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March 14, 2003

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room, Mailstop 1-5
Washington, D.C. 20219
Attention: Docket No. 03-04

Re: Request for Preemption Determination
Georgia Fair Lending Act
68 *Federal Register* 8959, February 26, 2003

Dear Sir or Madam:

The American Bankers Association ("ABA")[1] is responding to publication by the Office of the Comptroller of the Currency ("OCC") of a request from National City Bank, National City Bank of Indiana and its operating subsidiaries, First Franklin Financial Corporation and National City Mortgage Company (collectively "National City") for a determination or order from OCC that the Georgia Fair Lending Act ("GFLA") is preempted by the National Bank Act, 12 U.S.C. § 371 and OCC's implementing regulations.[2] Failure to preempt GFLA would significantly interfere with the ability of national banks, including members of the ABA, to engage in real estate lending in Georgia.

BACKGROUND

The Georgia Fair Lending Act[3] as amended on March 7, 2003,[4] restricts the ability of lenders to charge certain fees and engage in certain practices with

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[1] The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Our membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—makes ABA the largest banking trade association in the country.

[2] 12 U.S.C. 24 (Seventh), 12 U.S.C. § 371 and 12 C.F.R. Part 34. OCC has published for comment National City's request for preemption as required by Section 114 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. Pub. L. No. 103-328, 108 Stat. 2338 (1994).

[3] Ga. Code Ann. §§ 7-6A-1 *et seq.*

[4] On March 7, 2003, Georgia Governor Sonny Perdue signed into law SB 53/HCSFA, that amended GFLA to remove some of its more onerous provisions, including the imposition of assignee liability that had caused three national rating agencies to cease rating loans that originated in Georgia. The law took effect on March 7, 2003. All references herein are to the newly enacted version of GFLA.

respect to two categories of home loans originated in Georgia: "home loans" and "high-cost home loans."

Home Loans. Under GFLA, a "home loan" is any consumer-purpose loan or line of credit secured by borrower-occupied one to four family residential property within the conforming loan limit set by FNMA for a single-family dwelling, except reverse mortgages, bridge loans, and loans which are also secured by personal property.[5] Among the restrictions GFLA imposes on all home loans are the following:

- A prohibition on "flipping;" defined as refinancing a home loan that closed within the prior five years ***unless*** the new loan provides reasonable, tangible net benefit to the borrower considering all the circumstances;[6] and
- A prohibition on charging fees for loan balance information.[7]

High-Cost Home Loans. Under GFLA, a "high-cost home loan" is:

- A home loan that equals or exceeds the annual percentage rate threshold in Section 152 of the Home Ownership and Equity Protection Act of 1994 (HOEPA)[8] as implemented by the Federal Reserve Board in its regulations at 12 C.F.R. § 226.32; or
- A home loan for which the total points and fees payable (excluding not more than two *bona fide* discount points, exceed:
  - five percent of the total loan amount for loans of $20,000 or more; or
  - the lesser of eight percent of the total loan amount ***or*** $1,000 for loans under $20,000.

High-cost home loans are subject to numerous disclosure requirements and restrictions on the terms of credit and loan-related fees.[9] Among other things, creditors must disclose to borrowers that the loan is high cost, and borrowers must attend loan counseling before the lender may make the loan. GFLA also requires lenders to provide detailed pre-foreclosure notices to borrowers of their rights to cure defaults.

PREEMPTION ANALYSIS

Courts have enunciated various principles to determine when a state law is preempted, but fundamentally it is a question of Congressional intent. The legislature's intent to preempt may be either explicit or implicit. If the intent is explicit, the inquiry is ended unless there are questions about the scope of preemption. Alternatively, preemption may be implicit, with the necessary legislative intent divined from a determination that:

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[5] Ga. Code Ann. § 7-6A-2(8).
[6] Ga. Code Ann. § 7-6A-4(a).
[7] Ga. Code Ann. § 7-6A-3(4).
[8] 15 U.S.C. § 1602(aa).
[9] Ga. Code Ann. § 7-6A-5.

