June 11, 1992

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Re: Iowa Credit Card Registration Law (Your January 21, 1992, Letter)

Dear Mr. Liska:

You asked whether federal credit unions ("FCUs") must comply with Iowa Code Chapter 5360, which requires credit card issuers whose principal place of business is not in Iowa [1] , to register with and provide certain information to the appropriate Iowa state supervisor. We have previously considered the law in question and have determined that FCUs must comply with its registration and filing requirements. However, it is our opinion that certain other provisions of Chapter 536C and related provisions of Iowa Code Chapter 537 are preempted in their application to FCUs. A discussion of the various sections of the Iowa law, and our findings as to each, follows. Portions of the statute not specifically discussed are not preempted.

ANALYSIS

1. Preemption Standards

Federal preemption of state laws stems from the supremacy clause, U.S Const., art. V, cl. 2, which provides that the laws of the United States shall be the supreme law of the land, notwithstanding any state laws to the contrary. Preemption may be express, as when specified in a statute, Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-153 (1982), or it may be implied by the nature of federal legislation and the subject matter, even absent a declaration of preemptive intent. Meyers v. Beverly Hills Federal Savings and Loan Ass'n, 499 F.2d 1145, 1146 (9th Cir. 1974). Where Congress' preemptive intent is not expressly stated, it may be inferred on either of two bases. First, a state statute may conflict with federal law. Fidelity Federal, supra, at 152-153. Second, "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room" for state action in the same area. Id.; Conference of Federal Savings and Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979) aff'd mem, 445 U.S. 921. Where Congress chooses to act, it may take over the entire field or only a portion thereof. National State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981, 985 (3d Cir. 1980).

While federal preemption of state law may be implied, it is not to be assumed, and federal legislation will only preempt a field traditionally within a state's police power if that is the clear intent of Congress. National State Bank, supra, at 985. Where Congress has not asserted exclusive jurisdiction and there is no conflict between federal and state statutes, the two may coexist.

2. Matters not Preempted

Thus, while the Federal Credit Union Act ("FCU Act") preempts much of the field of FCU regulation (see discussion below), there are instances in which FCUs are subject to state laws. In our view, Sections 536C.4 and 536C.5, requiring FCUs to register, file copies of their credit agreements, and pay an annual fee to the Iowa Superintendent of Credit Unions, are valid exercises of Iowa's power in an area of traditional interest to the states, and apply to FCUs.

NCUA's policy on preemption is derived not only from relevant judicial decisions, but from Executive Order No. 12612, Federalism. The order states, in pertinent part:

> §4(a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute. 52 Fed. Reg. 41685 (October 26, 1987).

There is no direct conflict between Sections 536C.4 and 536C.5, and the FCU Act or NCUA's Rules and Regulations ("Regulations"), nor is there firm evidence of congressional intent to preempt state law in this limited area. The Iowa law's registration and filing requirements neither frustrate the purpose of the FCU Act nor impair NCUA's ability to carry out its regulatory duties. Since Sections 536C.4 and 536C.5 do not infringe upon the federal law or impose an undue burden on FCUs' performance of their functions, they are not preempted. National State Bank, supra, at 985-986. Our opinion is consistent with relevant case law, with our previous opinions, and with Executive Order 12612.

3. Express Preemption

Federal legislation or regulations may expressly preempt state laws. Certain matters relating to FCU loans are expressly preempted by Section 701.21 of the Regulations, 12 C.F.R. Section 701.21. Section 701.21(b)(1) provides that federal law preempts any state law purporting to regulate the rates, terms of repayment and other conditions of federal credit union loans and lines of credit, including credit cards. Section 701.21(b)(2) makes clear that state laws affecting other aspects of FCU loans and lines of credit are not preempted. In our view, the Iowa law as a whole does not affect rates, terms of repayment, or other conditions similar to those specified in Section 701.21(b)(1), of FCU loans and lines of credit and therefore, it is not preempted in its entirety by Section 7012.1(b)(1).

However, you note in your letter that Section 536C.6 requires credit card issuers to comply with Chapter 537, the Iowa Consumer Credit Code. You did not analyze

chapter 537 in your letter, and we are not sufficiently familiar with Iowa law to render an opinion on its content or intended applicability. Nonetheless, we have briefly reviewed Chapter 537, and it appears to us that some of its provisions are preempted insofar as they purport to apply to FCUs.

Article 2 of Chapter 537 covers finance charges and other fees. Section 701.21(b)(1) 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 . . . .

To the degree that the Iowa statute attempts to govern the imposition of such charges and fees by FCUs, it is preempted.

Article 3, Part 3 of Chapter 537 imposes limitations on use of security for loans. Those sections of Chapter 537 purporting to limit FCUs in their choice of and requirements for security are preempted by Section 701.21 (b) (1) (iii) (C), which preempts state law governing "the type or amount of security and the relation of the value of the security to the amount of the loan or line of credit."

