

Chapter 30

ADMINISTRATIVE ACTIONS

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Chapter 30

ADMINISTRATIVE ACTIONS

Objectives

- Determine the administrative actions available
- Determine the procedures of the various types of administrative actions

Associated Risks

- Reputation Risk. Although reputation risk is the primary risk, the need for administrative actions most likely results from high risk in any or all of the remaining six risk areas.

Overview

Administrative actions are available to the agency to prevent, alter, or eliminate serious operational problems in a credit union or, if correcting the problem is not feasible, to merge or liquidate the credit union. Administrative actions provide protection to the credit union, its members, its creditors, the NCUSIF, and the credit union industry in general. Administrative actions assist those credit unions that have serious operational or managerial problems that normal supervisory efforts have not, or cannot, resolve. They are not a convenient shortcut of NCUA's supervisory responsibilities.

Administrative actions represent the strongest supervisory tool available to NCUA. The actions generally used to correct problems and to ensure the continued existence of credit unions include:

- Cease and Desist;
- Civil Money Penalties;
- Removal of Officials;
- Prohibition; and
- Conservatorship used to correct problems.

Other more serious forms of administrative action include:

- Termination of Share Insurance (limited to federally insured state-chartered credit unions);
- Liquidation (insolvent federal credit unions);
- Revocation of Charter (solvent federal credit unions); and
- Conservatorship as a first step to liquidation.

In some cases, when NCUA initiates an administrative action (for example, cease and desist or removal actions) an administrative law judge hears both sides of the case. The administrative law judge recommends a decision to the NCUA Board. The Board then issues a final order that adopts, modifies, or rejects the administrative law judge's findings. The party subject to the order may appeal the final order through the federal court system. Certain other administrative actions may be directly challenged in court without an administrative law judge's involvement; for example, temporary cease and desist orders, immediate removal/prohibition orders, conservatorship actions, and involuntary liquidations under Title II.

Scope

The paragraphs that follow refer to the *NCUA Rules and Regulations* as 12 C.F.R., followed by the appropriate part or section number, and cite references to the *FCU Act* as "§206(h)" followed by an official citation (in most cases), for example "12 U.S.C. 1786(h)."

Examiner's Role

Because administrative actions are time-consuming and expensive for NCUA and quite serious for the credit union, examiners should try to resolve a credit union's problems informally whenever possible. Often, a realistic Document of Resolution and frequent examiner contacts will resolve problems with no need for administrative action. When realistic and workable plans do not result in corrective action or improved condition, however, the examiner should consult with the supervisory examiner.

Before deciding to take administrative action, the examiner and supervisory examiner must clearly understand the nature of the credit

union's problems and why any previous attempts to resolve the problems failed.

The administrative record must bear out the examiner's concerns about the credit union. The examiner must compile the administrative record and generally will serve as the principal witness in any administrative or judicial hearing. The administrative record is the total collection of information NCUA needs for decision-making purposes. The record must present a complete, factual, and fully documented history of the credit union's problems and the attempts by NCUA and the credit union to resolve them.

The following conditions generally indicate a persistent, serious problem that may warrant administrative action:

- An unsafe or unsound practice, i.e., any action or lack of action contrary to generally accepted standards of prudent operation (but not necessarily contrary to GAAP). The probable consequences of continuing the unsafe practice would be abnormal risk or loss to the credit union, its members, or the NCUSIF. Some courts require an additional factor, that the practice be reasonably related to the financial integrity of the credit union;
- A serious violation of law, rule, regulation, agreement with the board, or condition imposed in writing by the NCUA Board;
- Disclosure of the problem in at least one previous examination or follow-up report, or in the case of federally insured, state-chartered credit unions, in correspondence released by the state regulator or NCUA; and
- A practice or condition that one or more officials, who currently are unresponsive or are unwilling to take the necessary corrective steps, can resolve.

Note: These conditions do not exclude other conditions that may warrant administrative action. Examiner judgment is part of the evaluative process.

In deciding what, if any, action to take, the examiner should consider the:

- Financial condition of the credit union;
- Interests of the membership;
- Effect on the NCUSIF;
- Interest of management in continuing the credit union;
- Ability of management to run the credit union effectively;
- Sponsor's economic condition;
- Local economic conditions; and
- Creditors' interests.

When the examiner and supervisory examiner agree that administrative action is warranted, the examiner will prepare a memo to the regional office, noting the supervisory examiner's concurrence. The memo will usually include:

- Type of action recommended;
- Grounds for recommendation, based on *FCU Act*, *NCUA Rules and Regulations*, and this Guide;
- History and trend of operations since problems first appeared; supervisory efforts, agreements reached, and corrective action taken by officials;
- Probable asset share ratio computation; if insolvent, discussion of "escape clause" in *NCUA Rules and Regulations*, 12 C.F.R. §700.1(j)(1);
- Discussion of alternatives to the action, such as merger, special assistance, voluntary liquidation, where appropriate; and

- Discussion of why less severe forms of administrative action are inappropriate. For example, if the credit union is solvent and the examiner recommends revocation of charter, the memo should state reasons for not recommending a cease and desist or conservatorship.

The examiner may recommend administrative action at the conclusion of an examination or after a supervisory contact. In some cases, examiners need further information before making a recommendation. The Regional Office should contact the Office of General Counsel for an *Order of Investigation*, which will allow issuance of subpoenas for documents or testimony.

The regional office will review the recommendation for administrative action. If examiners discover any facts or findings subsequent to the recommendation they should promptly communicate the information to the supervisory examiner and regional director.

As the NCUA Delegations of Authority requires, the regional office will consult with the appropriate central office staff before processing the administrative actions. For administrative actions that require NCUA Board approval, the region will submit for review draft Board Action packages containing the proposed administrative actions to the Office of General Counsel, the Office of Examination and Insurance, and any other office that may have interest in the action. Regions must submit these packages within the timeframes established by the NCUA Board's guidelines for submission of draft Board Action Memorandums (BAMs).

Delivery

The regional director usually assigns the examiner to deliver the notice (or order) to the credit union or individual and to obtain a signed receipt (typed on copies of the notice) from the person who accepts delivery. The examiner will give the highest priority to the delivery of the enforcement action consistent with guidance provided by the regional director.

Refusal by credit union officials or an individual to accept the notice or order will not alter its force or effect. If the credit union refuses delivery, the examiner should place the original notice or order in a

conspicuous place, usually in the credit union's place of business, and if possible, in view of at least one official. The examiner should promptly report such an unorthodox delivery, or inability to effect delivery to the supervisory examiner and note the circumstances on a copy of the order. If the administrative action includes appointment of a liquidating agent or a conservator, and the officials refuse to release the records, the examiner should also promptly report this fact to the supervisory examiner.