- The federal government has "occupied the field" or created a scheme of federal regulation so pervasive that there is no room left for state regulation;[10]
- That federal law may irreconcilably conflict with state law such that compliance is a physical impossibility;
- State law may be an obstacle to accomplishing the full purposes and objectives of Congress;[11] or
- State law significantly impairs or interferes with powers explicitly granted by Congress.[12]

Although states are not without any authority to impose regulations upon national banks, the areas in which they are permitted to regulate are typically limited to 'contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal and tort law. . . Consumer protection is not reflected in the case law as an area in which the states have traditionally been permitted to regulate national banks."[13] Because of this '"history of significant federal presence' in national banking, the [usual] presumption against preemption of state law is inapplicable."[14]

To analyze the issues presented by National City's request for a preemption order or determination, ABA believes that the questions to be answered are (1) whether Congress' grant of authority to OCC in Section 371 is such that OCC "occupies the field" with respect to the real estate lending powers of national banks so as to leave no room for state regulation, or (2) whether GFLA "significantly impairs or interferes with powers explicitly granted by Congress" such that it is preempted in accordance with the preemption standard set forth by the U.S. Supreme Court in it's 1996 decision in *Barnett Bank of Marion County, N.A. v. Nelson*.[15] We emphatically answer both of these questions in the affirmative: federal law *does* occupy the field and GFLA *does* significantly interfere with the conduct of real estate lending powers by national banks and their operating subsidiaries.

1. *OCC's grant of authority under Section 371 leaves no room for state regulation of national banks' federally granted real estate lending authority.*

National banks were first given the authority to lend on the security of real estate in Section 24 of the Federal Reserve Act of 1913, codified at 12 U.S.C. § 371. (References hereinafter will be to Section 371.) Section 371 contained a limited grant of authority for a national bank to lend on the security of "improved and unencumbered farm land, situated within its Federal reserve district [sic]."[16] In

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[10] *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).
[11] Fidelity Federal Savings & Loan Association. v. de la Cuesta, 458 U.S. 141, 152 (1982) (summarizing preemption principles).
[12] *Barnett Bank of Marion County, N.A. v. Nelson,* 116 S. Ct. 1103 (1996).
[13] *American Bankers Ass'n v. Lockyer* at 30, No. CIV. S-02-1138 FCD JFM (December 2002) (citing *Bank of America v. City & County of San Francisco*, 309 F. 3rd 551 (9th Cir. 2002)).
[14] *Bank of America,* 309 F.3rd 551, 559 (citing *United States v. Locks*, 529 U.S. 89, 108 (2000)).
[15] *Id.*
[16] Federal Reserve Act, ch. 6, § 24, 38 Stat. 251, 273 (1913).

addition to this geographic limitation, the Federal Reserve Act imposed additional limits on the term and amount of each loan and an aggregate lending limit.

Since 1913, Congress has amended Section 371 numerous times to broaden the types of real estate loans national banks were permitted to make, to expand geographic limits, and to modify loan term limits and per-loan and aggregate lending limits. In 1982, "to provide national banks with the ability to engage in more creative and flexible financing, and to become stronger participants in the home financing market,"[17] Congress replaced these "rigid statutory limitations"[18] with a broad provision authorizing national banks to

> make, arrange, purchase, or sell loans or extensions of credit secured by liens on interest in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation.[19]

In 1991, without explanation Congress removed the term "rule" from Section 371 and enacted an additional provision requiring national banks (and other insured depository institutions) to conduct real estate lending pursuant to "uniform standards" adopted at the federal level by regulation of OCC and the other federal banking agencies.[20]

Thus, the legislative history of Section 371 demonstrates that for nearly 70 years Congress was directly involved in expanding the scope of national banks' real estate lending authority until 1982, when Congress delegated to OCC comprehensive authority to regulate those powers. Congress' active participation in the scope of national bank real estate lending authority followed by its action to unconditionally delegate its authority to OCC clearly demonstrates Congress' intent that OCC, with its greater flexibility and knowledge of current banking and real estate markets, should stand in its place. Congress could have conditioned its delegation on compliance with state laws or consultation with state authorities. That it did not necessarily leads to the conclusion that Congress intended that OCC should occupy the field and be the sole authority with respect to national banks' real estate lending powers.

