Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

Dan Friedman
Counsel to the General Assembly

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

February 20, 2009

The Honorable Saqib Ali
224 House Office Building
Annapolis MD 21401

Dear Delegate Ali:

You asked for advice about HB 1292, which prohibits certain provisions in consumer contracts. Specifically, your question is whether the proposed legislation would be preempted by federal law. In my view, the bill is not preempted by federal law.

HB 1292 seeks to prohibit persons from using or enforcing certain contract provisions "without the consumer's prior written consent, based on: (1) The merchant from which the consumer obtains consumer credit, consumer goods, or consumer services; or (2) The mortgage lender that holds a mortgage on the consumer's home." Because the practice of behavioral scoring is used by some national banks as a source of data points to be used in managing their risk in issuing credit, it is important to determine if and to what extent the State's ability to regulate these provisions is preempted by federal law.

The National Bank Act (NBA) grants nationally chartered banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking," including "loaning money on personal security." 12 U.S.C. § 24 (Seventh). Further, OCC regulations provide that "[a] national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law." 12 CFR § 7.4008(a). The OCC regulations also state,

> A national bank may make non-real estate loans without regard to state law limitations concerning…[t]he terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan,

104 Legislative Services Building · 90 State Circle · Annapolis, Maryland 21401
410-946-5600 · 301-970-5600 · Fax 410-946-5601 · TDD 410-946-5401 · 301-970-5401

> including the circumstances under which a loan may called due and payable upon the passage of time or a specified event external to the loan.

12 CFR § 7.4008(d)(2)(iv). Moreover, the Supreme Court clarified that NBA preemption of state consumer protection law includes independent subsidiaries of national banks and that the "powers" granted to national banks under the NBA are "not normally limited by, but rather ordinarily preempting, contrary state law." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007).

HB 1292 is not in conflict with federal law because the Federal Trade Commission (FTC) has made clear that companies using behavioral scoring to determine the amount of available credit to a consumer must disclose that information to the consumer. Moreover, the FTC announced it considers the failure to disclose, or failure to disclose adequately, the use of behavioral scoring to be an unfair and deceptive trade practice in violation of the FTC Act, 15 U.S.C. § 45(a). *See FTC v. Compucredit and Jefferson Capital Systems*, Civil No. 1:08-CV-1976-BBM-RGV (N.D. Ga.)(Filed June 10, 2008). In that case, the companies entered into a consent order with the FTC, agreeing, among other things, to provide restitution to consumers. (Stipulated Order, dated Dec. 19, 2008). Therefore, in my view, so long as the provision in HB 1292 that the term may not be enforced "without the consumer's prior written consent" is applied consistent with the FTC's disclosure standards, HB 1292 would not be preempted by federal law.

Sincerely,

Sandra Benson Brantley
Assistant Attorney General