The examiner may provide the credit union or individual being served general guidance about options and deadlines for response to the notice or order. Under no circumstances should the examiner discuss matters requiring legal interpretation of rights and alternatives. Instead, the examiner should advise the officials to consult Part 747 of the *NCUA Rules and Regulations*, the *FCU Act*, or their legal counsel.

**Contacts after
Delivery**

The examiner should not handle any inquiries from the media, but should direct any such inquiries to the regional director or an associate regional director. The supervisory examiner, with instructions from the regional director, will give specific guidance to the examiner regarding the supervision of the credit union that received a notice or order. In all cases, the supervisory plan will directly relate to both the type of administrative action served on the credit union or the person, and the timeframe for the credit union or the person to exercise the right to due process (i.e., administrative hearing or court challenge), as established in the *FCU Act* or the *NCUA Rules and Regulations*.

Examiners will often need to develop additional facts relating to the charges cited in the enforcement action for NCUA's use in a hearing or in a final decision on the action being sought. They should give high priority to these assignments. The examiner should refrain from making statements during the supervisory contacts that could prejudice the case or place NCUA in an untenable or insupportable position.

**Challenges in
U.S. District
Court**

In the case of a Temporary Cease and Desist Order, Immediate Suspension or Prohibition, Conservatorship, or Title II involuntary liquidation, the *FCU Act* permits a challenge of the Agency's action in U.S. District Court within 10 days of service of the order. A credit

union or individual may also sue NCUA even though the *FCU Act* does not provide for such.

The examiner must therefore have all findings and support documentation in order at the time of service. The Agency is represented in court by the Office of General Counsel and the Department of Justice or the various U.S. Attorneys' Offices, and these offices need time to process pleadings. An examiner with reason to believe that an administrative action will be challenged must notify the supervisory examiner or the regional office before serving the notice to allow for timely and effective legal assistance.

Institution-Affiliated Party

NCUA has the authority to bring removals, prohibitions, cease and desist, and civil money penalties against "institution-affiliated parties," defined in §206(r) of the *FCU Act*, 12 U.S.C. 1786 (r), as:

- Committee members, directors, officers, employees, and persons participating in the affairs of a credit union (either regulation or case-by-case decision may define person participating); and
- Independent contractors, including attorneys, appraisers, and accountants, who knowingly or recklessly participate in a violation of law, regulation, a breach of fiduciary duty, or any unsafe or unsound practice, and that violation or breach has caused or is likely to cause a more than minimal financial loss to the credit union, or a significant adverse effect on the credit union.

LUA Policy Issues

Letters of Understanding and Agreement (LUAs) are supervisory tools. Some credit unions equate LUAs with informal administrative actions, because NCUA has, at times, enforced violations of LUA terms through other administrative actions.

An LUA is essentially a contract between NCUA and a credit union. The credit union agrees to take, or not take, actions specified in the LUA. Regional directors issue LUAs when credit unions have not adequately responded to less severe measures, such as Documents of Resolution (DORs). NCUA requires LUAs for newly chartered credit unions and for granting permanent 208 assistance. (Refer to the

Special Assistance, Letters of Understanding and Agreement, Conservatorship, and Special Actions chapter of the Examiner's Guide for further guidance.)

- **LUA Publication.** The *FCU Act* requires that the NCUA Board publish and make available to the public "any written agreement or other written statement for which a violation may be enforced by the Board unless the Board, in its discretion, determines that publication would be contrary to public interest." NCUA must publish an LUA before it can enforce a violation of one of its terms. NCUA may enforce a published LUA by bringing an administrative action (e.g., a Cease and Desist Order or Civil Money Penalty), and proving noncompliance with the published LUA.

These publication requirements apply to all LUAs, including those issued to newly chartered credit unions, as well as those issued in connection with 208 assistance. NCUA may take an administrative action, even if the agency did not publish the LUA, if the credit union fails to comply with the terms of the LUA and the credit union's conduct constitutes a safety and soundness violation or violation of law or regulation.

Delegation of Authority SUP 16, authorizes regional directors to enter into LUAs with elected and appointed officials of FCUs and FISCUs. Regional directors discuss and negotiate publication with credit unions to prevent unfair surprises to credit unions and their officials.

The regional directors will address the issue of publication in every LUA between NCUA and an FCU by including one of the following three provisions:

1. This LUA will not be published;
2. This LUA will be published; or
3. The regional director is reserving for a reasonable time the right to publish this LUA.

The regional director forwards copies of all LUAs planned for publication to the NCUA Board and the Office of General Counsel. The Office of General Counsel oversees the details of publication.

The *FCU Act* provides that NCUA may enforce the terms of an unpublished LUA if the NCUA Board approves non-publication based upon a finding that publication would be contrary to the public interest. If the regional director recommends to the NCUA Board that an LUA not be published because publication would be contrary to the public interest, and the NCUA Board issues this determination, NCUA can still enforce the LUA. The regional director's recommendation must clearly show why publication would be contrary to public interest. The *FCU Act* requires a quarterly written report to Congress summarizing all non-published LUAs that are enforceable under this exception. NCUA expects rare use of this exception to publication to only those conditions that truly justify a conclusion that non-publication is in the public interest.

- LUAs with Federally Insured State-Chartered Credit Unions (FISCUs). An LUA issued to a FISCU by a state supervisory authority need not address publication, unless required by state law or regulation. NCUA, together with the state supervisory authority, may jointly issue an LUA to a FISCU. In such instances, the requirement for publication applies if NCUA attempts to take action based on a violation of the terms of the LUA. Therefore, regional directors will include one of the three provisions discussed above in all LUAs issued jointly with NCUA and an SSA.

Cease and Desist

12 U.S.C. §§1786(e) and (f) contain NCUA's authority to issue cease and desist orders; 12 C.F.R. 747, Subpart A contains the rules and regulations governing cease and desist administrative hearings. §206(e) of the *FCU Act* empowers the NCUA Board to issue a notice of charges and to arrange for an administrative hearing to determine whether NCUA should issue an order to a credit union or an institution-affiliated party ordering it or them to either stop certain activity or to take affirmative action to correct particular problems. Because there is a minimum of 30 days between serving of the notice and holding of the hearing, §206(f) authorizes the NCUA Board to

issue a temporary cease and desist order which takes effect immediately upon delivery. The NCUA Board uses this temporary order when significant conditions require immediate action. NCUA usually issues it at the same time it issues a notice of charges and hearing and it remains in effect until the NCUA Board withdraws it, the Board issues a final order after a hearing, or a U.S. District Court lifts it after a challenge.