The fact that the only amendment since 1982 was to require that, in the wake of the savings and loan failures of the late 1980's and early 1990's, all insured depository institutions conduct real estate lending activities pursuant to uniform federal standards adopted by OCC and the other federal banking agencies, further evidences Congress' intent that national banks should not be subject to state laws governing real estate lending standards.

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[17] S. Rep. No. 97-536, at 27 (1982).
[18] *Id*.
[19] Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 403, 96 Stat. 1469, 1510-11 (1982).
[20] Section 304 of the Federal Deposit Insurance Corporation Improvement Act, 12 U.S.C. 1828(o).

Preemption of GFLA would not leave a void with respect to national banks' real estate lending practices. Because federal preemption doctrine is derived from the Supremacy Clause of the U.S. Constitution, it does not displace other federal laws. Indeed, as most recently revised by the Federal Reserve Board, HOEPA addresses the same types of practices associated with predatory lending as does GFLA. Similarly, predatory lending practices may also constitute unfair or deceptive trade practices in violation of the Federal Trade Commission Act (FTC Act).[21] Both HOEPA and the FTC Act are enforced with respect to national banks by OCC.

Moreover, OCC recently reconfirmed its expectations with respect to the business practices of national banks in Advisory Letter 2003-2 which states that

> Any lending practices that take unfair advantage of borrowers, or that have a detrimental impact on communities, also conflict with the high standards expected of national banks. . . Although the OCC does not have reason to believe that national banks or their operating subsidiaries . . . generally are engaged in predatory lending practices, it expects that national banks will take appropriate steps to ensure that they do not become involved in predatory lending.[22]

The advisory letter provides examples of practices that may be abusive as well as how guidance on how national banks can avoid engaging in such practices. Simultaneously, OCC also released Advisory Letter 2003-3 that provides guidance to national banks on how to avoid predatory and abusive lending practices in brokered and purchased loans.

Based on the legislative history and scope of Section 371, as well as the other federal enforcement mechanisms that restrict predatory lending practices, ABA believes there can be no question that GFLA is preempted because federal law pervasively occupies the field with respect to national banks' federally granted real estate lending powers.

2. GFLA significantly impairs or interferes with national banks' ability to engage in federally authorized real estate lending activities.

Assuming *arguendo* that Section 371 does not occupy the field, GFLA clearly imposes significant restrictions on the ability of national banks to conduct their federally authorized real estate lending activities.

The U.S. Supreme Court most recently reconfirmed the "significantly impairs or interferes with" standard in *Barnett Bank of Marion County, N.A. v. Nelson*.[23] *Barnett* involved a preemption challenge to national bank insurance powers in

[21] 15 U.S.C. §§ 41-58 as amended.
[22] AL 2003-2 (February 21, 2003).
[23] *Barnett Bank of Marion County, N.A. v. Nelson,* 116 S. Ct. 1103 (1996).

Section 92 of the National Bank Act. In that decision, the Supreme Court established the "significant interference/substantial impairment" test based on the plain language of Section 92, which placed no restrictions on the insurance powers of national banks. The Supreme Court unanimously and unambiguously held that state laws that prevent or significantly interfere with national banks' exercise of powers under Section 92 are preempted.

