

Preemption of Georgia Fair Lending Act

Summary Conclusion: Federal law preempts application of various provisions of the Georgia Fair Lending Act to federal savings associations and their operating subsidiaries.

Date: January 21, 2003

Subjects: Home Owners' Loan Act/Savings Association Powers

P-2003-1



Office of Thrift Supervision

Department of the Treasury

Chief Counsel

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

January 21, 2003

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Re: Preemption of Georgia Fair Lending Act

Dear []:

This responds to your recent letter on behalf of [] (“Association”), a federal savings association, and its operating subsidiary, [] (“Operating Subsidiary”). In your letter, you ask the Office of Thrift Supervision (“OTS”) to confirm that federal law preempts the application to the Association and the Operating Subsidiary of the recently enacted Georgia Fair Lending Act (“GFLA”).¹ We conclude that GFLA provisions purporting to regulate the terms of credit, loan-related fees, disclosures, or the ability of a creditor to originate or refinance a loan, are preempted by federal law from applying to federal savings associations and their operating subsidiaries.

Background

The restrictions GFLA imposes differ depending upon whether a loan is a “home loan,” a “covered home loan,” or a “high-cost home loan.”² All “home loans” are subject to certain restrictions on the terms of credit and loan-related fees. These include prohibiting the financing of credit insurance, debt cancellation coverage, or suspension coverage, and limiting late fees and payoff statement fees.

“Covered home loans” are subject to a further restriction on the terms of credit and the refinancing of a loan. GFLA limits the number of times a loan may be refinanced and the circumstances in which a refinancing may occur.

¹ GFLA is to be codified as Ga. Code. Ann. §§ 7-6A-1 *et seq.* Notwithstanding the title of the statute, GFLA does not address lending discrimination.

² GFLA § 7-6A-2 defines these terms. In general, the category into which a loan falls depends on the annual percentage rate and amount of points and fees charged.

“High-cost home loans” are subject to all of these restrictions, plus numerous other disclosure requirements and restrictions on the terms of credit and loan-related fees. Creditors must disclose to borrowers that the loan is high-cost. Borrowers must attend loan counseling before the creditor may make the loan. Restrictions on the terms of credit and loan-related fees include prohibiting prepayment penalties, balloon payments, negative amortization, increases in the interest rates after default, advance payments from loan proceeds, fees to modify, renew, extend, amend or defer a payment, and accelerating payment at the creditor’s or servicer’s sole discretion.

Discussion

GFLA provisions purporting to regulate the terms of credit, loan-related fees, disclosures, or the ability of a creditor to originate or refinance a loan, are preempted by federal law from applying to federal savings associations.³ In enacting the Home Owners’ Loan Act (“HOLA”),⁴ Congress required the Federal Home Loan Bank Board (“FHLBB”), and now the OTS, to provide for the organization, incorporation, examination, operation, and regulation of federal savings associations “giving primary consideration of the best practices of thrift institutions in the United States.”⁵ Consistent with this language, OTS has made clear in its lending regulations its intent to carry out this congressional objective by giving federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.⁶ That uniform federal scheme occupies the field of regulation for lending activities. The comprehensiveness of the HOLA language demonstrates that Congress intended the federal scheme to be exclusive, leaving no room for state regulation, conflicting or complementary.

OTS occupies the field to enhance safety and soundness and enable federal savings associations to conduct their operations in accordance with best practices by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden.⁷ Under OTS regulation 560.2(a), federal savings associations may extend credit as authorized under federal law without regard to state laws purporting to regulate

³ Those provisions are Ga. Code. Ann. §§ 7-6A-3, 7-6A-4, 7-6A-5, and 7-6A-7(f). As per telephone discussions between you and OTS staff, however, this opinion does not address certain specific provisions within those sections: GFLA § 7-6A-5(11)-(13), which imposes certain requirements for foreclosures on high-cost home loans and GFLA §§ 7-6A-5(6), which pertains to the ability of borrowers to assert claims or defenses in court.

⁴ 12 U.S.C.A. § 1461 *et seq.* (West 2001).

⁵ HOLA § 5(a); 12 U.S.C.A. § 1464(a) (West 2001).

⁶ 12 C.F.R. § 560.2(a) (2002).

