IN AND OUT OF DIDMCA

A COMPREHENSIVE STATE LEGISLATIVE HISTORY OF THE DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980 OPT-OUTS AND OPT-BACK-INS

To better understand why six of the seven states[1] that opted out of state rate exportation provisions authorized in the Depository Institutions Deregulation and Monetary Control Act of 1980[2] (DIDMCA) subsequently opted back in, AFSA collected as much legislative history of the initial opt-outs and opt-back-ins as possible. It took us about a year to collect all the contemporaneous resources we could get our hands on. We collected audio recordings, media coverage, archived committee records, and hearing records where available.

In sum, the legislative history of most state opt-outs indicates federalism concerns—*i.e.* not wanting the federal government to stick its nose into what happens in their state, while the legislative history of opt-back-ins (opt-out repeals) generally indicates a desire to put in-state banks on a level playing field with out-of-state banks to allow them to compete nationally.

DIDMCA records reach back over four decades, and this document reflects AFSA's findings so far.[3] We are certain other contemporaneous records exist that we simply have not yet located. We

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[1] We have limited this research to "states," and have not included Puerto Rico, which also opted out of DIDMCA. We may address Puerto Rico's legislative history at a later date.

[2] Pub. L. No. 96-221, 94 Stat. 132, 164-65 (1980), codified at 12 USC 1831d. Section 521 of DIDMCA preempts state usury laws permitting federally-insured state-chartered banks to charge "interest" (as defined by federal law) at the greater of (1) one percent above the Federal Reserve rate in effect or (2) "at the rate allowed by the laws of the State, territory, or district where the bank is located". *See also* 12 C.F.R. Part 331. For a general discussion of the effect of state opt-out, *see* Michael C. Tomkies, *Interstate Consumer Credit Transactions: Recent Developments*, 43 CONSUMER FIN. L.Q. REP. 152, 156-58 (1989), https://www.dltlaw.com/wp-content/uploads/sites/1602755/2020/06/InterstateConsumerCredit-1.pdf. Mike Tomkies, now with Dreher Tomkies LLP, is a tremendous contributor to AFSA's State Government Affairs and Law Committees, and several AFSA working groups. We thank him for his direct and indirect help with everything AFSA has done related to DIDMCA.

[3] This paper was updated with additional North Carolina information and re-issued July 24, 2024.

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encourage anyone who comes across such a record to share it so that we may incorporate it here (and acknowledge your contribution to this research, of course).

CHRONOLOGY

In 1980, Iowa became the first state to opt out of DIDMCA, and Iowa is still the only state not to eventually opt back in.[4] In 1981, four states opted out of DIDMCA (Colorado, Maine, Massachusetts, and Wisconsin). These four opted back in 1994, 1995, 1986, and 1998 respectively. In 1982, Nebraska opted out (opting back in in 1988), and North Carolina opted out in 1983 (opting back in in 1995). In 2023, Colorado became the only state to opt-in (1981), opt-out (1994), and opt back in. That law, set to go into effect on July 1, 2024, was preliminarily enjoined on June 18, 2024 by the U.S. District Court in Colorado. AFSA is a co-plaintiff in that case.[5]

We seek to find why each of the seven states opted out of DIDMCA and why six of those seven states entirely reversed course. What follows is the most complete legislative history that we have been able to compile in each of the opt-out states (in alphabetical order).

COLORADO

Colorado is the only state to opt-out, opt-in, and then opt-out again of DIDMCA. In opting out in 1981, the legislative history indicates a general mindset favoring state law over federal law. In subsequently opting back in to DIDMCA 1984, highlights of the legislative history include, in no particular order: 1) a desire to attract banks to the state, reversing the disadvantage that Colorado-based banks faced in not being able to export rates to customers in other states and thus compete on a national basis; 2) improving the general environment for credit card issuers in the state (non-DIDMCA related, but part of the same bill); and 3) acknowledgement that Colorado cannot control what other states' banks do vis-a-vis Colorado consumers.

Initial Opt-out. Colorado opted out of section 521 of DIDMCA in 1981. In an audio recording of a hearing on the bill in the Senate Business Committee, Senate Majority Leader Cole speaking in favor of the bill indicates a general distaste for federal law versus state law,[6] and reads aloud from the bill, "The state of Colorado does not want any provisions of any federal law preempting a state usury law to apply in this state."[7]

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[4] We note the state has largely mitigated the effects of its opt-out by deregulating its laws, with the exception of a 21% cap on installment loans *Compare* Iowa Code § 537.2401 (21% cap for consumer loan not pursuant to open-end credit) *with* Iowa Code § 537.2402 (no limitation on open-end credit).

[5] *National Association of Industrial Bankers; American Financial Services Association; and American Fintech Council v. Philip J. Weiser and Martha Fulford*. USDC Colorado Civil Action No. 1:24-cv-00812-DDD-KAS, Document 69 (6/18/24).

[6] Senate Business Affairs and Labor Committee hearing on HB 1178 recording at 3:40 "I wish there were more bills of this sort to preempt federal law if we can constitutionally do it." Feb. 17, 1981.

[7] Sen. Bus. Affairs HB1178 hearing 2/17/81 recording at 2:30.

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Cole also refers to an earlier discussion not in the record at hand, stating "it was unanimous that we should stay with our own laws rather than letting the federal preempt our laws."[8] The Committee recognized there was "no way we could override" regulation at the federal level, that the opt-out would only apply to state-chartered banks, and "those under federal charter would have to obey" federal law[9] when the Senate Business Committee reported the bill favorably 7-0 with one abstention.[10]

Opt-back-in. Colorado opted back in to DIDMCA in 1994. At a House Committee on Business Affairs and Labor hearing considering the opt-back-in bill, Representative Jim Dyer spoke in favor of the legislation, stating it was "a bill about contracts that are freely entered into by a consumer and a corporation,"[11] and said that the Colorado Uniform Consumer Credit Code Commissioner was "on board" with the bill,[12] along the banking department,[13] and the governor.

We digress to note that the minutes of a Commission on Consumer Credit meeting (which occurred in December prior to the Committee hearing) include the Commission's discussion of the proposed bill SB 94-176, including the DIDMCA opt-back-in. The minutes state that the then-UCCC Commissioner noted the issue was pending in Colorado courts, but her interpretation was "out of state banks are required to comply with the UCCC when making loans in the state. [And] [w]hether or not Colorado banks could export Colorado's credit laws to other states depended on whether those states have opted out" of DIDMCA.[14] We also note that the Commissioner testified at the subsequent March house hearing that the Commission on Consumer Credit supported the bill with

