

of this Determination and Order, therefore, we are initiating a rulemaking that addresses that issue.

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## I. Background

### A. Relevant Provisions of State and Federal Law and Regulations

#### 1. The Georgia Fair Lending Act

The GFLA became effective October 1, 2002. As originally enacted, the GFLA restricted the ability of creditors or servicers to charge certain fees and engage in certain practices for three categories that it defined: "home loans,"

"covered home loans," and "high-cost home loans." Whether a loan was covered by one of these categories depended on the annual percentage rate and the amount of points and fees charged.<sup>3</sup> All "home loans" were subject to certain restrictions on the terms of credit and loan-related fees, including prohibitions on the financing of credit insurance, debt cancellation or suspension coverage, and limitations on late fees and payoff statement fees.

In addition to the restrictions on "home loans," "covered home loans" were subject to restrictions on the number of times a loan could be refinanced and the circumstances in which a refinancing could occur. For example, the GFLA prohibited a creditor from refinancing an existing home loan that was less than five years old with a "covered home loan" that did not provide a reasonable "tangible net benefit" to the borrower, considering all the circumstances.

"High-cost home loans" were subject to the restrictions on "home loans" and "covered home loans," as well as numerous disclosure requirements and restrictions on the terms of credit and loan-related fees. Creditors were required to disclose to borrowers that the loan is high-cost, and borrowers were required to be provided with certain loan counseling before the creditor could make the loan. In addition, the GFLA prohibited certain pre-payment penalties; balloon payments; negative amortization; increases in interest rates after default; advance payments from loan proceeds; fees to modify, renew, extend, amend, or defer a payment; and accelerating payments at the creditor's or servicer's sole discretion.

The original GFLA provided a private right of action for borrowers against lenders and mortgage brokers for injunctive and declaratory relief as well as for actual, statutory, and punitive damages, and permitted recovery of a plaintiff's attorney's fees. In addition, the Georgia Attorney General, district attorneys, the Commissioner of Banking and Finance and, with respect to the insurance provisions, the Commissioner of Insurance were given the jurisdiction to enforce the GFLA through their general regulatory powers and civil processes permitted under state law.

The original GFLA also provided that any purchaser or assignee of a high-cost home loan would be subject to all affirmative claims and defenses that the borrower could assert against the original lender. This extension of lender liability to assignees and purchasers had

the potential to seriously impede the secondary market for Georgia mortgage loans and, following the enactment of the original GFLA, Moody's Investors Service concluded that including GFLA-covered loans in securitizations was too risky, causing lenders to scale back loans in the state and leading issuers to remove Georgia loans from securitizations. Standard and Poor's also announced that it would no longer rate mortgage-backed securities that included Georgia mortgage loans.

On March 7, 2003, the Georgia legislature amended the GFLA. The amendments eliminated the "covered home loan" category, but all of the original GFLA restrictions on "high-cost home loans" remain in effect under the current version of the law. The amendments did not change the civil liability provisions applicable to loan originators and mortgage brokers. The amendments did, however, limit purchaser or assignee liability by providing a due diligence defense in the event of a borrower claim and by capping the amount of the purchaser's or assignee's potential liability. However, Moody's and Standard and Poor's still apply significant limits on their willingness to rate mortgage-backed securities that include Georgia high-cost home loans.

As amended, the GFLA provides that if the GFLA has been determined to be preempted by Federal law for Federally-chartered institutions, the comparable state-chartered institutions (e.g. state banks, thrifts, trust companies, or their subsidiaries) will likewise not be subject to the GFLA.<sup>4</sup> Under this parity law, most of the provisions in the GFLA are already inapplicable to state-chartered savings and loan associations because the OTS has determined that most of the GFLA is inapplicable to Federally-chartered thrifts.<sup>5</sup>

<sup>4</sup> The statute provides that "[t]he provisions of this chapter shall not apply to any bank, trust company, savings and loan, savings bank, credit union, or subsidiary thereof, respectively, that is chartered under the laws of this state or any other state only to the extent federal law precludes or preempts or has been determined to preclude or preempt the application of the provisions of this chapter to any federally chartered bank, trust company, savings and loan, savings bank, credit union, or subsidiary thereof, respectively, and such federal preclusion or preemption shall apply only to the same type of state chartered entity as the federally chartered entity affected; provided, however, the provisions of this chapter . . . shall be applicable to an independent mortgage broker for any loan originated or brokered by the broker that is initially funded by any state or federally chartered bank, trust company, savings and loan, savings bank, or credit union." GFLA § 7-6A-12.

<sup>5</sup> See OTS Op. Chief Counsel, P-2003-1 (Jan. 21, 2003), available at <http://www.ots.treas.gov/docs/56301.pdf>.

<sup>3</sup> See GFLA § 7-6A-2.