Grounds

The grounds for a cease and desist action are set forth in §206(e) of the *FCU Act*. The examiner can recommend taking such action if any insured credit union or institution-affiliated party is:

- Engaging in or has engaged in, or the examiner has reasonable cause to believe that the credit union or the persons involved are about to engage in, an unsafe or an unsound practice in conducting the business of the credit union (see the Examiner's Role section for definition of unsafe and unsound practice); or
- Violating or has violated, or the examiner has reasonable cause to believe that the credit union or persons involved are about to violate a law, a rule, a regulation, any condition imposed in writing by the NCUA Board, or any written agreement entered into with the NCUA Board, as long as the agreement has been published in accordance with §1786(s) of the *FCU Act*.

A cease and desist order, whether permanent or temporary, is similar to an injunction. It is usually NCUA's first option when the agency needs formal action. Cease and desist is useful and effective because it allows NCUA to stop a current harmful practice or anticipate and prevent harmful practices from occurring.

Although a cease and desist order normally resolves a persisting or recurring problem, NCUA may use a cease and desist action for a first-time problem that could seriously affect the credit union's operations and where the officials have indicated they will not take corrective action.

While a cease and desist order most often prevents certain actions from occurring, it may accommodate purposes of affirmative action, including:

- Rescission of contracts;
- Limitations on growth of the credit union;
- Employment of qualified employees;
- Disposal of loans or assets; and
- Restitution, reimbursement, indemnification or guarantees against loss, which the examiner may order only if the credit union or institution-affiliated party was unjustly enriched or recklessly disregarded the law or regulation.

A cease and desist action allows resolution of problems in a solvent credit union while preserving and strengthening the credit union's corporate and managerial integrity. A cease and desist order is usually effective in compelling the credit union to take the needed action. If, however, examiners believe that issuance of a final order would not affect compliance, they should consider an alternative administrative action.

The administrative process for issuing a cease and desist order is as follows:

- The NCUA Board or regional director issues a Notice of Charges, setting out the allegations and statement of facts supporting the charges. The Notice establishes a time and place for a hearing between 30 and 60 days.
- The credit union or institution-affiliated party may consent, i.e., agree to a final order without contesting the charges. The NCUA Board then issues a final order without an administrative hearing. If there is no consent, a hearing is held before an administrative law judge.

- After the hearing, the administrative law judge sends a recommended decision and the hearing record to the NCUA Board.
- Within 90 days the Board must render its final decision. The Board may disagree with the administrative law judge, but the evidence must clearly support the decision.
- The credit union or institution-affiliated party may, if it disagrees, appeal to the U.S. Court of Appeals within 30 days after service of the final order. The court will uphold the NCUA Board's action unless it finds that action is arbitrary and capricious. The final order is in effect during the appeal unless stayed or modified by the court.
- The Order is effective 30 days after service on the credit union or institution-affiliated party. Violation of the order could result in civil money penalties of up to \$1,000,000 per day.

Notice of Charges and Hearing

The Notice of Charges and Hearing will contain the specific charges and supporting facts. The notice establishes a time and place for a hearing before an administrative law judge. The date for the hearing will be 30 to 60 days after service of the notice unless NCUA had set an earlier date at the request of the affected party. The examiner should advise the credit union or institution-affiliated party as to the seriousness of the notice upon its delivery. The examiner should make the officials aware of: (1) the timeframe in which they must respond by filing an answer to the allegations, and (2) the need to file a written notice of appearance with the administrative law judge. The notice will include this and other instructions.

Final Cease and Desist Order (Permanent)

NCUA will issue and serve a final cease and desist order:

- If the credit union or institution-affiliated party waives its right to a hearing and consents to the issuance of the cease and desist order; or
- If the NCUA Board, upon review of the hearing record and recommended decision of the administrative law judge, finds that

the charges specified in the Notice of Charges and Hearing have been established.

A cease and desist order becomes effective 30 days after service upon the credit union and it remains effective, except to the extent an action of the NCUA or a reviewing court stays, modifies, terminates, or sets it aside. A cease and desist order issued upon consent becomes effective at the time specified in the order.

If the credit union or institution-affiliated party is in violation of its terms, NCUA may enforce a final order (or temporary order) by filing a lawsuit seeking enforcement in U.S. District Court or imposing civil money penalties (see the Assessment of Civil Money Penalties section of this chapter.)

**Temporary
Cease and
Desist Order**

NCUA can issue a temporary cease and desist order before completing the normal administrative process when the violation or threatened violation as specified in the Notice of Charges and Hearing will likely:

- Cause insolvency;
- Cause a significant dissipation of the assets or the earnings of the credit union;
- Weaken the condition of the credit union; or
- Otherwise prejudice the interests of the insured members of the credit union.

The temporary cease and desist order usually accompanies the Notice of Charges and Hearing. In most cases, it will be part of the notice, but it may be a separate document. At times, facts developed after the serving of a Notice of Charges and Hearing may warrant issuing of a temporary cease and desist order, even though it did not previously appear appropriate. The examiner should immediately notify the supervisory examiner of any facts that would support such action.

The temporary cease and desist order becomes effective upon service and remains effective unless set aside, limited or suspended by a court

or the NCUA Board. The temporary order remains effective until completion of the administrative proceedings held as specified in the Notice of Charges and Hearing or until the NCUA dismisses the charges. When NCUA issues a final cease and desist order against the credit union, the temporary cease and desist order continues until the effective date of the permanent order. The credit union or the institution-affiliated party subject to a temporary cease and desist order may challenge the order by filing suit in a U.S. District Court within ten days after service. The credit union or institution-affiliated party may be subject to civil money penalties for violating the temporary order.

The NCUA Board may withdraw a cease and desist order at any time during the administrative process. This may occur, for example, after the credit union takes adequate corrective action, executes a letter of understanding, or otherwise convinces the NCUA Board that it can safely terminate the administrative proceedings. However, the fact that a credit union has ceased the practice leading to the Notice, or promises that it will not recur, does not necessarily mean that NCUA should terminate the action. The NCUA Board is free to pursue a final order to ensure that future violations do not occur, or to deter other credit unions from committing the same unsafe or unsound practices or violations.

**Assessment
of Civil
Money
Penalties**

12 U.S.C. §1786(k) contains NCUA's authority to issue civil money penalties; 12 C.F.R. 747, Subpart A contains the rules and regulations governing civil money penalty administrative hearings. The NCUA Board may assess civil money penalties against either a credit union or an institution-affiliated party (see definition of institution-affiliated party above). The *FCU Act* specifies three tiers of civil money penalties. For particularly serious violations, assessments may reach \$1,000,000 per day for each day the violation continues, although for credit unions the maximum is the lesser of \$1,000,000 per day or 1 percent of assets per day.