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[8] Sen. Bus. Affairs HB1178 hearing 2/17/81 recording at 2:55.
[9] Sen. Bus. Affairs HB1178 hearing 2/17/81 recording at 7:20.
[10] Sen. Bus. Affairs HB1178 hearing 2/17/81 recording at 10:10.
[11] House Committee on Business Affairs and Labor hearing on SB 94-176 (March 8, 1994) recording at 0:49.
[12] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 4:40. Later at the same hearing, Laura Udis, then-Administrator of the Uniform Consumer Credit Code testified representing the Commission on Consumer Credit, which supported the bill with the engrossed amendments. She indicated the Commission had concerns (from the credit card portions of the bill) that were addressed, including change-of-terms, over limit concerns, and restoring a right to cure. Nothing Udis mentioned in her testimony related to the state's opt-in or opt-out of DIDMCA. House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 1:01:10.
[13] Later in the hearing, Senator Dyer states "just a comment from Barbara Walker, state Bank Commissioner: it's the Division's policy that opting in by repealing [the opt-out law] may end some of the confusion over this law and could benefit Colorado by attracting credit card banks to this state." Sen. Bus. Affairs HB1178 hearing 2/17/81 recording at 27:15.
[14] Commission on Consumer Credit Minutes of Meeting Dec. 21, 1993 at p. 347.Additional Meeting Highlights*:* 1) Denny Dummler, "formerly involved in the bank card industry," expressed his support for repealing Colorado's DIDMCA opt-out because card issuers need the flexibility to charge the same rates across where they operate; 2) Attorney General Gale Norton "indicated that without final proposals and a draft of the proposed legislation, it was not appropriate for the commission to take a formal position"; 3) Commissioner Felicia Boillot Muftic was concerned with the lack of consumer protections resulting from repealing the DIDMCA opt-out and with allowing out of state bank to export fees to Colorado consumers; and 4) Attorney General Gale Norton wanted more information from the Division of Banking and its attorneys on the DIDMCA issue.

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the engrossed amendments that addressed their credit card provision concerns, and didn't address DIDMCA in her testimony before the Committee.[15]

Rep. Dyer said Colorado's existing opt-out law made Colorado a less attractive state for credit card issuers, stating "Colorado is at a disadvantage at attracting the credit card industry vis-à-vis other states, and this bill will take care of that.[16]" He further noted that only three percent of credit cards in the country at the time were from Colorado banks,[17] arguing that opting back in would "allow state banks to compete nationwide with other state banks."[18]

Bolstering that concept, President and CEO of Nordstrom National Bank John Walgamont testified in favor of the bill, indicating that the bill's opt-out reversal was important to Nordstrom's effort to expand their business across the country with a planned national credit card product launch.[19]

Importantly, Rep. Dyer noted that under the state's then-DIDMCA opt-out law, Colorado could only control what its own banks could charge, and could *not* control the rates *other* states export into Colorado and charge Colorado customers. Rep. Dyer referenced an editorial from the Denver Post:[20]

> I passed out an Editorial in today's Denver Post. I highlighted only one of several errors in that editorial. The thing I highlighted was to say that out of state banks that give cards to Coloradoans have to follow the same rules. This is not true. If it were true, then possibly this is a bad bill and you should vote no, but this is not true. And that is the focus of that whole editorial—to say that we can inflict Colorado rules on out of state companies.[21]

In addition to Dyer's clarification that Colorado could not control what out-of-state banks could do in the state and the forementioned discussion of the desire to compete with other states, the Committee discussed states' rights. Representative Pfiffner posed a question to "whoever can answer it," about federalism, "here we have said that as a general assembly we don't want federal guidelines. To me that seems to be a good thing, and so I don't know why we're getting rid of something where we're saying 'we want the guidelines, not the fed's guidelines.'"[22]

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[15] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 1:01:10.
[16] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 1:25.
[17] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 3:20.
[18] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 18:00.
[19] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 37:37. Walgamont also noted Nordstrom's desire to stay based in Colorado.
[20] A Denver Post editorial (p. 354) published March 8, 1994 excoriates SB 176, focusing primarily on non-DIDMCA provisions of the bill that change state credit card laws, but does refer to the opt-out law / opt-back-in proposal, stating "[o]ut-of-state banks that give cards to Coloradans have to follow the same rules [as state banks]. But SB 176 would wipe out the requirement that out-of-state banks adhere to Colorado law." This is the comment that Rep. Dyer refers to in his testimony the same day, March 8, 1994, stating that the comment is not true. We note an additional undated Denver Post article (pp. 352-353) discusses other (non-DIDMCA) portions of the bill, particularly credit card fees and penalties.
[21] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 2:10.
[22] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 25:12.

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To address that concern, Rep. Dyer deferred to Tom S.[23] from Coloradans for a Competitive Financial Climate, who said "because of the opt-out, state banks in Colorado are not allowed to export their fees and interest that are allowed by the state law of Colorado. They're not allowed to charge those to customers outside the state of Colorado. All national banks have that power. Colorado banks actually have fewer powers than the national banks do because of this opt-out."[24]

The House Committee on Business Affairs and Labor passed the bill 9-2 on March 8, 1994. It passed the house 38-26 and the senate 23-10.

COLORADO LEGISLATIVE HISTORY ADDITIONAL RESOURCES

A. Opt-out legislation: HB 1178 (1981) Legislative history
   - Audio Tapes
      i. House third reading (Feb 6, 1981)
      ii. Senate Business Committee reading (Feb 17, 1981)
      iii. Senate second reading (Mar 6, 1981)
      iv. Senate third reading (Mar 9, 1981)
   - Committee Summaries
      i. HB 1178 writeup
      ii. House Committee on Judiciary summary
      iii. Senate Committee on Business Affairs and Labor summary
   - Senate Journal: President signs bill (Mar 26, 1981)
   - Senate Journal: "Shall the bill pass" (Mar 9, 1981)

B. Opt-in legislation: SB 94-176 (1994) Legislative history
   - Audio Tapes
      i. Senate second reading (Feb 17, 1994)
      ii. Senate third reading (Feb 18, 1994)
      iii. House Business Committee (Mar 8, 1994)
      iv. House second reading (Mar 22, 1994)
      v. House third reading (Mar 24, 1994)
      vi. Senate consideration House amendments (April 14, 1994)
      vii. House consideration first conference committee report (May 3, 1994)
      viii. House consideration second conference committee report (May 11, 1994)
      ix. Second conference committee (May 11, 1994)
      x. Senate consideration second conference committee report (May 11, 1994)
   - Committee Summaries
      i. SB 94-176 writeup
      ii. First conference committee summary
      iii. Second conference committee summary

[23] The name is unclear from the audio recording, but it's possibly Tom "Showing" or similar.
[24] House Comm Bus. Aff. SB 94-176 hearing 3/8/94 recording at 25:45.

