

FEDERAL RESERVE BANK
OF NEW YORK

Circular No. 9539
August 17, 1983

REGULATION Z
Proposed Preemption Determinations

To All Depository Institutions, and Others Concerned,
in the Second Federal Reserve District:

The Board of Governors of the Federal Reserve System has requested comment as to whether provisions of New Hampshire and New Jersey State laws that govern the offering of cash discounts in the sale of motor fuel are not inconsistent with the Truth in Lending Act or Regulation Z and should not be preempted.

The Board has also requested comment on its view that these laws are of a type not subject to the Board's authority to preempt State law under the Truth in Lending Act.

Printed on the following pages is the text of the Board's Notice of Intent which has been reprinted from the *Federal Register* of August 5, 1983. Comments should be submitted by October 7, 1983, and may be sent to our Regulations Division.

ANTHONY M. SOLOMON,
President.

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Reg. Z; Doc. No. R-0477]

Truth in Lending; Intent To Make Determinations of Effect on State Laws; New Hampshire and New Jersey

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of intent to make determinations of effect on state laws.

SUMMARY: The Board is publishing for comment proposed determinations as to whether certain provisions in the laws of New Hampshire and New Jersey are inconsistent with, and therefore preempted by, the Truth in Lending Act or Regulation Z. The request for preemption determinations concerns state laws governing the offering of cash discounts in the sale of motor vehicle fuel. The Board believes that these laws may be of a type not subject to the Board's preemption authority and specifically requests comment on this question. Alternatively, the Board has assumed—for discussion purposes—that these laws are subject to a preemption determination, and proposes to find that the laws are not preempted.

DATE: Comments must be received on or before October 7, 1983.

ADDRESS: Comments should refer to Docket No. R-0477 and be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, or delivered to Room B-2223, 20th and Constitution Avenue, NW., Washington, D.C., between 8:45 a.m. and 5:15 p.m. Comments may be inspected in Room B-1122 between 8:45 a.m. and 5:15 p.m.

FOR FURTHER INFORMATION CONTACT: Gerald Hurst or Lynn Goldfaden, Staff Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, at (202) 452-3667 or 452-3867.

SUPPLEMENTARY INFORMATION: (1) General. The Board has received a request for a determination as to whether provisions of certain laws in New Hampshire and New Jersey are inconsistent with, and therefore

preempted by, the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) and Regulation Z (12 CFR Part 226). This notice is issued under authority delegated to the Director of the Division of Consumer and Community Affairs, as set forth in the Board's Rules Regarding Delegation of Authority (12 CFR 265.2(h)(2); 48 FR 4454, February 1, 1983).

Section 111(a)(1) of the act authorizes the Board to determine whether any inconsistency exists between chapters 1 (General Provisions), 2 (Credit Transactions), or 3 (Credit Advertising) of the Truth in Lending Act or its implementing regulation, Regulation Z, and any state law relating to the disclosure of information in connection with consumer credit transactions. Section 171(a) of the act authorizes the Board to determine whether any inconsistency exists between chapter 4 (Credit Billing) of the act or its implementing regulation and any state law relating to credit billing practices.

Section 167(b), the federal statutory provision relevant to these determinations, is located in chapter 4 of the act, but its purpose is to provide an exception for certain cash discounts to the finance charge rules in section 106, which is found in chapter 1. Since section 167(b) is significant only in its relationship to the finance charge rules, the Board believes that section 111(a)(1), instead of section 171(a), provides the appropriate standard for review for preemption determinations concerning the federal cash discount provision.

The Board believes, however, that the state laws addressed in the present preemption request may be outside the scope of the Board's preemption authority under the Truth in Lending Act. The state laws deal with permissible sales and pricing practices in the sale of motor vehicle fuel rather than with the disclosure of information in connection with consumer credit transactions. Section 111(b) of the act, which limits the effect of the federal act on state laws, provides that:

This title does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, *but not limited to*, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible

under such laws in connection with the extension or use of credit * * *. (Emphasis added.)

If the state laws contained in this request do not fall within the scope of section 111(a)(1), it appears that the Board would not be authorized to make preemption determinations as to those laws. The Board believes that the state laws included in the present request may not be subject to preemption determinations because they do not relate to the disclosure of credit terms. Comment is specifically requested on this point.

If the Board, however, ultimately finds that these state laws are within the scope of section 111(a)(1), it will be necessary to make preemption determinations as to those laws. Therefore, in order to facilitate public comment, this notice includes proposed determinations, on the assumption that the state laws may be subject to the Board's preemption authority.

