

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 721

RIN 3133-AD12

Incidental Powers

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Rule.

SUMMARY: NCUA is amending its regulation governing a federal credit union's (FCU's) incidental powers by adding illustrations of permissible activities under the categories of correspondent services, operational programs, and finder activities. These amendments will provide useful information to FCUs by clarifying and updating the illustrations regarding permissible activities.

DATES: This rule is effective November 21, 2008.

FOR FURTHER INFORMATION CONTACT: Justin M. Anderson, Staff Attorney, Office of General Counsel, at (703) 518-6540.

SUPPLEMENTARY INFORMATION:

A. Background.

In May, the NCUA Board issued a proposed rule to update and clarify Part 721 of NCUA's regulations. 73 FR 30818 (May 29, 2008). The proposed rule recommended adding illustrations of permissible activities under the categories of correspondent services, operational programs, and finder activities.

B. Discussion.

NCUA's policy is to review regulations periodically to "update, clarify and simplify existing regulations and eliminate redundant and unnecessary provisions." Interpretive Ruling and Policy Statement (IRPS) 87-2, Developing and Reviewing Government Regulations. NCUA notifies the public about the review, which is conducted on a rolling basis so that a third of its regulations are reviewed each year. The proposed rule was the result of NCUA's 2007 review under IRPS 87-2, which covered the middle third of the regulations, including part 721. The proposed changes were intended to update and clarify the regulation.

C. Summary of Changes.

Briefly summarized, the current incidental powers rule provides: a standard derived from well-established case law for recognizing an incidental powers

activity; incorporates into broad, “pre-approved” categories of activities the activities legal opinions from NCUA’s Office of General Counsel (OGC) have recognized; and describes an application process for adding new activities and seeking advisory opinions from NCUA’s OGC on whether an activity would fit within an existing category. This final rule adds illustrations of permissible activities to the categories of correspondent services, operational programs, and finder activities. Under the category of correspondent services, this final rule recognizes FCUs may provide correspondent services to foreign as well as federal or state-chartered credit unions. This final rule also clarifies the category of finder activities includes an FCU’s negotiation of group discounts and the performance of administrative functions for outside vendors. Finally, this final rule adds payroll services to the operational programs category. The regulatory text in this final rule is the same as the regulatory text in the proposed rule.

D. Summary of Comments.

The NCUA Board received seven comment letters regarding the proposal: three from credit union trade associations; two from state credit union leagues; and two from FCUs. All of the comment letters generally supported the amendments in the proposed rule.

On September 10, 2008, NCUA received notice that two comment letters submitted via the Federal eRulemaking Portal regarding this rulemaking had not been forwarded to NCUA. This was due to a minor software problem that has

been corrected¹. The comment period for this rule closed on July 28, 2008. As noted above, all seven comment letters NCUA received supported the amendments and the Board believes, given the identity of these commenters, which includes major credit union trade associations, state leagues, and individual credit unions, that these comment letters broadly and fairly represent the views of interested parties. The only suggested changes involved suggestions to expand provisions in the rule beyond the proposed rule.

The Board believes it is appropriate and fair in these circumstances to proceed with the final rule rather than delay implementation. This rule creates no burden for FCUs but merely incorporates as illustrations in the rule certain activities already recognized as permissible in legal opinions from NCUA's OGC. Moreover, the rule, itself, permits ongoing requests to the NCUA and OGC for consideration of whether an activity is permissible as an incidental powers activity. 12 CFR 721.4. NCUA's OGC may recognize an activity as permissible through an interpretive legal opinion without necessitating a rule change. For these reasons, the Board concludes there is no need to reopen the comment period and the interest of the public and FCUs is served by proceeding with the final rule. Commenters are free to submit requests for legal interpretation to OGC or follow the petition process provided in the rule. *Id.*

¹ The interagency "eRulemaking Program" launched the website www.regulations.gov in January 2003 to provide access and an opportunity to comment on all proposed federal regulations at one online portal. NCUA's understanding is that the software problem has been corrected and safeguards are now in place to ensure this error will not occur for future proposed rules. Questions about this matter may be directed to John Moses, Chief, eRulemaking Program Branch, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, 202/566-1352, Moses.John@epamail.epa.gov.

