

Preemption of New Mexico Home Loan Protection Act

Summary Conclusion: Federal law preempts various provisions of the New Mexico Home Loan Protection Act for federal savings associations. The NM Act's multifaceted scheme could not be applied to federal savings associations in a manner that would compel them to comply with the preempted provisions.

Date: Sept. 2, 2003

Subjects: Home Owners' Loan Act/Savings Association Powers

P-2003-6



Office of Thrift Supervision
Department of the Treasury

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

Chief Counsel

P-2003-6

September 2, 2003

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Re: Preemption of New Mexico Home Loan Protection Act

Dear []:

This responds to your recent letter on behalf of [] (“Association”), a federal savings association. In your letter, you request a legal opinion on whether federal law preempts the New Mexico Home Loan Protection Act (“NM Act”) for federal savings associations.¹

This office has previously addressed preemption of similar Georgia, New York, and New Jersey legislation.² Many of the NM Act provisions are the same as, or similar to, provisions of these other states’ predatory lending laws. These provisions (1) prohibit the financing of credit insurance, debt cancellation, or debt suspension agreements (§ 4A), balloon payments (§ 5B), negative amortization (§ 5C), default interest rates (§ 5D), loan modification fees (§ 5J), acceleration clauses (§ 5N), and prepayment penalties (§ 5O); (2) limit the financing of points and fees (§ 5A), the number of payments paid in advance from loan proceeds (§ 5E), payment deferral fees (§ 5K), and late fees (§ 5M); (3) prohibit the encouragement of default (§ 5L), (4) require special disclosures for borrowers (§ 5P); (5) prohibit loan flipping (§ 4B) and lending without regard to repayment ability (§ 5H); (6) mandate housing counseling (§ 5G); and (7) restrict payments to home improvement contractors (§ 5I).³

¹ 2003 N.M. Laws Ch. 436 (S.B. 449). The statute takes effect January 1, 2004.

² See OTS Ops. Chief Counsel (January 21, 2003) (“1/21/03 Op.”), January 30, 2003 (“1/30/03 Op.”), and July 22, 2003 (“7/22/03 Op.”).

³ As per a July 29, 2003 telephone discussion between you and OTS staff, however, and consistent with our prior opinions, we are not addressing preemption of provisions pertaining to the ability of borrowers to assert claims or defenses in court (§ 5F). See 7/22/03 Op. at 4 n.6; 1/30/03 Op. at 3 n.10; 1/21/03 Op. at 2 n.3. While we are not

A few of the NM Act provisions are not like ones we have addressed in these prior opinions. These provisions are triggered upon default on high-cost home loans rather than at loan origination. They (1) require creditors to accept any partial payment made or tendered in response to a default notice (§ 6A); (2) reinstate the borrower to the same position as if a default had not occurred and nullify an acceleration of an obligation (§ 6B); and (3) prohibit charges, fees or penalties for curing a loan default (§ 6C).

All of these NM Act provisions – whether they are triggered at loan origination or upon default – purport to regulate the terms of credit, loan-related fees, disclosures, mortgage processing, origination, refinancing, and servicing, and disbursements. Thus, they are preempted from applying to federal savings associations for the same reasons OTS has stated in its prior opinions.⁴

For the same reasons OTS has stated in its prior opinions, the NM Act's multifaceted compliance scheme could not be applied to federal savings associations in a manner that would compel them to comply with the preempted provisions.⁵ The NM Act provisions preempted from applying to federal savings associations in this manner are those (1) using state foreclosure law as tool to compel compliance (§§ 6D and 6E); (2) allowing borrowers to bring civil action for violations (§ 9) and to assert claims, defenses, counterclaims, and actions against creditors or subsequent holders or assignees including in foreclosure actions (§§ 11B and 11C); (3) making violations unfair or deceptive trade practices (§ 12); and (4) providing for administrative enforcement by the

addressing provisions subjecting creditors, holders, or servicers to the same claims and defenses as a borrower could assert against a manufactured home seller or home improvement contractor (§ 7), the analysis we provided of a similar provision in New Jersey legislation would apply. *See* 7/22/03 Op. at 4 n.6 and 6 n.14. We also are not addressing provisions amending other legislation (§§ 15-17).

⁴ 7/22/03 Op. at 3-6; 7/30/03 Op. at 2-4; 1/21/03 Op. at 2-4. The same conclusions would apply to federal savings association operating subsidiaries and the loans they originate. OTS has consistently concluded that state laws purporting to regulate the activities of a federal savings association's operating subsidiary are preempted by federal law to the same extent such laws are preempted for the federal savings association itself. *See* 12 C.F.R. § 559.3(n)(1) (2003); 7/22/03 Op. (and authorities cited therein).

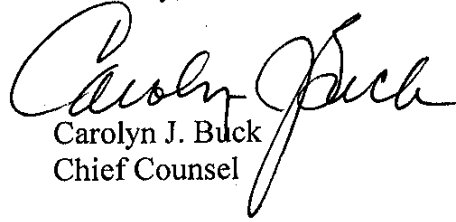
Since the provisions triggered upon loan default are preempted under 12 C.F.R. § 560.2(b) (2003), we do not reach whether they might be considered real property laws under 12 C.F.R. § 560.2(c)(2) (2003). 61 Fed. Reg. 50,951, 50,966-50,967 (September 30, 1996). We note, however, that depending on how the provisions might ultimately be interpreted, they could substantially interfere with the ability to foreclose on high-cost home loans. Such a result would be inconsistent with the purposes of the Home Owners' Loan Act, including being potentially contrary to safety and soundness and prudent loan administration. *See* 12 C.F.R. §§ 560.1(b), 560.2(a), 560.101 and App. to 560.101 (2003).

⁵ *See* 7/22/03 Op. at 6 and n.17; 1/30/03 Op. at 5 and n.20.

Financial Institutions Division of the New Mexico Department of Regulation and Licensing (§ 13).

We trust that this is responsive to your inquiry. If you have further questions, please contact Richard Bennett, Counsel (Banking and Finance), at (202) 906-7409.

Sincerely,



Carolyn J. Buck
Chief Counsel

cc: Regional Directors
Regional Counsel