Grounds

- First tier. Any credit union or institution-affiliated party that violates a law or regulation, a final order of the NCUA Board, a published agreement with the Board (such as a Letter of

Understanding and Agreement), or a condition imposed in a published writing by the Board in connection with the granting of any application (such as the Insurance Agreement), may receive a fine of not more than \$5,000 for each day of the violation. First tier penalties may apply to credit unions that, even after warnings, repeatedly submit late or substantially inaccurate call reports.

- Second tier. If the credit union or institution-affiliated party commits a first tier violation, and exhibits reckless conduct or a breach of fiduciary duty, and the violation, practice or breach is part of a pattern of misconduct, or causes more than a minimal loss to the credit union, or results in a monetary gain or other benefit to the institution-affiliated party, then the NCUA Board may assess a civil money penalty of not more than \$25,000 per day for each day of the violation.
- Third tier. Any credit union or institution-affiliated party that knowingly commits the first tier violations, knowingly engages in unsafe or unsound practices, knowingly breaches any fiduciary duty, or knowingly or recklessly causes a substantial loss to the credit union or a substantial monetary gain or other benefit to a party because of the violation, breach, or practice, may receive assessment of a civil money penalty of not more than \$1,000,000 per day for each day of the violation, or in the case of a credit union, 1 percent of assets, whichever is less.

The normal administrative procedure for a civil money penalty action is as follows:

- The NCUA Board issues a Notice of Assessment, setting forth a statement of the law and facts on which it bases the assessment.
- The assessed party has 90 days to make payment, but may request a hearing within 20 days.
- An administrative law judge will hold a formal hearing if requested.
- After the administrative hearing, the administrative law judge submits a recommended decision to the NCUA Board.

- The NCUA Board issues its final order.
- An institution-affiliated party or credit union may appeal to the U.S. Court of Appeals within 20 days of receipt of the final order.

Removal of Officials

12 U.S.C. §1786(g) contains NCUA's authority to issue a removal order; 12 C.F.R. 747, Subpart A contains the rules and regulations governing removal administrative hearings. The administrative action to remove directors, officers, or committee members as provided in §206(g) of the *FCU Act* is available as an initial course of action or as a continuation of a cease and desist order if the officials refuse to comply as directed. Whether this enforcement action is an initial course or a continuation of a cease and desist order, it is separate and has its own applicability to particular situations.

In some cases involving a breach of fiduciary duty on the part of the director, the officer, or the committee member, discharge of the responsible person is an internal matter performed by the board of directors. On occasion, the director, the officer, or the committee member will voluntarily resign. It may be necessary to initiate formal removal proceedings, however, when internal or voluntary solutions do not work.

Removal of a director, an officer, or a committee member is not anticipatory in nature as in the cease and desist action. Removal is appropriate only when an official committed an act that constitutes grounds for removal, i.e., it cannot be imposed for future or threatened conduct. Removal can follow only if NCUA has issued a Notice of Intent to Remove or a Notice of Suspension and Intent to Remove and after completion of the appropriate administrative proceedings as provided in the *FCU Act* and *NCUA Rules and Regulations*.

NCUA may remove a person who voluntarily withdraws or whose services the credit union terminated. A removal action may be brought any time up to six years after resignation, termination of employment, liquidation, or any other termination of a relationship with the credit union (see §206(k)(3), 12 U.S.C. 1786(k)(3)).

Any party who has been removed or suspended from office is also automatically removed, suspended, and prohibited from participating in the affairs of any federally insured financial institution without the express written consent of the appropriate regulatory authority.

Grounds

NCUA can remove from office directors, officers, or committee members when they have:

- Directly or indirectly violated:
 - A statute or regulation; or
 - A provision of a final cease and desist order (but not a provision of an immediate, temporary cease and desist order); or
 - Any condition imposed in writing by the NCUA Board regarding the granting of any application or other request by the credit union (e.g., an application for insurance or 208 Assistance); or
 - Any published, written agreement between the credit union and the NCUA Board; or if they have
 - Engaged or participated in any unsafe or unsound practice in connection with the credit union; or
 - Committed or engaged in any act, omission, or practice which constitutes a breach of fiduciary duty; and
- Because of the violation, practice, or breach described above:
 - The credit union has or will suffer financial loss or other damage; or
 - The interests of the members have or could be prejudiced; or
 - The party receives financial gain or others benefit because of the violation, practice, or breach; and

- Such violation, practice, or breach:
 - Involves personal dishonesty by the party; or
 - Demonstrates the party's unfitness to serve the credit union or to participate in its affairs.

An official's past or current violation of the Depository Institution Management Interlocks Act is an additional ground for removal.

Following are the administrative procedures for removal:

- The NCUA Board issues a Notice of Intent to Remove.
- If the official or employee does not resign or consent, a hearing is held before an administrative law judge 30 to 60 days after service of the order.
- The administrative law judge sends the recommended decision and the hearing record to the NCUA Board.
- The NCUA Board issues a final order.
- The respondent may appeal to U.S. Court of Appeals, but the final order remains in effect unless modified by the NCUA Board or the Court.

Notice of Intent to Remove

The notice to remove an official from office contains a statement of facts constituting the grounds for removal and will establish a time and a place for holding a hearing before an administrative law judge, normally, between 30 days and 60 days serving the notice.

The rules and the procedures contained in Part 747, Subpart A of the *NCUA Rules and Regulations* apply to suspension and removal actions. The examiner should inform the official upon delivery of the notice that unless the official personally or an authorized representative appears at the hearing, the judge deems that the official has consented to the issuance of an Order of Removal. The party may also consent to the issuance of a removal order to save the time and expense of hiring

counsel or appearing at the hearing. In this case, rather than holding an administrative hearing, the matter will go directly to the NCUA Board for issuance of a final order of removal.

**Immediate
Suspension of
an Official**

An immediate suspension is similar to a temporary cease and desist order. If necessary to protect the credit union or the interests of its members, NCUA can immediately suspend an official from all official duties pending completion of the administrative hearing. This would be appropriate, for example, when it appears that the individual, once served with a notice, likely will cause further loss to the credit union or destroy credit union records before completion of the hearing or the issuance of the NCUA Board's final Order of Removal. Like a temporary cease and desist order, an Immediate Suspension will usually be a part of or will be served simultaneously with the Notice of Intent to Remove, although it may be served any time after the notice. It, too, becomes effective immediately upon service and remains in effect until dismissed or until the NCUA Board issues a final order. The official may challenge it in court within 10 days of service, and the NCUA Board may enforce the order by suing in U.S. District Court or by assessing civil money penalties.