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iv. House Committee on Business Affairs and Labors summary

- Dec. 21, 1993 Commission on Consumer Credit Minutes of Meeting (Pages 347-350 of PDF)
- CO House Journal
    i. Business Affairs & Labor Report referred to Committee of the Whole with a favorable recommendation (Mar 9, 1994)
    ii. SB94-176 passes the House 38-26 roll call vote (Mar 24, 1994)
    iii. First report of first conference committee (Apr 29, 1994)
    iv. First Conference Committee vote (May 3, 1994)
    v. First report of second conference committee (May 10, 1994)
    vi. House Vote for immediate reconsideration (May 11, 1994)
    vii. Senate roll call vote 23-10
    viii. Bill history index SB 94-176
- CO Session Laws 1994 – Effects of SB 94-176

IOWA

Iowa was the first state to opt-out of DIDMCA and remains the only state to opt-out and not eventually opt-back-in, although the state has largely mitigated the effects of its opt-out by deregulating its laws, with the exception of a 21% cap on installment loans.[25] Legislative history on the 1980 opt-out is scant, though one might infer from the language an enthusiasm of the Iowa legislature in opting out of DIDMCA. The law says Iowa "does not want any of the [applicable provisions] to apply with respect to loans made in" the state, *and* it "is the intent of the general assembly of the state of Iowa in enacting this section to exercise all authority granted by Congress and to satisfy all requirements imposed by Congress . . . for the purpose of rendering [DIDMCA] inapplicable in this state."[26]

Though not legislative history, we note that in a subsequent September 23, 1986 redacted letter regarding whether a state bank chartered in a different state must be licensed in Iowa, the state rejects the argument that DIDMCA preempts Iowa law, and states that out of state state-chartered banks require a license in the state to make supervised loans to Iowans.[27]

IOWA LEGISLATIVE HISTORY ADDITIONAL RESOURCES

- HF 2492/Chapter 1156 (1980) became law 5/10/80 (index p. 1248)
- 1980 Legislation Summary of Sixty-Eighth Iowa General Assembly Meeting (p. 71)

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[25] *Compare* Iowa Code § 537.2401 (21% cap for consumer loan not pursuant to open-end credit) *with* Iowa Code § 537.2402 (no limitation on open-end credit).
[26] Iowa Laws of the 68th G.A. 1980 Session 68.2 Ch. 1156. (April 30, 1980).
[27] Iowa Office of Attorney General Thomas J. Miller letter re: whether issuance of lender credit cards requires a license. September 23, 1986.

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- Senate and House Journals [Index](#) (pp. 4,5, 16, 17, 25, 27, 219, 238, 247, 271, 272, 285, 349, 259, 738, 747, 1169, 2492, and 1277 (1980))

MAINE

Maine opted out of DIDMCA in 1981 and opted back in in 1995. The opt-out appears to be based on federalism, but with a twist. Discussion focuses on whether banks should be able to charge the discount rate plus one percent, and who should control interest rates in the state generally.[28] The opt-back-in legislative history, on the other hand, is similar to other states, outlining the competitive disadvantage Maine banks face compared to other states' banks.

Opt-out. Maine's opt-out of DIDMCA looks different than other states, though we note no state's opt-out is identical. It is entitled AN ACT to Overrule Federal Preemption of Certain Maximum Rate Ceilings of the Maine Consumer Credit Code.[29] Media coverage of a January 7, 1981 hearing on the opt-out bill in the Maine Business Legislation Committee quoted the opt-out bill sponsor, Rep. David Brenerman (D-Portland) arguing "the state, not the federal government, should set the interest. The issue is, who will regulate the interest, the state or someone in Congress."[30] Much of the focus of the discussion was on DIDMCA's authorization for state-chartered banks to optionally charge a default rate of the federal discount rate plus one percent. "Brenerman and other supporters acknowledged the change has had no effect in Maine, but there were indications that supporters did not want the state's ceiling tied to the federal discount rate, in case it went higher than 18 percent."[31] Maine bankers reportedly opposed the bill, arguing "there should be no interest maximum set on consumer loans—and if there were it should be at higher than 18 percent." The Bureau of Consumer Protection superintendent Barbara R. Alexander reportedly "feared the congressional action last year was the beginning of total federal control of interest."[32]

Opt-back-in. In 1993, Maine opted back in with respect to all transactions other than credit cards.[33] Key Bank and others argued that the opt-out hindered Maine banks who sought to develop and

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[28] "Brenerman told the committee the legislation would renew the state maximum interest on consumer loans and mortgages for mobile homes, at 18 percent. That was the highest rate allowed by the state Consumer Credit Code passed in 1975. That ceiling, though, was removed by congressional action last spring and replaced with federal regulations that set the interest rates states could charge at either 1 percent above the federal discount rate (which would place it at 14 percent) or the old state rate if it were higher than that." *Credit loan ceiling bill draws lots of interest*, by Dan Simpson, Portland Press Herald, January 8, 1981.

[29] We infer this was either intended to be a partial opt-out of DIDMCA or a more complete opt-out with exceptions noted. The "certain" ceilings Maine sought to overrule preemption on were 1) Mobile home consumer credit transactions; 2) consumer loans entered into by state-chartered supervised financial institutions; and 3) first lien mortgages to state-licensed creditors, [Laws of the State of Maine](#) as passed by the 110th legislature, Pub. Law Ch. 218 H.P. 12 – L.D. 6 § 1-110 (1981).

[30] [*Credit loan ceiling bill draws lots of interest*](#), by Dan Simpson, Portland Press Herald (January 8, 1981).

[31] [*Credit loan ceiling bill draws lots of interest*](#), by Dan Simpson, Portland Press Herald (January 8, 1981).

[32] [*Credit loan ceiling bill draws lots of interest*](#), by Dan Simpson, Portland Press Herald (January 8, 1981).

[33] An Act Authorizing Maine Banks to Export Certain Credit Terms, https://lldc.mainelegislature.org/Open/LDs/116/116-LD-0298.pdfL.D. 298 (1993).

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retain nationwide lending programs in such areas as student loans and boat finance.[34] And in 1994, Maine substantially deregulated credit card pricing (LD 1722), removing the primary reason that the opt-out had been continued for credit card: retaining a barrier to "high rate" credit card programs.

Sen. Dale McCormick, the same sponsor of the 1994 credit card deregulation bill, sponsored the 1995 DIDMCA opt-back-in bill (LD 49). Media coverage of her efforts said the bill "picks up where the other left off," would put Maine on par with Delaware, and "would allow export of credit card terms."[35] In adopting the bill, McCormick hoped Maine would attract "a large share" of the 35,000 new jobs projected nationally in the financial services sector.[36]

The official summary of the bill doesn't mention the opt-in explicitly, but lists numerous credit card law changes, including a repeal of "the provision fixing maximum finance charges on open-end credit plans related to credit cards".[37]

Testimony from the April 4, 1995 hearing on LD 49 sheds more light. The title of the bill reveals the intent: An Act to Create Additional Employment Opportunities in the Financial Services Industry by Allowing Financial Organizations to Charge Additional Finance Charges.[38] At the hearing, six individuals registered their support for the bill, including the sponsors, the Maine Bankers Association, The Chamber of Commerce, the Maine Department of Economic and Community Development, and Atlantic Bank. One individual from the Maine AFL-CIO registered in opposition. And Will Lund, then-superintendent of Maine's Bureau of Consumer Credit Protection registered neither in favor nor opposed.[39]

Susan Fulsom, representing the Department of Economic & Community Development, testified in support citing "the economic development opportunities" the bill represented. Fulsom referred to the legislation enacted in 1994 that "was successful in removing some of the major barriers to attract financial services businesses to the state," but "did not go far enough in correcting restrictive regulation on the industry." She stated the bill would "bring Maine law into line with Delaware law, and allow [Maine] to be competitive with major credit cards issuing states[.]"[40]

Referencing the prior year's deregulation bill, Senator Dale McCormick testified that more areas "needed to be addressed," including "eliminating statutory language that prohibited [sic] state chartered banks or bank affiliates from exporting credit terms," and elaborated as to why that

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[34] Testimony of Richard P. Hackett, Maine Joint Standing Committee on Banking and Insurance, 117th Legislature, Public Hearing L.D. 49 (April 4, 1995) at p. 18 of 37.

