April 11, 2007

Vicki D. Bridgeman, Director of Unclaimed Property
Department of the Treasury
James Monroe Building
101 N. 14th Street, 4th Floor
Richmond, Virginia 23219

Re: Preemption of Virginia Abandoned Property Provision, §55-210.3.01.C.

Dear Ms. Bridgeman:

Our understanding is that the Division of Unclaimed Property (Division) has objected to certain federal credit union (FCU) dividend and fee practices for inactive accounts. Specifically, the Division seeks to prohibit the practice where an FCU retroactively waives account fees or reinstates dividends previously unpaid because of an inactive status. §55-210.3:01.C of the Code of Virginia (Code). As to FCUs, federal law preempts this Code provision.

Under §55-210.3:01.C, a banking or financial organization cannot assess a service charge or fail to accrue interest on any account the organization has declared dormant or inactive unless done in the same manner for active accounts, or unless certain conditions are met. An organization may impose a service charge or cease interest payments where (1) a contract between the holder of the property (holder) and the owner of the property (owner) permits these actions; (2) the holder notifies the owner of these actions no more than three months before imposing them if the property exceeds $100; and, (3) the holder does not reverse or cancel the charges or retroactively pay interest, other than to correct a documented internal error. All three conditions must be met for a service charge or cancelled interest payment to occur.

NCUA's longstanding position is that a state law, which attempts to govern an FCU's imposition of account fees and charges, including inactive or dormant accounts, directly conflicts with §107(6) of the Federal Credit Union Act (FCUA) and §701.35 of NCUA regulations and is preempted by federal law. *See, e.g.*, OGC Opinion Letter Nos. 04-0259, 93-0719, 91-0926, and 90-0827. Interestingly, OGC Opinion Letter No. 90-0827 involved an earlier version of a Virginia unclaimed property provision, similar to your current provision. The earlier version was preempted by federal law.

Our analysis of the current provision also supports federal preemption as to FCUs for several reasons discussed below.

The provision at issue does not apply to FCUs.

As a preliminary matter, a review of the Code indicates the state is deliberate in its use of the term "credit union" and we do not read the term to include FCUs. For example under Title 6.1, Banking and Finance, §6.1-225.2 defines a credit union as a cooperative, nonprofit corporation "organized under the laws of this Commonwealth;" §6.1-225.50 addresses a circumstance where specific state provisions apply to federal credit unions provided the provisions are not inconsistent with federal law; and §6.1-330.49 explains that "credit union" does not mean a federal credit union. These provisions demonstrate that, where the state specifically means to include FCUs, it has stated so.

Consistent with this practice, within the provision at issue, §55-210.3:01.B specifically includes FCUs in establishing the period and circumstance under which share accounts with a free life savings insurance benefit are presumed abandoned. Yet, §55-210.3:01.C is addressed to a banking or financial organization. As defined under §55-210.2, neither definition specifically includes an FCU; therefore, as a matter of statutory construction, the provision does not apply to FCUs.

Federal law is not silent in this area and preempts state law.

The FCUA grants FCUs exclusive authority to determine terms, rates and conditions for member share accounts except as limited by the NCUA Board. 12 U.S.C. §1757(6). NCUA regulations state:

> A federal credit union may, consistent with this section, parts 707 and 740 of this subchapter, other federal law, and its contractual obligations, determine the types of fees or charges and other matters affecting the opening, maintaining and closing of a share, share draft or share certificate account. **State laws regulating such activities are not applicable to federal credit unions.**

12 C.F.R. §701.35(c) (emphasis added).

> The amount of a fee and the conditions under which a fee is imposed must be included in the account agreement or disclosures, including any reservation of rights to change terms.

12 C.F.R. §§707.4, 707.5. Section 701.35 indicates an FCU has authority to determine fees and other conditions related to the opening, maintaining, and closing of accounts and expressly preempts any state law affecting these activities. Part 707, NCUA's regulation implementing the Truth-in-Savings Act,

requires appropriate notice and disclosure of fees and other specified terms to accountholders.

NCUA has not relinquished its authority to states.

A state does not have authority to regulate an FCU's account operation until an account achieves unclaimed property status, which is five years in Virginia. Once unclaimed property status is reached, the state does not acquire any authority to reach back and affect an FCU's action's before an account's abandonment. NCUA's longstanding policy concerning a state's authority with regard to FCU compliance with state unclaimed property law is established in NCUA's Interpretive Ruling and Policy Statement (IRPS) 82-4. The preamble to IRPS 82-4, in fact, specifically addresses questions about retroactivity and service fees.

IRPS 82-4 indicates certain state authorities may conduct inspections of FCU records for compliance with state unclaimed property laws if there is a reasonable cause to believe the FCU is not in compliance. In permitting inspection of FCUs in this circumstance, NCUA has not relinquished its exclusive enforcement jurisdiction over FCUs. If violations of state escheat law occur and the matter cannot be resolved informally between the parties, the state should report such violations to the NCUA Region Director (for Virginia, the Region II Director) for appropriate action. The imposition of fines and penalties under state law falls exclusively within NCUA's enforcement jurisdiction for FCUs.

The property at issue is *not* unclaimed property.

The state's provision attempts to regulate an FCU's operation before an account is escheatable under state law. The member's recovery of fees, and any associated payment of dividends, occurs when the member reactivates an account preventing its escheatment to the state. The member's action rebuts a presumption of abandonment and resets the clock for determining unclaimed property. Consequently, the property never achieves a status as unclaimed property.

Federal preemption in this instance is beneficial to members as consumers.

Though not required for our preemption analysis, we observe the practice of reversing inactive or dormant account fees, and paying the dividends associated with these amounts, returns funds to members and avoids escheatment of the funds to the state. Conversely, the state's provision penalizes members who revive an account relationship instead of allowing the funds to escheat to the state. Therefore, we view the state's provision as being less beneficial and providing less protection to consumers than federal law.

For your convenience, enclosed is a copy of IRPS 82-4 and the referenced OGC Opinion Letters. If you have any questions regarding this legal opinion, please contact Staff Attorney Linda Dent or me at (703) 518-6540. Any specific questions concerning enforcement should be directed to Jane Walters, Region II Director, at (703) 519-4600.

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

GC/LKD:bhs
06-1214
cc: Jane Walters, Region II Director

Enclosures