Prohibitions

12 U.S.C. §1786(g) contains NCUA's authority to issue a prohibition order; 12 C.F.R. 747, Subpart A contains the rules and regulations governing prohibition hearings. A prohibition action is similar to, but broader in scope, than a removal proceeding. A removal action removes a person from a specified official position in a credit union, while a prohibition action stops any institution-affiliated party from participating in the affairs of a credit union. Because institution-affiliated parties are not always elected or appointed officials of an insured credit union, they may not always be removed as directors, officers, or committee members. Instead, NCUA must prohibit them from further participation in the affairs of an insured credit union.

The examiner prepares a recommendation for prohibition in the same manner as other administrative actions. The recommendation includes:

- Recipient of the prohibition action, i.e., name of the person, business address, and position with the company, group or

enterprise (including name of the proprietorship, partnership, or corporation) and the relationship with the credit union;

- Sufficient evidence to establish the grounds necessary for a prohibition action; and
- Specifics of the prohibition action, e.g., events causing the insured credit union's (or the other business enterprise's) realized or probable financial loss (or other damage) or events that allowed the institution-affiliated party to profit.

Prohibition of a person, like the removal of an official, is not anticipatory in nature as in a cease and desist action. Prohibition can follow only if NCUA issued a Notice of Intent to Prohibit and completed the appropriate administrative proceedings or the institution-affiliated party consented. NCUA may combine proceedings for removal and prohibition if appropriate. The procedures for a prohibition action are essentially the same as those for a removal action.

Grounds

The grounds are the same as those for removal.

Notice of Intent to Prohibit a Person from Further Participation

When NCUA determines that grounds for a prohibition action exist, it will serve a Notice of Intent to Prohibit upon the institution-affiliated party.

NCUA is not precluded from issuing a notice of prohibition where the person voluntarily withdraws or when the credit union terminates services after discovering financial loss or other damage. NCUA may bring a prohibition action any time up to six years after resignation, termination of employment, liquidation, or any other termination of a relationship with the credit union (see §206(k)(3) of the *FCU Act*, 12 U.S.C. 1786(k)(3)).

The examiner will inform the person served with the notice of the basic requirements regarding the hearing, which is held not less than 30 days and not more than 60 days after delivery, as stated in the notice. Usually, the region directs the examiner to complete a follow-

up supervision contact before the hearing date. However, if examiners do not make a contact or if the examiner learns before the hearing of additional pertinent information regarding the person and the charges cited in the notice, they should report this information to the regional office as soon as possible. The examiner should expect to participate in the hearing as a witness for NCUA.

**Immediate
Prohibition**

NCUA may issue an immediate prohibition order to protect the credit union or the interest of its members on the same basis and for the same reasons as an immediate removal of official order. The discussion in the section, Immediate Suspension of an Official, applies equally here.

**Removal or
Prohibition
Involving
Felony**

§206(i) of the *FCU Act*, 12 U.S.C. §1786(I) contains NCUA's authority to issue a removal or prohibition order for cases involving a felony; 12 C.F.R. 747, Subpart D contains the rules and regulations governing prohibition hearings. If examiners learn of any criminal charges brought against institution-affiliated parties involving dishonesty or breach of trust, they should report any evidence supporting a possible felony to their supervisory examiner. In no instance should the examiner proceed to investigate any complaints or indictments brought against institution-affiliated parties without first consulting with the supervisory examiner.

The examiner will report findings in support of a recommendation to suspend the official or to prohibit the person, if an official or other institution-affiliated party: (1) has been charged with a crime involving dishonesty or breach of trust; (2) the crime is punishable under federal or state law by imprisonment for more than one year; and (3) the continued service or participation by such party may pose a threat to the interests of the credit union's members or threaten to impair public confidence in the credit union. The examiner must develop tangible evidence to show that these grounds exist.

Examples of tangible evidence supporting suspension of the person as an official could include: (1) a membership meeting called in an attempt to force the resignation of the official or the termination of a person's participation; (2) share outflows; (3) membership cancellations directly attributed to general membership dissatisfaction

over the continuation of the person as an official; (4) significant adverse publicity; or (4) inability of the credit union to obtain loans from regular sources.

The examiner should refrain from expressing an opinion of guilt or innocence in the recommendation for suspension or for prohibition. The suspension or the prohibition remains in effect until the court finally disposes of the information, the indictment, or the complaint, or until NCUA terminates the administrative action.

If the final verdict is guilty, and the judgment is no longer subject to appeal, or if the individual enters a pretrial diversion or other similar program, NCUA may issue and have the examiner serve upon the person a final order removing or prohibiting that individual from participating further in the credit union's affairs. A not guilty verdict will not preclude NCUA from instituting removal or prohibition proceedings under the general removal and prohibition provisions previously discussed. The examiner will need to maintain close follow-up on the legal proceedings and immediately report to the supervisory examiner any new developments which may affect the order issued or pending.

The administrative procedures for felony removal or prohibition are as follows:

- The NCUA Board issues a Notice of Suspension and/or Prohibition, effective immediately.
- The NCUA Board holds no administrative hearing unless the official or other person requests one from the Board in writing within 30 days.
- If the institution-affiliated party requests, the NCUA Board or its designated hearing officer holds the hearing in Washington, DC. The hearing is not the type of formal administrative proceeding held for the other types of administrative actions and does not take place before an administrative law judge.

- If the court convicts the institution-affiliated party, and that conviction is no longer subject to appellate review, the Board may issue a final Notice of Removal or Prohibition.
- If the court acquits the institution-affiliated party, the Board may still proceed with a removal or prohibition, but it must be a §206(g)-type removal or prohibition.
- When a respondent requests an informal hearing, the presiding officer at the hearing makes his recommended decision to the Board within 10 days.
- The Board issues its decision within 60 days.
- There is no right to appeal the Board's final order.

Conservatorship

§206(h) of the *FCU Act*, 12 U.S.C. 1786(h) contains NCUA's authority to place an insured credit union into conservatorship. Conservatorship is a procedure whereby the NCUA takes immediate possession and control of a credit union's business and assets and may operate the credit union until:

- The NCUA Board permits it to resume business on its own, subject to any terms or conditions the Board may impose;
- The NCUA Board transfers possession and control to a state authority (in the case of a federally insured state-chartered credit union); or
- The NCUA Board liquidates the credit union.

Unlike the previous forms of action discussed, conservatorship does not involve an administrative hearing. The NCUA Board may act "ex parte without notice," meaning it need not notify the credit union of its intended action or provide it with the opportunity to contest the action before taking it. Within 10 days after the NCUA Board places a credit union into conservatorship, however, the credit union may challenge the action in U.S. District Court. Whether or not the credit union

challenges the conservatorship action, it is effective immediately upon service of the order to the credit union.