Three commenters, however, suggested additional changes to Part 721, including some comments suggesting NCUA permit FCUs to offer particular services to nonmembers. As discussed below, the suggested changes are either outside the scope of this rule, prohibited by statute, or addressed in another section of NCUA's regulations. The Board notes the incidental powers rule addresses only those activities and services an FCU can offer to its members and this authority is generally not a basis for FCUs to provide services to nonmembers.

One commenter suggested including, as an incidental power, the ability to sell or lease "excess capacity" that the credit union does not anticipate ever using. Alternatively, this commenter suggested extending the time period for an FCU to implement an expansion policy. The Federal Credit Union Act (the Act) authorizes FCUs to "purchase, hold, and dispose of property necessary or incidental to its operations." 12 U.S.C §1757(4). The Act does not otherwise authorize FCUs to purchase or hold property. The current incidental powers rule recognizes the authority to sell "excess capacity." Given that an FCU is generally only authorized to purchase and hold property for "its operations," the excess capacity authority granted in the rule requires an FCU to make investments in facilities, equipment, or services in good faith with the intent of serving its members and the expectation the "excess capacity" will be taken up by future expansion of services to members. 12 C.F.R. §721.3(d). The suggested

change, therefore, would expand the powers of FCUs beyond the statutory authority granted by the Act. With regard to expanding the time frame for taking up “excess capacity of fixed assets,” the fixed asset regulation, and not Part 721, specifically addresses the time frames for the future use of fixed assets. 12 C.F.R. §701.36. The commenter’s suggestion is outside the scope of this rule. The Board notes the fixed asset rule is among the first third of NCUA’s regulations scheduled for review in 2009 and public comments for potential rulemaking concerning that rule are welcome.

This commenter also suggested NCUA should permit FCUs to engage in three additional activities under the incidental powers regulation. First, the commenter suggested NCUA allow FCUs to buy and sell loan portfolios of other credit unions as investments. Part 703 of NCUA’s regulations addresses the permissible investments an FCU can hold. 12 CFR Part 703. The commenter’s suggestion is outside the scope of the proposed rule. Like the fixed asset regulation, NCUA’s investment rule is among the first third of NCUA’s regulations scheduled for review in 2009, and the public is welcome to submit comments. The Board also notes the sale and purchase of loans among credit unions is generally permissible, subject to other provisions in NCUA’s regulations. 12 CFR §§ 701.22, 701.23, 741.8, 742.4.

Second, the commenter suggested NCUA permit FCUs to establish Interest on Lawyers Trust Accounts (IOLTAs). In brief, an IOLTA is an interest bearing

account set up by attorneys to hold client funds. The interest, which lawyers cannot keep for themselves because the funds belong to their clients, can be donated to charities. The issue for credit unions regarding IOLTAs is that the Nation Credit Union Share Insurance Fund generally only provides insurance to the beneficial owners of an account, and they must be members. Under NCUA's insurance rules, all the clients whose funds are in the IOLTA would have to be members of the credit union where the account is established for the client funds in the IOLTA to be fully insured. NCUA's position on insurance coverage of IOLTAs currently remains as set out in an opinion from the OGC, OGC Op. 96-0841 (September 17, 1996), and is available on the agency website at www.ncua.gov.

Finally, the commenter suggested NCUA allow FCUs to sell gift cards and travelers checks to nonmembers. Generally, FCUs may only provide financial products and services to members, and the incidental powers rule only addresses activities and services for members. In 2006, NCUA adopted a new regulation authorizing FCUs to provide certain services to nonmembers within the field of membership, which implemented authority the Financial Services Reform Act granted. 12 C.F.R. §701.30. The Board notes §701.30(a) specifically authorizes an FCU to sell travelers checks to nonmembers who are within its field of membership; the rule does not, however, specifically address gift cards. Consideration of whether gift cards or other stored value products

would be permissible under §701.30 is outside the scope of this rulemaking on incidental powers activities.

Another commenter suggested NCUA include four additional activities in the incidental powers regulation. First, the commenter suggested NCUA should permit FCUs to engage in activities authorized as incidental for state credit unions in the state or states in which they operate. Many states currently have parity provisions in state laws permitting a state-chartered credit union to engage in any activity permissible for an FCU. The Act does not have a similar provision allowing FCUs to engage in incidental powers authorized by the states in which they operate, and the Board cannot grant by regulation broader authority than that provided in the Act.

