ADVISORY RULING # 68
SEPTEMBER 16, 1982

September 16, 1982

Dear

You have asked whether loans made by trustees to members of pension and profit sharing plans that qualify under the Employee Retirement Income Security Act of 1974 ("ERISA plans") are subject to the Maine Consumer Credit Code.

Specifically, you have asked whether loans made by trustees are subject to the licensing provisions of 9-A M.R.S.A., §2-301. The definitions of "consumer loan" (§1-301(14)) and "creditor" (Section 1-301(17)) are crucial to determining the answer.

The first step is to identify the creditor, i.e., "the person to whom the debt...is initially payable..." (§1-301- (17)(B)). The definition in the Maine Code is identical to that of Regulation Z (§226.2(a)(17) and (22). The Official Staff Commentary (Comment 5 to 226.2(a)(3) and Comment 3 to 226.2(a)(22)) provides that the trustee and the trust are the same "person" for purposes of identifying the creditor under the Truth in Lending Act. I adopt this interpretation for the Code definitions. Therefore, when a supervised financial organization acts as a trustee for an ERISA plan, the licensing provisions of the Code are not applicable.

When the lender is not a supervised financial organization, the creditor may be subject to licensing depending on the rate of the finance charge (over 12¼%) and whether the creditor is "regularly engaged." Regulation Z adopts a numerical standard (25 transactions) to trigger the duty to make disclosures, §226.2(a)(17)(i). The Bureau is unable to adopt such a rule in an Advisory Ruling in any case, but generally we will be guided by the Reg. Z standard as well as other variables: nature and purpose of loan; interest rate; other contract terms, etc. In other words, the Bureau will seek to determine the need for licensing on a creditor-by-creditor basis in order to effectuate the policies of the Code and the public interest in regulating consumer lenders.*****

Turning specifically to ERISA plans, the Bureau sees no compelling policy reason to regulate these loan transactions when the assets of the plan are small and the frequency of loans is low. This is particularly true because, like loans made against an insurance policy, the consumer is borrowing his own funds. As a general enforcement posture, the Bureau does not intend to pursue this issue. I do not believe the risks of the private use of the remedies of §5-201(2) are such as to stimulate the trustee to seek licensing. However, you may want to seek (and the Bureau would support) an exclusion of ERISA plan loans from the Code in the next legislative session, see Kansas S.A. §16a-1-301(13)(b)(iii).

I hope this responds to your request.

Sincerely,

/s/ Barbara R. Alexander

Barbara R. Alexander
Superintendent

BA:as

*****AR #88 Amendment

This Ruling is modified regarding the Bureau's position that it has not, nor will not, adopt the numerical test set forth in Regulation Z §226.2(a)(17)(i), footnote 3, as the standard for determining whether or not a person is "regularly engaged" in the extension of consumer credit for Code purposes. The Bureau hereby adopts the federal approach to (1) end confusion in this area, and (2) ensure greater consistency between state and federal law and easier compliance by creditors. Notwithstanding that a transaction may not fall under the Consumer Credit Code or Truth-in-Lending in a particular case because the numerical test may not have been met, creditors are reminded that such transactions may still be scrutinized for unfairness or deception under 5 M.R.S.A., c. 10, the Unfair Trade Practices Act.

7/14/86