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NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

April 14, 1989

Office of General Counsel

Ms. Mary C. Mazzotta
Director of Compliance
Compliance and Governmental Affairs Division
New York State Credit Union League, Inc.
P.O. Box 15021
Albany, NY 12212-5021

Re: Possible Preemption of Federal Law Over
General Regulation of New York State Banking
Board Part 38 (Your February 28, 1989, Letter)

Dear Ms. Mazzotta:

You have asked whether Federal law preempts Section 38.3 of the New York State Banking Board General Regulations. The portion of the regulation limiting the amount a Federal credit union ("FCU") may charge as a loan application fee, credit report fee or property appraisal fee is preempted by Section 701.21(b)(1)(i)(c) of NCUA's Rules and Regulations (12 C.F.R. §701.21(b)(1)(i)(c)). The disclosure requirements contained in Section 38.3 may be preempted by Regulation Z (12 C.F.R. Part 226). We suggest you contact the Federal Reserve Board which writes and interprets Regulation Z for a determination on that issue.

BACKGROUND

Section 38.3 of the New York State Banking Board General Regulations sets forth certain disclosures and procedures that mortgage brokers, mortgage bankers and exempt organizations must follow when extending mortgage loans. "Exempt organizations" is defined in Section 38.1(g), which refers to the definition of exempt organizations in Section 39.2. Section 39.2 includes Federal credit unions in the definition of exempt organizations.

Section 38.3(a) applies only to mortgage broker application disclosures and procedures and is therefore inapplicable to an FCU. Section 38.3(b) sets forth application disclosures and procedures for mortgage bankers and exempt organizations. This section provides:

FOIA - Vol. V, Part K Preemption

(1) Disclosures.

Prior to acceptance of an application, application fee, credit report fee or property appraisal fee, every mortgage banker or exempt organization shall disclose in writing to each applicant for a mortgage loan:

(i) The amount of the application fee, and the mortgage banker or exempt organization's best estimate of the credit report fee and/or property appraisal fee and the terms and conditions under which such fees may be refundable;

(ii) The telephone number of a person, department or office within the mortgage banker or exempt organization to whom the applicant may address questions, comments or complaints.

(2) Required Procedures for Mortgage Bankers and Exempt Organizations.

(i) The application fee, which shall be denominated as such, shall be a fee reasonably related to the negotiating, processing and application services to be performed on behalf of the applicant, and shall not be figured as a percentage of the principal amount of the loan or the amount financed.

(ii) The credit report fee and property appraisal fee shall be the mortgage banker's or exempt organization's good faith estimate of the actual cost of the service. Any amount collected in excess of the actual cost must be returned at or prior to closing.

(iii) A mortgage banker or exempt organization may satisfy the disclosure requirements of this section by making such disclosures in one or more documents, including but not limited to any form or document used to comply with otherwise applicable state or Federal laws or regulations.

(iv) If a mortgage loan involves more than one mortgage broker, mortgage banker or exempt organization, or any combination

thereof, the persons involved shall agree among themselves as to who must comply with the disclosure and other requirements imposed under this Part 38.3. In the absence of agreement, all such persons shall be liable therefor.

(v) Every mortgage banker and exempt organization shall provide each applicant with a duplicate of the signed application within seven (7) business days from the time of receipt of such application by the mortgage banker or exempt organization.

(vi) All printed disclosures concerning refundability must be made in bold face block letters of black type at least twelve (12) point size. If the disclosures are made in typewritten form, the disclosures concerning refundability must be all in upper case letters and underlined.

Section 38.3(c) applies to mortgage bankers or exempt organizations acting in a mortgage brokerage capacity. It is inapplicable to FCU's since they do not have this authority.

Section 38.3(d) provides, in part:

Separate Application and Disclosure Procedures:

In addition to the disclosures required by this section, each mortgage banker and exempt organization shall disclose in writing to each applicant for a mortgage loan when the interest rate for the loan will be set. . . .

Section 38.3(e) provides:

Telephone Applications.

Nothing in this section shall be construed to prohibit the acceptance of telephone applications provided that the applicant, upon request, is given the opportunity to review the information he orally submits within ten days of the phone application and provided further that the applicant receives the appropriate disclosure set forth above prior to paying an application fee, credit report fee, or a property appraisal fee.

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ANALYSIS

Section 701.21(b) of NCUA's Rules and Regulations (12 C.F.R. 701.21(b)) states:

(1) . . . This exercise of the Board's authority [regulating loans and lines of credit] preempts any state law purporting to limit or affect:

* * *

(i)(C) closing costs, application, origination, or other fees:

* * *

(3) . . . Except as provided by section 701.21(b)(1), it is not the Board's intent to preempt state laws affecting aspects of credit transactions that are primarily regulated by Federal law other than the Federal Credit Union Act, for example, state laws concerning credit cost disclosure requirements Applicability of state law in these instances should be determined pursuant to the preemption standards of the relevant Federal law and regulations.

The Section 38.3(b)(2) limitations on the amount that can be charged as an application fee, credit report fee and property appraisal fee are preempted by Section 701.21(b)(1)(i)(C) of the NCUA Regulations. The disclosures required by Sections 38.3(b)(1), (d), and (e) are preempted, if at all, by other Federal law pursuant to Section 701.21(b)(3), particularly Regulation Z (12 C.F.R. Part 226). You may wish to contact the Federal Reserve Board to make a preemption determination on the disclosure requirements.

Sincerely,

Hattie M. Ulan

HATTIE M. ULAN
Assistant General Counsel

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