May 23, 2003

Edwin B. Wills, Senior Vice President
District of Columbia Credit Union League
333 John Carlyle Street, Suite 520
Alexandria, Virginia 22314

Re: Applicability of the District of Columbia (D.C.) Home Loan Protection Act of 2002 to Federal Credit Unions.

Dear Mr. Wills:

Chairman Dollar referred your January 27, 2003, letter to this office for a legal opinion on whether D.C.'s Home Loan Protection Act of 2002 (HLPA) applies to federal credit unions (FCUs). Our opinion is that this law is preempted because it purports to limit or affect the rates, terms of repayment and other conditions of loans and lines of credit that FCUs may offer to their members. Our opinion is that the District of Columbia may not require FCUs to comply with it.

HLPA is an anti-predatory lending law requiring certain disclosures and prohibiting certain terms and conditions in residentially secured loans. D.C. CODE ANN. §26.1151.01 et seq. (Lexis 2002). FCUs are already subject to the Home Ownership and Equity Protection Act (HOEPA), an amendment to Truth in Lending Act (TILA), which governs certain closed-end home mortgages but excludes "residential loans." 12 C.F.R. §226.32(a). A "residential loan" is a loan in which a mortgage is created "in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling." 12 C.F.R. §226.2(a)(24).

The D.C. law, HLPA, applies to both open and closed-end home loans, but like HOEPA, excludes "residential loans." D.C. CODE ANN. §26-1151.01(7)(A), (14)(B)(Lexis 2002). The definition of a covered loan under HLPA, because it includes open-end loans and is triggered at slightly lower thresholds, encompasses a broader scope of mortgage loans than those covered by HOEPA. In addition, HLPA places more conditions on lending than HOEPA by establishing certain prohibited practices and prescribing disclosure and filing requirements for loans within its scope.

NCUA's lending regulation expressly preempts any state laws that would limit or affect lending rates, repayment terms or lending conditions by FCUs.[1] 12 C.F.R.

[1] NCUA's lending regulation provides:

> Section 701.21 is promulgated pursuant to the NCUA Board's exclusive authority as set forth in Section 107(5) of the Federal Credit Union Act (12 U.S.C. §1757(5) to regulate the rates, terms of repayment and other conditions of Federal credit union loans and lines of credit (including credit cards) to members.

§701.21(b). Various provisions in HLPA are specifically identified in NCUA's lending regulation as examples of the types of provisions our lending regulation preempts. For example, HLPA has provisions regarding the repayment ability of borrowers, D.C. CODE ANN. §26-1152.02, which could determine or affect the eligibility of borrowers. This is an example in our regulation of a lending condition. 12 C.F.R. §701.21(b)(1)(iii). Another example is HLPA's provision specifically addressing payments in connection with home improvement contracts. D.C. CODE ANN. 26-1152.07. This falls within the category in our lending regulation of a state law directed at the purpose of a loan. 12 C.F.R. §701.21(b)(1)(iii)(A).

HLPA's various restrictions and requirements are directed at "covered loans."[2] AS noted above, a covered loan is defined in terms of its rates, repayment terms or lending conditions. D.C. CODE ANN. §26-1151.01(7)(A), (14)(B). As such, an FCU must either change its rates or other terms and conditions of its lending or be subject to the requirements of HLPA. NCUA's long-standing position is that state laws affecting rates, repayment terms or lending conditions are preempted.[3] 49 Fed. Reg. 30683, 30684 (August 1, 1984).

> This exercise of the Board's authority preempts any state law purporting to limit or affect:
> (i)(A) rates of interest and amounts of finance charges . . .
> (B) late charges; and
> (C) closing costs, application, origination, or other fees;
> (ii) terms of repayment, including . . .
> (A) the maturity of loans and lines of credit;
> (B) the amount, uniformity, and frequency of payments, including the accrual of interest if payments are insufficient to pay all interest due;
> (C) balloon payments; and
> (D) prepayment limits;
> (iii) conditions related to:
> (A) the amount of the loan or line of credit;
> (B) the purpose of the loan or line of credit;
> (C) the type or amount of security . . .
> (D) eligible borrowers; and
> (E) the imposition and enforcement of liens on the shares of borrowers and accommodation parties.

[2] HLPA includes restrictions and requirements covering: disclosure requirements; prohibitions regarding repayment ability, financing, refinancing, call provisions and home improvement contracts; and limitations regarding balloon payment, negative amortization, advance payments, and due-on-demand clauses. D.C. CODE ANN. §§26-1152.02, 26-1152.03, 26-1152.04, 26-1152.05, 26-1152.08, 26-1152.09, 26-1152.11, 25-1152.12, 26-1152.13, 26-1152.14, 26-1152.15, and 26-1152.16.

