Office of Thrift Supervision
Department of the Treasury

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May 10, 1995

MEMORANDUM FOR KAREN BRUTON
SOUTHEAST REGIONAL COUNSEL

THROUGH: Carolyn J. Buck CJB
Chief Counsel

FROM: Jeff Miner JM
Deputy Chief Counsel

Evelyne Bonhomme EB
Counsel (Banking and Finance)

SUBJECT: Georgia Residential Mortgage Act

I. Introduction and Summary of Conclusions

This responds to your inquiry regarding whether federal savings associations must comply with the Georgia Residential Mortgage Act ("Mortgage Act").[1]

In brief, we conclude that federal savings associations are obligated to comply with the provisions of the Mortgage Act requiring all lenders to collect from borrowers and remit to the State a $6.50 "per loan fee." However, as the courts and the Office of Thrift Supervision ("OTS") have opined on numerous prior occasions, federal savings associations are not bound by state laws that attempt to regulate their mortgage lending practices. Accordingly, federal savings associations need not comply with those portions of the Mortgage Act imposing requirements regarding licensing, registration, advertising, disclosure, escrow accounts, financial reports, maintenance of books and records, and fees for registration and filing. These areas of the operations of federal savings associations are subject to federal regulation.

II. Background

The Mortgage Act purports to apply to all persons who transact business directly or indirectly as mortgage brokers or mortgage lenders in Georgia. A "mortgage broker" is defined as any person who directly or indirectly solicits, processes, places, or

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1 Ga. Code Ann. §§ 7-1-1000 et seq. (Supp. 1994).

negotiates mortgage loans for others.[2] A "mortgage lender" is any person who directly or indirectly makes, originates, or purchases mortgage loans or who services mortgage loans.[3] The Mortgage Act's provisions extend to any mortgage lender or mortgage broker that originates or facilitates origination of mortgage loans secured by property located in Georgia, even when the lender or broker is located outside Georgia.[4]

The Mortgage Act contains licensing requirements for all mortgage brokers and lenders unless exempted. Savings associations, banks, building and loan associations, and credit unions chartered under federal and state law that have offices in Georgia are exempt from the licensing requirements under the Act.[5] However, federally chartered institutions with no business location in the State must register with (but not obtain a license from) the Georgia Department of Banking and Finance ("DBF") if they engage in residential mortgage lending activities in Georgia.[6] Such institutions must register on forms provided by the DBF and pay an annual registration fee of between $400 and $800.[7]

Institutions required to register under the Mortgage Act are also required submit certain financial and other reports to the State, to make certain disclosures when originating loans, to comply with certain advertising restrictions and escrow regulations, and to maintain segregated books and records to document compliance with the Mortgage Act.[8]

The Mortgage Act also provides that <u>all</u> mortgage lenders and brokers, including those that are exempt from the licensing and registration requirements of the Act, must collect from borrowers a "per loan fee" of $6.50 per mortgage loan closed in Georgia.[9] These fees must be remitted to the DBF by lenders and brokers on a semi-annual basis. When remitting these fees, lenders and brokers

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2 Ga. Code Ann. § 7-1-1000(5).

3 Ga. Code Ann. § 7-1-1000(6).

4 Ga. Code Ann. § 7-1-1000(7).

5 Ga. Code Ann. § 7-1-1001(a)(1).

6 Ga. Code Ann. § 7-1-1001(b).

7 Ga. Code Ann. § 7-1-1011 and Ga. Comp. R. & Regs. § 80-5-1-.02(c) (1994).

8 Ga. Code Ann. §§ 7-1-1009 through 7-1-1016.

9 Ga. Code § 7-1-1011, as amended March 29, 1994 (not yet reflected in Ga. Code Ann.).

must submit a form to the DBF that contains the name of the institution, its license and registration number (if applicable), and the number of loans closed during the reporting period.[10]

Lenders and brokers that fail to collect the required fees become directly liable for the fees.[11] Violations of the Mortgage Act may also result in criminal penalties of up to $1,000 per day and imprisonment of responsible employees for up to one year.[12]

III. Discussion

On numerous prior occasions, the OTS and its predecessor, the Federal Home Loan Bank Board ("FHLBB"), have opined that state laws attempting to impose licensing and registration requirements on federal savings associations[13] or to otherwise regulate the mortgage lending practices of federal savings associations[14] are preempted by federal law. The courts have repeatedly reached the same conclusion.[15] Accordingly, those portions of the Mortgage Act that impose requirements regarding registration, licensing, advertising, disclosure, escrow accounts, reports, maintenance of books and records, and fees for registration and filing are inapplicable to federal savings associations.

The provisions of the Mortgage Act requiring lenders to collect a "per loan fee" from borrowers require separate

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10 Id.

11 Id.

12 Ga. Code Ann. § 7-1-1019. Oddly, the civil administrative enforcement provisions of the statute (e.g., cease and desist orders and civil fines) apply only to persons required to be "licensed" under the Mortgage Act and, thus, appear to have no potential application to federal savings associations. Ga. Code Ann. § 7-1-1018.

