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DECLARATORY ORDER

TO: All State-Chartered Credit Unions

July 11, 2013

RE: In order to provide parity with federal credit unions, overdraft fees imposed by state-chartered credit unions in connection with deposit accounts are not subject to state law usury limitations.

The Department of Banking and Finance ("Department") has received a written request from an industry group representing the interests of credit unions for the issuance of a parity order regarding overdraft fees related to deposit accounts.¹ The ultimate issue is whether Georgia state-chartered credit unions may charge an overdraft fee when a member overdraws his or her deposit account, such as a share account or share draft account – with the use of a check, debit card, ATM card or other means –without any usury restrictions. As set forth in more detail below, in light of the fact that federal law authorizes federal credit unions to impose overdraft fees on members' deposit accounts without any usury limitations, the Commissioner declares that overdraft fees imposed by state-chartered credit unions are not subject to state law usury limitations.

The Commissioner is expressly authorized to issue parity orders pursuant to O.C.G.A. § 7-1-61 which provides in pertinent part that:

- (b) In the exercise of the discretion permitted by this Code section, the commissioner shall consider:
 - (1) The ability of financial institutions to exercise any additional powers in a safe and sound manner;

¹ For purposes of this determination, an overdraft occurs when a member attempts to withdraw funds that exceed the available balance in the member's deposit account and, notwithstanding the insufficient funds, the credit union honors the transaction. In the event an overdraft takes place in a member's deposit account and a credit union imposes a fee for honoring the transaction, such fee is referred to as an overdraft fee. For each transaction that exceeds the available account balance, the member is subject to the imposition of an overdraft fee.

- (2) The authority of any federally chartered bank, as the term "bank" is defined in Code Section 7-1-621, operating pursuant to federal law, regulation, or authoritative pronouncement;
- (3) The powers of other entities providing financial services in this state;
and
- (4) Any specific limitations on financial institution operations or powers contained in this chapter. ...
- (e) To provide parity with other federally insured financial institutions, the commissioner may, by specific order directed to an individual financial institution or category of financial institutions, modify or amend the following qualifying or limiting requirements imposed on financial institutions by this chapter:
 - (1) Collateral requirements and limits on the amount of obligations owing to it from any one person or corporation;
 - (2) Loan to value or other limitations in lending;
 - (3) Limitations on the amount of investments in stock or other capital securities of a corporation or other entity;
 - (4) Limitations on the amount of bank acceptances to be issued; and
 - (5) If Georgia law has been determined to be federally preempted, other limitations or restrictions on financial institutions contained in this chapter.

No such order will be issued unless the commissioner determines that such activity will not present undue safety and soundness risks to the financial institution or institutions involved. In making such a determination, the commissioner shall consider the financial condition and regulatory safety and soundness ratings of the institution or institutions affected and the ability of management to administer and supervise the activity. Any such order pursuant to this subsection will be available for public review.

(Emphasis added). Therefore, in evaluating the request that the Commissioner exercise his parity power under O.C.G.A. § 7-1-61(e), the Commissioner must consider the permissible scope of activity for other federally insured financial institutions.

Among other powers, federal credit unions are authorized to receive deposits “subject to the terms, rates, and conditions” established by the credit union. 12 U.S.C. § 1757(6). In exercising this deposit taking power, federal credit unions have the ability to, among other things, “determine the types of fees or charges,” subject to certain limitations, that it will impose on the accounts. 12 CFR § 701.35(c). “State laws regulating such activities are not applicable

to federal credit unions.” *Id.* (emphasis added).² Therefore, any state law limiting a credit union’s ability to establish overdraft fees is “not applicable” to a federal credit union.

Just like federal credit unions, state-chartered credit unions are authorized to accept deposits. O.C.G.A. §§ 7-1-650(1) and (2). The Department views overdraft fees imposed on deposit accounts as part of the deposit taking power of state-chartered credit unions. However, unlike federal credit unions, state-chartered credit unions are potentially subject to a usury challenge for the imposition of overdraft fees as such fees imposed by state-chartered financial institutions can in certain circumstances be viewed as interest under state law. *See* 2003 A.G. Op. 2003-9 (“an overdraft fee will not be considered interest when the transaction is readily characterized as a checking account transaction, lacking the legal and economic reality of a loan or extension of credit, and when the fee is not determined based on the amount and time value of overdraft amounts”); *see also Synovus Bank v. Griner*, No. A12A1822, 2013 Ga. App. LEXIS 294, at *21 (March 28, 2013). A federal credit union on the other hand can never be subject to a usury claim for the imposition of an overdraft fee as, subject to certain limitations that are not applicable to setting the amount of overdraft fees, a federal credit union is authorized to “determine the types of fees or charges” imposed on deposit accounts. Any efforts to characterize an overdraft fee imposed by a federal credit union as interest for purposes of state usury laws would be preempted. 12 CFR § 701.35(c).³