[3] We note that FCUs are not subject to the filing requirements in §26.1152.21 because that requirement is limited to lenders subject to the jurisdiction of the Mayor. D.C. CODE ANN. §26-1152.21. They are also not subject to §26-1152.07 that requires reporting certain information to credit bureaus. This provision is preempted by the Fair Credit Reporting Act, which expressly

The NCUA defers to state law in the lending area only on limited issues specifically stated in its regulation. 12 C.F.R. §701.21(b)(2). In aspects of credit transactions primarily regulated by other federal law, NCUA will apply the preemption standards of the relevant federal law in determining whether state law will apply, except to those areas NCUA has specifically preempted in its own regulation, 12 C.F.R. §701.21(b)(1). As noted above, the provisions of HLPA fall within §701.21(b)(1) and are preempted.

TILA has a so-called "savings clause" that provides that a creditor must comply with any state law governing HOEPA loans to the extent the state law is not inconsistent with HOEPA. 12 C.F.R. §226.28(a)(1). In the past, NCUA interpreted this provision as requiring FCU compliance with a state law governing loans that are otherwise subject to HOEPA. GC 00-0827 (March 2, 2001).

Recent judicial interpretation has, however, limited the effect of the savings clause of TILA and other federal statutes on the preemption analysis under federal banking laws. Bank of America v. City & County of San Francisco, 309 F.3d 551, 565 (9th Cir. 2002); American Bankers Association v. State of California, 238 F.Supp. 1000 (E.D. Cal. 2002). The court in American Bankers Association stated that "there is no indication the savings clause reaches beyond TILA to control the preemption analysis applicable under any other federal laws, including the federal banking laws." Id. at 1009. The court concluded that the TILA savings clause does not save the TILA credit card disclosure provisions from preemption by the FCUA. Id. Based on this, NCUA's lending regulation preempts any state law, including one affecting aspects of lending primarily regulated by TILA, that regulates rates, terms of repayment and other conditions of loans and lines of credit. 12 C.F.R. §701.21(b)(1).

NCUA's lending regulation specifically provides that the NCUA Board "retains exclusive examination and administrative enforcement jurisdiction over Federal

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preempts state laws relating to the responsibilities of persons who furnish information to consumer reporting agencies. 15 U.S.C. §1681t(b)(1)(F).

There are several provisions that place conditions on a loan that are not required by NCUA's lending regulation and are, therefore, preempted. 12 C.F.R. §701.21(b)(1). Some of these requirements, such as the prohibitions on unfair steering, bad faith charges, oppressive arbitration clauses, advance waivers, and the duty to ascertain that the broker is licensed are all sound business practices. D.C. CODE ANN. §§26-1152.06, 1152.10, 1152.17, 1152.18 and 1152.20. NCUA would take the appropriate administrative action if an FCU were engaging in these practices. Like the above requirements, the requirement to provide home ownership counseling places additional conditions on an FCU that is not required by NCUA's regulations and is, therefore, preempted. D.C. CODE ANN. §26-1152.19.

credit unions." 12 C.F.R. §701.21(b)(4). Only the NCUA and not, as stated in HLPA, the Mayor, has the authority to take enforcement actions, including the imposition of administrative penalties against FCUs. D.C. CODE ANN. §§26-1153.01-.03. Section 26-1153.02, by its terms, only applies to lenders over which the Mayor has jurisdiction and, therefore, does not apply to FCUs. With respect to the other two enforcement provisions, as explained in the attached OGC legal opinion 02-0566, dated October 4, 2002, and as provided in NCUA's regulations, if violations of state law occur and the matter cannot be resolved informally, the imposition of fines and penalties falls within NCUA's enforcement jurisdiction. 12 C.F.R. §701.21(b)(4).

We note that HLPA specifically exempts federally-chartered banks, thrifts, trust companies and their subsidiaries from its requirements. D.C. CODE ANN. §26-1151.01(7)(B). As explained in the attached letter from NCUA Chairman Dennis Dollar to Councilwoman Sharon Ambrose dated June 17, 2002, there is no legal or regulatory basis to treat credit unions differently than other federally chartered financial institutions.

Finally, although we conclude that our regulation preempts HLPA, we want to highlight that the Federal Credit Union Act, our regulations and TILA contain significant consumer protections for all member loans, not only those that are real estate secured. FCUs are subject to an 18 percent interest rate ceiling. 12 U.S.C. §1757(5(A)(vi); 12 C.F.R. §701.21(c)(7)(ii)(B). Additionally, like HLPA, the FCUA strictly prohibits FCUs from charging prepayment penalties. 12 U.S.C. §1757(5)(a)(viii).