Conservatorship is a particularly useful tool in situations where management has abandoned the credit union or is totally inadequate to cope with severe financial problems that must be immediately brought under control. Conservatorship allows NCUA to influence more actively the operations of the credit union and to avoid or substantially reduce any further dissipation of assets.

Conservatorship is also useful when evidence exists of complex illegal or unsafe practices, but the examiners cannot readily determine the full ramifications of this activity. Conservatorship precludes management from having any access to records, and thus avoids the chance that management can tamper with or destroy vital records. At the same time, it permits either full or limited member services to continue.

Ideally, conservatorship will result in the credit union being returned to the members' control. This action requires NCUA Board approval. Prior to returning the credit union to the members' control, NCUA staff (other than those who had responsibility for managing the operations of the credit union) should complete an examination.

Grounds

NCUA may take conservatorship action whenever any of the following grounds are present:

- The credit union's assets require conserving;
- NCUSIF's funds are at risk;
- The members' interests need protection;
- The credit union consents to conservatorship by resolution of its board of directors;
- The credit union has willfully violated a final cease and desist order; or

- Management conceals or refuses to make available the books and records for inspection by an examiner or lawful agent of the NCUA Board.
- The Attorney General notifies the NCUA Board that the credit union has been found guilty of certain criminal provisions.

**State Credit
Unions**

In the case of a federally insured state credit union, the *FCU Act* provides that written approval of the state regulatory authority is a prerequisite to conservatorship action. However, if the state does not provide such approval within 30 days of the NCUA Board's notice to it that grounds for conservatorship exist, and the NCUA Board responds in writing to the state's written reason, if any, why the state is withholding approval, then, a unanimous vote of the NCUA Board can place the credit union into conservatorship without state approval.

**Termination
of Insurance**

§206(a) of the *FCU Act*, 12 U.S.C. 1786(a) contains the authority to terminate an insured credit union's share insurance; 12 C.F.R. §747 Subpart C contains the rules and regulations governing a termination of insurance action. Although the NCUA Board can theoretically take this action against a federal credit union, the Board most often reserves it for federally insured state-chartered credit unions. (Because federal credit unions must be federally insured, a termination of insurance would result in liquidation, unless the credit union could convert to a state charter before completing the proceeding.) Therefore, the recommended course of action for a federal credit union is immediate liquidation, if insolvent, or Notice of Suspension of Charter and/or Notice of Intent to Place into Involuntary Liquidation, for problems other than insolvency. (See the section of this chapter titled Revocation of Charter and Involuntary Liquidation of Solvent Credit Unions.)

For federally insured state-chartered credit unions, termination of insurance is the most severe action NCUA can initiate. It protects the NCUSIF when the credit union is unwilling or unable to take corrective action. In this regard, its purpose is similar to one of the basis for a conservatorship.

Termination of insurance will most likely force the state credit union into involuntary liquidation unless the credit union has an alternative share insurance program for which it can qualify and can thereby maintain member confidence. For these reasons, the regional office will closely communicate with the state regulatory agency whenever it contemplates this administrative action against any federally insured state-chartered credit union. Examiners will not discuss the potential for an administrative action with the credit union or with the state regulatory agency unless their supervisory examiners or the regional director specifically directs them to.

Grounds

The grounds for a termination of insurance action are essentially the same as those for a cease and desist action:

- Unsafe or unsound practices or conditions; or
- Violations of law, rule, regulation, any condition imposed in writing by the NCUA Board, or any written agreement entered into with the NCUA Board. To be enforceable, the Board must have previously published the agreement. Publication requires issuance of a press release and availability of the agreement to the public.

Termination of insurance action serves as an initial course of action or as a continuation of a cease and desist order if the officials refuse to comply as directed. Examples of conditions that might warrant a recommendation for termination of share insurance include:

- Insolvency as defined in §700.2(e) of the *NCUA Rules and Regulations*, and the unwillingness of the credit union's board of directors or state regulator to place the credit union into involuntary liquidation or to act appropriately to minimize risk and potential loss to the NCUSIF; or
- Abandonment of the credit union's operations by the elected and the appointed officials, and the state regulator's inaction to minimize risk and potential loss to the NCUSIF; or
- Plant closing, extended work stoppage, or breakdown in membership confidence that causes a major outflow of shares and

of liquidity, or general mismanagement of the operations by the officials that is causing or will cause an insolvent condition, and the officials or state regulator not acting to minimize risk and potential loss to the NCUSIF; or

- An unsafe or unsound practice or a serious violation of an applicable law, rule, regulation, order, or any condition imposed by the NCUA Board that is causing or will cause an insolvent condition, and the officials or state regulator not acting to minimize risk and potential loss to the NCUSIF.

Following are the administrative procedures for termination of insurance:

- The NCUA Board issues a Notice of Charges, with a request for corrective action. The credit union has 120 days to make such corrections, although the Board may reduce this time to not less than 20 days if the insurance risk is sufficient.
- If the credit union does not take corrective action, then the NCUA Board may issue a Notice of Intent to Terminate Insured Status. This sets out a statement of the facts justifying termination, and establishes a time and place for an administrative hearing within 30 to 60 days.
- An administrative law judge holds an administrative hearing.
- The administrative law judge files a recommended decision with the NCUA Board.
- The NCUA Board issues its final order.
- The credit union may appeal to the U.S. Court of Appeals, but the order is effective unless modified or lifted by the Board or the Court.
- NCUSIF insurance continues for one year from the date of termination on current shares; however, the NCUSIF does not insure new shares.

Notice of Charges

As a preliminary step to a Notice of Intent to Terminate Insured Status and if conditions warrant, NCUA will issue a Notice of Charges to the credit union, with a copy to the state regulatory agency. This notice will contain a statement describing the unsafe or unsound practices, conditions or relevant violations. This notice will request that the credit union correct the practices, the conditions, or the violations within 120 days after service of the notice. NCUA may set a shorter timeframe of not less than 20 days if it determines that any further delay may unduly subject the NCUSIF to greater risk or if the state regulatory agency requires a timeframe shorter than 120 days.

The Notice of Charges may motivate the officials to take the necessary corrective action. The region may assign the examiner to investigate the circumstances and the events in the case as a preliminary step in the process of issuing a Notice of Charges. In such an event, the examiner must identify the unsafe or unsound practices or serious violations and establish supporting facts that constitute grounds for the action. The examiner's analysis of the circumstances should provide sufficient evidence to proceed with the Notice of Intent to Terminate Insured Status if the credit union fails to correct the conditions cited in the Notice of Charges.