Section 537.3308 governs use of balloon payments. Section 537.3308 appears, by its terms, not to apply to credit card transactions. However, Section 701.21 (b) (1) (ii) (C) of-NCUA's Regulations preempts any state law restricting use of balloon payments, so that even if Section 537.3308 otherwise applies to credit card transactions, it does not apply to FCUs.

As noted above, our review of Chapter 537 was extremely limited. We caution you that you should look more closely at Chapter 537 to determine whether it contains other sections that would also be preempted by Section 701.21(b)(1) of NCUA's Regulations.

4. Implied Preemption

Preemption will be implied when a state law conflicts with a federal statute. Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-153 (1982). Courts will also find that a state stature is preempted where the federal scheme is so pervasive as to leave no room for the state action in the same erea. Conference of Federal Savings and Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979), aff'd mem, 445 U.S. 921. The FCU Act contains a pervasive scheme for federal examination and supervision of FCUs, including enforcement powers. The FCU Act is so comprehensive in this area as to preclude state action. Section 536C.8, authorizing the Iowa Superintendent of Credit Unions to examine books, records, accounts and files of FCUs for compliance with pertinent Iowa laws, and Sections 536C.9, 10 and 14, granting the Superintendent enforcement authority, both intrude on a field completely filled by the FCU Act and conflict with NCUA's exclusive supervision and. enforcement authority over FCUs. For that reason, it is our opinion

that those sections of the Iowa statute are impliedly preempted. [1]

FCUs are instrumentalities of the federal government, created pursuant to a federal statute, the FCU Act, without relation to state law. Under Section 104 of the FCU Act, 12 U.S.C. 1754, an FCU comes into being upon NCUA Board ("Board") approval of its organizational certificate; NCUA approval is crucial to an FCU's existence, and *nothing* more is required. Upon approval, an FCU exists as a corporation, "vested with all the powers and charged with all the liabilities conferred and imposed by . . . [Title I of the FCU Act] upon corporations organized hereunder." Similarly, the Board has sole authority to suspend or revoke an FCU's charter (see, 12 U.S.C. 1766(b) and 1782(f)) and to liquidate an FCU (see, 12 U.S.C. 1766(b) and 1787). Generally, the Board has rulemaking authority governing FCU creation, express and incidental powers and operations (see, 12 U.S.C. 1766(a)).

It is apparent that Congress, when it enacted the FCU Act, contemplated a pervasive federal system not only of chartering and regulation, but also of supervision and examination of FCUs. Section 106 of the FCU Act, 12 U.S.C. 1756, states that FCUs "shall be under the supervision of the Board. . . . Each FCU shall be subject to examination by, and for this purpose shall make its books and records accessible to, any person designated by the Board." Section 204 of the FCU Act, 12 U.S.C. 1784, grants the Board comprehensive examination powers over both FCUs and federally-insured, state-chartered credit unions ("FISCUs"). The examination power includes the right to subpoena records as necessary. All FCUs and FISCUs agree to pay the cost of NCUA examinations. 12 U.S.C. 1781(b)(2). All FISCUs must provide the Board with any information regarding examination by a state regulator, and furnish any additional information that the Board may require. 12 U.S.C. 1781(b)(3). However, while the Board may accept an examination performed by a state regulator, it need not do so, and may choose to perform its own examination. Similarly, the Board may make an NCUA examination available to such regulator, but is not required to do so. 12 U.S.C. 1784(d).

The Board clearly possesses broad examination and supervision power over FCUs. Under the Act, the Board's examination authority extends to FISCUs, despite the fact that FISCUs are regulated by the states. By contrast, states have no corresponding power to examine FCUs. Whereas the power to examine FISCUs is shared by the states and the Board, the authority to examine FCUs rests exclusively with the Board. While states may enact laws extending to FCUs, they have no authority to examine FCUs for compliance unless specifically designated by the Board under 12 U.S.C. 1756.

The Board has delegated its examination authority to states in only one instance. In Interpretive Ruling and Policy Statement ("IRPS") 82-4, 47 Fed. Reg. 53325 (November 26, 1982), the Board stated that pursuant to its designation authority under 12 U.S.C. 1756, state agencies authorized under state law to conduct inspections pursuant to abandoned property law, "are designated by the NCUA Board to conduct inspections of Federal credit union records for the sole purpose of

determining compliance with state unclaimed property laws." In the preamble to IRPS 82-4, the Board not only made clear that the states' power to examine credit unions arose solely from the Board's designation of its statutory powers and was limited to the scope specified by the Board, but also stated that inherent in its designation authority was the power to withdraw the designation of any state that abused the delegated power. The NCUA, in IRPS 82-4, has interpreted the FCU Act as granting it the sole authority to examine FCUs. NCUA's own interpretation of the regulatory statute which it is responsible for enforcing must be given great weight and deference. Clarke v. Securities Industry Association, 479 U.S. 338, 404 (1987).