(2) *Standards for and effect of preemption determinations.* In determining whether a state law is inconsistent with the federal provisions, § 226.28(a)(1) of Regulation Z, which implements § 111 of the act, provides that a state law is inconsistent if it requires a creditor¹ to make disclosures or take actions that contradict the federal law. A state law is contradictory, and therefore preempted, if it significantly impedes the operation of the federal law or interferes with the purposes of the federal statute.

In general, preemption determinations are limited to those provisions of state law identified in the request for a determination. At the Board's discretion, however, other state provisions that may be affected by the federal law also may be addressed.

If the Board determines that a state requirement is inconsistent with the federal law, the state law is preempted to the extent of the inconsistency. Creditors in that state may not make disclosures using the inconsistent term or form, even on a separate document from the federal disclosures. A determination on provisions in the law

¹ A service station operator accepting credit cards is a "creditor" for limited purposes under § 226.2(a)(17)(iii) of Regulation Z, 12 CFR Part 226.

of one state will have no effect in the validity of similar provisions in other states.

Preemption determinations have an effective date of the October 1 that follows the determination by at least 6 months, as required by section 105(d) of the act. It is expected that these proposed determinations, if adopted, would have an effective date of October 1, 1984, although creditors could begin complying with the determinations before that time.

(3) *Discussion of specific requests and proposed determinations.* In response to a request from a federation of trade associations representing independent petroleum marketers, the Board has reviewed provisions in the laws of New Hampshire and New Jersey. The request is available for public inspection and copying, subject to the Board's Rules Regarding Availability of Information (12 CFR Part 261). The proposed determinations regarding the state laws at issue, together with the reasons for the proposals, are set forth below.

New Hampshire. The federation has requested a determination of whether section 339-B:8,II of New Hampshire Revised Statutes Annotated (1981 Supp.) (N.H. Rev. Stat. Ann.), as interpreted by the state Attorney General's office, is inconsistent with, and therefore preempted by, the Truth in Lending Act and Regulation Z. Under that law it is unlawful for any person operating a retail gasoline station to:

Post a different price at one pump for the same grade of gasoline as is dispensed from another pump when both pumps are supplied from a common storage at the same service station and when the gasoline dispensed from both is represented to be and is sold as the same quality of gasoline; provided, however, that this paragraph shall not prohibit such price differences between a self-service and an attendant-operated pump supplied from a common storage as described hereinabove.

The New Hampshire Attorney General's office, in opinions dated May 26, 1982, and January 21, 1983, has interpreted N.H. Rev. Stat. Ann. section 339-B:8,II as prohibiting the establishment of separate "cash pumps" and "credit pumps" with different posted prices for the same grade of gasoline, but permitting the dealer to

vary the price charged for separate sales of gasoline from the same pump according to the method of payment. As a result, dealers in New Hampshire may offer "a discount for cash program which involves the posting and charging of one price for the same grade of gasoline with a discount provided for customers who pay with cash, if advertised and operated in a manner which is neither deceptive nor misleading."

The federation argues that since the federal law contains a provision stating that the establishment of separate pumps or islands for cash and credit sales is an allowable means of offering a cash discount (see Comment 4(b)(9)-3 of the Official Staff Commentary to Regulation Z (12 CFR Part 226, Supplement I; as amended, 48 FR 41343, September 20, 1982) the state law, as interpreted, is inconsistent with federal law, impedes and interferes with the offering of cash discounts, and is preempted. The Board, however, does not believe that the state law is preempted.

In discussing the term "regular price" in the Official Staff Commentary, the staff made clear that offering a discount by establishing separate cash and credit pumps, and posting only the cash or credit prices on these pumps, would be considered an appropriate means of offering a discount under section 167(b) of the act and would not result in a surcharge prohibited under section 167(a)(2). However, this material only describes a permissible means of offering a cash discount under federal law, not a required or the sole means of doing so.

The purpose of the federal cash discount provision is to encourage the offering of cash discounts by removing certain impediments to offering them. Specifically, Congress provided that a discount offered in accordance with section 167(b) of the act would not be a finance charge under the federal Truth in Lending Act, or a finance charge or other charge for credit under state usury or disclosure laws (see section 171(c) of the act). The New Hampshire law does not provide that a discount offered in accordance with the federal law is to be a finance charge for disclosure or usury

purposes. Rather, the state law, by prohibiting a particular practice in the sale of gasoline, prohibits one manner of offering discounts that is permissible under federal law while allowing dealers to offer discounts in another manner. As a result, the Board does not believe that the state law significantly impedes or interferes with the federal scheme and therefore the state law is not preempted.

New Jersey. The federation has also requested a determination on two provisions of New Jersey law as they have been interpreted in relation to the offering of cash discounts by petroleum retailers. The first provision in question provides:

A retail dealer may sell similar fuels at different prices to cash and credit customers, and the price posted on top of the pump and on the pump meter shall be the credit purchase price. A conspicuous sign shall also be displayed at the pump or at the island posting the price per gallon (or per gallon and per liter) reduction for cash purchasers of fuels.

