

June 1, 1992

Sara E. Carroll,
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Affairs Division
New York State Credit Union League, Inc.
Box 15021
Albany, New York 12212-5021

Re: Preemption of State Laws Governing Grace Periods (Your March 16, 1992, Letter)

Dear Ms. Carroll:

You asked whether federal law preempts several New York statutes requiring specific grace periods prior to imposition of late fees. Insofar as the laws in question apply to loans originated by federal credit unions ("FCUs"), they are preempted.

Two of the laws about which you inquired, Sections 108(4)(c) (closed end personal loans) and 108(5)(e) (open end personal loans) of the New York Banking Law, do not appear to apply to FCUs. Both Section 108(4) and Section 108(5) impose restrictions on loans made by a "bank or trust company." "Bank" and "trust company" are defined in Sections 2(1) and 2(2), respectively, as corporations organized under or subject to the provisions of Article 3 of the Banking Law. FCUs clearly are not organized under Article 3 of the Banking Law, and we see nothing in Article 3 that would subject FCUs to its provisions. Therefore, it is our opinion that Sections 108(4)(c) and 108(5)(e) of the Banking Law do not apply to FCUs.

You also asked whether Section 302(7) of the New York Personal Property Law (motor vehicle installment contracts), Section 413(5) of the New York Personal Property Law (retail installment credit agreements) and Section 254-b of the New York Real Property Law are preempted. Each of those sections is discussed separately below.

Section 302(7) of the Personal Property Law states, in part, that the holder of a retail installment contract for the purchase of a motor vehicle may not impose a late charge until the loan has been delinquent for at least ten days. The term "holder" is defined in Section 301(10) as the retail seller of the motor vehicle financed, or a financing agency or assignee that purchases the installment contract in question. Section 301(9) defines "financing agency" as a person in the business, in whole or in part, of purchasing retail installment contracts. While under Section 701.23 of NCUA's Rules and Regulations (the "Regulations"), 12 C.F.R. 701.23, an FCU could purchase a retail installment contract of its member, thereby becoming a holder and within the scope of Section 302(7), you indicated in our telephone conversation that you are concerned only with loans that an FCU originates, not with those that it purchases. We do not believe an FCU can originate a motor vehicle retail installment contract. An FCU originating a loan would not meet the definition of a "holder" under Section 301(1)) since it is not a motor vehicle retailer. Therefore Section 302(7) would not apply. If an FCU did purchase a retail installment contract that was made subject to Section 302(7), the late charge limitation would apply unless the retail installment contract was refinanced by the FCU.

Section 413(5) of the New York Personal Property Law states, in part, that a retail installment credit agreement may provide for a late charge on any installment that has become due and remained unpaid for more than ten days. A retail installment credit agreement is defined in Section 401(8) of the Personal

Property Law as an installment contract between a buyer and a seller, or between a financing agency and a buyer. The term "financing agency" includes a person engaged in whole or in part in the business of purchasing retail installment contracts, or entering into credit agreements with buyers as provided in Section 413(11). Since a credit agreement under section 413(11) must comply in all respects with Section 413, portions of which would be preempted for FCUs (see, e.g., Section 413(3), limiting service charges) we do not believe that an FCU would enter into a credit agreement under Section 413(11). An FCU could purchase the credit agreement of its member, thereby qualifying as a financing agency. In that case, the agreement would meet the definition of a retail credit agreement, and would be subject to Section 413(5). Again, however, you have stated that you are concerned only with loans originated by the FCU. Because we do not believe that an FCU would originate a loan under Section 413(11), it is our opinion that Section 413(5) of the New York Personal Property Law would not apply to such loans.

Assuming for the moment that an FCU did originate such a loan, Section 413(5) would be preempted by Section 107(10) of the Federal Credit Union Act ("FCU Act"), 12 U.S.C. 1757(10) and Section 701.21(b)(1)(i)(B) of NCUA's Rules and Regulations ("Regulations"), 12 C.F.R. 701.21(b)(1)(i)(B). Section 107(10) of the FCU Act gives FCUs exclusive authority to set and impose late charges, subject only to their bylaws (and to applicable provisions of the FCU Act and the Regulations). Any attempt by a state to limit an FCU in its exercise of that power conflicts with Section 107(10). Moreover, Section 701.21(b)(1) of the Regulations preempts any state law purporting to limit or affect the "rates, terms of repayment and other conditions" of FCU loans, including late charges (see, Section 701.21(b)(1)(i)(B)). While the 1984 letter that you cited addressed preemption only with regard to the amount of a late charge, neither the FCU Act nor the Regulations is similarly limited. Both speak only of "late charges," and are therefore broad enough to encompass, and preempt, state laws attempting to regulate any aspect of such charges, including the time for their imposition. (We note that the standard FCU bylaw, Article XII, Section 8, is similarly broad, allowing an FCU to impose "a late charge as determined by the board of directors.") Section 413(5) of the New York Personal Property law is preempted by Section 107(10) of the FCU Act and Section 701.21(b)(1)(i)(B) of the Regulations, insofar as it purports to regulate loans originated by an FCU. This analysis would not apply to loans made pursuant to Section 413 by other lenders and purchased by an FCU.

Section 254-b of the New York Real Property Law provides, among other things, that a mortgagee or lender may not impose a late charge on any installment paid within fifteen days of its due date. We have briefly reviewed the Real Property Law, and are unable to find any definition of the terms "mortgagee" or "lender." Therefore, we question whether Section 254-b is intended to apply to FCUs. However, assuming that the statute does purport to apply, the portion in question is preempted by Section 107(10) of the FCU Act and Section 701.21(b)(1)(i)(B) of the Regulations. Our reasoning on this issue is the same as for preemption of Section 413(5) of the Personal Property Act.

I hope that we have been of assistance.

Sincerely,

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Associate General Counsel

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