We hope you find this information helpful.

Sincerely,

Sheila A. Albin
Associate General Counsel

GC/MFR/SAA:bhs
03-0165
Enclosures

October 4, 2002

Kimberly Bohannan, Assistant Vice President
Regulatory and Compliance Services
North Carolina Credit Union League
4160 Piedmont Parkway
Greensboro, NC 27410

Re: North Carolina Mortgage Lending Act.

Dear Ms. Bohannan:

You have asked if federal credit unions (FCUs) are subject to the provision of North Carolina's Mortgage Lending Act (MLA) that requires financial institutions to file for an exemption from the licensing requirements of the statute. Under the statute, FCUs are subject to a penalty if they fail to file an exemption. Our view is that federal law preempts this state law, and FCUs are not required to comply. We comment below on some other provisions in the MLA, including some we conclude are also preempted.

The MLA establishes a licensing and regulatory framework for entities and natural persons engaged in mortgage lending. It prohibits mortgage lending unless an entity or person is licensed or exempt. FCUs along with other regulated financial institutions are exempt from the licensing requirements and $500 annual licensing fee of the MLA but are required to file an exemption form. Those that fail to file face a penalty of up to $250 per year and are prohibited from acting as a mortgage lender or broker. N.C. GEN. STAT. §§53-243.01(8)c, 53-243.15 (2001)(Effective July 1, 2002). The purpose of requiring FCUs to file to obtain an exemption, which is already stated in the statute, is not apparent from the statute or discussions with the state regulator. In addition to requiring exempt entities to file an exemption form, the MLA prohibits them from engaging in a list of prohibited activities. N.C. GEN. STAT. §§53-243.01(8)c, 53-243.11. Most of these activities amount to unfair or deceptive practices that are otherwise illegal or would violate contractual obligations. Two provisions, however, addressing impermissible interest rates and prepayment penalties conflict with federal law and are preempted.

Federal preemption stems from the Supremacy Clause of the United States Constitution, which provides that the laws of the United States shall be the supreme law of the land, notwithstanding any state laws to the contrary.[4] Preemption may be express, as when specified in a statute, or it may be implied by the nature of federal legislation and the subject matter, even absent a

[4] U.S. Const. art. V, cl. 2.

declaration of preemptive intent.[5] Where Congress' preemptive intent is not expressly stated, it may be inferred on either of two bases: field preemption and conflict preemption. Federal preemption may preempt a state law or statute on the basis of field preemption where the scheme of the federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for States to supplement it.'"[6] Under conflict preemption, a state statute may conflict with federal law to the point "where compliance with both federal and state regulations is a physical impossibility."[7] Conflict preemption also occurs when state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[8]

FCUs are federal instrumentalities created without relation to state law. 12 U.S.C. §§1751-1795k. When Congress enacted the FCU Act, it contemplated a pervasive system of chartering, regulation, supervision, and examination. Nevertheless, neither the FCU Act nor NCUA's regulations expressly preempt state registration requirements, and the FCU Act and NCUA regulations do not occupy the entire field of credit union regulation. Therefore, federal law does not preempt the North Carolina requirement to file for an exemption on the basis of field preemption.

The FCU Act provides for an FCU's organization and NCUA's approval of the organization certificate, which vests the FCU with its powers and liabilities. 12 U.S.C. §§1753, 1754. The FCU Act does not limit an FCU with respect to its authority to make loans in any state. 12 U.S.C §1757(5). The FCU Act would, therefore, preempt any state law that required an FCU to obtain a license to engage in mortgage lending. Id. The North Carolina law, by requiring FCUs to file for an exemption from a licensing requirement that federal law would preempt, frustrates the objectives of Congress and conflicts with federal law because it interferes with an FCU's ability to make mortgage loans in North Carolina and is in direct conflict with NCUA's exclusive authority in this area.

If an FCU fails to file for an exemption from the MLA, in addition to a penalty, it prohibits an FCU from "transact[ing] business in this State as a mortgage broker." N.C. GEN. STAT. §53-243.01(15)(b). Like a licensing requirement, the requirement that an FCU must file an exemption to make mortgage loans in North Carolina is preempted. It conflicts with federal law because it interferes

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[5] Fidelity Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982); Gade v. National Solid Wastes Management Assoc., 505 U.S. 88, 98 (1992).
[6] Fidelity Federal, 458 U.S. at 153 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
[7] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).
[8] Gade, 505 U.S. at 98 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

with an FCU's ability to make mortgage loans in North Carolina and is in direct conflict with NCUA's exclusive authority in this area.

