

March 12, 2004

David Kantor, Esq.
Leonard, Street and Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

Re: Preemption of Minnesota State Law Restricting Advertising.

Dear Mr. Kantor:

You have asked our opinion on whether federal law preempts the application to federal credit unions (FCUs) of a Minnesota state law limiting entities from providing certain financial services and restricting the use of the terms “bank,” “banker,” or “banking” in advertising. Our view is that the law conflicts with the Federal Credit Union Act and therefore, as to FCUs, it is preempted.

The Minnesota law at issue provides:

No . . . corporation, except as specifically authorized by the laws of this state, who does not hold an effective certificate of authority, issued by the commissioner of commerce, to engage in the business of banking and is not subject to and complying with all the provisions of law relating to banks shall engage in such business, or make use of the words “bank,” “banker,” or “banking,” or any derivative or compound of any such words . . . in any . . . advertising, or any other written or printed matter, in such manner as might indicate to any person that such . . . corporation is authorized to engage in the business of banking.

MINN. STAT. ANN. §47.03(1) (West 2002). This provision has exceptions for insurance companies authorized to engage in the insurance business under Minnesota law and holding companies and their affiliates as defined under the federal banking laws. *Id.* It provides civil penalties of up to \$100 a day. MINN. STAT. ANN. §47.03(2) (West 2002).

If the intent is to apply this provision to FCUs, as indicated in the letter to your FCU client from the Minnesota Department of Commerce (Department), it is preempted by operation of the FCU Act and our regulations. At least three bases support our view.

First, Minnesota law defines the business of “banking” in generic terms to include the acceptance of deposits of money or currency and the making of loans. MINN. STAT. ANN. §47.02 (West 2002). These activities are fundamental to the operation of a credit union, and a literal application of this language to an FCU would prohibit it from functioning. The statute contains a reference to the federal Banking Act of 1933 and provides that its prohibitions do not apply to any “holding company affiliate or affiliate” as defined therein. MINN. STAT. ANN. §47.03(1) (West 2002). The 1933 federal statute, frequently referred to as the Glass-Steagall act, created the Federal Deposit Insurance Corporation and also established the separation (since amended) between commercial and investment banking. Pub. L. No. 73-66, 48 Stat. 162 (codified as amended throughout Title 12 of the U.S. Code). We interpret the reference to holding companies and affiliates to mean that banks and savings associations chartered under federal law are not covered by this state statute. The statute ignores the fact that FCUs, wherever located, are likewise creatures of federal law, chartered and regulated exclusively by NCUA, under the provisions of the FCU Act and NCUA regulations. 12 U.S.C. §§1751 – 1795k; 12 C.F.R. Parts 700 – 795.

In a previous opinion addressing a Connecticut statute limiting the ability of an out-of-state FCU to establish and maintain an ATM in that state, we stated that the statute “frustrates the objective of Congress

and is a nullity with respect to FCUs.” OGC Legal Opinion 93-1027, March 15, 1994. The rationale of that letter applies equally to the Minnesota statute in question. If an FCU is authorized under federal law to engage in an activity, even if state law defines it as the “business of banking,” the FCU does not require the additional approval of the state authority to engage in that activity. State law may not prohibit an otherwise permissible activity authorized by federal law.

Second, the Minnesota statute would prohibit an FCU from using the term “banking” or derivative terms in its advertisements. MINN. STAT. ANN. §47.03 (West 2002). Despite the generic nature of the statutory definition of “banking,” the apparent intent of this prohibition (with some exceptions not relevant here) is to restrict usage of descriptive terms such as “banking” to entities that hold a bank charter issued by the state. While there are important differences between FCUs and commercial banks, we have previously recognized that terms such as “banking” have become generic, as reflected in the excerpt below of a letter to a state bankers association:

[t]he term “banking services” has become a generic term essentially synonymous with “financial services.” Moreover, one sees the word “bank” used as a verb in many contexts and persons without access to financial services are sometimes described as “unbanked.”

NCUA letter from Chairman Dennis Dollar to Daniel J. Forte, dated March 19, 2002 (attached).

Third, the NCUA has addressed the issue of permissible advertising by credit unions and has, through its regulation and oversight in this area, occupied the field. NCUA’s advertising regulation requires that advertisements cannot be “inaccurate or deceptive.” 12 C.F.R. §704.2. NCUA’s advertising regulation preempts any state statute that attempts to limit an FCU’s authority to advertise.

As you have noted, the 10th Circuit ruled that an Oklahoma statute with advertising restrictions similar to Minnesota’s statute was preempted by the Federal Home Loan Bank Board’s (FHLBB) advertising regulation. *Federal Home Loan Bank Board v. Empie*, 778 F.2d 1447 (10th Cir. 1985). Like the FHLBB at the time, the NCUA “Board is authorized under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation” of FCUs. *Id.* at 1453; 12 U.S.C. §§1754; 1756; and 1766. The court went on to state that “the connection between accurate advertising and Congress’ goal of sound and stable operations of savings institutions is obvious.” *Federal Home Loan Bank Board* at 1453. NCUA’s interpretation of its advertising regulation, as noted in Chairman Dollar’s March 19th letter, directly conflicts with Minnesota’s advertising restrictions. The Minnesota statute is, therefore, preempted.

Finally, we note that the intent of the Minnesota statute appears, in part, to be to minimize public confusion as to which entities engaged in business in the state are chartered financial institutions that are subject to some type of governmental oversight and regulation. An FCU clearly falls within this category, even though it is not regulated by a state agency. 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 “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.

We would, accordingly, oppose any attempt by a state regulatory authority to enforce the Minnesota statute against an FCU. Our view is that failure by an FCU to comply with the statute does not constitute a misleading or deceptive advertisement warranting enforcement action by NCUA. We appreciate your

bringing this matter to our attention and hope that you find our guidance helpful.

Sincerely,

Sheila A. Albin
Associate General Counsel

OGC/MFR/RPK:bhs
03-0146

Enclosure

cc: Minnesota Department of Commerce