Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #1000
August 2004

April 2, 2004

Mr. David G. Sorrell
Commissioner
Department of Banking and Finance
29909 Brandywine Road
Suite 200
Atlanta, GA 30341-5565

Dear Commissioner Sorrell:

This letter replies to your request for clarification from the Office of the Comptroller of the Currency on several matters relating to our Preemption Determination and Order concerning the Georgia Fair Lending Act (GFLA).[1] Again, I apologize for the delay in our response.

You have asked: (1) for a list of the citations to the sections of the Official Code of Georgia that we concluded in the Determination and Order are preempted by Federal law (or, if simpler, a list of those sections that are *not* preempted); (2) for an explanation of the treatment of state laws concerning credit life insurance sales under the Gramm-Leach-Bliley Act (GLBA); and (3) whether the Determination and Order applies to loans "originated by an external broker and subsequently funded by a national bank."

At the same time as we issued the Determination and Order, we also published a proposed regulation addressing the applicability of State laws to national banks' Federally authorized activities, including real estate lending. That rulemaking process concluded with the issuance, in January of this year, of our final preemption regulation.[2] Our reply to your questions takes this new rule into account.

[1] The Determination and Order was published in the Federal Register at 68 Fed. Reg. 46264 (August 5, 2003).

[2] 68 Fed. Reg. 46119 (August 5, 2003) (proposed preemption rule); 69 Fed. Reg. 1904 (January 13, 2004) (final preemption rule).

Discussion

1. GFLA Provisions Not Preempted in the Determination and Order

The Determination and Order did not address, and thus by its terms did not preempt, the GFLA provision concerning termination of foreclosure proceedings (§ 7-6A-5(13)(B)) and mortgage broker liability (§ 7-6A-7(f)).

The GFLA termination of foreclosure proceeding provision requires a lender to terminate a foreclosure proceeding once a default is cured. This *termination* provision is distinct from the GFLA provision concerning a borrower's *right to cure* a default, which we concluded in the Determination and Order was preempted under a pre-existing OCC regulation because the provision impermissibly restricted the term to maturity of a national bank's real estate loans. The GFLA *right to cure* provision also is preempted by our new regulation,[3] but the *termination* provision is not preempted by the new rule.

Several additional GFLA provisions do not apply to institutions within our jurisdiction, either because they deal with enforcement and remedies (and are, therefore, moot given that the underlying obligations that would be enforced were determined, in the Determination and Order, to be inapplicable) or because they address matters, such as your Department's authority to promulgate rules, that were not relevant for purposes of the Determination and Order. These GFLA provisions are §§ 7-6A-4(c); 7-6A-6(c); 7-6A-7(a)-(e) and (g)-(i); 7-6A-8; 7-6A-9(1) and (2); 7-6A-10-13; and Sections 2 and 3. The preemption rule does not alter this analysis of these provisions.

2. Credit Life Insurance

In the Determination and Order, we concluded that the GFLA's restrictions on the financing of credit insurance are preempted by Federal law.[4] The same result follows under our new rule.[5]

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[3] The right-to-cure provision is discussed at 68 Fed. Reg. at 46276-77. Under the GFLA, if a high cost home loan is accelerated, a borrower may cure a default at any point prior to foreclosure. Such a cure reinstates the borrower to the same provision as if the default had not occurred and nullifies the acceleration. The GFLA right-to-cure provision thus requires the original term of the loan to be reinstated upon the curing of a default, notwithstanding the possibility that prudent underwriting would suggest a modification of terms (including maturity). As we explained in the Determination and Order, this provision was preempted under our former real estate lending rule at 12 CFR § 34.4(a)(3), which rendered inapplicable state laws concerning term to maturity. Under the final preemption rule, the preemption result is the same but, because section 34.4 has been revised, the GFLA right-to-cure provision is now preempted by 12 C.F.R. § 34.4(a)(4), which provides that a national bank may make real estate loans without regard to state law limitations concerning the terms of credit, including the term to maturity of the loan.

