

December 9, 2009

Rose H. Conner, Assistant Administrator
North Carolina Department of Commerce, Credit Union Division
205 W. Millbrook Road, Suite 105
Raleigh, North Carolina 27609

Re: Notice of Exemption Requirement in North Carolina Mortgage Lending Act.

Dear Ms. Conner:

You have asked for our view on whether federal law preempts recent amendments to a North Carolina law that, by its terms, would require federal credit unions (FCUs) engaged in the mortgage business to file a notice of exemption from state licensing requirements. Our view is federal law preempts this requirement and FCUs are not required to file a notice with the state commissioner in order to “claim and confirm” their exempt status.

Recent amendments to North Carolina’s Mortgage Lending Act (MLA) revised provisions on licensing requirements, filing a notice of exemption, and other provisions in the MLA to, among other reasons stated in the preamble, bring state law into compliance with recent federal law. N.C. Gen. Stat. §53-244.010, 53-244.050 (g), (h) (2009), 2009 N.C. Sess. Laws 374. The referenced federal law is the Secure and Fair Enforcement for Mortgage Licensing Act (the SAFE Act), part of the Housing and Economic Recovery Act of 2008, Pub. L. 110-289, Division A, Title V, sections 1501 – 1517, 122 Stat. 2654, 2810 – 2824 (July 30, 2008), codified at 12 U.S.C. 5101- 5116. The SAFE Act mandates a nationwide licensing and registration system for mortgage loan originators. A 2008 NCUA legal opinion provides background and addresses several questions regarding the SAFE Act. OGC Op. 08-0843 (Oct. 3, 2008) (available on NCUA’s website).

In 2002, North Carolina law established licensing for mortgage loan originators and companies and, this prior state law, required financial institutions to get state licenses or file for an exemption from those requirements. In response to a request from the North Carolina Credit Union League (NCCUL), our office concluded that, “because NCUA has determined that the requirement to file for an exemption is preempted by federal law and the authority to enforce this provision is within NCUA’s exclusive jurisdiction, FCUs are not required to comply with the filing requirements of the MLA.” OGC Op. 02-0566 (Oct. 4, 2002) (available on NCUA’s website). This legal opinion addressed the federal preemption issue primarily through an analysis of the authorities granted to FCUs and the NCUA under the FCU Act.¹

¹ “The FCU Act provides for an FCU’s organization and NCUA’s approval of the organization certificate, which vests the FCU with its powers and liabilities. 12 U.S.C. §§1753, 1754. The FCU Act does not limit an FCU with respect to its authority to make loans in any state. 12 U.S.C §1757(5). The FCU Act would,

In considering the revised NC law, we conclude the preemption analysis set out in OGC Op. 02-0566 continues to provide the basis for federal preemption of the law's requirement for FCUs to file a notice of exemption. As noted above, North Carolina already had MLA licensing requirements when it enacted the North Carolina SAFE Act in 2009 to bring North Carolina's mortgage lending laws into compliance with the SAFE Act.² Like its predecessor, the recent North Carolina law prohibits persons from engaging in the mortgage business or acting as a mortgage loan originator in North Carolina without obtaining and maintaining a license.³ N.C. Gen. Stat. §53-244.040. Also, under the revised MLA, just as under its predecessor, credit unions, including FCUs, can be exempt if they file a notice of exemption. N.C. Gen. Stat. §53-244.050(g), (h).

While the SAFE Act contemplates separate state and federal regimes for mortgage loan originators, it provided for a national registration system and required NCUA, the other federal banking agencies, and the Farm Credit Administration to develop and maintain a system for registering mortgage loan originators employed by institutions regulated by these agencies. The federal agencies have published a proposed rule, 74 Fed. Reg. 27,386 (June 9, 2009), to establish the Nationwide Mortgage Licensing System (NMLS) for individuals engaged in the business of residential mortgage loan origination and a final rule is expected soon. Individuals, if employed at a federally regulated institution, must register on the NMLS. Individuals who are not employed at a federally regulated institution must be licensed under state law and register on the NMLS.⁴

NCUA's regulatory provision on preemption of state law states it does not apply to aspects of credit transactions primarily regulated by other federal law. 12 CFR §701.21 (b)(3). The SAFE Act expressly addresses the registration requirements for mortgage loan originators regulated by federal agencies. FCUs and their employees who originate mortgages will be required to register under this federal registration regime. In addition to the provisions of the FCU Act supporting preemption of the exemption notice

therefore, preempt any state law that required an FCU to obtain a license to engage in mortgage lending. *Id.* The North Carolina law, by requiring FCUs to file for an exemption from a licensing requirement that federal law would preempt, frustrates the objectives of Congress and conflicts with federal law because it interferes with an FCU's ability to make mortgage loans in North Carolina and is in direct conflict with NCUA's exclusive authority in this area." OGC Op. 02-0566.

² The law became effective July 31, 2009, with mortgage loan originator licensure required by July 31, 2010 for exclusive mortgage brokers or by December 31, 2009 for limited loan officers. <http://www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H1523v6.pdf>.

³ The North Carolina SAFE Act also requires mortgage loan originators to, among other things, register with the Nationwide Mortgage Licensing System (NMLS) established under the federal SAFE Act, complete pre-license testing and education, submit to fingerprinting for the purpose of a criminal history background check, and pass a qualified written exam developed by the NMLS.

⁴ The SAFE Act requires states to provide a licensing regime for mortgage loan originators within one year of enactment or within two years for states whose legislatures meet biennially.

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requirement in North Carolina law, the SAFE Act addresses the sole basis identified in the state law for requiring exempt institutions to “claim and confirm” their exemption. The SAFE Act requires a national registry open to consumers and, thus, fully addresses the basis identified in the state law, namely, to facilitate the referral of consumers who contact the state commissioner. N.C. Gen. Stat. §53-244.050 (g). Therefore, we conclude federal law preempts the state provision requiring FCUs to file a notice of exemption from the state licensing requirements under the North Carolina SAFE Act.

Finally, we note that, although not addressed in state law, FCUs that have not filed a notice of exemption may not be able to access a state foreclosure database contemplated under a separate state law.⁵ You informed us a state database has been developed that can generate a certificate indicating certain loans are not subprime loans, and that North Carolina courts have been requesting or requiring lenders foreclosing on properties to present these certificates. As designed, exempt institutions’ access to the database was keyed to the filing of a notice of exemption. In the interest of federal and state comity, our view is administration of the database should be designed so that FCUs will have access without filing a notice of exemption so that they can accommodate requests from state courts.

Thank you for the opportunity to address these issues. If you have any further questions, please contact Staff Attorney Regina Metz or me.

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

cc: Region III

GC/RMM/SAA
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⁵ <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/PDF/H2623v6.pdf>.