

February 12, 1991

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Re: Florida Dept. of Professional Regulations vs. Nearman, Lents, Orth (Your January 31, 1991 Letter)

Dear Mr. Lozoff:

This responds to your request for our opinion on the relation between Section 701.12 of the National Credit Union Administration's ("NCUA") Rules and Regulations (the "Regulations") (12 C.F.R. ~701.12) and the Florida Public Accountancy Statute. While we can not provide an interpretation of the Florida statute, it appears that individuals who are not certified public accountants ("CPAs") may conduct the audits required by Section 701.12 without violating Section 473.322(1)(c) of the Florida statute.

In your request, you asked us to address three issues.

1. Does Section 701.12 expressly authorize non-CPAs to conduct internal compliance audits, and are CPA audits required only under the conditions set forth in Section 701.13?

Sections 701.12 and 701.13 of the Regulations set forth the annual audit requirements for federal credit unions. (See Section 741.2 of NCUA Regulations which applies these requirements to federally insured, state chartered credit unions.) Section 701.12 implements Section 115 of the Federal Credit Union Act (the "Act") (12 U.S.C. ~1761d), which states, in part:

The supervisory committee shall make or cause to be made an annual audit and shall submit a report of that audit to the board of directors and a summary of the report to the members at the next annual meeting of the credit union... Section 701.12 is not, per se, an affirmative authorization regulation in the context of your question. It restates the statutory requirement that the supervisory committee have an annual audit conducted. To the extent that it permits that audit to be conducted by the supervisory committee itself, without imposing professional standards or qualifications on the individual committee members, then it could be viewed as authorization for certain non-CPAs to perform the audit.

While Section 701.12 details requirements for auditing standards and procedures, it does not specifically address whether or not a CPA is required to perform the audit. It has always been the NCUA's position that the services of a CPA are not required. Section 701.12(d) does require, however, that compensated auditors must be independent of certain credit union officials and their immediate family members.

Neither the Act nor the Regulations required any audit by a CPA until 1989, when the Federal Financial Institutions Reform, Recovery, and Enforcement Act (P.L. 101-73) ("FIRREA") was enacted. FIRREA mandated that every federally insured credit union obtain an outside, independent audit by a CPA under certain circumstances. (See Section 202(a)(6) of the Act, 12 U.S.C. 1782(a)(6).) Section 701.13 was added to implement Section 202(a)(6).

The NCUA Board, in the preamble to Section 701.13, noted that some commenters on the proposed rule had suggested that regular CPA audits should be required of all federally insured credit unions. The Board stated, "Because of the financial hardship a routine CPA audit requirement would place on many smaller

credit unions, the Board has no immediate plans to change the existing ~701.12 audit and verification requirements." (54 F.R. 51381, December 15, 1989) The Board went on to say, "Auditors lacking certified public accountant standing will continue to be permitted to conduct ~701.12 audits and verifications." (54 F.R. 51832, December 15, 1989)

To summarize, neither the Act nor Section 701.12 requires that a CPA perform the routine yearly audits mandated by Section 701.12. CPA audits are required only in the circumstances set forth in Section 701.13.

2. Does an audit of the type prescribed by Section 701.12 require any of the acts prohibited by Florida's public accountancy statute, F.S. Section 473.322?

We will only address Section 473.322(1)(c), since that appears to be the relevant provision.

F.S. ~ 473.322(1)(c) provides:

No person shall knowingly: . . . [a]ttest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

The activities prohibited by the statute seem to us distinguishable from those described in Section 701.12.

The Regulation does not require that the individual performing the audit "attest as an expert in accountancy to the reliability or fairness of presentation of financial information." As noted above, both Section 701.12 and the Act anticipate that a credit union's own supervisory committee may carry out its own audit; there is no requirement that the supervisory committee (or any individual to whom it delegates the audit power) attest as an expert to its findings. Nor is the supervisory committee or other auditor required to "utilize any form of disclaimer of opinion ... to convey an assurance of reliability as to matters not specifically disclaimed."

While we have limited familiarity with the Florida statute, it seems to us that Section 473.322(1)(c) is intended to prohibit a non-CPA from "attest[ing] as an expert in accountancy" or rendering a so-called "opinion audit." Section 701.12 does not require either of these. If, however, an auditor hired by the supervisory committee does either of these acts, it appears that he/she would be subject to the Florida statute. According to both the proposed and final versions of Section 701.13 and the preambles thereto, opinion audits are required only in the circumstances delineated in Section 701.13(a)(3). Section 701.13(b) specifies that a credit union falling within Section 701.13(a)(3) must obtain "an opinion audit as that term is understood under generally accepted auditing standards." (See 54 F.R. 38869-38870, 9/21/89 and 54 F.R. 51381-51382, 12/15/89.)

In our opinion, a non-CPA may perform a Section 701.12 audit without violating F.S. ~473.322(1)(c).

3. Does the preemption doctrine prevent the state from taking action against professionals engaged in audit activities regardless of whether there is a conflict between Section 701.12 and state law?

Preemption is not an issue unless there is a conflict between the Act or Regulations and state law. As discussed above, we see no conflict between the Federal Credit Union Act or Section 701.12 of the

Regulations and F.S. ~473.322(1)(c). In addition, as we understand it, the state is not attempting to enforce or impose professional standards or requirements

on a credit union. Instead, its action is against non-credit union personnel engaged in an independent private business venture.

Sincerely,

James J. Engel
Deputy General Counsel

cc: H. Allen Carver
Region III Director

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