Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

May 13, 2004

Interpretive Letter #1002
August 2004

David G. Sorrell
Commissioner
Georgia Department of Banking and Finance
2990 Brandywine Road, Suite 200
Atlanta, GA 30341-5565

Dear Commissioner Sorrell:

This letter replies to your recent request for clarification of a letter I wrote you on April 2, 2004. My April 2 letter addressed several issues related to the applicability of the OCC's Preemption Determination and Order (Order) concerning the Georgia Fair Lending Act (GFLA) [1] and our new preemption regulation.[2] Concerning the applicability of the Order and the preemption rule to mortgage brokers, I explained that "[i]f 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."

In your letter dated April 19, 2004, you stated that you wanted to be sure that that the OCC is not "negating the liability of the non bank broker under [GFLA], regardless of who that broker transfers the loan to," and you requested our confirmation that a non-bank mortgage broker is liable for any violations of the GFLA the broker makes "in his/her own right."

The Order and the relevant portions of our preemption rule apply to the real estate lending activities *only* of national banks and national bank operating subsidiaries (collectively referred to here as national banks). Thus, as described in my April 2 letter, the Order and preemption rule govern in any mortgage lending transaction where the national bank is making the loan, whether or not a mortgage broker is involved in the transaction. We understand your reference to a "non-bank mortgage broker" acting "in his/her own right" to describe a different situation, that is, a situation where a non-bank mortgage broker – or other non-national bank lender – establishes the terms of credit or provides the funding for the mortgage loan. In those circumstances, the national bank is not making the mortgage loan, and we agree that the mortgage broker is not

[1] 68 Fed. Reg. 46264 (August 5, 2003).

[2] 69 Fed. Reg. 1904 (January 13, 2004).

covered either by the terms of our Order or by the preemption rule.

Similarly, where a non-national bank lender makes a loan that is later sold to a national bank, the original lender – including a mortgage broker who is funding loans from a non-national bank source – would be subject to the GFLA regardless of the fact that a national bank subsequently purchases the loan.

We note that this situation is distinguishable from "table funding" arrangements, however. "Table funding" refers to a practice whereby a mortgage loan is funded at settlement by an advance of loan funds and a contemporaneous assignment of the loan is made to the person advancing the funds. We consider a national bank that provides funding and takes assignment of a loan pursuant to a "table funding" arrangement to be the lender.[3] Under the Order and our preemption rule, the GFLA would not apply to a national bank that uses this type of arrangement to make loans.

I trust this is responsive to your inquiry.

Sincerely,

signed

John D. Hawke, Jr.
Comptroller of the Currency

[3] *See, e.g.,* 12 C.F.R. § 22.2(l) (provision of OCC flood insurance regulation providing that a national bank is the maker of a table-funded loan). The regulations implementing the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq*., define a lender in a table funding arrangement as the person "to whom the obligation is initially assigned at or after settlement" who is not necessarily the person in whose name the loan is closed. 12 C.F.R. § 3500.2(b).