



## *Department of Banking and Finance*

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*Commissioner*

### **Declaratory Ruling**

**TO:** Georgia State-Chartered Credit Unions  
**FROM:** Robert M. Braswell, Commissioner  
**DATE:** August 13, 2007  
**SUBJECT:** Effect of Preemption of O.C.G.A. §§ 7-1-239.5 & 7-1-372

O.C.G.A. § 7-1-372 provides in pertinent part that "A commercial bank shall pay all checks drawn on it at par and shall make no charge for the payment of such checks..." Similarly, O.C.G.A. § 7-1-239.5 provides that:

**"No financial institution, savings bank, national bank, or state or federal credit union or savings and loan association may charge any fee of any kind to a person or corporation who does not have an account with that institution for cashing a check or other instrument which is payable to such person or corporation and is drawn on the account of another person or corporation with that institution."**

Quite simply, the "on us" state statutes referenced above prevent a financial institution located in Georgia from charging a fee to a non-account holder for cashing a check drawn on that financial institution.

Many of you are aware that on August 3, 2007, the Department, after consulting with its counsel, the office of the State Attorney General, and confirming that all required factors were analyzed and considered issued a Declaratory Ruling to all state-chartered banks, based upon the authority found at O.C.G.A. § 7-1-61(e)(5), declaring that the above referenced "on us" state statutes would not apply to state-chartered banks. This action afforded state-chartered banks the ability to charge check cashing fees to non-account holders to ensure parity with national banks operating in the State of Georgia.

In considering the matter as to whether the "on us" statutes are applicable to state-chartered credit unions, the Department has received a legal opinion number 7-0743 dated August 7, 2007, from the National Credit Union Administration (NCUA) through their General Counsel's office on the subject of preemption of "on us" state statutes as applicable to credit unions. The Department has reviewed this documentation and concluded that the "on us" Georgia statutes are in direct conflict with provisions of The Federal Credit Union Act (Act) and NCUA's regulations. The Act authorizes Federal Credit Unions to offer share draft account to members and to cash checks and money orders for their members (12 U.S.C. §§ 1757(6), 1757 (12), and 1785(12)(B)). In

2006, amendments to the Act granted explicit authority for federal credit unions to cash checks for persons in the field of membership “for a fee” (12 U.S.C. § 1757(12)(B)).

In addition, our research indicates that Federal credit unions operating in Georgia are authorized to charge “on us” fees by the NCUA at 701.35(c):

(c) A federal credit union may, consistent with this section, parts 707 and 740 of this subchapter, other federal law, and its contractual obligations, determine the types of fees or charges and other matters affecting the opening maintaining and closing of a share, share draft or share certificate account. State laws regulating such activities are not applicable to federal credit unions.

As set forth in the August 3, 2007, Department Declaratory Ruling applicable to state-chartered banks, the United States District Court for the Northern District of Georgia concluded that “the Georgia statutes are in direct conflict with the National Bank Act, and therefore are preempted.” Bank of America v. Sorrell, 248 F.Supp.2d 1196, 1199 (N.D. GA. 2002). The Act provisions cited in this Declaratory Ruling are similar to those provisions contained within the National Bank Act reference in the Bank of America decision.

The Department of Banking and Finance (Department) has received several requests from industry groups asking the Department to exercise its discretionary authority under O.C.G.A. § 7-1-61(e) to issue an order that would afford state-chartered credit unions the ability to charge check cashing fees to non-account holders to ensure parity with other federal credit unions operating in the State of Georgia, similar to the preemption recognition for Georgia state-chartered banks with national banks.

The Department has reviewed these requests and we conclude that federal law as set forth above has preempted the applicability of the above referenced “on us” state statutes for state-chartered credit unions.

O.C.G.A. § 7-1-61(e)(5) provides in pertinent part that:

(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. . .

(5) If Georgia law has been determined to be federally preempted, other limitations or restrictions on financial institutions contained in this chapter.

In addition to specific requirements contained in the section, prior to exercising this discretionary power found at O.C.G.A. § 7-1-61(e)(5), the Commissioner must consider the following four factors found in O.C.G.A. § 7-1-61(b):

(b) In the exercise of 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;
- (2) The authority of any federally chartered bank, as the term “bank” is defined in Code Section 7-1-21, 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 . . .

We conclude that federal law has been determined by the authorized federal agency to preempt the applicability of the “on us” Georgia state statutes for federal credit unions. Therefore, based upon the authority found at O.C.G.A. § 7-1-61(e)(5), after confirming that all required factors have been analyzed and considered, the “on us” state statutes shall not apply to state-chartered credit unions. This will afford state-chartered credit unions the ability to charge check cashing fees to non-account holders to ensure parity with other federal credit unions operating in the State of Georgia.

State-chartered credit unions are cautioned, however, that should any part of the federal preemption as determined by Federal Court Ruling or by Order of the applicable Federal Agency be issued, overturned, clarified, or revised, then state credit unions will be subject to those provisions to which other federal credit unions are subject.

The effective date of the preemption for state chartered credit unions shall be August 13, 2007.

Questions about this preemption should be directed to Judy Newberry, Deputy Commissioner of Legal and Consumer Affairs (770) 986-1650.