

October 25, 2004

J. Scott Sullivan, President/CEO
Nebraska Credit Union League & Affiliates
P. O. Box 45526
Omaha, Nebraska 68145-0526

Re: Meaning of the Phrase "Empowered to Grant" in NCUA regulations.

Dear Mr. Sullivan:

Jane Walters, NCUA Region IV Director, forwarded your inquiry regarding the authority of a federal credit union (FCU) to purchase loans it is empowered to grant to the Office of General Counsel for response. You have asked if the phrase "empowered to grant," as used in NCUA's loan participation rule and Regulatory Flexibility Program (RegFlex), limits an FCU's purchase of loans or participation in loans to those made to its own members. 12 C.F.R. §§701.22 and 742.5. No, our view is that the phrase "empowered to grant" as used in NCUA's regulations refers to the authority of an FCU to make the type of loans permitted by the Federal Credit Union Act, NCUA regulations, FCU Bylaws, and its own internal policies.

The regulatory history and regulatory language of the three NCUA regulations where the phrase "empowered to grant" appears -- loan participation, eligible obligations, and RegFlex -- support the conclusion that the phrase is intended to describe the type of loans an FCU may make but not limit the loans in those contexts to loans made to an FCU's own members.

The loan participation rule answers the membership question directly by stating:

A participant Federal credit union that is not an originating lender shall:

- (1) participate only in loans it is empowered to grant . . . [and]
- (2) participate in participation loans only if made to its own members or members of another participating credit union

12 C.F.R. §§701.22(d)(1) and (2). The qualifying language in subsection (d)(2) would be either superfluous or contradictory if the phrase "empowered to grant" were interpreted to mean that loan participations were only permissible if the loans were made to the FCU's own members. These sections read together indicate that "empowered to grant" does not limit a participating credit union only to loans made to its members.

The eligible obligations rule states:

A Federal credit union may purchase, in whole or in part within the limitations of the Board of directors' written purchase policies:

(i) Eligible obligations of its members, from any source, if either (A) they are loans it is empowered to grant or (B) they are refinanced with the consent of the borrowers, within 60 days after they are purchased, so that they are loans it is empowered to grant.

12 C.F.R. 701.23(b)(1). The specific limitation in this subsection, namely that an FCU can only purchase the eligible obligations of its members, indicates that, absent that specific language, the phrase "empowered to grant" would not limit the purchase of eligible obligations to those of the FCU's own members. Including specific language in the section to impose the membership limitation indicates the term "empowered to grant" does not otherwise already include a membership limitation; otherwise the language would be superfluous.

The RegFlex rule permits a qualifying credit union to purchase certain kinds of loans from federally insured credit unions as long as the loans are loans the RegFlex credit union is empowered to grant and does not note any membership based limitations. 12 C.F.R. §742.5. The absence of a membership based limitation in §742.5 is consistent with the intent of the RegFlex rule to provide qualifying credit unions with enhanced regulatory flexibility. Reading a membership limitation into that section would all but eliminate the benefit and flexibility the section is intended to provide. 66 FR 58656, 58660 (November 23, 2001), 66 FR 15055, 15059 (March 15, 2001).

Finally, we note an FCU's own policies may limit the loans it is empowered to grant in addition to the limitations derived from the FCU Act, NCUA's regulations and the FCU Bylaws. NCUA's regulations, such as the member business loans (MBLs), loan participation, and eligible obligations rules, require a board of directors to adopt written policies before engaging in those activities. 12 C.F.R. §§701.22(b), 701.23(b)(1), and 723.5(a). If a board of directors does not wish to make MBLs or engage in loan participations, it may chose not to adopt policies

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to implement these activities. As a result, an FCU's lack of written policies or limitations in its written policies regarding certain activities can be a source of self-imposed limitations on the kind of loans it is empowered to grant.

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

OGC/FSK:bhs

04-0713

cc: Region IV