13 OTS Op. by Williams, Nov. 20, 1992; OTS Op. Chief Counsel, Nov. 30, 1990; OTS Op. by Katz, Jan. 9, 1990; and FHLBB Op. General Counsel, Oct. 29, 1976.

14 FHLBB Op. by Quillian, April 28, 1987; FHLBB Op. by Raiden, Nov. 12, 1985; and FHLBB Op. by Raiden, Aug. 13, 1985.

15 E.g. Federal Home Loan Bank Board v. Empie, 778 F.2d 1447 (10th Cir. 1985); First Federal Savings & Loan Association v. Greenwald, 591 F.2d 417 (1st Cir. 1979); Wisconsin League of Financial Institutions v. Galecki, 707 F. Supp. 401 (W.D. Wis. 1989); and People v. Coast Federal Savings & Loan Association, 98 F. Supp. 311 (S.D. Cal. 1951).

consideration. These provisions raise the question of whether, and under what circumstances, states may require federal savings associations to collect and remit loan-related taxes from borrowers. This question has not been previously addressed by OTS.

Pursuant to § 5(a) of the Home Owners' Loan Act, the OTS is authorized to promulgate regulations preempting state laws that threaten the safety and soundness of savings associations or interfere with their ability to make loans, receive deposits, and provide other goods and services in a manner consistent with the best practices of thrift institutions in the United States.[16] Pursuant to this authority, the OTS has promulgated comprehensive regulations occupying the entire field of lending regulation.[17] However, this does not mean that every state law having any conceivable connection to the lending operations of federal savings associations is preempted. For example, state laws regulating the foreclosure rights of mortgagors apply to federal savings associations.

Thus, whenever a state law affecting the lending operations of federal savings associations is evaluated from a preemption perspective, the OTS lending regulations and their regulatory history must be reviewed and a judgment made regarding whether the state law is of a type that lending regulations were intended to preempt.

We have found no evidence that the OTS lending regulations were intended to preempt state laws requiring lenders to collect loan-related taxes from borrowers. The key is <u>not</u> that the regulatory history of the lending regulations fails to make specific mention of state tax collection laws. The drafters of the regulations were not required to anticipate and specifically describe each type of state law falling within the scope of regulatory preemption. Rather, our conclusion is based on a judgment that state tax collection laws are different in kind from the types of state laws intended to be preempted by the lending regulations. The provisions of the Mortgage Act that attempt to impose requirements regarding escrow accounts, disclosure, advertising, books and records, registration, and lender fees are classic examples of the types of state laws that fall within the scope of OTS lending regulation preemption. Each of these state laws relates to lending practices and to the operations of savings associations, <u>i.e.</u>, whether and how loans are made. State laws

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16 12 U.S.C.A. § 1464(a) (West Supp. 1994); <u>Fidelity Federal Savings and Loan Association v. de la Cuesta</u>, 458 U.S. 141 (1982); and <u>Glendale Federal Savings and Loan Association v. Fox</u>, 459 F. Supp. 903, 909 (C.D. Cal. 1978).

17 <u>See</u> authorities cited above.

requiring borrowers to pay, and lenders to collect, loan-related taxes are different in kind.

Accordingly, we conclude that our regulations have not preempted the "per loan fee" requirements of the Mortgage Act. Federal savings associations remain subject to these requirements.[18] This does not mean that the OTS lacks authority to preempt state laws requiring lenders to collect loan-related fees. If the OTS were to conclude that the collection burdens imposed on federal savings associations by one or more states were inimical to safety and soundness or interfered with efficient mortgage loan originations, the OTS would have authority to promulgate a preemptive regulation. To date, however, the OTS has not done so.

Our conclusion that federal savings associations are subject to the "per loan fee" collection requirements should not be confused with questions of enforcement jurisdiction. Jurisdiction to take enforcement action for violations of the Georgia law appears to lie exclusively with the OTS.[19] Georgia should refer violations of the Mortgage Act to the OTS for resolution. Please contact us if you become aware of any attempts by the state to take direct administrative enforcement action against a federal savings association under the Mortgage Act.

The conclusions expressed herein are based on the information contained in your submissions to us and summarized herein. Our conclusions depend on the accuracy and completeness of that information. Any material change in facts from those recited herein could result in different conclusions.

Please let us know if you have any further questions.

cc: John Price
All Regional Counsel
Barbara Haggerty, Central Region
Alan Faircloth, Southeast Region

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[18] We note that federal savings associations originating FHA and VA loans may only collect fees authorized under 24 C.F.R. § 203.27. Although the Georgia "per loan fee" will presumably be deemed a permissible "reasonable and customary charge" within the meaning of this regulation, § 203.27(a)(3)(vi), federal savings associations should take care to disclose the "per loan fee" in the statements required by § 203.27(d), so as to confirm that the fee is permissible under the regulation.

[19] Conference of Federal Savings and Loan Associations v. Stein, 604 F.2d 1256 (9th Cir. 1979), aff'd mem., 445 U.S. 921 (1980).