New Jersey Administrative Code (N.J.A.C.) § 18:19-2.7(b).

A February 9, 1983 memorandum from the New Jersey Department of Law and Public Safety clarified this provision by stating:

1. All gasoline pumps will show the posted price per gallon and/or liter at the higher or credit card price. A sign disclosing the cents-off per gallon discount may be shown at the pump or at the island site. The lower cash price may be posted on a street sign or some other sign not in close proximity to the pumps themselves. This sign shall be accessible to the public.

2. Separate islands for cash and/or credit may be used provided that the pump posted signs and computer prices on both the cash island and credit card island reflect the higher credit card price.

The federation believes that these provisions result in two positions that are contradictory to positions taken by the Board and should be preempted. Specifically, the positions are:

(1) New Jersey law requires the meter on a gasoline pump dedicated to cash sales to display the higher credit card price.

(2) New Jersey law requires the meter on a gasoline pump used for both cash and credit card sales to display the higher credit card price.

With respect to the first position, the federal law does permit a service station operator to designate separate pumps or separate islands as being for either cash or credit purchases while displaying only the appropriate cash or credit price at the pumps. (See Comment 4(b)(9)-3 of the Official Staff commentary to Regulation Z.) The New Jersey law, however, like the New Hampshire law described above, requires certain sales practices to be followed by persons offering cash discounts in the sale of gasoline.

The federal law, as interpreted by the staff, simply gives an example of a permissible means of offering a discount under section 167(b). The federal law does not require the use of this method and a state's decision to prohibit a specific method of offering cash discounts does not significantly impede the operation of the federal law or interfere with its purposes. Therefore, the Board believes that the provisions of New Jersey law are not preempted.

With respect to the second position, the staff has not taken a position as to whether it is appropriate to display the cash price on the meter of a pump used for both cash and credit card sales. However, even if a position had been taken that it was permitted, the Board believes the state law would not be preempted. Once again, the federal law would only be providing an example of a method of giving a discount that is proper under federal law.

The federation also asks for a determination that New Jersey Attorney

General's Formal Opinion No. 2—1982 is preempted. The opinion addresses section 56:6-2(e) of New Jersey Statutes Annotated, which provides:

No rebates, allowances, concessions or benefits shall be given directly or indirectly, so as to permit any person to obtain motor fuels from a retail dealer below the posted price or at a net price lower than the posted price applicable at the time of sale.

Relying largely upon a court decision, *Sperry and Hutchinson Co. v. Margetts*, 15 N.J. 203 (1954), that discusses the Statutory provision, the Attorney General concluded that:

There is no statutory impediment under the Motor Fuel Act to a motor fuel retail dealer establishing one price for the sale of gasoline to its credit customers and a separate lower price to its cash customers, provided a discount would approximate the economic value to the retailer of providing a discount to his cash customers. (Emphasis added.)

The federation argues that this opinion, in implicitly placing a limit on the amount of the discount that can be offered to cash customers, is inconsistent with the federal cash discount provision and therefore should be preempted.

Congress, in passing the Cash Discount Act of 1981, expressly removed the five percent limitation on the amount of a cash discount that could be offered to cash customers and excluded from the treatment as a finance charge in credit card transactions. Once again, however, the federal law is permissive with respect to the amount of a cash discount that is allowed under the federal cash discount provision. The state law, as interpreted, results in an absolute prohibition on the offering of discounts in a certain manner. The law

does not say that cash discounts in excess of a specific amount, or in excess of an amount that approximates "the economic value to the retailer of providing a discount to his cash customers," is to be treated as a finance charge or other charge for credit under state disclosure or usury laws; instead the law prohibits a retail dealer from offering a discount at all under certain circumstances. A retail dealer can offer a cash discount in compliance with the state law and still take advantage of the benefits of the federal cash discount provision, although the dealer may not take advantage of the unlimited nature of the federal cash discount provision. As a result, the Board believes that the state position, as set forth in the formal opinion of the Attorney General, does not significantly impede the operation of the federal law or interfere with its purposes, and therefore is not preempted.

(4) *Comment requested.* Interested persons are invited to submit comments regarding the proposed finding that these state laws are not subject to the Board's preemption authority and the proposed determinations. After the close of the comment period and analysis of the comments received, notice of final action on the proposals will be published in the *Federal Register*.

List of Subjects in 12 CFR Part 226

Advertising, Credit, Consumer Protection, Finance, Truth in Lending.

Board of Governors of the Federal Reserve System, August 2, 1983.

William W. Wiles,

Secretary of the Board.

[FR Doc. 83-21395 Filed 8-4-83; 8:45 am]

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