⁷ *Id.*

or otherwise affect their credit activities. As described above, GFLA imposes a number of specific restrictions and requirements on home loans. GFLA would regulate areas covered by regulation 560.2 and therefore does not apply to federal savings associations' home lending.

OTS has described with specificity the scope of its occupation of the field of lending regulation by noting the types of state laws encompassed within the preemption. They include many of the types of provisions found in GFLA. For example, 12 C.F.R. § 560.2(b)(4) preempts state laws on terms of credit, § 560.2(b)(5) preempts state laws on loan-related fees, § 560.2(b)(9) preempts state laws on disclosure and advertising, and § 560.2(b)(10) preempts state laws on processing, origination, servicing, sale, purchase, investment, and participation in mortgages. This conclusion is further supported by numerous opinions of OTS, and its predecessor, the FHLBB.⁸

GFLA would thwart the more general congressional objective that OTS have exclusive responsibility for regulating the operations of federal savings associations "giving primary consideration of the best practices of thrift institutions in the United States."⁹ Congress gave OTS, not the States, the task of determining the best practices for thrift institutions and creating nationally uniform rules. OTS conducts regular examinations of thrift lending operations for safety and soundness and compliance with established consumer protections. Federal savings associations must comply with the requirements of federal law, including restrictions on abusive practices such as those in the Home Ownership Equity Protection Act and its implementing regulations.¹⁰ Subjecting federal savings associations to the burdens of complying with a "hodgepodge of conflicting and overlapping state lending requirements" would undermine the federal objective of permitting federal savings associations to exercise their lending powers "under a single set of uniform federal laws and regulations. This [uniformity] furthers both the 'best practices' and safety and soundness objectives of the HOLA by enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory duplication and burden."¹¹

⁸ See, e.g., OTS Op. Counsels (Banking and Finance), 5/16/01 (preemption of state law on terms of credit); FHLBB Op. Gen. Counsel, 2/1/82 (same); OTS Ops. Chief Counsel, 12/14/01, 4/21/00, and 3/10/99 (preemption of state law on loan-related fees); OTS Op. Chief Counsel, 12/24/96 (preemption of state law on loan-related fees and disclosures); OTS Mem. Dep. Chief Counsel, 5/10/95 (preemption of state law on disclosures).

⁹ 12 U.S.C.A. § 1464(a) (West 2001).

¹⁰ See 15 U.S.C.A. § 1639 (WESTLAW 2002) (HOEPA); 12 C.F.R. pt. 226, subpart E (2002) (HOEPA regulations).

¹¹ 61 Fed. Reg. 50,951, 50,965 (Sept. 30, 1996) (Final Rule: Lending and Investment).

With regard to the application of GFLA to the Operating Subsidiary, we note that in both its regulations and opinions, OTS has consistently indicated that state laws purporting to regulate the activities of a federal savings association's operating subsidiary are preempted by federal law to the same extent such laws are preempted for the federal savings association itself.¹² Accordingly, to the extent that the Association conducts its lending operations through the Operating Subsidiary, federal law preempts application of the same GFLA provisions to the Operating Subsidiary as are preempted for the Association.

Finally, you have inquired whether the Association or the Operating Subsidiary may fund loans in the Association's or the Operating Subsidiary's name arranged by independent mortgage brokers where the loan terms do not comply with GFLA. As discussed above, OTS regulations specifically preempt state laws purporting to impose requirements on federal savings associations regarding processing and origination of mortgages.¹³ Accordingly, GFLA would not restrict the Association or the Operating Subsidiary from funding loans in its own name, even where the loans contain terms that do not meet those GFLA requirements and restrictions that are preempted for federal savings associations and operating subsidiaries.¹⁴ The loan documents, however, must evidence that the Association or the Operating Subsidiary is the lender.

We trust that this responsive to your inquiry. If you have further questions, please contact Richard Bennett, Counsel (Banking and Finance), at (202) 906-7409.

Sincerely,



Carolyn J. Buck
Chief Counsel

cc: Regional Directors
Regional Counsel

¹² See 12 C.F.R. § 559.3(n)(1) (2002); OTS Op. Chief Counsel (July 26, 1999) (and authorities cited therein).

¹³ 12 C.F.R. § 560.2(b)(10) (2002).

¹⁴ Whether federal preemption applies to entities other than federal savings associations or operating subsidiaries is beyond the scope of this opinion.