[35] *McCormick readies 'ambitious' package*, by Drew Morris, Kennebunkport Journal (January 1, 1995).

[36] *McCormick readies 'ambitious' package*, by Drew Morris, Kennebunkport Journal (January 1, 1995).

[37] Bill Summaries, Joint Standing Committee on Banking and Insurance, LD 49 summary at p. 4 (August, 1995).

[38] Maine Joint Standing Committee on Banking and Insurance, 117th Legislature, Public Hearing L.D. 49 (April 4, 1995) at pp. 2-3 of 37.

[39] Maine Joint Standing Committee on Banking and Insurance, 117th Legislature, Public Hearing L.D. 49 (April 4, 1995) at p. 7 of 37.

[40] Maine Joint Standing Committee on Banking and Insurance, 117th Legislature, Public Hearing L.D. 49 (April 4, 1995) at p. 8 of 37.

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change was needed. "In 1993, this Committee and the full legislature passed a law that allowed state-chartered banks to export loans with Maine terms prevailing, for all loans but for credit card loans. Changing this law would increase our ability to attract state chartered financial institution credit card business operations centers."[41]

Then-superintendent of Maine's Bureau of Consumer Credit Protection Will Lund's testimony neither for nor against LD 49. He he noted the credit card deregulation provisions of the bill would move the state to one of the least restrictive in the region, and stated "however, as you are aware, many Maine residents already hold credit cards issued from out of state banks which do not now need to comply with current state law."[42]

The most extensive testimony about DIDMCA came from Richard P. Hackett, a Maine attorney specializing in consumer financial services testifying at the request of the Maine Bankers Association, who stated he drafted the bill and was there for "tech support." He explained the U.S. Supreme Court's decision in *Marquette*[43] (establishing national banks' rate exportation authority), DIDMCA, and the states that opted out "in whole or in part" and subsequently opted back in, stating that Maine opted back in "with respect to all transactions other than credit cards" and explained further that Maine's remaining opt-out on the books (at the time) only applied to open-end credit card plans."

He said, "Maine's opt out clearly causes a bank located in Maine to be unable to take Maine laws to other states," and that 1994's credit card deregulation eliminated "the primary reason" any part of DIDMCA opt-out had remained in Maine:

> Namely, keeping a barrier to "high rate" credit card programs. The reason for that 'barrier is now gone. What is more, it is unclear whether the opt out ever had any real effect in keeping so-called "high rate" credit cards out of Maine . . .. It clearly does <u>not</u> keep any national bank program out of Maine, and many of the Delaware and South Dakota credit programs are national bank programs. The Maine opt out may keep some state-chartered programs out of the state, although state chartered institutions . . . remain active in Maine, relying on a number of technical arguments that make the opt out inapplicable to them . . . Thus, the technical effect of . . . the bill is to establish the right of Maine located banks to export Maine law elsewhere, <u>and</u> if our opt out ever affected incoming credit cards (a dubious proposition), to drop that [provision].[44]

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[41] Maine Joint Standing Committee on Banking and Insurance, 117th Legislature, Public Hearing L.D. 49 (April 4, 1995) at pp. 12-13 of 37.
[42] Maine Joint Standing Committee on Banking and Insurance, 117th Legislature, Public Hearing L.D. 49 (April 4, 1995) at p. 14 of 37.
[43] *Nat'l Bank v. First Omaha Serv. Corp.*, 439 U.S. 299 (1978).
[44] Maine Joint Standing Committee on Banking and Insurance, 117th Legislature, Public Hearing L.D. 49 (April 4, 1995) at p. 19-20 of 37 (emphasis supplied).

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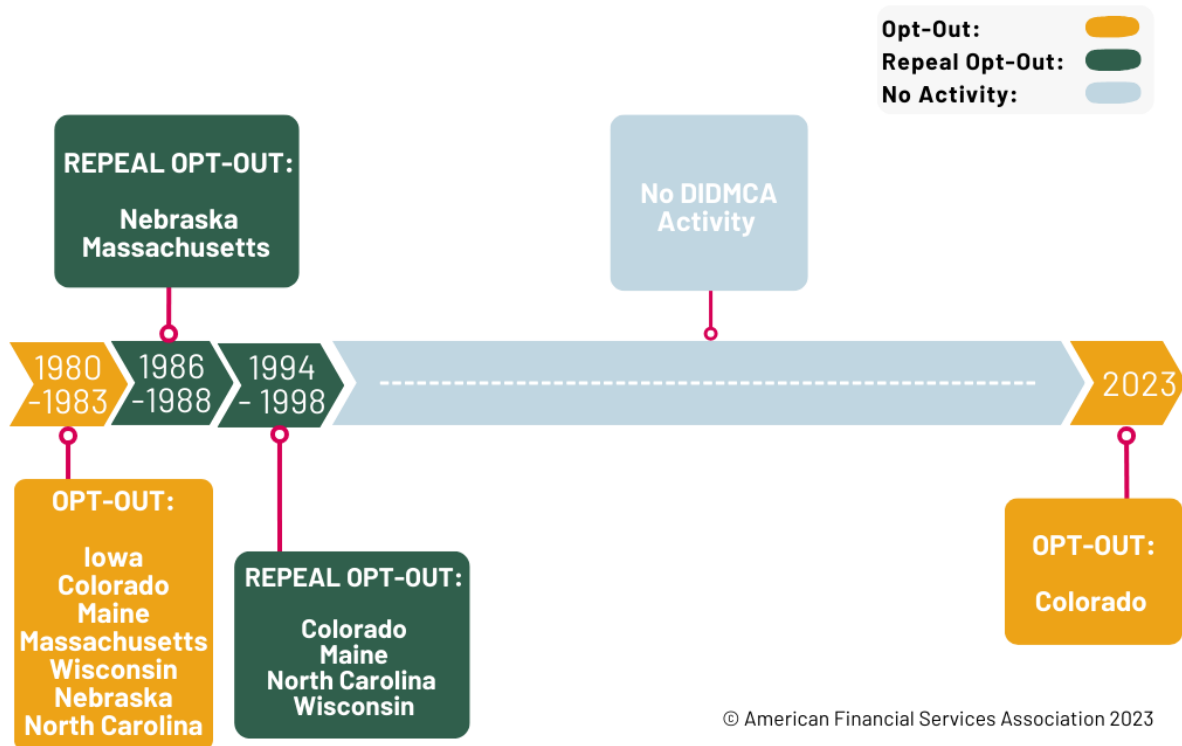
The bill passed the Joint Standing Committee on Banking and Insurance by a vote of 12 to 1.[45] On May 9th 1995 the bill passed the house by a vote of 109 to 29[46] and the senate 24 to 1.[47]



MAINE LEGISLATIVE HISTORY ADDITIONAL RESOURCES

A. Opt-out legislation: LD 6/Chapter 218 (1981)
   - Amendment (Apr 10, 1981)
   - Consent Calendar, First Day (Apr 13, 1981)
   - Consent Calendar, Second Day (Apr 14, 1981)
   - Passed to be Enacted (Apr 21, 1981)

B. Opt-Back-In legislation: Public Law Ch. 137 (May 22, 1995) LD 49
   - Amendment (Apr 19, 1995)

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[45] Maine Joint Standing Committee on Banking and Insurance, 117th Legislature, Public Hearing L.D. 49 (April 4, 1995) at p. 36 of 37.
[46] Legislative Record of the 117th Legislature, Volume I, House (May 9, 1995) at H-573.
[47] Legislative Record of the 117th Legislature, Volume IV, Senate (May 10, 1995) at S-719.

