



301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC TECHNICAL ADVICE MEMORANDUM #89-18

TO: Mr. Marvin N. Davant, Director
Field Services Division

FROM: John Swearingen, Manager
Tax Policy and Procedures Department

DATE: July 5, 1989

SUBJECT: Service Charges - Inactive Accounts
(Abandoned Property)

REFERENCE: S.C. Code Section 27-17-20 (1976)
S.C. Code Ann. Section 27-17-30 (Supp. 1987)
S.C. Code Ann. Section 27-17-310 (Supp. 1987)

AUTHORITY: S.C. Code Section 12-3-170
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Questions:

- (1) Does the Federal Credit Union Act, expressly or implicitly, provide that Congress intended federally chartered credit unions to be exempt from all state regulation?
- (2) Is the inactive account policy of ABC in conflict with S.C. Code Section 27-17-310?

Facts:

ABC is a federally chartered credit union operating within the boundaries of South Carolina. ABC has an inactive account policy which states:

Effective 7/1/85, regular share accounts with no activity for 12 months will be transferred to an inactive status.

This will occur when combined savings balances are less than \$100 and a member has no loans outstanding.

1. A quarterly maintenance/service fee of \$2.00 will be assessed per member which will be deducted from the regular share account beginning 9/30/85; and
2. If the regular share balance should fall below the \$5.00 membership minimum, the account balance will be transferred to miscellaneous operating income.

As a result of a recent Field Services audit of ABC, several exceptions to the above noted policy were made and the audit department feels that ABC has in its possession approximately \$21,000 of abandoned property that should be turned over to the Commission.

Field Services cites S.C. Code Sections 27-17-30 and 27-17-310 as their authority for seeking possession of the presumed abandoned property. ABC argues that the Federal Credit Union Act, 12 U.S.C. Section 1751 *et seq*, preempts any attempt by the state to regulate federally chartered credit unions. ABC also argues that S.C. Code Section 27-17-310 applies only to banks and not to credit unions. As such, ABC refuses to remit the presumed abandoned property to the S.C. Tax Commission.

Discussion:

1. In Tousley v. N.A. Van Lines, 752 F.2d 96, 101 (4th Cir. 1985), the U.S. Court of Appeals consolidated prior U.S. Supreme Court holdings into one concise method for deciding the preemption issue:

"...in the absence of express preemption by Congress, the examination of any preemption issue involves a two-tier inquiry: (1) whether Congress in passing the statute intended to occupy the field, or (2) whether the state statute is void because it conflicts with federal regulation." See also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

Since the Federal Credit Union Act, 12 U.S.C. Section 1751 *et seq*, does not contain an express preemption provision, see U.S. v. Alabama, 434 F.Supp. 64, 66 (M.D. Ala. N.D. 1977), the above method must be used to decide the preemption issue.

In U.S. v. Alabama, the Commissioner of the Alabama Department of Revenue sought to examine the abandoned property records of a federally chartered credit union. The Commissioner claimed authority to do so under the provisions of the Alabama Uniform Disposition of Unclaimed Property Act. The National Credit Union Administration claimed that its Administrator had exclusive control over the records of federal credit unions and that the Alabama statute was preempted by the Federal Credit Union Act. As a result, the United States filed suit on behalf of the Administration seeking to enjoin the State of Alabama from enforcing the provisions its Uniform Disposition of Unclaimed Property Act against federally chartered credit unions.

The U.S. District Court formulated its holding through an analysis virtually identical to that expressed in Tousley, supra. Essentially, the Court held that the Alabama statute was constitutional and that the state had a right to claim abandoned property within its boundaries. The Court also held that Congress did not intend for the Federal Credit Union Act, alone, to regulate federal credit unions. The Court held that "the Federal Credit Union Act specifically authorizes the states to act within this sphere." Id., at 67.

In applying the Tousley two part test, the United States Supreme Court noted that the Alabama abandoned property law and the Federal Credit Union Act do not attempt to occupy the same field. The court distinguished the parameters of the two acts as follows:

...the federal act is an attempt to establish, regulate and provide uniformity for federal credit unions whereas the Alabama Uniform Disposition of Unclaimed Property Act provides a simplified method whereby the state may take possession of abandoned property, holding it until the rightful owner claims it.

In further support of the conclusion that federal preemption was not intended, the court looks to the fact that no preemptive section was included in the act as in other federal acts. Also, the Federal Credit Union Act specifically authorizes states to act within the sphere of credit unions by providing procedures by which a federal credit union may be converted to a state credit union.

Therefore, based on the fact that the federal act expressly provides for the existence of state credit unions and that the Abandoned Property Act is not an attempt to regulate the policies or practices of the NCUA, the court concludes that it was not the intent of Congress to occupy this field.

In summary, the Federal Credit Union Act does not expressly or implicitly preexempt state regulation of federal credit unions pursuant to the Federal District Court decision in United States v. Alabama (supra). Since no South Carolina courts have examined this issue, Alabama's argument must be considered to be persuasive.

2. S.C. Code Section 27-17-30 sets out the criteria for determining whether property held or owing by a banking or financial organization or by a business association is presumed abandoned. Subsection (2) specifically refers to the purchase of shares or other interest in a financial organization. S.C. Code Section 27-17-20(3) defines the term financial organization to mean, "any savings and loan association,...., credit union or investment company engaged in business in this State." Thus, credit unions are within the scope of the South Carolina Uniform Disposition of Unclaimed Property Act, S.C. Code Sections 27-17-10 et seq. Therefore, any credit union which operates within the boundaries of this State will be subject to the provisions of Chapter 17, Title 27.

However, we must keep in mind the holding of the U.S. District Court in U.S. v. Alabama as discussed in Question #1. There appears to be no conflict between the provisions of Chapter 17, Title 27 and the inactive account policy of ABC. S.C. Code Section 27-17-310 permits a service charge of not more than \$1.00 per month or \$12.00 per year. ABC's policy permits a service charge of \$2.00 per quarter or \$8.00 per year. Thus, ABC is operating within the limitations of S.C. Code Section 27-17-310.

The issues regarding the uniform application of service charges within each class and the transferring of share balances below the \$5.00 minimum balance to miscellaneous operating income are moot. In U.S. v. Alabama, the District court held that the Administration had the power to establish their own policies and practices and any attempt by the state to regulate such policies and practices would result in a conflict in which the state must fall. Therefore, with respect to the policies and practices of the Administration, the state is precluded from imposing conflicting state regulation. This conclusion is also supported by federal regulations governing credit unions found at 12 C.F.R. Section 701.35 (1988).

Conclusion:

- (1) Based upon the above discussion, the federally chartered credit unions are not expressly or implicitly exempt from all state regulation. However, the state may not attempt to regulate the established policies and practices of the National Credit Union Administration.
- (2) The inactive account policy of ABC does not conflict with S.C. Code Section 27-17-310 and the other issues relating to ABC's policy should be left to the regulation of the Administration.