Notice of Intent to Terminate Insured Status

If NCUA pursues the Notice of Intent to Terminate Insured Status, the notice will contain a statement of the facts about the alleged unsafe or unsound practices or violations and will set the time and place for a hearing. The date of the hearing will be 30 to 60 days after service of the notice unless NCUA fixes an earlier date at the credit union's request. The examiner should caution the credit union about the seriousness of the notice upon its delivery. A copy of the notice is also sent to the state regulatory agency. The examiner informs the officials of the time limits for responding to the allegations and that the credit union or its representative must file a written notice of appearance with the administrative law judge. These instructions are included in the notice.

Notice of Termination of Insured Status

If a credit union cannot be returned to satisfactory operations and the danger of insolvency eliminated, the NCUA Board will terminate its insured status after an administrative hearing. Before the effective date

of termination of insurance, the credit union is required to mail to each member and to publish in a newspaper of general circulation the Notice of Termination of Insured Status. The format for this notice is specified in §747.207 of the *NCUA Rules and Regulations*. Specific duties of the credit union after termination of share insurance are specified in §747.208 of the *NCUA Rules and Regulations*.

The credit union is subject to the same duties and obligations of an insured credit union for one year after the effective date of the Notice of Termination of Insured Status; shares on deposit when insurance is terminated remain insured for the following year. Any shares purchased after the effective date of the final order are not insured by the NCUSIF. An examiner may be asked to follow up on the final order to determine if the credit union is fulfilling its duties and obligations to its members and to the NCUSIF.

**Involuntary
Liquidation
(Insolvency)**

§207(a)(1) of the *FCU Act* empowers the NCUA Board to close a federal credit union that is bankrupt or insolvent. This administrative action eliminates the credit union as a legal entity. NCUA cannot take this action against a federally insured state-chartered credit union.

Grounds

The grounds for this most severe action is insolvency or bankruptcy as defined in §700.2(e) of the *NCUA Rules and Regulations*.

The credit union has no right to a preclosure administrative hearing. The federal credit union's charter is immediately revoked and the credit union is placed into involuntary liquidation. The credit union may, however, challenge the action in U.S. District Court within 10 days. It is critical, therefore, that the finding of insolvency be based upon tangible evidence and indisputable circumstances using the most current information available. The examiner must prepare a supplemental memorandum for the liquidation package that contains all significant data to support the recommended action, including an analysis of the various exceptions set forth in §700.2(e) of the regulations.

Notice of Revocation of Charter and Involuntary Liquidation; Appointment of Agent The notice will be served on the federal credit union in the same manner as previously discussed for notices or final orders involving solvent federal credit unions. The order is effective immediately upon service, and all assets, books and records of the credit union immediately become the property of the NCUA. Agents for the Liquidating Agent will be appointed as provided in §207(a) of the *FCU Act*.

Post Liquidation Challenge A credit union placed into involuntary liquidation pursuant to §207(a) has the right to challenge NCUA's action in U.S. District Court within 10 days after liquidation. It is therefore imperative that the administrative record adequately supports insolvency. The examiner must be prepared to testify in court to establish the reasonableness of the insolvency calculation. For this reason, involuntary liquidations require the concurrence of the Office of General Counsel to ensure that the liquidation package is legally sufficient.

Revocation of Charter and Involuntary Liquidation of Solvent Credit Unions The authority to place a solvent federal credit union into involuntary liquidation is contained in §120(b)(1) of the *FCU Act*, 12 U.S.C. 1766 (b)(1). The rules and regulations relating to these administrative proceedings are contained in 12 C.F.R. Part 747, Subpart E. The effect of this action is the elimination of a federal credit union as a legal entity after due process provided for by §120(b) of the *FCU Act* and Part 747, Subpart E of the *NCUA Rules and Regulations*. It is the most drastic enforcement action that can be taken against a solvent federal credit union.

Grounds Pursuant to the authority in §120(b)(1) of the *FCU Act*, the NCUA Board may suspend or revoke the charter of a federal credit union that has violated any provision of its charter, its bylaws, the *FCU Act*, or NCUA regulations. This type of action may also be taken for reasons of bankruptcy, but generally is initiated under §207 of the *FCU Act*. Examples of conditions that may warrant recommending revocation of charter in a solvent credit union are:

- Abandonment of the credit union's operations and affairs by the officials; or

- Plant closing and officials refusing to vote to present the question of liquidation to the members. Such plant closing may force insolvency under the concept of an ongoing concern, or may cause a dissipation of the assets and expose the creditors and the NCUSIF to a greater than normal risk; or
- Other specific serious violations of its charter, its bylaws, the *FCU Act*, or regulations that cannot be reversed and that may cause insolvency; or
- Serious operational deficiencies that the officials have not acted to correct and which, if allowed to continue, may cause insolvency.

Abandonment shall be deemed to have occurred when all or most of the elected and the appointed officials have demonstrated by their actions, or failure to act, an intent to end operations. Proof is evidenced when an active quorum cannot or will not be formed by the remaining officials.

Because of the significant effect revocation of charter will have on the membership, the examiner should ensure that the grounds for revocation are indisputable and represent the most logical solution to the credit union's problems. For this reason, the revocation of a charter will not be initiated without a recent examination or supervision report. The examiner should prepare a supplemental memorandum to support the recommended action. Following are the administrative procedures for a revocation of charter:

- NCUA issues a Notice of Intent to Revoke Charter and Place into Involuntary Liquidation or a Notice of Suspension of Charter and Intent to Place into Involuntary Liquidation. If a Notice of Suspension is issued, operational control of the credit union is immediately transferred to NCUA. All subsequent administrative steps are the same for both a Notice of Intent and a Notice of Suspension.
- The credit union has 40 days in which to:
 - File a written statement stating why it should not be liquidated, or

- Request an oral hearing, or
- Consent to liquidation by a board of directors' resolution.

- If the credit union files a written statement, the NCUA Board will render a decision within 45 days. A Notice of Revocation of Charter and Involuntary Liquidation will be issued where the grounds for liquidation are found to exist.

- If the credit union requests a hearing, it will be held before an administrative law judge.

- The judge submits the recommended decision to the NCUA Board.

- The NCUA Board issues a final order.

Notice of Intent to Revoke Charter and Place Into Involuntary Liquidation

The examiner will recommend a Notice of Intent to Revoke Charter whenever the timeframe for due process will not create a greater risk of loss to the members, the creditors, and the NCUSIF than exists at the time of the recommendation. The examiner should be aware that the credit union will continue to conduct business during the effective time of this notice.

The examiner will determine whether or not a greater risk for loss exists by allowing the credit union to conduct business in the interim based on the conditions and the circumstances in each case. However, if a greater risk for loss is likely to exist, a recommendation for conservatorship or a Notice of Suspension of Charter and Intent to Revoke Charter and Place Into Involuntary Liquidation may be appropriate. This latter action is discussed in the following subsection.