Therefore, pursuant to the authority conveyed by the General Assembly under O.C.G.A. § 7-1-61(e)(5), the Commissioner modifies the deposit taking authority of state-chartered credit unions in O.C.G.A. §§ 7-1-650(1) and (2) to provide that state-chartered credit unions can establish the amount of overdraft fees on deposit accounts free of any state law usury limitations in order to achieve parity with federal credit unions. In reaching this determination, the Commissioner has considered the authority of national banks and federal credit unions. O.C.G.A. §§ 7-1-61(b) and (e). In addition, pursuant to the authority contained in O.C.G.A. § 7-1-650(6), the Commissioner authorizes state-chartered credit unions, consistent with their deposit taking authority in O.C.G.A. §§ 7-1-650(1) and (2), to determine the amount of overdraft fees imposed on deposit accounts free of any state law usury limitations.⁴

Notwithstanding the fact the Department views overdraft fees as part of the deposit taking power of state-chartered financial institutions, the Department recognizes that some cases

² The imposition of an overdraft fee on a deposit account by a national bank is a non-interest charge or fee. 12 CFR § 7.4002(a); OCC interpretive Letter No. 1082 (May 17, 2007). Therefore, overdraft fees imposed by national banks are not interest for purposes of the limitations on usury found in the National Bank Act. *See Video Trax, Inc. v. Nations Bank, N.A.*, 33 F.Supp. 2d 1041, 1059 (S.D. Fl. 1998) *aff’d* 205 F.3d 1358 (11th Cir. 2000). As a result, to the extent state law characterizes an overdraft fee as interest for purposes of usury limitations, state law is preempted as to national banks. *Beneficial National Bank v. Anderson*, 539 U.S. 1, 11 (2003) (determining that “there is, in short, no such thing as a state-law claim of usury against a national bank”).

³ Similarly, any attempt to characterize an overdraft fee imposed by a national bank as interest for purposes of usury is also preempted. *Beneficial National Bank*, 539 U.S. at 11.

⁴ O.C.G.A. § 7-1-650(6) provides that:

[A credit union] may undertake with the approval of the department other activities which are not inconsistent with this chapter or regulations adopted pursuant thereto, including such powers as are afforded to federally chartered credit unions, either directly, through a subsidiary corporation, or in cooperation with other credit unions; provided, however, no such approval shall be granted unless the commissioner determines the activities do not present undue safety and soundness risks to the credit union involved.

indicate the possibility that under state law an overdraft can, in certain circumstances, be a loan or an advance of money and, as such, any related fees could be viewed as interest. Synovus Bank, at *21; Duncan v. State, 172 Ga. 186, 189 (1931); West v. Federal Deposit Ins. Corp., 149 Ga. App. 342, 346 (1979). Even if an overdraft is viewed as a loan or advance of money, an overdraft fee imposed by a federal credit union is not interest for purposes of federal law. See 12 CFR § 701.21.

A federal credit union is authorized to make loans but the loans are subject to federal limitations on the amount of interest that can be imposed. 12 USC § 1757(5); see 12 CFR § 701.21. “[A]ny state law purporting to limit or affect” the imposition of “other fees” related to a loan made by a federal credit union is expressly preempted. 12 CFR § 701.21(b)(1)(i)(C); see Crissey v. Alaska USA Federal Credit Union, 811 P.2d 1057, 1060 (Alaska 1991) (“federal law *does* preempt any state law that might determine the permissibility of a federally chartered credit union’s late charges,” which is one of the charges expressly identified in 12 CFR § 701.21 (b) (emphasis in original)). Federal credit unions have the power to honor overdrafts on deposit accounts and impose a fee related to the overdrafts. 12 CFR § 701.21(c)(3). Although a federal credit union has the ability to impose an overdraft fee, it must do so, in the absence of a credit application, within the confines of the entity’s written overdraft policy. *Id.* The written policy needs to:

set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union’s ability to absorb losses; establish a time limit not to exceed forty-five calendar days for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft; limit the dollar amount of overdrafts the credit union will honor per member; and establish the fee and interest rate, if any, the credit union will charge members for honoring overdrafts.

