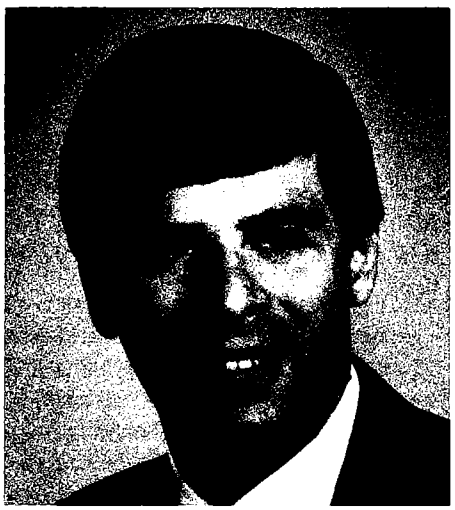
FIRREA Removes Opt-Out Limitation on Interest Rate Exportation by Insured Savings Associations

By Jeffrey I. Langer*



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The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") has made a little-publicized but important change in the interest rate exportation authority of federally-insured savings associations. This change involves the inapplicability of Section 525 ("Section 525") of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") to insured savings associations as a result of the (i) repeal of Section 522 of DIDMCA ("Section 522") by Section 407 of FIRREA and (ii) reenactment of former Section 522 in a substantially similar form as part of Section 301 of FIRREA.

Section 525 authorizes states to override or "opt out" of the federal usury preemption found in Sections 521 through 523 of DIDMCA. Section 525 provides:

> The amendments made by section [sic] 521 through 523 of this title shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the amendments made by such sections to apply with respect to loans made in such State, except that such amendment shall apply to a loan made on or after the date such law is adopted or such certification is made if such loan is made pursuant to a commitment to make such loan which was entered into on or after April 1, 1980, and prior to the date on which such law is adopted or such certification is made.[1]

Section 525 was never codified, appearing only as a note to 12 U.S.C. Section 1730g. Section 522 of DIDMCA ("Section 522"), the preemption provision applicable to insured savings associations, was enacted as Section 414 of the National Housing Act ("NHA") and codified at 12 U.S.C. Section 1730g.[2] Section 522 granted to insured savings associations interest rate exportation authority similar to that granted national banks under 12 U.S.C. Section 85.[3] In the case of insured savings associations, however, this exportation right was subject to state opt-out authority under Section 525.

Section 407 of FIRREA repealed Title 4 of NHA, including Section 414 of NHA, the amendment made by Section 522 of

* The views expressed in this article are those of the author and do not necessarily represent the views of the law firm with which he is associated.

1. Pub. L. 96-221, § 525; 94 Stat. 167 (Mar. 31, 1980) (appearing at 12 U.S.C. § 1730g note (1982)).

   The states of Colorado, Iowa, Massachusetts, Maine, Nebraska, North Carolina and Wisconsin and the Commonwealth of Puerto Rico have acted to opt out of sections 521 through 523 of DIDMCA. *See* Colo. Rev. Stat. § 5-13-104 (Supp. 1988); 1980 Iowa Acts ch. 1156, § 32 (not codified); 1981 Mass. Acts ch. 231 § 2 (codified at Mass. Gen. Laws ch. 183, § 63 note; repealed in 1986 Mass. Acts ch. 177); Me. Rev. Stat. Ann. tit. 9A, § 1-110 (Supp. 1989); 1982 Neb. Laws 623, § 2 (codified at Neb. Rev. Stat. § 45-1,104, repealed by amendment in 1988 Neb. Laws 913, § 2); N.C. Gen. Stat. § 24-2.3 (1986); 1981 Wis. Laws ch. 45, § 50 (not codified); P.R. Laws Ann. tit. 10, § 9981 (Supp. 1988). Because Section 525 requires "explicit" expression, the validity of a state's expression of its desire to opt out may be questioned if the state opt-out provision does not specifically name the relevant section of DIDMCA overridden. Whether a state may be permitted to rescind its override provision is unknown. Massachusetts and Nebraska have rescinded their original opt-out legislation. 1986 Mass. Acts ch. 177; 1988 Neb. Laws 913, § 2, Neb. Rev. Stat. § 45-1,104, as amended. Section 525 contains no time limitation within which states must act to override federal preemption. Consequently, more states could enact opt-out legislation in the future.