We have reviewed recent interpretations by the Office of Comptroller of the Currency (OCC) that conclude state requirements that national banks obtain state approvals or licenses to exercise a power authorized under federal law conflict with federal law and are preempted.[9] The OCC noted that "[i]f a national bank is authorized under federal law to exercise a power, it does not require the additional permission of a state to exercise that power."[10] This argument is even more compelling with respect to the MLA, because there is no discernable purpose behind the requirement to file the exemption certification.

The statute provides that the state regulator may assess a civil penalty not to exceed $250 for each year a financial institution fails to file for an exemption. N.C. GEN. STAT. §53-243.15(b). As discussed above, failure to file also prohibits an FCU from acting as a mortgage broker. Id. Based on field preemption, if an FCU fails to file its exemption certification, the North Carolina Credit Union Division does not have the authority to enforce the imposition of a civil penalty or prohibit an FCU from making mortgage loans.

The FCU Act contains a pervasive scheme for NCUA examination and supervision of FCUs, including enforcement powers. The FCU Act is so comprehensive in this area as to preclude state action. The FCU Act states that "FCUs shall be under the supervision of the Board" and "[e]ach FCU shall be subject to examination by, and for this purpose shall make its books and records accessible to, any person designated by the Board." 12 U.S.C §1756. The FCU Act grants the Board comprehensive examination power over both FCUs and federally-insured state-chartered credit unions (FISCUs). 12 U.S.C. §1754. The Board clearly possesses broad examination and supervision power over FCUs. Under the FCU Act, the Board's authority extends to FISCUs, despite the fact that FISCUs are regulated by states. By contrast, states have no corresponding power to examine FCUs. In recognition of NCUA's exclusive jurisdiction in this area, NCUA's regulations provide that the Board "retains exclusive examination and enforcement jurisdiction over Federal credit unions" and violations of "applicable state laws related to the lending activities of a Federal credit unions should be referred to the appropriate NCUA regional office." 12 C.F.R. §701.21(b)(4).

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[9] See OCC Interpretive Letters No. 872, dated October 28, 1999, and No. 866, dated October 8, 1999 (preempting state laws that prohibit national banks from engaging in fiduciary activities).
[10] Id. at p. 10.

The imposition of any penalty or prohibition under the MLA would fall within NCUA's exclusive enforcement jurisdiction. Because NCUA is unable to ascertain a rational basis for the requirement to file an exemption and has also determined that the requirement to file is preempted by federal law, NCUA would not be willing to enforce a penalty or take any enforcement action against an FCU that fails to file an exemption.

Finally, we note that the form that credit unions are to use to file for an exemption provides that a credit union agrees to comply with the provisions of the MLA. Thus, the filing of the form is more than registration. The MLA prohibits certain activities for exempted entities that are expressly preempted by the FCU Act. Included in the list of prohibitions is the charging or collecting any fee or rate that is "contrary to the provisions of Chapter 24 of the General Statutes." N.C. GEN. STAT. §53-243.11(5).

Chapter 24 is preempted to the same extent it was before the enactment of §53-243. N.C. Gen. Stat. Chapter 24. Section 24-1.1E generally tracks the Home Ownership and Equity Protection Act (HOEPA), an amendment to the Truth in Lending Act, 15 U.S.C. §1601 *et seq*., that covers certain closed-end home loans, and it is not preempted. For those loans not covered by HOEPA, the North Carolina law is preempted, to the extent it limits or affects the rates of interest, finance charges, late charges, closing costs, terms of repayment, and loan conditions, such as the loan amount, type of loan, permissible security, eligibility of borrowers and enforcement of liens. 12 C.F.R. §701.21(b)(1). Although §24-1.1A(b) of the North Carolina statute limits prepayment penalties, they are prohibited under the FCU Act and NCUA's lending regulation. 12 U.S.C. §1757(5)(A)(viii);12 C.F.R. §701.21(c)(6). Therefore, this provision conflicts with federal law and is preempted.

As explained above, because NCUA has determined that the requirement to file for an exemption is preempted by federal law and the authority to enforce this provision is within NCUA's exclusive jurisdiction, FCUs are not required to comply with the filing requirements of the MLA.

Sincerely,

Sheila A. Albin
Associate General Counsel

GC/MFR:bhs
SSIC 3000
02-0566

June 17, 2002

The Honorable Sharon Ambrose, Chairperson
Committee on Consumer and Regulatory Affairs
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Room 102
Washington, DC 20004

Dear Ms. Ambrose:

As Chairman of the National Credit Union Administration (NCUA), I am compelled to challenge your statement in the attached letter to Lafayette Federal Credit Union that "credit unions are not as regulated as banks and their subsidiaries." With all due respect, I must strongly disagree with your assertion. Federally chartered and insured credit unions are regulated to the same degree and in the same manner as banks, thrifts, trust companies and their subsidiaries, and should be treated the same as those institutions under the pending Home Loan Protection Act of 2002.

