

January 30, 1996

Robert Rusch
Director, Government Affairs
CUNA Mutual Group
P.O. Box 391
Madison, WI 53701-0391

Re: Partially Self-Funded Employee Health Plans
(Your Letter of November 22, 1995)

Dear Mr. Rusch:

You have requested NCUA concurrence with your analysis of the permissibility of a CUNA Mutual Group ("CUNA Mutual") partially self-funded employee health benefit plan (the "Plan") to be marketed to federal credit unions ("FCUs"). In the past it has been NCUA's opinion that FCUs are prohibited from conducting partially self-funded employee health benefit plans. Upon further review, and after requests to reconsider from the major trade associations and other parties, NCUA has determined that an FCU may participate in a well-planned, partially self-funded health benefit plan such as the one described in your request letter.

BACKGROUND

Plan specifics were contained in your letter. For purposes of this opinion, the following Plan features are considered of significant importance to NCUA: (1) reinsurance, with actuarially determined and reviewed specific, annual aggregate, and monthly aggregate stop-loss coverage, provided by a well-rated, reputable, and reliable reinsurer; (2) independent, non-FCU party coverage of Plan administration, participant administration, and benefit administration through a written Administrative Services Agreement, provided by a reliable, reputable company; (3) absence of FCU trust responsibilities, and the placement of fiduciary liability insurance for non-trustee FCU and FCU official fiduciaries; and (4) absence of special reserve requirements by an FCU.

ANALYSIS

Self-Insurance Prohibition

As you note, NCUA has long prohibited FCUs from entering into the business of insurance, including reinsurance. The ban on "self-insurance" is justified on several grounds.

- First, FCU's have no express insurance powers granted in the FCU Act.
- Second, insurance powers do not meet the test for a permissible FCU incidental authority as provided in relevant court decisions. NCUA has held that FCUs have limited authority to endorse an insurance plan, or to perform clerical, administrative functions on behalf of a third party insurance vendor. The prohibition is also in accord with Congressional intent, as evidenced by the statutory prohibition on CUSOs, which provide "services which are associated with the routine operations of credit unions," from investing "in shares, stocks or obligations of an insurance company...or any similar organization...." The only insurance related activity that can be performed by a CUSO is that of "agency for sale of insurance."
- Third, the ban prevents the wasting of FCU assets. General corporate law provides that "the directors of a corporation are bound to protect the assets of the corporation and to see that its funds are not expended

except for corporate purposes.... They may be held liable to the corporation for the waste of corporate assets." In particular, NCUA has found that a debt cancellation forgiveness program and payment of life savings claims from general assets constitute a wasting of assets, as well as impermissible self-insurance. These programs also involved the creation and maintenance of special reserves which only the NCUA Board can authorize. The only special reserve account currently authorized by the Board is the investment valuation reserve account for federally insured, state-chartered credit unions holding investments which are impermissible for FCUs.

Compensation Analysis

The prohibition against FCU involvement in the business of insurance remains NCUA policy. However, the issue you raise is whether a partially self-funded employee health plan is permissible on other grounds. In your legal analysis, you state that the Plan should be interpreted as being a permissible component of employee compensation, and not impermissible self-insurance, for the following reasons:

(1) employee benefit plans, both health and retirement, are employee compensation under a reasonable reading of an FCU's authority to "subject to the limitations of this title and the bylaws of the credit union, provide for the hiring and compensation of officers and employees.";

(2) employee health plans are subject to the same Department of Labor and Department of Treasury (Internal Revenue Service) oversight as employee retirement plans, which are expressly permissible under section 701.19 of NCUA's rules (you represent that from a benefits law perspective, pension plans (permissible under NCUA regulations) and welfare plans are treated almost identically);

(3) several state credit union supervisors ("SSAs") permit state-chartered credit unions to engage in partially self-funded employee health plans, and NCUA has made no objection to SSAs on insurance of accounts or safety and soundness grounds (you hold that to deny FCUs employee benefit programs available to state-chartered credit unions places FCUs at an unfair disadvantage in providing health care for their employees); and

(4) the Plan is in certain respects similar to CUNA Mutual's Select Risk Rating Plan ("SRRP"), which NCUA has found to be a permissible insurance rating plan. Like a SRRP, the Plan does not involve creation or maintenance of an FCU special reserve account. Nor does the plan require an FCU to exercise any prohibited trust powers.

In addition, provision of health insurance as a reasonable component of compensation is also found in section 701.33(b)(2)(ii) of NCUA's rules. FCU officials are entitled to receive "reasonable health, accident and related types of personal insurance protection...." from an FCU without violating the prohibition against receipt of impermissible compensation from an FCU. NCUA has previously held that FCU provision of comprehensive health insurance to officials is permissible.

For these reasons, and based upon the representations contained in your letter, NCUA concurs with your analysis that the Plan does not constitute impermissible self-insurance and is permissible for FCUs. Due especially to the provision of adequate, actuarially-determined amounts of specific and aggregate stop-loss reinsurance coverage from a top-rated, reputable, reliable reinsurance carrier; the presence of a reputable, reliable, independent administrator to administer the plan; and compliance with other applicable laws; NCUA is assured that the Plan constitutes the permissible compensation of FCU employees rather than the impermissible business of insurance. From the information that CUNA Mutual has provided, the Office of Examination and Insurance also concurs in the permissibility of the Plan as presented.

This letter should not be interpreted as a recommendation or endorsement of the Plan. If you have any questions, please contact Sparky Conrey, Staff Attorney, at (703) 518-6540.

Sincerely,

Richard S. Schulman
Associate General Counsel

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Enclosures