Id. 12 CFR § 701.21(c)(3) sets forth certain factors that a federal credit union must address in setting its overdraft policy. However, nothing in the regulation suggests if a federal credit union fails to consider the elements set forth in 12 CFR § 701.21(c)(3) that an overdraft fee related to a deposit account will suddenly be treated as interest for purposes of usury. Instead, a federal credit union that does not adopt a policy addressing the enumerated elements prior to imposing an overdraft fee will be subject to regulatory scrutiny. See 12 CFR § 701.21(b)(4) (The NCUA “retains exclusive examination and administrative enforcement jurisdiction over Federal credit unions. Violations of Federal or applicable state laws relating to the lending activities of a Federal credit union should be referred to the appropriate NCUA regional office.”)

In the event an overdraft is in fact a loan or advance of money under Georgia law, the interest that can be imposed by a credit union on the overdraft is governed by O.C.G.A. § 7-1-658(a). See O.C.G.A. § 7-1-650. Georgia law provides in relevant part that “[c]redit unions may lend money to their members at reasonable rates of interest, which shall not exceed 1 ¼ percent each month on the unpaid balance or such greater rates as shall be authorized for other financial institutions.” O.C.G.A. § 7-1-658(a) (emphasis added). Federal credit unions have the ability to impose overdraft fees on deposit accounts limited only by their written policies which are subject to regulatory scrutiny. 12 CFR § 701.21. Similarly, overdraft fees imposed by national banks are non-interest charges and fees not subject to usury limitations but subject to

review by the appropriate regulatory body. 12 CFR § 7.4002. Therefore, national banks and federal credit unions can impose overdraft fees free of any usury limitations.

In light of the above, pursuant to the authority conveyed by the General Assembly under O.C.G.A. §§ 7-1-61(e)(2) or (5), in the event an overdraft is a loan or an advance of money, the Commissioner modifies O.C.G.A. § 7-1-658 to provide that state-chartered credit unions can impose overdraft fees on deposit accounts free of any state law usury limitation in order to achieve parity with federal credit unions. In reaching this determination, the Commissioner has considered the authority of national banks and federal credit unions. O.C.G.A. §§ 7-1-61(b) and (e). In addition, pursuant to the authority in O.C.G.A. § 7-1-650(6), the Commissioner authorizes credit unions to impose overdraft fees free of any state law usury limitation but subject to regulatory scrutiny as set forth in more detail below. For purposes of clarity, the Commissioner is relying on the provision in O.C.G.A. § 7-1-658 which authorizes credit unions to impose “such greater [interest] rates as shall be authorized for other financial institutions.” As national banks and federal credit unions can impose overdraft fees free of any state law usury limitations, state-chartered credit unions, subject to regulation by the Department, can similarly impose overdraft fees and not be subject to state law usury claims.

In order to achieve parity, the Department will require state-chartered credit unions, to the extent they have not already done so, to comply with the provisions in 12 CFR §701.21(c)(3). In the event any state-chartered credit union fails to comply with these provisions, such failure will not transform any overdraft fee into interest for purposes of usury but, instead, will subject the state-chartered institution to regulatory action by the Department as well as its federal regulator. In addition to 12 CFR § 701.21(c)(3), the Department expects state-chartered credit unions to continue to implement the joint guidance on overdrafts. 70 Fed. Reg. 9127 (February 24, 2005). Finally, in exercising its regulatory authority over state-chartered credit unions, the Department will view the FDIC guidance on overdrafts as examples of best practices to be utilized in the honoring of overdrafts and the imposition of a related fee. Overdraft Payment Programs and Consumer Protection: Final Overdraft Payment Supervisory Guidance, FIL-81-2010 (November 24, 2010). Implementation of the above guidance will help ensure that state-chartered credit unions are in compliance with regulatory and statutory requirements.

In issuing this parity order, the Commissioner has taken into consideration the authority of federally chartered financial institutions to impose overdraft fees on deposit accounts free of usury implications. The Commissioner has determined that the imposition of overdraft fees on deposit accounts does not impose a safety and soundness risk to state-chartered credit unions. In reaching this determination, the Commissioner has considered that overdraft fees on deposit accounts have been imposed by most state-chartered credit unions for a number of years and, as a result, these institutions already administer and supervise this activity. By providing for parity with federally chartered financial institutions, the Commissioner has concluded that such determination will, if anything, reduce the safety and soundness risks of state-chartered credit unions and improve their safety and soundness ratings as these institutions will no longer be subject to usury claims related to overdraft fees. In addition, this determination will ease the administrative burden on management at state-chartered credit unions as overdraft fees can be imposed without having to possibly engage in a usury analysis prior to imposing an overdraft fee.

