

February 10, 2004

Ms. Tracey Rock
Director of Governmental Affairs
New Mexico Credit Union League
4201 Wolcott Avenue NE
Albuquerque, NM 87109

Re: Preemption of the New Mexico Home Loan Protection Act.

Dear Ms. Rock:

You have asked if the New Mexico Home Loan Protection Act (the Act), which addresses predatory lending practices by creditors making consumer mortgage loans, 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.

The Act, which became effective on January 1, 2004, is an anti-predatory lending law requiring certain disclosures and prohibiting or restricting certain terms and conditions in mortgage loans. 2003 N.M. Adv. Legis. Serv. Chap. 436. Similar to laws adopted in recent years in states like Georgia and New Jersey, the Act imposes some restrictions on all creditors making mortgage loans, defined as "home loans." It also creates a special category of "high cost" loans, defined to mean loans that exceed established interest rate or closing cost thresholds, and imposes significant additional restrictions and obligations on creditors that elect to make them.

Section 4 of the Act applies to "home loans" and prohibits any creditor from financing single premium credit life, unemployment or disability insurance, or single payment debt cancellation or suspension agreements. Premiums and fees calculated on the unpaid principal loan balance and paid on a monthly basis are permissible. Section 4 also prohibits any creditor from engaging in loan "flipping," defined to mean the refinance of an existing loan when the new loan does not provide the borrower with a "reasonable, tangible net benefit."

Section 5 of the Act contains several provisions that apply to creditors who make "high cost" loans. These provisions include limits on the amount of points that may be financed by the lender and limitations on balloon payments, as well as prohibitions on the use of negative amortization and a higher default interest rate. Section 5 requires a creditor making a high cost home loan to ensure that the borrower has first received counseling from an independent counselor and prohibits a creditor from making a high cost loan without first evaluating the borrower's ability to repay the debt.

Section 5 also restricts a creditor from making loan proceeds payable directly to a home improvement contractor and limits the use of mandatory arbitration provisions in loan documents. In addition, Section 5 imposes limits on the use of late fees, renewal fees and payment deferral fees, and prohibits both unilateral acceleration provisions and prepayment penalties. Finally, Section 5 mandates that a disclosure, in a prescribed format, be given to the borrower not later than three business days before the loan closing.

The balance of the Act provides various procedural and substantive rights to “high cost” borrowers, including the right to cure default (Section 6), to pursue claims and defenses against certain originators and assignees (Sections 7 & 11), and to recover actual and punitive damages (Section 9). Section 12 makes a violation of the Act actionable under the state’s Unfair Practices Act. Section 14 calls for the Act to be “liberally construed.”

The Act’s various restrictions and requirements are directed at “home loans” and “high-cost” loans.” As noted above, these types of loans are defined in terms of their rates, repayment terms or lending conditions. As such, an FCU must either change its rates or other terms and conditions of its lending or be subject to the requirements of the Act. NCUA’s long-standing position is that state laws affecting rates, repayment terms or lending conditions are preempted. 49 Fed. Reg. 30683, 30684 (August 1, 1984).

NCUA’s lending regulation preempts any state law that regulates the rates, terms of repayment and other conditions of FCU loans and lines of credit to members.¹ 12 C.F.R. §701.21(b).

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. 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.

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This office recently discussed our preemption analysis under NCUA's lending regulation in a legal opinion reviewing a Georgia statute comparable to the Act. OGC Legal Opinion 03-0412, dated November 10, 2003 (available on NCUA's website, www.NCUA.gov). The Georgia statute is quite similar to the Act and imposes comparable limitations and prohibitions on creditors making consumer mortgage loans. The reasoning and analysis in our Georgia opinion apply equally in this case. This opinion also contains a thorough discussion of NCUA's examination and enforcement authority.

The Office of Thrift Supervision (OTS), the federal regulatory agency with supervisory responsibility for federally chartered thrifts and savings banks, has determined that the Act is inapplicable to the institutions it regulates. Office of Thrift Supervision, P-2003-6, Preemption of New Mexico Home Loan Protection Act (September 2, 2003). We note that the principles of federalism described by OTS in its opinion apply equally to NCUA. In addition, we note that the Financial Institutions Division of New Mexico's Regulation and Licensing Department (Financial Institutions Division) issued a rule in December, 2003, acknowledging OTS preemption for federally chartered institutions and extending the same privilege to banks chartered by the state. N.M. Reg. Volume XIV, No. 24 (December 30, 2003).

Credit unions are nonprofit cooperatives, owned by their members and democratically controlled, that may only lend and pay dividends to their members and, as such, are disinclined by their nature and structure to engage in the kinds of practices regarded as predatory or abusive. We would like to highlight, however, that although we conclude that our regulation preempts the Act, the Federal Credit Union Act (FCUA) and our regulations contain significant consumer protections for all member loans. For example, 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). The FCUA prohibits FCUs from charging prepayment penalties. 12 U.S.C. §1757(5)(a)(viii). NCUA's regulation governing credit practices prohibits an FCU from assessing a late fee on an otherwise timely monthly payment simply because a late fee assessed on an earlier payment remains unpaid. 12 C.F.R. §706.4.

Sincerely,

Sheila A. Albin
Associate General Counsel

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