Section 536C.8 represents Iowa's attempt to exercise so-called "visitorial powers" over FCUs. Visitation has been defined as

> the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting its business, and enforce an observance of its laws and regulations. Burrill defines the word to mean "inspection; superintendence; direction; regulation. First National Bank of Youngstown v. Hughes, 6 F. 737, 740 (6th Cir. 1881), appeal dismissed 106 U.S. 523 (1883).

In our opinion, the State of Iowa has no right to exercise such powers over FCUs.

The Office of the Comptroller of the Currency ("OCC") has recently opined that Iowa has no right to exercise visitorial powers over out-of-state national banks making credit card loans in Iowa by examining their books and records under Iowa Code Section 536C.8. See, letter from William P. Bowden Jr., Chief Counsel, OCC Administrator of National Banks, to Robert G. Ballen, Esq., dated February 4, 1992 (copy enclosed). Although the OCC's opinion was based in part on a section of the National Bank Act, 12 U.S.C. 484(a), for which there is no counterpart in the FCU Act, the reasoning behind the decision supports a similar finding with regard to FCUs. After noting that while 12 U.S.C. 484(a) was only enacted in 1982, there has never been any doubt that the OCC has exclusive authority to examine national banks, the OCC cites Guthrie v. Harkness, 199 U.S. 148 (1905), which stated that in passing the predecessor of 12 U.S.C. 484, Congress had in mind

> that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the currency and examiners appointed by him. . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except insofar as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power. 199 U.S. 148 at 158.

FCUs, like national banks, are "national corporations" subject to supervision, examination and control by a federal regulator. Despite the lack of a section

comparable to 12 U.S.C. 484(a), the FCU Act's substantive provisions for supervision and examination of FCUs are no less complete and pervasive than those contained in the National Bank Act. Like the National Bank Act, the FCU Act "contain[s] a full code of provisions" regarding investigation and examination, and precludes the exercise of visitorial powers by any state. Iowa Code Section 536C.8 is preempted by the FCU Act.

The FCU Act is similarly comprehensive in terms of enforcement powers. Section 206 of the FCU Act, 12 U.S.C. 1786, authorizes the Board to issue cease and desist orders, obtain injunctions, remove or suspend FCU officials or prohibit them from further participation in the affairs of insured financial institutions, and impose fines and monetary penalties on FCUs and officials. The Board may take such action if it finds that the FCU or individual in question has violated or is about to violate any law. Section 206 does not limit the Board's enforcement power to the FCU Act, and it has long been our position that NCUA is the proper party to enforce state laws against FCUs. Even when designating its examination authority to the states in IRPS 82-4, the Board stated in the preamble, "[i]f violations of state law occur and the matter cannot be resolved informally between the parties, the state should report such violations to NCUA for appropriate action. The imposition of fines and penalties would fall within NCUA's enforcement jurisdiction." This interpretation is consistent with case law. See, eg., National State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981 (3d Cir. 1980) (although New Jersey's substantive anti-redlining law not preempted with regard to national banks, Comptroller of Currency, rather than state, is proper party to enforce the law); Conference of Federal Savings and Loan Associations v Stein, 604 F.2d 1256, 1260 (9th Cir. 1979), aff'd mem., 445 U.S. 921 (Federal Home Loan Bank Board's regulatory control over federal s&ls so pervasive as to preempt field, and consequently, assuming that state-conferred rights enforceable against federal s&ls, enforcement must be by FHLBB). It is our opinion that, to the degree that the Iowa law applies to FCUs, NCUA has exclusive authority to enforce the law. Therefore, Sections 5360.9 (cease. and desist orders), 5360.10 (injunctions) and 5360.14 (enforcement) are preempted.

SUMMARY

FCUs are subject to, and must comply with, Iowa Code Sections 536C.4 and 5360.5, requiring filing of information and payment of a registration fee. Portions of Iowa Code Chapter 537 are preempted as to FCUs, and Iowa Code Section 536C.6 is preempted insofar as it attempts to subject to FCUs to preempted portions of Chapter 537. Section 5360.8, permitting state examination for compliance with Chapter 536C, and Sections 5360.9, 10 and 14, granting the Iowa Superintendent of Credit Unions enforcement powers, are also preempted as to FCUs. The remaining sections of Iowa Code Chapter 536C are not preempted.

I hope that we have been of assistance.

Sincerely,

Hattie M. Ulan
Associate General Counsel

Enclosure

GC/MRS:sg
SSIC 3320
92-0123

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[1] FCUs with principal places of business in Iowa are exempted from the requirements of Chapter 536C by Section 536C.3. This opinion applies to FCUs with principal places of business outside Iowa.

[1] Because we find that Section 536C.8 is preempted, we do not reach the issue of whether that Section conflicts with Article XIX, Section 2 of the Standard FCU Bylaws.

[3] This assumes that the laws in question do not intrude on areas preempted by the FCU Act or NCUA's Rules and Regulations.