Second, the commenter suggested NCUA allow FCUs to manage repossessed properties for other credit unions. FCUs can hold repossessed assets only temporarily and NCUA restricts FCUs from holding these types of assets permanently in an income-producing manner. NCUA Accounting Manual §300. An FCU, however, could manage repossessed property for another credit union if it has excess capacity in this area of its operations, subject to the “good faith” limits of the rule. 12 CFR §721.3(d).

Third, the commenter suggested NCUA should permit FCUs to accept pre-paid funeral home accounts. Generally, a pre-paid funeral home account involves a

funeral director receiving pre-payment of funds for services and establishing a type of trust account at a financial institution to hold the funds. Subject to membership limitations, FCUs can accept funds for pre-paid funeral accounts.

This subject is addressed in a legal opinion from the OGC, OGC Op. 01-0120 (March 29, 2001), and is available on the agency website at www.ncua.gov.

Briefly summarized, if the trust account is a revocable trust where the consumer can get a refund of payments, then, like the comment on IOLTAs discussed above, account insurance coverage depends on whether the beneficial owner of the funds in the account is a member.

Finally, the commenter suggested NCUA permit a foreign currency investment pilot program. Investments are generally addressed in Part 703 of NCUA's regulations. The Board notes it considered a pilot program in 2007 similar to the one suggested by the commenter; however, a lack of support led to its withdrawal. 72 F.R. 41956 (Aug. 1, 2007)(advance notice of proposed rulemaking titled, "Permissible Foreign Currency Investments for Federal Credit Unions and Corporate Credit Unions"); withdrawn Spring 2008 Semiannual Regulatory Agenda.

Two commenters also urged NCUA to expand the test used to determine if an activity is within an FCU's incidental powers. One commenter contended the Office of the Comptroller of the Currency (OCC) has a broader test for determining what activities are incidental and suggested NCUA mirror that test.

The test NCUA uses is derived from the statutory authority in the Act that permits FCUs to engage in activities that are “necessary or requisite to enable it [FCUs] to carry on effectively the business for which it is incorporated.” 12 U.S.C. §1757(17). The OCC evaluates incidental activities under substantially identical statutory authority, which states banks can carry out activities that are necessary to carry on the business of banking. 12 U.S.C. §24(Seventh). In addition, OCC’s current regulations contain a test substantially similar to NCUA’s. For example, OCC’s regulation states “a national bank may conduct . . . activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking as determined by the OCC, or otherwise under statutory authority.” 12 CFR §5.34(e)(1). Also, OCC’s guidance on permissible activities for banks tracks its aforementioned regulation and shows no significant departure from the statutory authority or the test NCUA currently uses. Office of the Comptroller of the Currency, “Activities Permissible for a National Bank 2007” (June 2008 ed.).

REGULATORY PROCEDURES

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under \$10 million in assets). This proposed rule adds to the language of preexisting permissible activities for FCUs. The proposed rule, therefore, will not have a significant economic impact on a

substantial number of small credit unions and a regulatory flexibility analysis is not required.

Paperwork Reduction Act

NCUA has determined that the proposed amendments will not increase paperwork requirements and a paperwork reduction analysis is not required.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999 - Assessment of Federal Regulations and Policies on Families

NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR part 721

Credit unions, functions, implied powers, and insurance.

By the National Credit Union Administration Board on October 16, 2008.

Mary Rupp

Secretary of the Board

For the reasons stated in the preamble, the National Credit Union Administration is amending 12 CFR part 721 as set forth below:

PART 721 – Incidental Powers

1. The authority citation for part 721 continues to read as follows:

Authority: 12 U.S.C. 1757(17), 1766 and 1789.

2. Amend §721.3 as follows:

- a. Amend the first sentence in paragraph (b) by adding the phrase "including foreign credit unions" after the words "other credit unions."
- b. Revise paragraph (f) to read as set forth below.:
- c. Amend the second sentence in paragraph (j) by adding "payroll services" after the phrase "payroll deduction,".

§ 721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

* * * * *

(f) Finder activities. Finder activities are activities in which you introduce or otherwise bring together outside vendors with your members so that the two parties may negotiate and consummate transactions and include vendors of non-financial products, vendors that are other financial institutions, and vendors of financial products such as insurance and securities. Finder activities may include endorsing a product or service, negotiating group discounts on behalf of your members, offering third party products and services to members through the sale of advertising space on your website, account statements and receipts, and selling statistical or consumer financial information to outside vendors to facilitate the sale of their products to your members. You may perform administrative functions on behalf of vendors to facilitate transactions between your members and another institution.

* * * * *