NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

GC/HMU:cch
4650
April 2, 1986

Office of General Counsel

Leonard A. Bernstein, Esq.
Blank, Rome, Cominsky & McCauley
Four Penn Center Plaza
Philadelphia, PA 19103

Dear Mr. Bernstein:

This is in response to your letters of January 27, 1986, and February 14, 1986, concerning return item charges.

In your January letter, you asked whether a Federal credit union (FCU) has the authority to impose a return item charge when a borrower's check or share draft in payment of an FCU loan installment is returned because of insufficient funds. In addition you seek our opinion on the issue of the applicability of state law with respect to such FCU charges. You expressed your opinion that FCU's do have such authority and that state law would be preempted.

As more fully explained below, we agree with your analysis and conclusions that FCU's have the authority to impose return item charges with respect to loan payments. We also concur that state laws attempting to govern such charges are preempted by Federal law.

FCU's are empowered to make loans and extend lines of credit pursuant to Section 107(5) of the FCU Act (12 U.S.C. §1757(5)). Section 107(16) of the FCU Act (12 U.S.C. §1757(16)) grants FCU's the authority to exercise such incidental powers necessary or requisite to carry out their express powers. It is our opinion that Sections 107(5) and 107(16) of the FCU Act provide the statutory authority enabling an FCU to impose the return item charge discussed in this letter. Of course, the imposition of such a charge must be consistent with any contractual agreements with the member. NCUA's intent to preempt such charges is evident in Section 701.21(b)(1) of the NCUA Rules and Regulations (12 C.F.R. 701.21(b)(1)) promulgated pursuant to Section 107(5) of the FCU Act. This Section sets forth a nonexhaustive list of areas where state law is specifically preempted. Included on the list are "closing costs, application, origination or other fees" (see Section 701.21(b)(1)(i)(C)). It is our opinion that return item fees are included in the term "other fees." They are, therefore, preempted.

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In passing, we should also note, as stated in your letter, that the return item charge is not part of the finance charge under the Truth-In-Lending Act and Regulation Z (see 12 C.F.R. §226.4(c)(2) and the Official Staff Interpretation) and, therefore, not included as part of the finance charge for FCU usury purposes. This is consistent with prior opinions from this Office which have stated that, generally, those charges excluded under Regulation Z would similarly be excluded from the calculation of interest for usury purposes as set forth in the FCU Act and NCUA Rules and Regulations. (See Section 107(5)(A)(vi)(I) of the FCU Act and Section 701.27(c)(7) of the NCUA Regulations.)

In your February letter, you asked whether an FCU has the authority under the Act and Rules and Regulations to impose a return item charge when a member writes a share draft against a line of credit in excess of his credit limit. The same analysis and conclusions discussed above would apply except that the fee imposed would come under the "exceeding a credit limit" exclusion of Section 226.4(c)(2) of Regulation Z. We have enclosed a copy of a previous opinion that we rendered on this issue.

I hope that we have been of assistance. If further questions arise, please contact Hattie Ulan of this Office.

Sincerely,

STEVEN R. BISKER
Assistant General Counsel

Enclosure

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