LETTER OPINION
97-L-56

May 27, 1997

Honorable Merle Boucher
Minority House Leader
606 Highland Street
Rolette, ND 58366

Dear Rep. Boucher:

Thank you for your request for an opinion regarding the constitutionality and legality of House Bill No. 1274 dealing with revolving charge accounts. The four concerns you raise are as follows:

1. Whether House Bill No. 1274 is constitutional in light of the fact that a public hearing was not held on the amendments to the bill.
2. Whether the bill "creates a credit agreement between the bank and the customer if the customer has not rejected the card and agreement within 30 days, even if the customer did not request or use the card."
3. Whether the provisions allow higher or increased rates to apply to existing balances and whether the card holder has a shortened time period to pay off an existing balance.
4. Whether this bill subjects card holders to higher out of state fees than may have applied to his or her existing balance, and whether the North Dakota rates will be exempt from North Dakota's usury limit.

The first concern addresses the procedural constitutionality of House Bill No. l274. "[T]he general rule is the Legislature's action may not be challenged unless it exceeds or violates constitutional authority." See State ex rel. Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. l987). A similar question was raised in l988 concerning the enactment of Senate Bill No. 2035 during the 50th Legislative Session. See l988 N.D. Op. Atty. Gen. 74. That opinion concluded:

> While it is a generally held belief the Legislature must hold a hearing on each bill, a hearing on either a bill or an amendment to the bill is not constitutionally required. The belief may be based upon an implication derived from

> the rules adopted by the House and Senate and from long followed practice.

Because a hearing is not constitutionally required on an amendment to a bill, it is my opinion that House Bill No. 1274 is not unconstitutional based on this issue.

The second concern arises from the language in Section Two of the bill that defines the term "accepted" as "mean[ing] the buyer has signed the revolving charge agreement, the buyer has used the account issued under a revolving charge agreement, or within thirty days from the date of issuance the buyer has not canceled by written notice a credit card or other access device issued under a revolving charge agreement." (Emphasis added). House Bill No. 1274 defines a revolving charge agreement as

> a written instrument, defining the terms of credit extended from time to time pursuant thereto, pursuant to which the buyer's total unpaid balance thereunder, whenever incurred, is payable over a period of time and under the terms of which a credit service charge, other than the portion thereof consisting of late payment or other charges, is to be computed in relation to the buyer's unpaid balance from time to time.

A buyer is "a person who buys personal property from a retail seller, or to whom a retail seller otherwise extends credit, pursuant to a revolving charge agreement." A seller is "a person who agrees to sell or sells goods or services pursuant to a revolving charge agreement and a . . . bank that extends credit by the advancement of moneys or the payment for goods or services under a revolving charge agreement."

As enacted, House Bill No. 1274 provides three ways in which a revolving charge agreement becomes accepted by the buyer. The first way is to have the revolving charge agreement signed by the buyer. This is perhaps the simplest and most common way in which the buyer's consent is obtained.

The second way consists of an offer under a revolving charge agreement by the seller extending credit to the buyer. The buyer's action in using the credit constitutes consent and triggers the operation of the revolving charge agreement. In a typical example, a bank issues a credit card to a buyer under a revolving charge agreement and once the buyer uses the credit card, the account is

activated. When the credit card account is activated, the buyer becomes committed to all the terms under the revolving charge agreement imposed by the seller concerning the extension of credit.

The third way is similar to the second in that there is an offer of credit by the seller to the buyer under a revolving charge agreement. However, once the credit is offered, the buyer has thirty days from the date the card is issued to cancel the offer of credit by providing written notice to the seller of the buyer's intent to cancel. If the notice is not timely submitted, the terms of the revolving charge agreement become effective even if the buyer has not used the credit card. For example, a bank could issue a credit card to a buyer under a revolving charge agreement that imposes an annual fee and if the buyer does not provide written notice within thirty days of the card's issuance, the buyer would be responsible for the annual fee even if the buyer did not use the credit card.

The federal Truth-In-Lending Act (codified at l5 U.S.C § l601 et seq.), which governs most consumer credit issues, preempts any conflicting state law. See l5 U.S.C. § l6l9(b). Regulation Z, l2 CFR Part 226, issued by the Federal Reserve Board under the Trust-In-Lending Act prohibits sellers from sending out unsolicited credit cards. See l2 CFR § 226.l2. Regulation Z provides, in part, that "no [original] credit card shall be issued to any person except . . . [i]n response to an oral or written request or application for the card." Id. An "accepted credit card" is defined under Regulation Z as "any credit card that a cardholder has requested or applied for and received, or has signed, used, or authorized another person to use to obtain credit." Id., n. 21.

