NATIONAL CREDIT UNION ADMINISTRATION
WASHINGTON, D.C. 20456

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MAR 28 1985

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Attorneys at Law
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Dear Mr. Brown:

This is in response to your letter dated March 13, 1985, referring to your letter dated September 11, 1984, concerning Federal credit union service charges on dormant accounts. We have examined our records and determined that your September letter was not received by this Office.

The position of this Agency with respect to fees that FCU's may charge has most recently been expressed in the preamble to the amended Share, Share Draft, and Share Certificate Rule (Section 701.35), a copy of which is enclosed. Additionally, we have enclosed a copy of the NCUA Interpretive Ruling and Policy Statement 82-4, Examination For Compliance with State Unclaimed Property Laws, which was referred to in the preamble of the amended rule. As noted therein, it is the Agency's position that:

> "To the extent that such charges are either authorized or not prohibited by the Federal Credit Union Act, NCUA Rules and Regulations or Board policy, and are provided for in the contract with the member, it is the Board's position that state law prohibiting such charges would be preempted."

I hope that this information will assist you in providing your client with a legal opinion.

Sincerely,

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STEVEN R. BISKER
Assistant General Counsel

Enclosures

NATIONAL CREDIT UNION ADMINISTRATION

INTERPRETIVE RULING AND POLICY STATEMENT

IRPS 82-4

DATE: November 29, 1982

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR CH. VII

EXAMINATION FOR COMPLIANCE WITH STATE UNCLAIMED PROPERTY LAWS; INTERPRETIVE RULING AND POLICY STATEMENT

AGENCY: National Credit Union Administration (NCUA)

ACTION: Final Interpretive Ruling and Policy Statement (IRPS) 82-4

SUMMARY: This intrepretive Ruling and Policy Statement designates certain state authorities to conduct inspections of Federal credit union records to determine compliance with state unclaimed property laws when there is reasonable cause to believe that a Federal credit union has not complied with such laws. It also sets forth the NCUA's position on enforcement jurisdiction and fees for inspections.

EFFECTIVE DATE: November 26, 1982.

ADDRESS: National Credit Union Administration, 1776 G Street, N.W., Washington, D. C. 20456.

FOR FURTHER INFORMATION CONTACT: James J. Engel, Assistant General Counsel, Department of Legal Services, at the above address. Telephone (202) 357-1030.

SUPPLEMENTARY INFORMATION: At its June 16, 1982, meeting, the NCUA Board issued for public comment a proposed Interpretive Ruling and Policy Statement (IRPS) regarding state examination of Federal credit union (FCU) records for purposes of determining compliance with state unclaimed property laws. (47 F.R. 26842, June 22, 1982.) The proposed IRPS designated those state agencies authorized under state law to conduct unclaimed property inspections as representatives of the NCUA Board for purposes of determining compliance with those laws. In addition, the NCUA Board set forth its position that enforcement of those laws remains exclusively within the

Twenty-four comments were submitted: 19 from FCUs, 4 from trade associations, and 1 from a state department of revenue. (One state agency submitted a copy of its unclaimed property reporting form but did not comment on the proposed IRPS.) Of the 24 comments, 20 opposed the proposal and 4 were generally supportive.

Analysis of Comments

1. Designation of state agencies

The overall objection to the IRPS was that no state should have the authority to examine an FCU's records. While some commenters objected to state examinations strictly as a matter of principle, most felt the IRPS would have a precedential effect that would lead to examinations by numerous other state agencies. Once one state agency was allowed access to FCU records, states would be encouraged to claim authority to conduct other types of compliance examinations and any argument as to NCUA's exclusive examination power would be weakened.