- Referred to Banking & Insurance (Jan 12, 1995)
- Referred to Banking & Insurance (Jan 17, 1995)
- Amended assigned for second reading (Apr 25, 1995)
- Senate as amended (Apr 26, 1995)
- Consent Calendar, First Day – "Ought to Pass" (Apr 27, 1995)
- House vote – roll call ordered (May 9, 1995)
- Senate vote to be enacted (May 10, 1995)
- Banking & Insurance Committee Report & Summary (Aug 1995)
- Maine Title 9-A §1-110: Consumer Credit Code & General Provisions
- Complete legislative index 117th legislature

MASSACHUSETTS

Massachusetts opted out of DIDMCA in 1981, and then opted back in, at least partially, in 1986. Legislative history in Massachusetts in general is remarkably thin, with little more than records of votes.[48] AFSA obtained some records on the 1981 opt-out from the Massachusetts State House News Service archives.[49]

Opt-out. Other than the State House News Service coverage, the only record AFSA has in hand[50] relating to Massachusetts' opt-out is the bill language itself, which appeared in two 1981 senate bills. The first is a single page bill with narrow language stating "In accordance with the provisions of [parts of DIDMCA], said law should not apply to the Commonwealth of Massachusetts."[51] The latter is a senate bill reported out of the senate committee on Banks and Banking, dated April 9, 1981.[52] At a hearing in that committee on May 27, 1981 discussion was primarily about increasing

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[48] Boston University School of Law notes "For many years, legislative history on Massachusetts statutes has been notoriously difficult—if not impossible—to find." BU School of Law Massachusetts Law Update, Legislative History https://sites.bu.edu/masslaw/ accessed on 6/26/24.

[49] Massachusetts State House News Service coverage of Massachusetts senate committee discussion on Banks and Banking [sic] hearing discussion on S. 2121 (May 27, 1981).

[50] A footnote in the 1991 lower court decision in *Greenwood Trust Co. v. Massachusetts* (subsequently reversed by the U.S. Court of Appeals for the 1st Circuit), references the notoriously limited legislative records in Massachusetts: "the official Senate and House Journals contain only a record of action taken but no summary of debate. Similarly, there are no formal transcripts of Committee hearings. However, since the early 1970's [sic], a news bureau, the State House News Service ("SHNS"), provides in the form of press releases unofficial records of action and selective debate from many, though not all, daily legislative sessions. Fortunately, SHNS recorded coverage of the floor debate of the bill that became Mass. Stat. 1981, ch. 384. In the absence of an official record, the SHNS releases are parsed here." *See Greenwood Trust Co. v. Massachusetts*, 776 F. Supp. 21, at 43n.49 (D. Mass. 1991); *rev'd,* 971 F.2d 818, 828 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993).

[51] S 1429

[52] S 2121

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interest rates in the Commonwealth, and Senator Brennan explained provisions of the bill to the committee.[53]

Interestingly, Senator Brennan mentioned others states' banks exporting rates into Massachusetts, and in-state banks needing to be able to compete or else potentially move out of state. This is noteworthy because this was a discussion about interest rates in a bill with an opt-out (rather than opt-in) provision. Other states' discussions of competition, banks leaving the state, and other states exporting their rates into the state at hand are typically part of a debate on whether a state should opt-back-in to DIDMCA.

> Brennan continued saying a number of states do not restrict banks from marketing their cards in Massachusetts. In state customers are being charged 19 or 20 percent he said, because other states do not restrict issuers. Brennan claimed the realities of the situation are that many in state issuers will begin to move out of state if they can find unlimited interest rates. Brennan said banks originally wanted unlimited rates in Massachusetts, but the Banks and Banking Committee worked up this compromise and agreed to put the limit up to 18 percent.[54]

But from the coverage, it doesn't appear Senator Brennan was envisioning a DIDMCA opt-out keeping other states' banks from exporting their rates into Massachusetts. He noted, "the U.S. Supreme Court decided that the National Banking Act precludes state regulators from regulating banks chartered to do business in another state."[55]

The bill was approved June 4, 1981.[56]

Opt-back-in-sort-of. In 1986 Massachusetts passed "an act relative to out-of-state loans by Massachusetts banks" where it apparently re-opted out of DIDMCA, but only for loans made "in" the commonwealth. It states "The commonwealth of Massachusetts hereby declares and explicitly states by the terms of this act that it does not want any of the provisions of [relevant portions of DIDMCA] to apply with respect to loans, mortgages, credit sales and advances made in this commonwealth . . . ."[57] As the title of the bill indicates, the commonwealth intended to permit Massachusetts banks to make out of state loans.

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[53] Massachusetts State House News Service coverage of Massachusetts senate committee on Banks and Banking [sic] hearing discussion on S. 2121 (May 27, 1981), p. 1. We note reference is also made at this hearing to other contemporaneous bills, including H. 6552, H 6763, and S 1293.
[54] Massachusetts State House News Service coverage of Massachusetts senate committee on Banks and Banking [sic] hearing discussion on S. 2121 (May 27, 1981), p. 5.
[55] We recognize *Marquette* and DIDMCA are two distinct and different things. We make this inference based on the context of the hearing discussion, as reported by the state's news service. Massachusetts State House News Service coverage of Massachusetts senate committee on Banks and Banking [sic] hearing discussion on S. 2121 (May 27, 1981), p. 6.
[56] *chaptered* at 231, ch. 385 section 2 (1981).
[57] Mass. ch. 177 (July 3, 1986). Note the law also references Emergency letter July 8, 1985 at 3:03 p.m., which AFSA does not have in hand.

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MASSACHUSETTS LEGISLATIVE HISTORY ADDITIONAL RESOURCES

As discussed above, legislative records are thin, but see discussion above for the State House News Service coverage of a senate hearing relating to the bill that opted out of DIDMCA. Other than the bill itself AFSA has not found any *legislative* opt-back-in resources, but the *Greenwood Trust Company vs. Massachusetts*[58] case is instructive. We note that the case was not about Massachusetts' DIDMCA status per se, but rather about applicability of Massachusetts consumer protection law vis-à-vis out of state banks.