The state law must be interpreted in a manner that is consistent with the federal field of regulation, especially when that regulation preempts conflicting state law. See generally Commonwealth v. Gayne, 26 N.E. 449 (Mass. l89l) ("[W]here two governments like those of the United States and the Commonwealth exercise their authority within the same territory, the legislation of that which, as to certain subjects, is subordinate should be construed with reference to the powers and authority of the superior government.") Although allowed by state law, Regulation Z, in most situations prevents the seller from sending out unsolicited credit cards. The seller may only send out an original credit card pursuant to an oral or written request or application for the credit card by the buyer.

The next concern relates to the seller's ability to unilaterally change the terms of the revolving charge agreement. Section Two of the bill provides, in part, that

> a seller may change the terms of any revolving charge agreement, including the credit service charge, if this right of amendment has been reserved. A change under this authority is effective as to existing balances, if within twenty-five days of the effective date of the change, the buyer does not furnish written notice to the seller that the buyer does not agree to abide by the changes. Upon receipt of this written notice by the seller, the buyer has the remainder of the time under the existing terms in which to pay all sums owed to the seller.

This unilateral change is only authorized if this right of amendment is reserved by the seller in the existing revolving charge agreement. Consequently, there is no constitutional impairment of contracts violation by this provision.

Again, it is important to understand the mechanics of the federal Truth-In-Lending Act to interpret when notice must be provided to the buyer of the seller's intent to change the terms of the existing revolving charge agreement. Regulation Z requires sellers to mail or deliver written notice of certain changes at least fifteen days before the effective date. See 12 CFR § 226.9 (c)(1). Although state laws may not conflict with provisions of the federal Truth-in-Lending Act, state laws are permitted to augment those provisions.

Thus, a reasonable interpretation of the phrase "within twenty-five days of the effective date of the change" is that the seller must provide twenty-five days written notice to the buyer before the effective date of any change to the existing revolving charge agreement. If the buyer does not provides written notice objecting to the new terms, then the revolving charge agreement is modified as of the effective date of the change. If the buyer provides timely notice to the seller of the buyer's disapproval, "the buyer has the remainder of the time under the existing terms in which to pay all sums owed to the seller." House Bill No. 1724, Section Two.

In a typical revolving charge agreement, the buyer has a particular periodic date when the buyer is billed, a certain amount of time to submit payment before being subject to a late penalty charge, and a certain minimum payment. These conditions would remain in effect and the buyer would continue making payments as if there were no change

to the existing revolving charge agreement. The difference is that the buyer no longer has the ability to access any further credit under the agreement. It does not mean that the buyer must pay off the existing balance in full if that is not what the existing revolving charge agreement requires.

In response to the last concern raised, national banks currently can charge any finance charge that is permitted by the law of the state where the bank is located, even if it exceeds the usury limit imposed by the state where the borrower is located or where the transaction takes place. Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 309-310 (1978). In response to the argument that this interpretation would significantly impair states' ability to enact effective usury laws, the United States Supreme Court stated: "This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates." While recognizing that the impairment was accentuated by the use of modern credit cards, the Court concluded that the protection of state usury laws was an issue for Congress to address rather than the courts.

In summary, it is my opinion that House Bill No. 1274 is constitutional. Although arguably allowed by House Bill No. 1274, in most cases federal law requires that a seller may only send to a buyer an original credit card if the buyer has orally or in writing requested the credit card or submitted an application for it. In addition, if the buyer has requested or applied for a credit card, the buyer can be bound by the terms of the revolving charge agreement unless the buyer cancels the credit card within thirty days of the card's being issued. Further, it is my opinion that notice of any changes to the revolving charge agreement must be given to the buyer at least twenty-five days prior to the charge terms becoming effective. If the buyer gives the seller notice of the buyer's objection to the changed terms, those terms do not affect existing balances as long as the buyer does not use the credit card after the effective date of the changes and meets all payment deadlines. It is my further opinion that pursuant to House Bill No. 1274, North Dakota's usury limit does not apply to interest rates charged pursuant to a revolving charge agreement.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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