechtel, Deputy Commissioner of Legal and Consumer Affairs (770-986-1650).

Attachments: OGC Opinion 02-0649
OGC Opinion 03-0412

02-0649

July 29, 2002

Richard P. Kessler, Jr., Esquire
Macey, Wilensky, Wittner & Kessler, LLP
Marquis Two Tower, Suite 600
285 Peachtree Center Avenue, N.E.
Atlanta, GA 30303-1229

Re: Applicability of Georgia Fair Lending Act to Federal Credit Unions.

Dear Mr. Kessler:

You have asked whether Georgia's recently passed Fair Lending Act applies to federal credit unions (FCUs) in Georgia. As explained below, certain provisions relating to closed-end mortgages may be preempted by the Truth in Lending Act (TILA). 15 U.S.C. §1601 et seq. The Federal Reserve Board (FRB) makes this determination. Our lending regulation preempts other provisions not covered by TILA that regulate rates, terms of repayment and other conditions of loans and lines of credit. 12 C.F.R. §701.21(b)(1).

NCUA's lending regulation does not preempt state laws that affect aspects of credit transactions that are primarily regulated by other federal laws or regulations. Our regulation specifically provides that, in those cases, preemption is determined under the standards provided by the other relevant federal law. 12 C.F.R. §701.21(b)(3).

The Home Ownership and Equity Protection Act (HOEPA), an amendment to TILA, governs certain closed-end home mortgages and excludes "residential loans." 12 C.F.R. §226.32(a). "Residential loans" are defined in HOEPA as loans in which a mortgage "is created or retained in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling." 12 C.F.R. §226.2(a)(24).

The Georgia statute applies to both open and closed-end home loans and includes "residential loans," as defined in HOEPA. Ga. Code Ann. §7-6A-2(6), (9)(2002). The definition of a high cost home loan under the Georgia's statute, because it includes open-end loans and "residential loans," encompasses a broader scope of mortgage loans and is triggered at slightly different thresholds than those in HOEPA. Ga. Code Ann. §7-6A-2(8), (19). HOEPA does not restrict states from adopting laws that provide greater consumer protections for loans covered under HOEPA. 15 U.S.C. §1610(b). Under HOEPA, a creditor must comply with any state law governing HOEPA loans to the extent it is not inconsistent with HOEPA. 12 C.F.R. §226.28(a)(1). Thus, FCUs are subject to state law governing HOEPA loans to the extent the law is not inconsistent with HOEPA.

Reviewing the Georgia statute in light of HOEPA, we believe that FCUs entering into closed-end loans that are not "residential loans" and fall within either the HOEPA or Georgia thresholds are subject to provisions such as prohibitions regarding negative amortizations, increased interest rates, advance payments and certain lending practices. Ga. Code Ann. §§7-6A-4; 7-6A-5(2)-(5), (8), (9), and (14). These provisions, although in some instances more restrictive, track HOEPA and its implementing regulation, Regulation Z, issued by the FRB. We note that a determination as to whether state law is inconsistent with HOEPA, however, falls within the purview of FRB. A creditor, state or other interested party may submit a request to the FRB for a determination that a state law is inconsistent or substantially the same as TILA. 12 C.F.R. §226.28, Appendix A to Part 226.

For those loans not covered by HOEPA, our lending regulation preempts the Georgia statute to the extent it limits or affects rates of interest, finance charges, late charges, closing costs, terms of repayment, and loan conditions. 12 C.F.R. §701.21(b)(1). Our rule preempts two provisions in the Georgia statute that place conditions on the types of loans. Ga. Code Ann. §§7-6A-3(1); 7-6A-4. Our rule also preempts four provisions that limit fees. Ga. Code Ann. §§7-6A-3(3), (4); 7-6A-5(10), (13).

NCUA and not, as stated in the Georgia law, the state commissioner of banking and finance, has the authority to take enforcement action against FCUs. Ga. Code Ann. §7-6A-8. As explained in the attached letter from Hattie M. Ulan to Peter J. Liska, dated June 11, 1992, and as provided in NCUA's regulations, if violations of state law occur and the matter cannot be resolved informally, the imposition of fines and penalties falls within NCUA's enforcement jurisdiction. 12 C.F.R. §701.21(b)(4).

Finally, although we conclude that our lending regulation preempts some provisions of the Georgia statute, we want to highlight that the Federal Credit Union Act (FCUA) and our lending regulation contain significant consumer protections for all member loans, not only those that are real estate secured. FCUs are subject to an 18 percent interest rate ceiling. 12 U.S.C. §1757(5)(A)(vi); 12 C.F.R. §701.21(c)(7)(ii)(B). Additionally, unlike HOEPA or the Georgia statute, the FCUA strictly prohibits FCUs from charging prepayment penalties. 12 U.S.C. §1757(5)(A)(viii).

We hope that you find this information helpful.

Sincerely,

Sheila A. Albin
Associate General Counsel

GC/MFR:bhs
SSIC 3320
02-0649

Enclosure

03-0412

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

GC/MFR:bhs
03-0412