

SCHWARTZ & BALLEN LLP

1990 M STREET, N.W. · SUITE 500

WASHINGTON, DC 20036-3465

(202) 776-0700

FACSIMILE
(202) 776-0720

schwartzandballen.com

M E M O R A N D U M

February 27, 2003

To Our Clients and Friends

Re: OCC Request for Public Comment on
Georgia Fair Lending Act Preemption Determination

The Office of the Comptroller of the Currency (“OCC”) has been requested by a national bank to issue a determination or order that the Georgia Fair Lending Act (“GFLA”) is preempted by 12 U.S.C. 24(Seventh) and 12 U.S.C. 371. Comments should be submitted to the OCC by March 28, 2003.

The bank contends that the GFLA, which became effective October 1, 2002, restricts national banks and their operating subsidiaries’ ability to originate mortgage loans in the state of Georgia, set interest rates, fees and credit terms, establish disclosures and utilize the services of third party mortgage brokers in the origination process. The bank further contends that national banks and their operating subsidiaries have broad authority to originate and establish the terms and conditions of mortgage loans, subject only to the paramount regulations and orders established by OCC. Congress provided national banks with a broad grant of powers under 12 U.S.C. 24(Seventh) and a specific broad grant of power for real estate lending pursuant to 12 U.S.C. 371. The bank argues that there is no room for state involvement – that the statute and the OCC’s implementing regulations “occupy the field.”

The OCC believes that the legislative history of section 371 lends support to the position that the plain language of section 371 evidences a Congressional intent to permit only the OCC to impose conditions on national bank real estate lending. It further states that the history of national bank real estate lending activities under section 371 is one of extensive Congressional involvement gradually giving way to a streamlined approach in which Congress has delegated broad authority to the Comptroller.

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The OCC has implemented section 371 in regulations set forth at 12 CFR Part 34. The rule provides that a national bank may engage in real estate lending subject only to the terms, conditions, and limitations prescribed by the Comptroller of Currency by regulation or order.¹ The regulation expressly provides that five types of state law limitations are not applicable to real estate loans made by national banks and their operating subsidiaries.² The regulation also provides that the OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other aspects of real estate lending by national banks.³

In order to issue a determination or order, the OCC will analyze whether a particular provision of the GFLA falls within the list of types of laws already expressly preempted under 12 CFR 34.4(a). If a provision of the GFLA does not fall within that section, the OCC will apply “recognized principles of Federal preemption” to determine whether the particular provision applies. In this regard, the OCC will examine whether state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

The Federal Register notice can be found at www.schwartzandballen.com/WhatsNew.htm.

If you have any questions concerning this notice, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.

¹ 12 CFR 34.3.

² 12 CFR 34.4(a) specifically preempts state law limitations concerning: the amount of a loan in relation to the appraised value of the real estate; the schedule for the repayment of principal and interest; the term to maturity of the loan; the aggregate amount of funds that may be loaned upon the security of real estate; and the covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

³ 12 CFR 34.4(b).