

October 20, 2005

Marcelino J. Huerta, III  
Attorney and Counselor at Law  
109 North Brush Street  
Suite 200  
Tampa, FL 33602

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Re: xxxxxxxxxxxx Request  
BD 04-05

Dear Mr. Huerta:

You submitted a request to the NCUA Board on behalf of your client, xxxxxxxxxxxxxxxx, for consent to work in a federally insured credit union, pursuant to Section 205(d) of the Federal Credit Union Act, 12 U.S.C. 1785(d). The Board granted your request on October 17, 2005.

xxxxxxxxxxx had been employed by the xxxxxxxxxxxxxxxx Federal Credit Union (USF FCU) in various staff positions since 1994. Her most recent position was that of real estate loan manager. Last year, she and four other individuals were the subject of investigation by the Department of Housing and Urban Development Office of Inspector General (HUD-OIG), and the US Attorney's Office in the xxxxxxxxxxxxxxxx, concerning benefits from funds provided by HUD to assist low income families. xxxxxxxxxxxx was the only credit union employee investigated. Although xxxxxxxxxxxx was indicted along with the four other individuals, she was the only one of the five individuals acquitted after a lengthy trial. It is our understanding that xxxxxxxxxxxx stopped working at xxx FCU at some point after the investigation began. Records obtained in the course of the HUD-OIG investigation revealed that xxxxxxxxxxxx had a first degree misdemeanor conviction for attempted theft from a tire company in Ohio in 1985. The conviction was based on a guilty plea entered by xxxxxxxxxxxx under her maiden name, xxxxxxxxxxxx. HUD-OIG forwarded a letter containing this information to NCUA.

Section 205(d) of the FCU Act (12 U.S.C. 1785(d)) provides in part as follows:

[e]xcept with the prior written consent of the Board-  
(A) any person who has been convicted of any  
criminal offense involving dishonesty or a breach of  
trust ...may not-

- (i) become, or continue as, an institution-affiliated party with respect to any insured credit union; or
  - (ii) otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union;
- (B) any insured credit union may not permit any person referred to in subparagraph (A) to engage in any conduct or continue any relationship prohibited under such subparagraph.

The FDIC Act contains a similar provision prohibiting those with a prior conviction from working in institutions insured by the FDIC. (See Section 19 of the FDIC Act, 12 U.S.C. 1829.) We note the crime of attempted theft involves dishonesty. Hence, under the two provisions of federal law, xxxxxxxxxxxx is prohibited, among other things, from being employed by any federally insured financial institution, unless she obtains the appropriate consent.

Once NCUA became aware of xxxxxxxxxxxx's conviction, John Ianno of NCUA's Office of General Counsel notified you of the prohibitions found in Section 205(d) of the FCU Act and Section 19 of the FDIC Act. (See letter from John Ianno to you dated February 2, 2005.) Mr. Ianno's letter stated in part:

In order to participate in the conduct of the affairs of any insured credit union or depository institution in the future, xxxxxxxxxxxx would have to receive approval of the National Credit Union Administration Board (NCUA) with respect to credit unions or the Federal Deposit Insurance Corporation (FDIC) with respect to insured depository institutions.

We also obtained a copy of a letter from CUNA Mutual Group to xxxxxxxxxxxx, terminating her bondability due to her prior conviction.

You wrote to Mr. Ianno on April 18, 2005, requesting relief from the prohibition of Section 205(d) of the FCU Act. You stated in your request that xxxxxxxxxxxx's conviction had been expunged by the Ohio court in 1987. Included with your request was a copy of the Judgment Entry concerning expungement (Expungement).