The credit union has 40 days from the date the Notice of Intent is served to:

- File a written statement with NCUA setting forth the reasons why it should not be placed into involuntary liquidation; or

- In lieu of a written statement, request that an oral hearing be conducted in accordance with Part 747 of the *NCUA Rules and Regulations*; or

- Consent to the Notice by resolution of its board of directors.

The written statement, request for an oral hearing, or consent must be accompanied by a certified copy of a resolution by the board, signed by the president and the secretary authorizing such statement, request, or consent.

At the time of delivery of the Notice, the examiner will advise the officials of their options and of the timeframes within which their options must be exercised. The examiner must make it known to the officials that if the credit union fails to exercise any of its alternatives as provided in the *NCUA Rules and Regulations* within the prescribed timeframes, it will be deemed to have consented to the action being sought by NCUA.

**Notice of
Suspension of
Charter and
Intent to Revoke
Charter and
Place Into
Involuntary
Liquidation**

The examiner will recommend immediate suspension of charter whenever NCUA must act immediately to protect the interests of the members, the creditors, and the NCUSIF. All business by the credit union ceases except for the collection of loans, interest, and late charges; the collection of other funds legally due the credit union; and the payment of accounts payable and necessary operating expenses. NCUA will normally take immediate possession of all records and property of the credit union. Such immediate suspensions of charters are rare, since normally the same result can be achieved by placing the credit union into conservatorship.

The Notice of Suspension of Charter will contain a statement of the grounds for the immediate suspension and the authority upon which such grounds are based. Except for the statement of grounds supporting the need for immediate suspension of the charter and the restrictions placed on operations, the options available to the credit union will be the same as provided in a Notice of Intent to Revoke Charter.

**Appointment of
Agent**

A recommendation by the examiner that NCUA appoint an agent pursuant to a Notice of Suspension to take possession of all books, records, assets, and property of the credit union will be appropriate whenever it is apparent that the officials are unwilling or unable to

cope with their serious problems. A breakdown in the maintenance of the books and the records or abandonment of the credit union by the officials will be sufficient grounds to recommend appointment of an agent.

The appointed agent usually will be the district examiner, who will maintain, or have maintained, the records of the credit union and will open the credit union for restricted business activity. The credit union's surety bond coverage should be extended to cover the agents for the NCUA Board and arrangements should be made with the credit union's depository to honor the signature of the agents.

The duration of the agent's responsibility will extend until the credit union is placed into involuntary liquidation, the administrative action is withdrawn, or the appointment is rescinded, whichever comes first.

Notice of Termination

If the credit union officials have eliminated the serious problems cited in the Notice, a termination of the administrative action may be warranted. Documentation must be presented supporting the conclusion that the charges cited in the Notice no longer exist.

Notice of Revocation of Charter and Involuntary Liquidation; Appointment of Liquidating Agent

Once a Notice of Revocation of Charter is issued, NCUA ordinarily will appoint the Asset Management and Assistance Center (AMAC) liquidation specialist as the liquidating agent in involuntary liquidations for credit unions closed for reasons other than insolvency. In certain cases, examiners will be appointed as agents where geography or other factors preclude the liquidation specialist from handling the liquidation.

This final action will be taken after 40 days from delivery of the Notice of Intent to Revoke Charter or of the Notice of Suspension of Charter and Intent to Revoke Charter and Place Into Involuntary Liquidation. The examiner's recommendation to proceed with this final action will be supported by appropriate schedules and workpapers prepared on or about the fortieth day. The report should include specific comments and pertinent information on each charge cited in the notice.

The examiner also should report whether the credit union exercised any of the available options. If the credit union files a statement setting forth grounds and reasons why its charter should not be suspended, the examiner will analyze it objectively and provide factual evidence to support or reject the grounds.

**Order to
Establish
Special
Reserves**

Parts 116 and 201 of the *FCU Act* authorize the NCUA Board to require that special reserves be established when necessary to protect the interests of federal credit union members. In addition, Part 741 of the *NCUA Rules and Regulations* and the Agreement for Insurance require state-chartered federally insured credit unions to establish such reserves as the NCUA Board deems necessary.

The order requires that the reserves be established in an account entitled "Special Reserve for Losses" and that they not be transferred from that account or reduced in any way except by written permission of the NCUA Board or upon termination of the order. Generally, the order will affect the credit union's ability to pay dividends. An Order to Establish Special Reserve for Losses may be necessary under the following conditions:

- When the established reserves do not provide sufficient protection against a condition that threatens the credit union's soundness;
- When it is believed that the credit union may intentionally evade the need to establish sufficient reserves;
- When it is believed that the credit union may ignore the need for additional reserves; or
- When it is believed that the credit union may avoid establishing sufficient reserves by refinancing or extending loans or intentionally misrepresenting facts that, if properly disclosed, would have a material effect.

The Order to Establish Special Reserve is designed to prevent further deterioration of the credit union's financial condition. Before recommending such an order, the examiner should encourage the

board of directors to voluntarily transfer the appropriate amount to a special reserve account.

**Recommending
Special
Reserves for
Losses**

The examiner will recommend Special Reserve for Losses to the regional director, based on examination or supervision information and with the supervisory examiner's concurrence. The basis for the recommendation should be set forth in a separate memorandum and be part of the administrative record. Any order issued, along with the administrative record, should be retained.

Under Section 216 of the *Federal Credit Union Act* and Part 702 of the Rules and Regulations, NCUA may take supervisory actions that are similar to those available by using the foregoing administrative actions. These supervisory actions may include dismissing directors or senior management officials, ordering the employment of qualified senior executive officers, liquidation or conservatorship, and any other reasonable actions to carry out the purposes of prompt corrective action. Unlike many of the above administrative actions, the actions taken under prompt corrective action do not require administrative hearings before an administrative law judge. When considering administrative actions for a credit union which is undercapitalized, significantly undercapitalized, or critically undercapitalized, the examiner should therefore also consider whether or not the desired result could also be achieved by employing NCUA's powers under prompt corrective action.

References

- *Federal Credit Union Act*
 - 120(b) - Powers of the Board and Administration Personnel
 - Title II - Share Insurance
 - 201 - Insurance of Member Accounts
 - 206 - Termination of Insured Credit Union Status
Cease-and-Desist Orders; Removal or Suspension
From Office; Procedure
 - 207 - Payment of Insurance
 - 208 - Special Assistance to Avoid Liquidation
 - 216 - Prompt Corrective Action

- *NCUA Rules and Regulations*
 - 700.2-(e) - Insolvency
 - 702 – Prompt Corrective Action
 - 741 - Requirements for Insurance
 - 747 - Administrative Actions, Adjudicative Hearings, Rules of Practice and Procedure, and Investigations