While there is no particular measure of what constitutes "significant interference" or "impairs the efficiency of," courts have held that the threshold may be quite low even in instances where the state statute imposed no affirmative requirements or compliance costs on national banks.[24] OCC also noted in Advisory Letter 96-8[25] discussing the significant interference test, "a relatively small level of impact on the authority of national banks is sufficient to result in federal preemption of the state law at issue."

The Supreme Court and other federal courts have repeatedly stated that in adopting the National Bank Act, Congress intended to create a uniform national banking system.[26] Indeed, this national uniformity is one of the principal reasons for the extremely broad scope of preemption under the National Bank Act. However, if national banks have to change the way in which they conduct business to comply with the requirements of GFLA and with the separate and unique requirements of every other state that chooses to adopt its own legislation governing predatory lending practices, that uniformity guaranteed to national banks under federal law will be eviscerated.

It is clear that GFLA significantly impairs the efficiency of national banks engaged in real estate lending in Georgia and other states. For example, national banks must comply with HOEPA which permits refinancing of high-cost loans 12 months after origination; by contrast GFLA imposes a wait of five years. Creditors are unable to make high-cost loans in Georgia until the borrowers have received counseling. GFLA imposes specific disclosures and loan terms on credits in Georgia as well as detailed pre-foreclosure notices. As a result of these requirements, national banks lending in Georgia will have no choice but to segregate such loans so they can be earmarked for the special treatment required by GFLA, thus increasing all of their loan-related costs, including compliance, marketing, underwriting, *etc.* This situation will be compounded many times over as additional states impose their own requirements on high-cost loans. Indeed, states other than Georgia have adopted or are considering adopting similar legislation.[27] The net effect of these various, differing requirements will be to

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[24] *American Bankers Ass'n* at 33, No. CIV. S-02-1138 FCD JFM (December 2002) (citing *Franklin National Bank v. New York*, 347 U.S. 373, 377-79 (1954)).
[25] AL 96-8 (October 8, 1996).
[26] *Marquette Nat'l Bank v. First of Omaha Service Corp*., 439 U.S. 299, 308 (1978) (quoting *Davis v. Elmira Sav. Bank,* 161 U.S. 275, 283 (1896)); *Talbott v. Silver Bow County,* 139 U.S. 438, 443 (1891); *Nat'l State Bank v. Long,* 630 F.2d 981, 988 (3d Cir. 1980); *North Dakota v. Merchants Nat'l Bank & Trust Co.,* 466 F. Supp. 953, 955 (D.N.D. 1979), *aff'd,* 634 F.2d 368 (8th Cir. 1980); *Smiley v. Citibank*, 11 Cal. 4th 138, l58, 44 Cal. Rptr.2d 441, 900 P.2d 690 (1995), *aff'd,* 517 U.S. 735 (1996).
[27] The following states have enacted some form of predatory lending law: California, Colorado, Connecticut, Florida, Georgia, Idaho, Maryland, Michigan, Minnesota, Missouri, New York,

markedly undermine the uniform banking system which was intended by the drafters of the National Bank Act.

Because application of GFLA to national bank real estate lending powers would damage the efficiency of national banks engaged in real estate lending, ABA believes there can be no question that GFLA is preempted because it significantly interferes with the ability of national banks to engage in real estate lending in Georgia.

CONCLUSION

Based on the foregoing analysis, ABA believes that GFLA does not apply to national banks and their operating subsidiaries because federal law has occupied the field of regulation for national bank real estate lending activities so as to leave no room for regulation by the states. GFLA also would be preempted under the U.S. Supreme Court's *Barnett* preemption analysis because it significantly interferes with and impairs the efficiency of national banks' exercise of their federal real estate lending authority.

If you have any questions concerning any of these issues, please do not hesitate to contact the undersigned at 202-663-5324 or jmclaugh@aba.com.

Sincerely,

James D. McLaughlin

North Carolina, Ohio and Pennsylvania. The following additional states are currently considering predatory lending legislation: Alabama, Arkansas, Arizona, Hawaii, Illinois, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont and Washington.