



Credit Union National Association

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July 28, 2008

Ms. Mary Rupp
Secretary to the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Filed via: Regcomments@ncua.gov

Re: Proposed Rule Changes on Incidental Powers,
12 C.F.R. 721

Dear Ms. Rupp:

Thank you for the opportunity to express our views on the National Credit Union Administration Board's proposal to amend the agency's rule on Incidental Powers of Federal Credit Unions, 12 C.F.R. 721. By way of background, CUNA is the largest credit union trade association in the country, representing approximately 90% of the nation's 8,300 state and federal credit unions, which serve more than 90 million members. This letter was developed under the auspices of CUNA's Federal Credit Union Subcommittee, with input from CUNA's Examination and Supervision Subcommittee, Community Credit Union Committee, and Small Credit Union Committee.

Summary of CUNA's Views

- CUNA supports the changes NCUA is proposing that would:
 - Allow federal credit unions to provide correspondent services to foreign credit unions;
 - Add payroll services to the list of activities permitted as an "operational program";
 - Clarify that a federal credit union's negotiations and related activities with a vendor regarding a group discount for members and performance of administrative functions for vendors is permitted as a "finder" activity; and
 - Authorize credit unions to act as finders for financial products of other financial institutions.



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- As we have in the past, CUNA urges NCUA to take steps to expand federal credit unions' authority to engage in incidental powers. Such steps include:
 - Supplementing NCUA's three-part test for determining an incidental power with the approach used by the Comptroller of the Currency in recent opinion letters, which broadens the test and renders it more flexible.
 - Allow FCUs to engage in incidental activities authorized for state credit unions in the state or states in which they operate, to the extent such powers are not inconsistent with the Federal Credit Union Act.

- CUNA also recommends that NCUA approve new incidental activities which are:
 - Allowing federal credit unions to accept pre-paid funeral home accounts under the Trustee or Custodial Services category;
 - Permitting federal credit unions to manage repossessed residential properties for other credit unions; and
 - Authorizing a foreign currency investment pilot program as CUNA recommended in our comment letter of October 29, 2007.

Background

Incidental Powers, Part 721, describes the powers a federal credit union (FCU) may exercise as authorized under the Federal Credit Union Act. The FCU Act states that an FCU may “exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it was incorporated.” The current Part 721 includes a list of “pre-approved” categories considered to be incidental powers, as well as a non-exhaustive list of illustrations within each category.

The categories include:

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| Certification Services | Loan-related Products; |
| Correspondent Services | Marketing Activities |
| Electronic Financial Services | Monetary Instrument Services |
| Excess Capacity | Operational Programs |
| Financial Counseling Services; | Stored Value Products |
| Finder Activities | Trustee or Custodial Services |

NCUA issued this proposed rule in an effort to help clarify certain provisions and update the rule by adding examples of activities that have been recognized as permissible incidental powers activities since Part 721 was last amended in 2001.

CUNA's Comments

The proposal would affect three categories of incidental powers: correspondent services; operational programs; and finder activities. Primarily, the proposal would provide additional illustrations of permissible activities within each of these categories.

i. Correspondent Services The proposed rule would recognize that FCUs may provide correspondent services to foreign as well as federal or state-chartered credit unions.

Generally, correspondent service agreements address circumstances where a credit union, as a service to another credit union, provides a service to a member of the other credit union. Such a service may be offered, for example, where the geographic location of the member does not permit the member's own credit union to provide the service. A typical service would be the receipt of funds drawn from the account of an individual at a credit union to which that individual is not a member.

The current rule allows correspondent services between "credit unions," which NCUA generally defines to mean a federal or state-chartered credit union. In a 2006 opinion letter, however, NCUA stated that an FCU may receive funds from a member of a foreign credit union and then in turn transmit those funds to the member's credit union located in a foreign country. The proposed rule would revise this current provision to allow FCUs to provide correspondent services to both foreign and domestic credit unions. CUNA supports this addition.

ii. Operational Programs. The proposed rule would also add payroll services to the list of permissible activities under the operational programs category. This category generally relates to programs offered by credit unions to establish or deliver products and services that enhance member service and promote safe and sound operations.

Payroll services permit an FCU to make disbursements from a business member's account to third parties, as well as deduct the appropriate amounts for income taxes and employee-paid benefit premiums. NCUA has noted that payroll services are related to other permissible activities, such as electronic financial services and payroll deductions. The proposal would explicitly list payroll services as an example of an operational program. We agree with this revision as well and believe it will greatly enhance an FCU's ability to attract and retain business members.

iii. Finder Activities. The finder activities category of incidental powers allows an FCU to introduce its members to an outside vendor so that the two sides may negotiate and consummate a transaction. Finder activities may include the

offering of third-party products to a credit union's members, or the credit union may act as an intermediary between the parties for the sole purpose of bringing them together. Finder activities differ from marketing activities in that, as the "finder," a credit union simply identifies an outside party with a product or service it believes its members would be interested in.

The proposed rule would clarify that included in this category are an FCU's negotiation of group discounts and the performance of administrative functions to outside vendors. The proposal would also add language elaborating that vendors may be providers of both non-financial and financial products, which includes insurance.