In addition to a claim that the door would be open for other examinations, several commenters expressed concern that the state would engage in fishing expeditions and would impose additional operational burdens on FCU's, e.g., FCU staff time, because state examiners may not be familiar with a credit union's operations. Other commenters considered the action contrary to the dual chartering concept and/or a relegation by the NCUA Board of its responsibility and authority. Two commenters recognized the authority of the Board to designate any person to examine FCU records but disagreed with this action for several of the above stated reasons. They were also of the view that a designation should only be made when there is a strong showing of need.

The NCUA Board is not convinced that the designation of a state agency in this instance will establish an undesirable precedent. In fact, it is believed that by exercising its designation authority under the Federal Credit Union Act, the NCUA Board has strengthened its position vis-a-vis previous policy. In the past, NCUA did not object to state inspections; a position that could be viewed in a judicial forum as a recognition of state examination authority in areas in addition to unclaimed property. Now, however, the Board has specifically exercised one of its statutory powers to designate a particular party to conduct an examination for a particular purpose in a matter in which that party has a particular interest. The disposition of unclaimed property has been recognized as a legitimate interest of the states. The NCUA Board is also of the opinion that inherent in its designation authority is the authority to withdraw that designation should, for example, a particular state agency abuse its authority in the examination process.

The NCUA Board has no reason to believe that state agencies will act in any manner that woud cause undue hardship for FCUs. The Board is confident that state inspections will not be used as fishing expeditions. Although additional FCU staff time will be involved, the Board is not convinced that it will be unreasonable or burdensome. State personnel have long been involved in inspecting the records of other types of institutions and "unfamiliarity" with FCU's is not considered a persuasive argument to preclude state inspections.

2. Basis for inspection

Two commenters were concerned that the proposal may be viewed as a preemption by NCUA of state law prerequisites for an inspection of records. Their objection was that since most state unclaimed property laws require there be a reasonable cause to believe that an institution has not complied with the unclaimed property law before an examination can be made, states may view NCUA's designation as preempting that state law requirement.

This point is well taken and the Board had no intent to preempt such a state law requirement. The Board is of the opinion that such a requirement is appropriate and should relieve the concerns of other commenters as to unreasonable burden. The NCUA Board, therefore, has included "reasonable cause to believe" language in the IRPS. Additionally, the Board looked to the recent statutory amendment permitting state examination of national bank records for unclaimed property law compliance. Substantially identical language has been used in the IRPS including the statements that the review of records be at reasonable times and upon reasonable notice to a Federal credit union.

One of the commenters also suggested that a probable cause standard be used as a basis for a state inspection, rather than "reason to believe", because state unclaimed property laws prescribe criminal penalties. It is the Board's understanding that criminal penalties are imposed for <u>willful</u> refusal to deliver abandoned property to the state, rather than for failure to report or deliver. The Board is not convinced that a "higher" standard should apply to FCU's than to other types of institutions.

3. Enforcement

A large majority of commenters agreed that enforcement of state unclaimed property laws is properly a function of NCUA. The NCUA Board believes that its position on enforcement authority is primarily supported by §206 of the Federal Credit Union Act and by the existence of a dual system of credit unions. In addition, there is no indication that Congress, when amending the Federal law applicable to national banks, considered extending state examination authority to include enforcement authority even though such an issue would normally be associated with examining for compliance.

The final IRPS, therefore, retains the NCUA Board's statement on enforcement authority. If violations of state law occur and the matter cannot be resolved informally between the parties, the state should report such violations to NCUA for appropriate action. The imposition of fines and penalties under state law would fall within NCUA's enforcement jurisdiction.

4. Fees

The proposed IRPS provided that FCU's were not subject to the imposition of fees for a state inspection. A few commenters did not address this issue or did not specifically agree or object to it. Most commenters agreed with the position. The NCUA Board, however, has reconsidered the issue and believes that a fee may be appropriate in certain situations.

State law normally provides that a fee to cover the cost of an inspection or examination will be imposed only where, after an inspection has been made, it is determined that the party inspected has not complied with the state law. The Board believes that where a state has reasonable cause to believe that an FCU has not complied with state law, it conducts an inspection, and finds violations, a fee is appropriate. The Board has amended the proposed IRPS to include such a provision. The Board is not, however, providing fee imposition authority to a state agency. The fee must be authorized under state law.