[4] *See id*. at 46277 n.88 (concluding that these restrictions on financing credit insurance were preempted pursuant to then-current § 34.4(b) of our rules and noting that restrictions on financing credit insurance in connection with a home loan restrict the borrower's use of loan proceeds, which has the effect of impermissibly conditioning a national bank's exercise of its real estate lending powers).

[5] *See* 69 Fed. Reg. at 1917 (revised § 34.4(a).

Your letter notes that the Determination and Order refers to the insurance provisions of the GLBA and that the GFLA refers to the Georgia Department of Insurance as "the enforcement authority" over credit insurance products. For these reasons, you have asked whether "credit life insurance falls under [GLBA] and is therefore controlled by state law."

The Determination and Order does refer to the insurance provisions of the GLBA.[6] However, the purpose of that reference was to draw a clear distinction between the GFLA restriction on *financing* credit insurance, which we concluded was preempted, and State laws that pertain to the sale, solicitation, and cross-marketing of credit insurance, which we did not address and which are governed by the framework for determining applicable State law established by the GLBA.

The applicability to banks of State insurance sales, solicitation, and cross-marketing laws is appropriately analyzed under section 104 of the GLBA. In contrast, a national bank's extension of credit to finance the purchase of credit insurance is a lending activity, not an insurance activity. Thus, section 104 of GLBA is not relevant to the analysis. The ultimate conclusion that the provision is preempted is not affected by whether the Georgia insurance commissioner, rather than the State's banking regulator, may have jurisdiction at the State level over the financing of credit insurance products.

Questions about the applicability of any State insurance sales, solicitation, or cross-marketing laws to national banks are outside the scope of the Determination and Order. Such questions also are outside the scope of the preemption rule, which does not address the applicability of State law concerning credit insurance sales, solicitation, and cross-marketing to national banks.

3. Applicability of the Determination and Order and Preemption Rule to Mortgage Brokers

In the Determination and Order, we concluded that Federal law preempts the GFLA's restrictions on the real estate lending activities of national banks and their operating subsidiaries.[7] Similarly, the real estate lending provisions of our preemption rule apply to the real estate lending activities of national banks and their operating subsidiaries.[8] Your letter asks whether "mortgage loans originated by an external broker and subsequently funded by a national bank or national bank subsidiary [would] be preempted" by the Determination and Order. The answer depends on whether a national bank or national bank operating subsidiary makes the loan. If a loan is arranged by a mortgage broker but made by a national bank or its operating subsidiary, then the national bank (or operating subsidiary) is the lender and the provisions of the GFLA are preempted with respect to that loan.[9] If a loan is arranged by a mortgage broker but made by

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[6] *Id*. at 46277 n.88. Section 104 of the GLBA is codified at 15 U.S.C. § 6701.

[7] *Id.* at 46280-81 (citing various authorities, including the OCC's regulations at 12 C.F.R. §§ 5.34(e), 7.4006, and 34.1).

[8] *See* 12 C.F.R. § 34.1.

[9] This conclusion applies with respect to real estate loans made by national banks (or their operating subsidiaries) pursuant to legitimate business arrangements with mortgage brokers, not pursuant to sham arrangements where, for example, the broker rather than the bank has the preponderant economic interest in the transaction.

another type of entity, then the provisions of the GFLA are not preempted with respect to that loan under the national banking laws and the OCC's regulations, though they may be preempted pursuant to another Federal statutory regime.[10]

I appreciate your patience and trust these answers are responsive to your inquiry.

Sincerely,

signed

John D. Hawke, Jr.
Comptroller of the Currency

[10] *See, e.g.*, OTS Op. Chief Counsel (January 21, 2003) (concluding that the GFLA was preempted with respect to loans arranged by "independent mortgage brokers" but funded by Federal savings associations and their operating subsidiaries so long as the loan documents evidence that the thrift or operating subsidiary was the lender).