Specifically, *Greenwood* addresses whether a state chartered federally insured bank chartered in Delaware can charge a late fee to a Massachusetts consumer when Massachusetts law forbids it. On appeal in the First Circuit, the Federal Depository Insurance Corporation filed an amicus brief in the case criticizing the federal district court's decision (which found in favor of Massachusetts) and outlining Congress' intent to level the playing field between national banks and state chartered, federally-insured banks, stating:

> Both the legislative history and the express language of Section 521 confirm that it was adopted by Congress in 1980 for the purpose of equalizing competition between national banks and state banks with respect to usury laws. In order to achieve this goal, the operative language of Section 521 at issue in this case was adopted verbatim from the operative language of 12 USC §85 . . . which had since 1864 defined the rights of national banks with respect to state usury laws. At the time that the operative language of Section 85 was incorporated into the statute applicable to state banks, that language had consistently (and, in our view, correctly) been interpreted as conferring on national banks at least two rights: (i) the right to charge both periodic interest and charges that were either components of interest or material to the determination of the interest rate, in accordance with the laws applicable to the "most favored lender" under the laws of the state where the bank is located; and (ii) the right to have loan charges governed, in both interstate and intrastate transactions, by the laws o the state in which they were located , rather than the laws of the states in which their borrowers happened to reside. Congress' deliberate adoption of the precise language that had long been interpreted in this manner, coupled with its explicit goal of equalizing competition between state and national banks, necessarily requires the conclusion that Section 521 should be interpreted as

[58] *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 776 F. Supp. 21 (D. Mass. 1991). Overturned by 971 F.2d 812 1st Cir. (1992). In overturning the federal district court's decision, First Circuit Court of Appeals Judge Bruce Selya began the opinion, "This train wreck of a case arises out of a headlong collision between a state consumer-protection law and a federal banking law. It brings into sharp focus the tensions inherent in our federalist system while presenting a novel legal question: can a federally insured bank, chartered in Delaware, charge its Massachusetts credit-card customers a late fee on delinquent accounts, notwithstanding a Massachusetts statute explicitly prohibiting the practice? The district court answered this question in the negative, enforcing the state statute and granting partial summary judgment in appellees' favor. Because we believe that the lower court was on the wrong track, we reverse. Federal law has the right of way in this area." 971 F.2d 818 1st Cir. (1992).

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conferring on state banks the same two rights accorded to national banks by 12 USC §85.

NEBRASKA

Nebraska's legislative history echoes a familiar theme. Reasons for opting out (in 1982) mainly relate to federalism concerns that Nebraska, not Congress, should control rates in the state. And reasons for opting back in (in 1984) primarily relate to Nebraska's ability to compete with other states by exporting Nebraska rates to out-of-state borrowers.

Opt-out. On January 18, 1982 Nebraska's Banking, Commerce and Insurance Committee held a hearing on LB 623.[59] The vast majority of the discussion related to rate deregulation, but sponsor Senator John DeCamp also discussed the portion of the bill dealing with interest rates and then summarized the purpose of opting out of DIDMCA:

> the second aspect of this proposal simply says that at the state recognized under federal law that was recently passed that we have an option of exercising by law whether we are going to control in the future even the issue of usury rates at the state level. If we do nothing the federal preemption takes over are we are out of the field anyway for all practical purposes. Therefore, the second part of this legislation would say the State of Nebraska does recognize and at least in this moment in time wants to exercise it's [sic] option to keep control over this subject for the foreseeable future.[60]

Unlike legislative history in other states, Senator DeCamp insisted repeatedly that Nebraska's opting out was merely an effort to preserve the opt-out rights for the future, referencing a deadline DIDMCA originally contained to exercise opt-out powers. Since part of the bill involved rate deregulation, the sponsor stated that opting out did not really change anything directly, but clearly believed the matter was urgent:

> Whether we would ever use it in the future, whether we would ever need [the preemption], I don't know, but with an attitude in this state we want to keep as much state control . . . as possible at the very minimum I think we should pass legislation stating that we recognize that we will be preempted and written out of the law or any ability to control usury rates in the future unless we affirmatively take some action here in the Legislature.[61]

Opt-back-in. At a January 19, 1988 Banking, Commerce, and Insurance Committee hearing, Senator Jerry Conway characterized LB 913 as a "follow up" to previous legislation he sponsored attempting to make Nebraska more competitive than other states in the credit card space. Senator

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[59] Much of the testimony pertained to the part of the bill that would remove interest rates, rather than to the DIDMCA piece. Committee on Banking, Commerce and Insurance hearing transcript (January 18, 1982) at pp. 3-5.
[60] Committee on Banking, Commerce and Insurance hearing transcript (January 18, 1982) at p. 5.
[61] Committee on Banking, Commerce and Insurance hearing transcript (January 18, 1982) at pp. 5-6.

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Conway referenced Nebraska's 1982 opt-out, saying "[b]y virtue of that particular legislation and our opting out, it makes it somewhat difficult to establish the import/exporting of rates between state lines."[62]

Ed Nafus, Executive Vice President of First Data Resources—a credit card servicer that he said employed 4700 people in Omaha at the time—testified in support of the bill. He compared Nebraska to South Dakota, Delaware, and Georgia, saying that they were all four competitive states for credit cards, except for two differences that made Nebraska less appealing: annual fees and opting out of DIDMCA.[63]

He explained Nebraska opted out "because it did not want the federal government to mandate our state usury laws. Some legislators *may* have also felt this would protect in some way our state's borrowers from foreign lenders coming into our state."[64]

He continued to explain the FDIC interpreted DIDMCA to mean Nebraska state-chartered banks could not export into other states. "Their interpretation is this: Since we have opted out of [DIDMCA], then a Nebraska-chartered credit card bank cannot be assured that Nebraska law will apply in dealing with out-of-state borrowers . . . because of this interpretation by the FDIC, Nebraska is not viewed to have optimum conditions for the exportation of usury laws."[65]

NEBRASKA LEGISLATIVE HISTORY ADDITIONAL RESOURCES

A. Opt-out legislation: The bill is also mentioned in a February 22, 1982 hearing (pages 5-6, 11-13) and a February 8, 1982 committee hearing (page 3) on related legislation.

B. Prior to 1988 opt-back-in legislation: Prior to the 1988 opt-back-in, in 1984, the legislature enacted LB 1076 (legislative history at p. 2709), permitting out-of-state banks to set up a state or nationally-chartered credit card bank in Nebraska to export Nebraska's favorable usury laws.

NORTH CAROLINA

North Carolina opted out of DIDMCA in 1983 and opted back into the law in 1995. The main reason to opt out appears to be similar to many other states—maintaining control over the state's interest rates. Discussion around opting back in centers on putting North Carolina chartered banks on an even playing field with national banks.

Opt-out.

[62] Committee on Banking, Commerce, and Insurance Hearing (January 19, 1988) at p. 5.
[63] Committee on Banking, Commerce, and Insurance Hearing (January 19, 1988) at p. 6.
[64] Committee on Banking, Commerce, and Insurance Hearing (January 19, 1988) at p. 6 (emphasis added).
[65] Committee on Banking, Commerce, and Insurance Hearing (January 19, 1988) at p. 5.

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On March 28, 1993,[66] the Senate Banking Committee met for a special meeting regarding HB 336. In this meeting, discussion centered on how DIDMCA was similar to 12 US Code Section 85. Representative Al Adams explained that the decision to opt out was to ensure the federal government doesn't have the right to say what North Carolina interest rates and lending practices would be.