The NCUA Board has not adopted a policy on consent to participate pursuant to Section 205(d) of the FCU Act. The Board has received a very limited number of requests pursuant to Section 205(d) and has dealt with them on a case-by-case basis. This is the first request the NCUA Board has received for consent to work in any federally-insured credit union. All previous requests have been for

consent to work in a particular position in a particular credit union. The FDIC has an established policy interpreting Section 19 of the FDIC Act. (See Financial Institution Letter 125-98, 63 Fed. Reg. 66177, December 1, 1998.) The NCUA Board looked to the FDIC policy for guidance. There are two sections of the FDIC policy which are relevant to xxxxxxxxxxx's request. The first concerns completely expunged convictions. The FDIC policy states that "[a] conviction which has been completely expunged is not considered a conviction of record and will not require an application." See 63 F.R. at 66184. (Emphasis added.) The FDIC advises that the term "completely expunged" means that in the state where the expungement occurred, one cannot look to the conviction for any purpose, that is there are no exceptions allowing for review of the conviction. xxxxxxxxxxx's Expungement specifies that her conviction is expunged, subject to the exceptions noted in state law. The Ohio statute cited in the Expungement sets forth provisions allowing for inspection of sealed records to be made by, among others, any law enforcement agency as part of a background check of a person who applies for employment as a law enforcement officer. See Ohio Revised Code 2953.32(D). Hence, the xxxxxxxxxxx's Expungement does not qualify as completely expunged for purposes of the FDIC policy.

The FDIC policy also addresses de minimus offenses. It states:

De minimis Offenses: Approval is automatically granted and an application will not be required where the covered offense is considered de minimis, because it meets all of the following criteria:

- There is only one conviction or program entry of record for a covered offense;
- The offense was punishable by imprisonment for a term of less than one year and/or a fine of less than \$1000, and the individual did not serve time in jail;
- The conviction or program was entered at least five years prior to the date an application would otherwise be required; and
- The offense did not involve an insured depository institution or credit union.

Any person who meets the foregoing criteria shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction or program entry to all insured institutions in the affairs of which he or she intends to participate.

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See 63 F.R. at 66185.

xxxxxxxxxx's conviction meets all four criteria – it is her only conviction; a first degree misdemeanor in Ohio is punishable by imprisonment for not more than six months and/or a fine of not more than \$1000<sup>1</sup> and her 30-day sentence and \$250 fine were both suspended; the conviction took place in 1985, twenty years ago; and the offense did not involve an insured financial institution. FDIC states in the preamble to its policy that “[t]his exception represents the FDIC’s view that an individual should generally not be prohibited from participating in banking because of a singular offense of lesser consequence.” See 63 F.R. at 66181. The FDIC also states in its preamble to the policy that the de minimus offenses are of such low risk that “the affected person may be employed at any institution, in any position.” See 63 F.R. at 66181. Pursuant to FDIC policy, xxxxxxxxxxxx's conviction is considered de minimus and FDIC consent would be automatically granted for her to apply to work in any position in any FDIC-insured institution without need to file an application. However, according to the policy she must disclose her conviction to any FDIC-insured institution where she intends to work.

The NCUA Board determined that the FDIC policy on de minimus crimes should be applied to xxxxxxxxxxxx's request. Therefore pursuant to the consent provision of Section 205(d) of the FCU Act, the Board approved of xxxxxxxxxxxx's request to pursue employment with, or otherwise become an institution affiliated party or participate directly or indirectly in the affairs of, any insured credit union. xxxxxxxxxxxx must disclose her prior conviction to any insured credit union with whom she pursues employment. As noted above, if xxxxxxxxxxxx seeks to participate in the affairs of an FDIC-insured institution, she needs to obtain the approval of the FDIC pursuant to Section 19 of the FDIC Act and its application of Financial Institution Letter 125-98.

Copies of this letter will be sent to each of the agencies which regulate depository institutions, CUNA Mutual Group, xxx Federal Credit Union and xxxxxxxxxxx Federal Credit Union, to notify them of the NCUA Board's consent to xxxxxxxxxxxx's request.

Sincerely,

Mary Rupp  
Secretary, NCUA Board

cc: Region III Director

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<sup>1</sup> See Ohio Revised Code 2929.21.