

July 28, 2004

John C. Engel, Director of Legal Affairs
Wisconsin Credit Union League
N25 W23131 Paul Road
Pewaukee, Wisconsin 53072-5779

Re: 2003 Wisconsin Act 257.

Dear Mr. Engel:

You have asked if the 2003 Wisconsin Act 257 (the Act), which addresses predatory lending practices in consumer mortgage loans, applies to federal credit unions (FCUs).¹ WIS. STAT. Ch. 428, Sub. II. 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. You have also asked if the provisions that are preempted for FCUs are also preempted for credit union service organizations (CUSOs) owned by FCUs. No, our preemption analysis is not extended to the lending activities of CUSOs.

The Act is an anti-predatory lending law requiring certain disclosures and prohibiting certain terms and conditions in "covered loans." Generally, a covered loan is a closed-end, consumer credit mortgage loan secured by a consumer's principal dwelling that either meets the definition of a mortgage under the Home Ownership and Equity Protection Act (HOEPA) and its regulations, 15 U.S.C. §1602(aa) and 12 U.S.C. §226.32, or the terms of the loan include total points and fees that, at loan closing, exceed six percent of the total loan amount. WIS. STAT. §428.202(2).

Under the Act, covered loans are subject to certain provisions regulating the terms of credit, disclosures, and other loan conditions. These provisions include: 1) prohibiting balloon payments, certain call provisions, negative amortization, and increases in the interest rates after default; 2) limiting the number of advance payments from loan proceeds; 3) restricting payments of loan proceeds to home improvement contractors; 4) prohibiting single premium financing of credit insurance; 5) prohibiting refinancing of existing covered loans and subsidized low rate loans under certain conditions; 6) prohibiting the encouragement of default in order to refinance the debt; 7) requiring creditors to provide special disclosures to

¹ We note that the Responsible High Cost Mortgage Lending provisions of the Act do not apply to federally insured state-chartered credit unions to the extent that federal law preempts or prohibits application of the law to FCUs. WIS. STAT. §428.211.

borrowers; and 8) prohibiting certain prepayment penalties. WIS. STAT. §§428.203, .207.

The Act's various restrictions and requirements are directed at "covered loans." As noted above, covered loans are defined in terms of their rates, fees or other 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 federal credit union loans and lines of credit to members.² 12 C.F.R. §701.21(b). This office recently discussed our preemption analysis under NCUA's lending regulation when we reviewed comparable statutes in Georgia and New Jersey in OGC Legal Opinions 03-0412, dated November 10, 2003, and 03-1106, dated January 28, 2004, available on our website. Like these laws, the Act imposes similar limitations and prohibitions on covered loans. These restrictions, as described above, are specifically preempted under federal law because they regulate the rates, terms of repayment and other conditions of the loan. 12 C.F.R. §701.21(b)(1).

² 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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We note that the Act grants the State of Wisconsin sole regulatory authority, except as provided by federal law. WIS. STAT. §§428.209. It also requires the Wisconsin Department of Financial Institutions to adopt rules, conduct examinations of creditors and enforce the provisions of the Act. WIS. STAT. §§428.210. NCUA has the sole authority to take enforcement actions against FCUs. 12 C.F.R. §701.21(b)(4). The opinion referred to above regarding our analysis of the Georgia law contains a thorough discussion of NCUA's examination authority. OGC Legal Opinion 03-0412.

Likewise, you can find a discussion of the consumer protections afforded under federal law for member loans by reviewing OGC Legal Opinion 03-0165, dated May 23, 2003, and OGC Legal Opinion 02-0649, dated July 29, 2002, available on our website.

Finally, we note that FCUs are already subject to the HOEPA, an amendment to Truth in Lending Act, which governs some of the same closed-end home mortgages as covered loans. 12 C.F.R. §226.32(a). HOEPA bars certain credit terms and requires disclosures when either: 1) the annual percentage rate at loan closing exceeds by more than eight percent points for first-lien loans, or ten percent points for subordinate-lien loans, the yield on certain Treasury securities; or 2) the total points and fees payable by the consumer exceed the greater of \$499 or eight percent of the total loan amount. Id.

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

OGC/CJL:bhs
04-0606