Importantly, the senate banking record describes the FDIC's position that Section 521 of DIDMCA gave state-chartered banks the same right of exportation, and an apparent understanding that opting out of DIDMCA would *not* affect what other state's state-chartered banks charged North Carolinians.

> By letter dated March 17, 1981, the FDIC General Counsel's office expressed the opinion that Section 521 conferred the same rights on State banks as 12 USC 85 conferred on National banks in interstate lending. The General Counsel of the FDIC has told the Commissioner of Banks' office that in his opinion, if a State were to override the preemptions of Section 521, a State bank located in another State would still be able to charge North Carolina residents the highest rate allowed in the State bank's home state. In other words, override by North Carolina would not necessarily "inoculate" North Carolina customers from out-of-state, State banks. Override would prevent North Carolina State banks from charging North Carolina rates to out-of-state customers.[67]

Opt-back-in. SB 412 (1995) was created to opt-back-in to Sections 521-524 of DIDMCA. The bill reads in part, "Effective July 1, 1995 [relevant sections of DIDMCA] shall apply to loans, mortgages, credit sales, and advances made in this State on or after that date as if North Carolina had never opted out[.]"[68]

The main reason that North Carolina wanted to opt-back-in was to get state-chartered banks on the same playing field as national banks. Discussion around the bill centered on if the new law will change interest rates, as the committee concluded that it "would only allow exporting present rates already on the books."[69] Although this bill did not decide to opt-out of Section 501, most of the state law concerning this issue was consistent with the federal law in place.

NORTH CAROLINA LEGISLATIVE HISTORY ADDITIONAL RESOURCES

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[66] We note that DIDMCA required all states that wanted to opt out of Section 501 to do before April 1, 1983. North Carolina introduced their opt-out bill on March 2nd, 1983. Discussion around this bill was rushed, and committee members recognized the tight deadline, stating that "there probably would be amendments to the bill presented at a later time." Sections 521-524 of DIDMCA had no deadline for opting out.
House Banking & Thrift Institutions Committee Minutes (March 1983)

[67] Senate Banking Committee Minutes p. 10 of 27 of link (p. 4 of document entitled FEDERAL PRE-EMPTION [sic] OF STATE USURY LAWS (March 1983) (emphasis supplied).

[68] SB 412 House Committee Substitute *Codified at* Chapter 387 Section 1(b) (1995).

[69] Senate Commerce Committee Minutes (April 1995)

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A. Opt-out legislation: North Carolina Legislative Service H 336 (March 2, 1983) compiled history (as of July 7, 1984), p. 80.

B. Opt-back-in legislation:
   - North Carolina General Assembly SB 412 Legislative History 1995-1996 session
   - Final chaptered version SB 412 sec. 24-2.3 State opt-out from federal preemption
   - North Carolina House Financial Institutions Committee Minutes May 1995

WISCONSIN

The legislative history of Wisconsin's opt-out initially among the thinnest we found. We dug back in the 1981 online archives (looking for the opt-out history) and found only the subsequent 1998 repeal.[70] Deep in the records department of the legislature, original analysis by the Legislative Reference Bureau (LRB) and other records offered much more detail.[71]

Opt-out: The opt-out section of a larger 1981 bill is entitled "Rejection of federal preemption," and says "it is declared that this state rejects the applicability in this state of [relevant section of DIDMCA]."[72]

The bill made several changes to interest rates and finance charges allowed on many types of state-supervised loans and other finance agreements.[73] Notably, analysis by the LRB references state-chartered banks and their parity to national banks without reference to DIDMCA.

> State-chartered banks, credit unions, savings and loans associations and mutual savings banks are permitted to charge interest rates permitted for comparable federally chartered institutions. Current law is the same, except that it does not include savings and loan associations.[74]

Analysis of the opt-out explains the time limit for opting out associated certain sections of DIDMCA,[75] and continues to explain there is no time limit to opt-out of other provisions of

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[70] *linked from* Wisconsin 1981 Senate Journal archive online.
[71] We are forever thankful to Husch Blackwell LLP partner Marci Kawski and her Milwaukee office for their help finding what we were unable to find on our own.
[72] WI laws 586 Ch 45 § 50 (1981).
[73] Senate Bill 558 Analysis by the Legislative Reference Bureau, Wisconsin LRB-4181 (1981) pp.1-2.
[74] Senate Bill 558 Analysis by the Legislative Reference Bureau, Wisconsin LRB-4181 (1981) p. 2. Similar language appears in hand-written notes that apparently led to formal language in the analysis. State of Wisconsin Ch. 45 Laws of 1981 (October 31, 1981), p. 17.
[75] "The federal preemption regarding business and agricultural loans expires on April 1, 1983, unless a state exercises its option to reject the pre federal preemption before that date." Senate Bill 558 Analysis by the Legislative Reference Bureau, Wisconsin LRB-4181 (1981) p. 5.

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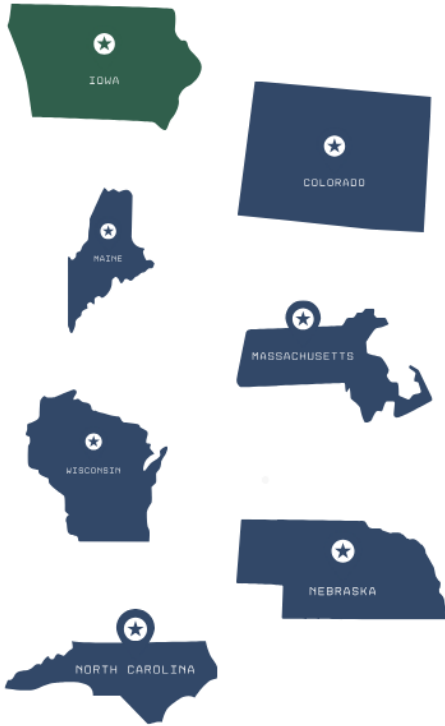
DIDMCA: "A state may reject this this federal preemption at any time. The bill expressly rejects these federal preemptions."[76]

DIDMCA



STATE	OPT-OUT	OPT BACK IN/ REPEAL OPT-OUT
Iowa	1980	X
Colorado	1981, 2023	1994
Maine	1981	1995
Massachusetts	1981	1986
Wisconsin	1981	1998
Nebraska	1982	1988
North Carolina	1983	1995

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We would be remiss if we didn't note the bill uses language that mirrors DIDMCA:

> *In order to prevent discrimination against state-chartered financial institutions with respect to interest rates*, state-chartered banks, credit unions, savings and loan associations and mutual savings banks . . .[77]

even though it is an opt-out bill. This may have been done on the theory that Wisconsin could protect its own banks by itself without needing federal authority, though we cannot be certain of the intent.

[76] Senate Bill 558 Analysis by the Legislative Reference Bureau, Wisconsin LRB-4181 (1981) p. 5.
[77] Senate Bill 558 Analysis by the Legislative Reference Bureau, Wisconsin LRB-4181 (1981) p. 5.

At a September 16, 1981 hearing before the Senate Committee on Aging, Business & Financial Institutions and Transportation, several associations appeared in favor of SB 558,[78] and several financial institutions appeared against.[79] We do not know the reasons for those in favor or against, though we doubt DIDMCA itself played a significant role. We infer the financial institutions supported the legislation because the legislation changed so many sections of state code regarding interest rates, though we can't be certain of sentiments on either side, since we do not have a record of testimony in favor or against.

