FEDERAL RESERVE BANK
OF NEW YORK

[Circular No. 9637
February 16, 1984]

REGULATION Z

Final Preemption Determinations

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

Following is the text of a statement issued by the Board of Governors of the Federal Reserve System:

The Federal Reserve Board has announced final determinations that provisions of New Hampshire and New Jersey State laws governing the offering of cash discounts in the sale of motor fuel are not inconsistent with the Truth in Lending Act and Regulation Z implementing the Act and are not preempted. The Board's determination is effective January 31, 1984.

In this regard, the Board made the more general determination that these laws are subject to the Board's preemption authority.

Printed below is the text of the Board's Notice in this matter, which has been reprinted from the *Federal Register* of February 6, 1984.

ANTHONY M. SOLOMON,
President.

FEDERAL RESERVE SYSTEM

12 CFR Part 226

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

Truth in Lending; Determinations of Effect on State Laws, New Hampshire and New Jersey

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Preemption determinations.

SUMMARY: In accordance with Appendix A to 12 CFR Part 226 and in response to a request, the Federal Reserve Board is publishing final determinations that certain provisions in the laws of New Hampshire and New Jersey are not inconsistent with, and therefore are not preempted by, the Truth in Lending Act or Regulation Z. The state laws that were the subject of the request govern the offering of cash discounts in the sale of motor vehicle fuel.

EFFECTIVE DATE: January 31, 1984.

FOR FURTHER INFORMATION CONTACT: Lynn Goldfaden or Gerald Hurst, 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.* 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. The Board may not find that any state law is inconsistent with a chapter 4 provision if the state law gives greater protection to the consumer than does the federal law.

The Board has determined that the state laws reviewed are not preempted under either of these standards. Since there is no preemption, a delayed effective date is unnecessary. Such a delay is needed only in those situations in which creditors are required to revise forms or procedures. Because the Board's action requires no changes, these determinations are effective immediately.

These final determinations are 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)(3); 48 FR 4454, February 1, 1983).

(2) *Discussion of specific requests and final determinations.* The Board received a request for determinations 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). The request came from a federation of trade associations representing independent petroleum marketers and was concerned with state law provisions governing the offering of cash discounts in the sale of motor vehicle fuel.

In response to this request, the Board, on August 5, 1983, published for comment a notice of its intent to make preemption determinations (48 FR 35659). In the notice, the Board first requested comment on whether these state laws are of the type subject to the Board's preemption authority. In addition, for discussion purposes, the Board assumed that the laws are subject to its review authority and proposed to find that the laws are not inconsistent with, and therefore not preempted by, the federal law.

The Board received twelve comments on the proposal. Most of the commenters believed that the state laws are not inconsistent with and are not preempted by the federal law.

Section 167(b) is the federal statutory provision relevant to these determinations, since it addresses the offering of cash discounts. Section

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167(b) 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. Because section 167(b) is so closely related to the finance charge rules, the state laws have been examined under the preemption standard in section 111(a)(1). However, because section 171(a) is the preemption provision for chapter 4 of the act, the state laws also have been examined under the standards found in that section. Upon review of these state laws, the Board has determined that under either standard, the laws are not inconsistent with, and therefore not preempted by, the federal law. The state law provisions and the Board's findings are discussed below.

New Hampshire. The federation asked for 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. That statute deals with the posting of prices for motor vehicle fuel at retail gasoline stations. The law prohibits the posting of a different price at one pump for the same grade of gasoline dispensed at another pump when both are supplied from common storage and the gasoline dispensed from both is of the same quality (although a "self serve"—"full serve" price distinction is permitted).

The New Hampshire Attorney General's office (in opinions dated May 26, 1982, and January 21, 1983) has interpreted the statute as prohibiting separate "cash pumps" and "credit pumps" with different posted prices for the same grade of gasoline, but permitting the dealer to vary the price for separate sales from the same pump according to the method of payment. As a result, dealers in New Hampshire may offer cash discount programs in which one price is posted and charged for the same grade of gasoline with a discount provided for cash customers.

The Board has determined that the New Hampshire provision is not preempted by the federal law. In discussing the term "regular price" in the Official Staff Commentary to Regulation Z, 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). (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.) However, this material only describes a permissible means of offering a cash discount under federal law, not a required method 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 believes that the state law is not inconsistent with the federal law and therefore is not preempted.

New Jersey. The federation also asked for 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 allows a retail dealer to sell similar fuels at different prices to cash and credit customers. However, the price posted on top of the pump and on the meter must be the credit price. In addition, the cash discount must appear on a conspicuous sign at the pump or at the island. New Jersey Administrative Code (N.J.A.C.) section 18:9–2.7(b).

This provision has been interpreted by the New Jersey Department of Law and Public Safety (in a memorandum dated February 9, 1983). The interpretation reiterated that all gasoline pumps must display the higher credit card price and that a sign disclosing the discount may be shown at the pump or at the island site. The interpretation also stated that separate islands for cash and/or credit are permissible if the pump signs and meter prices on both the cash island and credit island reflect the higher credit price.

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 is not inconsistent with the federal law.

Furthermore, the Board 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 requested a determination that New Jersey Attorney General's Formal Opinion No. 2—1982 is preempted. That opinion addresses section 56:6–2(e) of New Jersey Statutes Annotated, which provides that no rebates or price concessions may be given which would permit a person to obtain motor fuels from a retail dealer at less than the posted price or at a net price below the posted price applicable at the time of sale.

In the interpretation, the Attorney General concluded that the state law allows a retail dealer to set one price for the sale of gasoline to credit customers and a lower price to cash customers, if the discount "approximates the economic value to the retailer of providing a discount to his cash customers."

The Congress, in passing the Cash Discount Act of 1981, expressly removed the five percent limitation (contained in the original provision) on the amount of a cash discount that could be offered to cash customers and excluded from 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," are to be treated as a finance charge or other charge for credit under state disclosure or usury laws; instead the law only prohibits a retail dealer from offering a discount under certain circumstances. As a result, the Board believes that the state position, as set forth in the formal opinion of the Attorney General, is not inconsistent with the federal law.

Board of Governors of the Federal Reserve System, January 31, 1984.

William W. Wiles,

Secretary of the Board.

[FR Doc. 84–3084 Filed 2–3–84; 8:45 am]

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