

FEDERAL RESERVE BANK
OF NEW YORK

[Circular No. 10258
August 24, 1988]

EQUAL CREDIT OPPORTUNITY

Proposed Preemption Determination Under Regulation B
Comment Invited by September 12

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

The Board of Governors of the Federal Reserve System has issued for comment a proposed determination that a provision in New York law relating to the offering of special-purpose credit programs should be preempted by Regulation B. As indicated in the Board's notice in this matter, which has been reprinted from the *Federal Register*, a preliminary determination has been made that the New York law is preempted to the extent that it bars a creditor from offering a special-purpose credit program.

Printed below is the text of the Board's notice in this matter. Comments thereon should be submitted by September 12, 1988 and may be sent to the Board, as indicated in the notice, or to the Compliance Examinations Department.

E. GERALD CORRIGAN,
President.

FEDERAL RESERVE SYSTEM

12 CFR Part 202

[Reg. B; Docket No. R-0642]

Equal Credit Opportunity; Intent to Preempt New York Law

AGENCY: Board of Governors of Federal Reserve System.

ACTION: Notice of intent to make preemption determination.

SUMMARY: The Board is publishing for comment a proposed determination that a certain provision in New York law, Article 15, section 296-a, is inconsistent with the Equal Credit Opportunity Act and Regulations B. Any provision of state law that is inconsistent with the federal law, unless more protective, is preempted.

The inconsistency in this case has to do with the offering of special purpose credit programs. Both the federal and the New York state law prohibit credit discrimination on the basis of race, color, national origin, religion, sex, marital status or age. (In addition, the federal law bars discrimination based on receipt of income from public assistance programs or the good-faith exercise of any rights under the Consumer Credit Protection Act; and the New York law bars discrimination based on disability.) However, whereas the federal law permits creditors to offer special-purpose credit programs in which program participants may be required to share one or more of these characteristics, New York law permits no exceptions. The Board has made a preliminary determination that the New

York law is preempted to the extent that it bars a creditor from offering a special-purpose credit program.

DATE: Comments must be received on or before September 12, 1988.

ADDRESSES: Comments should be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, or delivered to the Mail Services Courtyard Entrance on 20th Street between C Street and Constitution Avenue, NW., Washington, DC between 8:45 a.m. and 5:15 p.m. weekdays. Comments should include a reference to Docket No. R-0642. Comments may be inspected in Room B-1122 between 8:45 a.m. and 5:15 p.m. weekdays.

FOR FURTHER INFORMATION CONTACT: Linda Vespereny, Staff Attorney,

(OVER)

Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452-2412; for the hearing-impaired only, contact Earnestine Hill or Dorothea Thompson, Telecommunications Device for the Deaf (TDD) at (202) 452-3544.

SUPPLEMENTARY INFORMATION: (1) General. The Board has been asked to determine whether certain provisions of New York law are inconsistent with, and therefore preempted by, the Equal Credit Opportunity Act (ECOA) (15 U.S.C. 1601 *et seq.*) and Regulation B (12 CFR Part 202). The request came from an organization set up specifically to guarantee loans made in the United States to overseas Chinese residing in the United States. This request is available for public inspection and copying, subject to the Board's rules regarding availability of information (12 CFR Part 281). Section 705(f) of the ECOA authorizes the Board to determine, for purposes of preemption, whether an inconsistency exists between a provision of the act and a state law relating to credit discrimination.

This notice of proposed preemption is based on a review of the New York and the ECOA provisions. It 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 Part 285).

(2) *Determination of Preemption.* The ECOA and Regulation B prohibit discrimination in any credit transaction on the basis of race, color, national origin, religion, sex, marital status, age, receipt of income from public assistance programs, or the good-faith exercise of any rights under the Consumer Credit Protection Act. However, § 202.8 of the regulation (which implements section 701(c) of the ECOA) permits a creditor to extend special-purpose credit to individuals who meet certain eligibility requirements, and to consider one or more common characteristics of program participants (for example, race or national origin) when extending credit under these programs.

Under section 705 of the ECOA and § 202.11 of Regulation B, state law provisions that are inconsistent with the requirements of the act and the regulation are preempted. Section 202.11(b)(v) of Regulation B also provides that a state law is inconsistent with the requirements of the federal law to the extent that the state law prohibits

inquiries necessary to establish or administer a special-purpose credit program as defined by § 202.8.

(3) *Comparison of New York Law and Regulation B.* Preemption determinations generally are limited to those provisions of state law identified in the request for a Board determination. New York Law, Article 15, section 296-a(1) is the primary focus of this inquiry. The language of this New York provision is set forth below, along with an analysis of it in light of Regulation B.

The relevant portions of section 296-a(1) — "Unlawful discriminatory practices in relation to credit" read as follows:

It shall be an unlawful discriminatory practice for any creditor or any officer, agent or employee thereof:

* * * * *

(b) To discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, age, sex marital status or disability.

(c) To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, age, sex, marital status or disability * * *

This section of the New York Human Rights law prohibits credit discrimination based on an applicant's or class of applicants' race, creed, color, national origin, sex, marital status or disability. Moreover, creditors may not make any record or inquiry regarding these characteristics. Based on the Board's analysis and discussions with officials of New York agencies, neither this nor any other section of the New York law appears to permit exceptions.

The Board has made a comparison of these provisions—New York statute section 296-a(1) (b) and (c)—to § 202.8 of the Regulation B, which implement section 701(c) of the federal statute. Section 202.8 allows for taking a prohibited basis into account when certain special-purpose credit programs are involved. It allows creditors to offer credit assistance programs authorized by federal or state law, or established by a not-for-profit organization, for the benefit of an economically disadvantaged class of persons. It allows not-for-profit organizations to offer credit assistance programs for the benefit of their members. In addition, for-profit organizations may provide special-purpose credit programs to meet

special social needs if the programs are administered pursuant to a written plan that identifies the class of persons the particular program is designed to benefit. In these special-purpose credit programs, participants may be required to share one or more common characteristics, such as race, national origin, or sex. If participants are required to possess a common characteristic, the creditor may request and consider information regarding that particular characteristic.

Under New York law the establishment of a special-purpose credit program, though permissible under the ECOA and § 202.8, would be unlawful since section 296-a (1) of the Human Rights law prohibits, without exception, discrimination on the basis of the specified characteristics. Furthermore, creditors are expressly prohibited under New York law from even inquiring about these characteristics.

(4) *Proposed Determination and Effect of Preemption.* Based on its analysis, the Board has made a preliminary determination that the New York law on credit discrimination is inconsistent with federal law, and that it is preempted by the ECOA and Regulation B to the extent of the inconsistency. Thus, if the preliminary determination is ultimately adopted following the comment period, the state of New York would be barred from prohibiting special-purpose credit programs that are permissible under federal law.

The Board makes no determination, however, as to whether a particular program qualifies as a special-purpose credit program under Regulation B. As explained in comment 8(a)-1 of the official staff commentary to the regulation (12 CFR Part 202, Supp. 1) the agency or creditor administering or offering the loan program must make the determination.

(5) *Comment Requested.* Interested persons are invited to submit comments regarding the proposed finding that the New York statute section 296-a is preempted by ECOA and Regulation B. After the close of the comment period and an analysis of the comments received, notice of final action will be published in the Federal Register.

Board of Governors of the Federal Reserve System, July 11, 1988.

William W. Wiles,
Secretary of the Board.

[FR Doc. 88-16025 Filed 7-15-88; 8:45 am]
BILLING CODE 6210-01-M