One of the primary objectives of the Financial Institutions Code of Georgia is to provide for competition and parity between federally insured financial institutions. See O.C.G.A. §§ 7-1-3(a), 7-1-61(e). These objectives are standards to be observed by the Department in exercising its discretionary powers. O.C.G.A. § 7-1-3(b). Accordingly, the Commissioner issues this order to ensure that such competition and parity is, and has always been in the past, consistent with respect to overdraft fees charged in connection with deposit account transactions. Therefore, the provisions of this order apply as of June 2, 2003, the date of the Supreme Court's decision in Beneficial National Bank v. Anderson. As such, overdraft fees charged by state-chartered credit unions in connection with deposit account transactions on or after June 2, 2003, are not subject to the usury limits set by the laws of this state.

The Commissioner determines that there is a genuine necessity for the provisions of this order to apply as of June 2, 2003, to ensure complete and consistent parity. State-chartered and federally chartered financial institutions have charged overdraft fees in connection with deposit account transactions for years. Federal law has provided for more than a decade⁵ that such overdraft fees are not interest. Federal credit unions and national banks during this time period have charged overdraft fees outside of any usury limitations without any risk of liability. Therefore, to ensure complete and consistent parity with federally chartered financial institutions, it is necessary that state-chartered credit unions not be subject to the risk of liability from claims that the imposition of overdraft fees in connection with deposit account transactions violated state-law usury provisions during the same time period. Otherwise, there would not be fair and equal competition between state-chartered financial institutions and federally chartered financial institutions in Georgia with respect to overdraft programs during this time period and in the future.

Furthermore, during this time period, state-chartered credit unions had a basis for a good faith belief that the charging of overdraft fees in connection with deposit account transactions would not subject the credit union to the risk of liability under Georgia usury laws. Federal and state regulators did not take the position that such overdraft fees constituted interest in violation of usury limitations. Similarly, in 2003, the Georgia Attorney General issued an opinion stating that overdraft fees charged in connection with checking account transactions are generally not considered interest under Georgia law. 2003 A.G. Op. 2003-9.

In addition, safety and soundness considerations support the time period of the application of the provisions of this order. Subjecting state-chartered credit unions to the risk of substantial civil liability, as well as potential criminal liability, for the charging of such overdraft fees in the past will adversely impact the state-chartered credit union system. It is important to the safety and soundness of the state credit union system that state-chartered credit unions, like federal credit unions, have certainty that the charging of such overdraft fees in the past will not subject the credit unions to the risk of liability.

Similarly, the Department is aware that many credit union members voluntarily choose to participate in credit union overdraft programs, and the Department wants to ensure that Georgia citizens continue to have access to such programs. If state-chartered credit unions are subject to the risk of substantial civil liability, as well as potential criminal liability, they may consider not

⁵ See e.g., 12 CFR § 701.35.

offering overdraft programs in the future. This would adversely affect many credit union members, some of which may only be eligible for membership at state-chartered credit unions.

The gravity and importance of this issue to businesses and consumers throughout Georgia simply cannot be overstated. The Griner decision promulgates a three-part test, which represents a substantial departure from the Department's regulatory interpretation and exposes every state-chartered financial institution in Georgia to expensive, time consuming, and perhaps crippling litigation. The decision threatens the continuing vitality of the dual charter system that has existed in Georgia for so many years by leaving state-chartered financial institutions guessing in a situation of great uncertainty and peril and threatening access to members following a period of extraordinary economic stress. This result threatens the very fabric of many local communities where state-chartered financial institutions are often the primary, if not only, source of credit for people of low to modest means, including those struggling to meet their financial obligations due to temporary unemployment or underemployment.

These reasons demonstrate the genuine necessity for the provisions of this order to apply as of June 2, 2003, to ensure complete and consistent parity between state-chartered credit unions and federal credit unions.

This determination permits state-chartered credit unions to impose overdraft fees free of any usury limitations in order to ensure parity with federal credit unions operating in the State of Georgia. However, state-chartered credit unions are cautioned that should any federal law or regulation be enacted or amended that imposes new limitations on overdraft fees, state-chartered credit unions will be subject to those provisions to which federal credit unions are subject.

SO ORDERED THIS 11th DAY OF JULY, 2013.



KEVIN B. HAGLER
Commissioner