2. Section 522 provides:

   > Title IV of the National Housing Act (12 U.S.C. 1724 *et seq.*) is amended by adding at the end thereof the following new section:
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   > "Sec. 414. (a) If the applicable rate prescribed in this section exceeds the rate an insured institution would be permitted to charge in the absence of this section, such institution may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such institution is located or at the rate allowed by the law of the State, territory, or district where such institution is located, whichever may be greater.
   >
   > "(b) If the rate prescribed in subsection (a) exceeds the rate such institution would be permitted to charge in the absence of this section, and such State fixed rate is thereby preempted by the rate described in subsection (a), the taking, receiving, reserving, or charging [sic] a greater rate of interest than that prescribed by subsection (a), when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover, in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of the interest paid from the institution taking or receiving such interest."

   Pub. L. 96-221, § 522; 94 Stat. 165 (Mar. 31, 1980) (codified at 12 U.S.C. § 1730g (1982)). *Cf.* FIRREA, § 301; Home Owners' Loan Act of 1933, § (4g) (to be codified at 12 U.S.C. § 1463(g)) (*see infra* note 5).

3. Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n, 845 F.2d 519, 521 (5th Cir. 1988) (relying on Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978)).

DIDMCA.[4] While the substance of Section 522 was reenacted in Section 301 of FIRREA as Section 4(g) ("Section 4(g)") of the Home Owners' Loan Act of 1933,[5] no provision of FIRREA replaced the reference in Section 525 to Section 522 with a reference to Section 4(g).

Thus, insured savings associations may assert that effective upon the enactment of FIRREA on August 9, 1989, state opt-out authority under Section 525 is no longer effective with respect to extensions of credit by insured savings associations because the amendment made by Section 522 no longer exists to be overridden by Section 525. This reading is supported by the narrow language of Sections 522 and 525. Section 522 explicitly amends the NHA by adding a new section. Section 525 expressly limits the application of the amendment made by Section 522. Section 407 of FIRREA repealed the amendment made by Section 522.

Even if the opt-out authority of Section 525 was not rendered inapplicable to insured savings associations by FIRREA, these associations may assert that the opt-out provisions already enacted by various states should no longer apply to them. Section 525 requires an explicit statement by the enacting state that the amendment made by Section 522 should not apply to loans made in that state. Arguably, this "explicitness" standard at least requires existing "opt-out" states to reenact their respective opt-out statutes with a specific reference to Section 4(g), as the reenactment or Section 522, so as to make these statutes effective as to insured savings associations.

The published legislative history of FIRREA does not offer any further guidance on this issue. Moreover, 12 C.F.R. Section 571.22,[6] the Office of Thrift Supervision's regulation interpreting Section 4 (g), does not discuss the continued applicability of Section 525 to insured savings associations.

The effect of rendering opt-out authority under Section 525 ineffective is to enhance the value of an insured savings association charter by removing a potential impediment to uniform nationwide rate-charging practices that remains applicable to insured state banks and insured credit unions. Thus, federally-insured savings associations may now enjoy an advantage over these institutions.

4. Section 407 of FIRREA provides that "Title 4 o the National Housing Act . . . is hereby repealed." Pub. L. 101-73, § 907; 103 Stat. 363 (Aug. 9, 1989).

5. This new section provides:

> (g) Preemption of State Usury Laws. —— (1) Notwithstanding any State law, a savings association may charge interest on any extension of credit at a rate of not more than 1 percent in excess of the discount rate on 90-day commerical paper in effect at the Federal Reserve bank in the Federal Reserve district in which such savings association is located or at the rate allowed by the laws of the State in which such savings association is located, whichever is greater.
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> (2) If the rate prescribed in paragraph (1) exceeds the rate such savings association would be permitted to charge in the absence of this subsection, the receiving or charging [sic] a greater rate of interest than that prescribed by paragraph (1), when knowingly done, shall be deemed a forfeiture of the entire interest which the extension of credit carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover, in a civil action commenced in a court of appropriate jurisdiction not later than 2 years after the date of such payment, an amount equal to twice the amount of the interest paid from the savings association taking or receiving such interest.

Pub. L. 101-73, § 301; 103 Stat. 282 (Aug. 9, 1989) (to be codified at 12 U.S.C. § 1463(g)).

6. 54 Fed. Reg. 49,688 (Nov. 30, 1989) (originally codified in a substantially identical form at 12 C.F.R. § 570.11 (1989)).