NCUA is an independent federal agency within the executive branch of the United States government that supervises and insures the accounts in over 6,500 federal credit unions and insures the accounts in over 4,000 state-chartered credit unions. The NCUA has a full-time, three-member board, appointed by the President of the United States and confirmed by the Senate.

NCUA is a member of the Federal Financial Institutions Examination Council (Council), an interagency body that prescribes uniform principles, standards, and report forms for the examination of all federally-insured financial institutions. The four other members of the Council are the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency, and the Office of Thrift Supervision. We work to promote uniformity in the supervision of all federal financial institutions including banks, thrifts, trust companies and credit unions. This uniformity of supervision and examination evidences that federal credit unions are subject to the same rigorous regulatory scrutiny as other federal financial institutions.

For several years, the NCUA has been an active participant in a federal interagency task force, along with its sister agencies, addressing ways to combat predatory lending practices. Throughout this process, it has become abundantly clear that, not only are credit unions not part of the problem, but have been part of the solution because, as member-owned cooperatives, they offer a low cost credit alternative to consumers. Furthermore, federal credit unions are limited by

the Federal Credit Union Act in the interest they may charge and are prohibited from charging prepayment penalties.

The U.S. Department of the Treasury recently completed the attached report entitled Comparing Credit Unions with Other Depository Institutions, dated January 2001 (Report). The Report contains a detailed comparison of the three types of depository institutions: credit unions, banks, and thrifts. The Report summary states:

> Despite their relatively small size and their restricted fields of membership, federally insured credit unions operate under banking statutes and rules virtually identical to those applicable to banks and thrifts. Significant differences have existed in the past, but have been gradually disappearing. Recently, most of the remaining major regulatory differences between credit unions and other depository institutions were removed.

Report at 1. As discussed in the Report, credit union regulation affecting the protection and confidence of consumers and the safety and soundness of the financial operations is substantially identical to that of thrifts and banks. For example, NCUA's enforcement authority is virtually identical to that of the banking and thrift regulators. Report at 58-61. NCUA enforces consumer protection laws in the same manner as banking and thrift regulators, Report at 61-66, including the Truth in Lending Act, the Home Ownership and Equity Protection Act and the implementing regulations found in Regulation Z as noted in the attached letter from NCUA General Counsel Robert Fenner to you. NCUA also enforces other consumer protection laws including the Equal Credit Opportunity Act and the implementing regulations found in Regulation B, Home Mortgage Disclosure Act and the implementing regulations found in Regulation C, and the Truth in Savings Act and the implementing regulations found in Part 707 of NCUA regulations.

As the FDIC deposit insurance fund insures bank and thrift accounts, the NCUA-administered National Credit Union Share Insurance Fund (NCUSIF) insures credit union accounts up to $100,000. As with the FDIC deposit insurance fund, the NCUSIF is well-capitalized and is backed by the full faith and credit of the United States government. Credit union deposits fund the NCUSIF and not one tax dollar was lost during the financial institutions crisis of the late 1980s and early 1990s. Like banks and thrifts, federally chartered and insured credit unions are subject to regular safety and soundness examinations.

Credit unions are nonprofit, cooperative institutions whose mission includes service to those who are most in need of affordable financial services. Credit unions are uniquely positioned, and encouraged by NCUA’s Access Across America program, to provide affordable financial services to the nation’s and the

District of Columbia's underserved communities. Access Across America is NCUA's re-statement of our commitment to seeing that progress continues and manifests itself in the lives of more Americans who need access to financial empowerment through credit union membership eligibility and the resulting access to low-cost financial services.

The District of Columbia's almost seventy federal credit unions have assets in excess of three billion dollars and provide an important source of housing finance credit to residents of the District of Columbia. To treat credit unions less advantageously than other federal financial institutions in the pending legislation is, quite simply, without a legal or regulatory basis, overlooks the contribution and record of the District's federal credit unions, and is a disservice to their members.

I would be happy to meet with you and make NCUA staff available to discuss this important issue further or provide any additional information you may need regarding the regulation of credit unions.

Sincerely,

Dennis Dollar
Chairman

GC/FSK:bhs
SSIC 3000
02-0486
Enclosures

cc: William A. Brooks, President and CEO
Lafayette Federal Credit Union