Additionally, the proposed rule would provide that FCUs may act as finders for the financial products of other financial institutions. The incidental powers rule does not limit the types of vendors or products and services an FCU may promote. NCUA has noted, however, that in utilizing any incidental powers activities FCUs must be particularly mindful of the provisions stating that FCUs must comply with all applicable law and regulations.

We support these changes, which will provide more flexibility for FCUs while remaining within the scope of the FCU Act.

CUNA Supports Additional Flexibility under Incidental Powers

Under the incidental powers rule and consistent with the general standard of the Comptroller of the Currency under Valic,¹ NCUA has established a three-part test for determining whether an activity is "incidental," i.e., necessary or requisite to enable the credit union to carry out its business functions.

Under this test, an activity will meet the definition of "incidental" if it is:

- (a) convenient or useful in carrying out the mission or business of credit unions consistent the FCU Act;
- (b) is the functional equivalent or logical outgrowth of activities that are part of the mission or business s of credit union; and
- (c) Involves risks similar in nature to those already assumed as part of the business of credit unions.

However, as reflected in its interpretations and policy statements, it is apparent that the standard used by the Comptroller of the Currency is evolving to provide banks even greater flexibility than the three-part test may support. OCC's approach to approving incidental activities is reflected in the Federal Deposit Insurance Corporation's guide on banking:

¹ NationsBank v. Variable Annuity Life Ins. Co. 513 US 251 (1995).

We have found permissible ‘incidental activities’ to include those that are incidental to operating a bank as a business enterprise, that optimize the use and value of a bank’s facilities and competencies, that enable banks to avoid economic waste, or that enhance the quality and efficient of the content or delivery of banking products or services (emphasis added).²

Several recent examples of how the Comptroller has interpreted its authority include approval for PNC Bank to construct a building in Pittsburgh that includes twelve floors of office space, a five-floor hotel and thirty-two condominium units, and its approval of Bank of America’s headquarters in Charlotte, North Carolina that includes a 150-room Ritz Carlton Hotel.

It is obvious that bank regulators view of incidental powers is more expansive than NCUA’s approach for credit unions. We do not believe there is any reason to conclude that Congress has given NCUA less flexibility to determine what is an incidental power for a federal credit union than OCC has to delineate such activities for a bank. We are not suggesting that credit unions want to rush to construct multiplexes that include hotels and the like. However, we encourage NCUA to consider that the incidental powers’ criteria used by the OCC continues to evolve to the benefit of banks and that NCUA should employ a similar approach for federal credit unions, as they seek to engage in activities consistent with their mission, purpose, and federal law.

For example, by following the more flexible approach that the OCC has laid out, we believe NCUA could permit an FCU to utilize additional incidental powers authorized for state-chartered credit unions in the state in which the FCU is located. See for example, Washington State Department of Credit Unions Opinion Number 01-8, November 8, 2001.

Some state chartered credit unions may have powers that are not statutorily allowed for FCUs, but we believe a streamlined process could be established under which NCUA could approve a list of state activities that are consistent with the Act for the FCUs operating in that state.

NCUA Should Consider Additional Activities

In addition to the broader incidental powers issues we believe NCUA should address, CUNA asks NCUA to consider a few additional activities, such as allowing FCUS the authority to accept funeral expense related accounts. These are funds that consumers provide to funeral establishments as prepayment for funeral expenses. Funeral directors should be able to deposit these funds into one account held at the credit union. While not an incidental power, the issue of deposit insurance for these accounts, as well as for Interest on Lawyers Trust

² Federal Deposit Insurance Corporation, “A Guide to the National Banking System,” Washington, DC May 1999.

Accounts (IOLTAs), should also be resolved to allow each individual's funds represented in the account to receive federal share insurance up to \$100,000. CUNA will be providing additional analysis to NCUA on this issue.

CUNA also supports allowing FCUs to manage the foreclosed property of other credit unions, consistent with their capacity and safety and soundness to do so. As the mortgage crisis continues to unfold, some credit unions are assuming ownership of foreclosed property. We encourage NCUA to allow an FCU that has the appropriate expertise, capabilities and financial condition to assist other credit unions manage their foreclosed property until they are able to dispose of such property.

Finally, as we stated in our comment letter filed in October on the agency's Advance Notice of Proposed Rulemaking on FCU and Corporate Credit Union Foreign Currency Investments, we encourage NCUA to develop a means for FCUs that can manage the risk to use the authority provided to them under the FCU Act to invest in foreign currency deposits. In our comment letter, we urged NCUA to craft a pilot program first before moving to a regulation that would provide well-run credit unions with experience in engaging in this power and the agency with experience in regulating it before moving to a rule. We noted that the Office of Thrift Supervision, which permits such investments for thrifts, does so under an informal procedure, rather than under a regulation. We also urged NCUA to consider that because federal credit unions may already accept foreign currency deposits, allowing FCUs to balance the exchange risk with foreign currency investments could be an important safety and soundness tool.

In closing, the incidental powers rule presents an important opportunity for the agency to allow more flexibility for FCUs. We urge NCUA to consider the recommendations we are suggesting to enhance the operations of FCUs. Thank you for the opportunity to express our views on NCUA's proposed changes to its incidental powers rule.

Sincerely,

A handwritten signature in cursive script that reads "Mary Mitchell Dunn".

Mary Mitchell Dunn
CUNA Deputy General Counsel
And Senior Vice President