At a subsequent executive session on October 1, 1981, the Senate Committee on Aging, Business & Financial Institutions and Transportation adopted various amendments, and passed the bill by a vote of 6-1.[80] The bill was then referred to the Senate Committee on Commerce and Consumer Affairs, which held a hearing on the bill on October 19, 1981. Appearances and Registrations for and against the bill were largely the same as, though not identical to, the first committee.[81] Ultimately that committee adopted assembly amendments and passed the bill out of that committee unanimously on October 22, 1981.[82]

Opt-back-in: As for the repeal bill itself, it sheds little light as to the reasons for opting back in, stating simply that DIDMCA allowed a state to opt out, that Wisconsin elected to do so in 1981, and that the section is repealed.[83]

From the legislative history of the repeal bill AB 669 we know that the bill was introduced on Dec. 23, 1997 and passed the assembly committee on Financial Institutions unanimously on Feb. 4, 1998.[84] There was at least one hearing on the bill in the senate on March 3, 1998. The bill was unanimously reported out of the relevant senate committee on March 10th 1998.[85] though as of the publication of this document, no testimony or additional records from that hearing has been found.

WISCONSIN LEGISLATIVE HISTORY ADDITIONAL RESOURCES

A. Opt-out legislation:

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[78] Appearances for the bill included the Wisconsin Mortgage Bankers Association, the Wisconsin Bankers Association, 1st Wisconsin National Bank, the Wisconsin Manufactured Housing Association, the Wisconsin Realtors, Wisconsin Auto & Truck Dealers Association, the Wisconsin Installment Bankers Association, and the Wisconsin Consumer Finance Association (an AFSA affiliate organization). Others registered in favor of the bill. Record of Committee Proceedings, Senate Bill 558 (September 16, 1981), p. 1.

[79] Appearances and registrations against the bill included the Wisconsin Savings League, the Wisconsin Consumers League, the Wisconsin Merchants Federation, some farmers Co-opts, the Wisconsin Farm Equipment Association, First Savings of WI, and the Wisconsin AFL-CIO. Record of Committee Proceedings, Senate Bill 558 (September 16, 1981), pp. 1-2.

[80] Record of Committee Proceedings, Senate Bill 558 (October 1, 1981), p. 4.

[81] Record of Committee Proceedings, Senate Bill 558 (October 19, 1981), p. 5.

[82] Record of Committee Proceedings, Senate Bill 558 (October 22, 1981), p. 11.

[83] Wisconsin 1997 AB 669.

[84] Wisconsin Legislative History AB 669 (1998).

[85] Wisconsin Legislative History AB 669 (1998).

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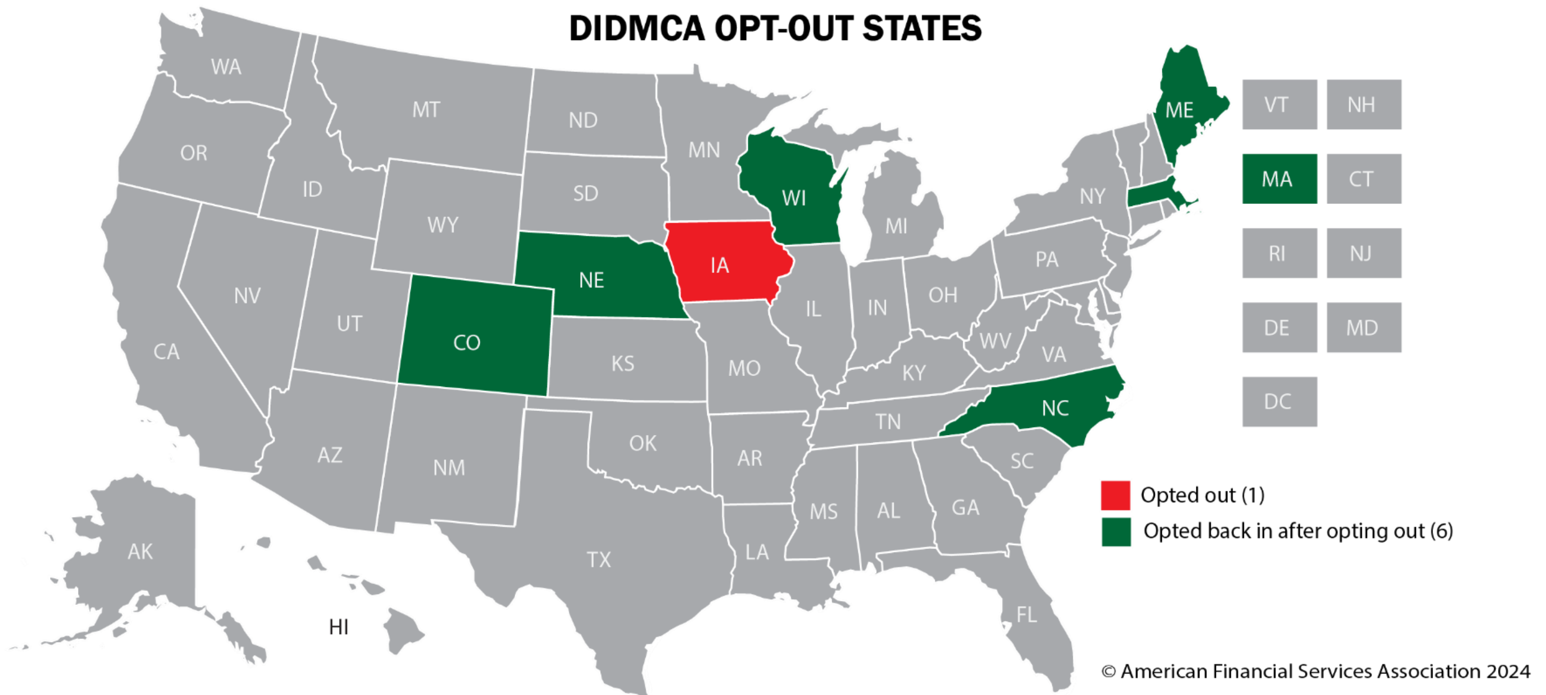
- SB 558/Chapter 45 Section 50 (1981)
- Senate Bill 558 Analysis by the Legislative Reference Bureau, Wisconsin LRB-4181 (1981)
- Record of Committee Proceedings, Senate Bill 558 (1981)
- State of Wisconsin Ch. 45 Laws of 1981 (October 31, 1981)

B. Opt-back-in legislation:

- AB 669/Act 142 (1997)
- Legislative history
- Dec. 15, 2005 Letter to FDIC re: parity for state chartered banks rulemaking clarifying 1998 opt-back-in

CONCLUSION

In conclusion, there is more to discover about states' choices to opt-out of and subsequently opt-back-into DIDCMA before we can call this record complete. If we had to generalize the reason seven states initially opted out, we would say it was federalism. If we had to generalize the reason six of the seven states opted back in, we would say it was to help their own state's state-chartered banks compete on an even playing field with state-chartered banks chartered in other states.



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