The NCUA's position has long been that FCU's are required to comply with state unclaimed property laws and the majority of commenters agreed with that position. To take the position that a state could not charge a fee for examination, when violations exist and when permitted by state law, would be somewhat inconsistent with NCUA's compliance requirement. Being subject to a fee for failure to comply with the law provides a compliance incentive.

5. Retroactivity and Service Charge.

Two commenters suggested that if an IRPS is issued, the Board should address two other issues; retroactivity and service charges for account inactivity.

With regard to retroactivity, the commenters were concerned because some state laws may permit the unclaimed property administrator to reach back 20 years for unclaimed funds or there may not be any limitation on how far back the state may claim. This would raise potential safety and soundness issues particularly if an FCU had absorbed such accounts into income.

The Board is not convinced that retroactivity presents a true problem for FCU's. First, the Board is confident that state authorities will act reasonably in claiming abandoned accounts. Second, FCU's have been required to comply with such laws in the past, have been examined by state authorities and have not, to the Board's knowledge, been adversely affected. Finally, as the enforcement authority, the Board will be in a position to address any true safety and soundness issue.

As to service charges that result in absorbing accounts or portions thereof into income, this is a matter of contract between the FCU and the member. To the extent that such charges are either authorized or not prohibited by the Federal Credit Union Act, NCUA Rules and Regulations or Board policy, and are provided for in the contract with the member, it is the Board's position that state law prohibiting such charges would be preempted.

6. Miscellaneous Comments.

Several other comments were submitted on the proposed IRPS. One commenter suggested that a comprehensive unclaimed property regulation be issued by NCUA preempting state law. Others suggested that NCUA revise its examination procedure to cover unclaimed property compliance. Another questioned whether any state imposed fee would be deducted from NCUA's operating fee. Additionally, one commenter suggested that unclaimed funds be turned over to NCUA and applied to the Share Insurance Fund.

The Board believes that the subject of unclaimed property is of particular interest to the states, not NCUA, and therefore compliance examinations are more appropriately a matter for state authorities.

The Board does not believe it should attempt to issue a comprehensive regulation on a matter of particular state concern. Due to the fact that a fee would only be charged for a violation of state law, a reduction in NCUA's operating fee would not be warranted. Because unclaimed funds remain the property of the member, even after delivery to the state, under the Uniform Act, the Board does not believe absorbtion of accounts by the Insurance Fund is a feasible alternative.

Finally, one commenter requested relief from the expenses of advertising the existence of unclaimed accounts, particularly those accounts of nominal value. For the most part, state law permits a holder of unclaimed property to turn it over to the state prior to the minimum period requirement for abandonment and relieves the holder of any further liability. It is suggested that FCU's exercise that option, if they find such accounts are increasing their expenses.

The NCUA Board, therefore, adopts the following statement as a Final Interpretive Ruling and Policy Statement.

Final Interpretive Ruling and Policy Statement (IRPS) 82-4

It has been the position of the National Credit Union Administration that Federal credit unions are required to comply with state unclaimed property laws. Recognizing that states have an interest in assuring compliance with these laws, it is the NCUA Board's position that limited access to Federal credit union records by appropriate state authorities for this purpose is both reasonable and proper.

Section 106 of the Federal Credit Union Act (12 U.S.C. 1756) provides that the books and records of each Federal credit union are subject to examination by, and accessible to, any person designated by the National Credit Union Administration Board (NCUA Board). Pursuant to this authority, those state agencies, authorized under state law to conduct inspections pursuant to the Uniform Disposition of Unclaimed Property Act or similar abandoned property law, are designated by the NCUA Board to conduct inspections of Federal credit union records for the sole purpose of determining compliance with state unclaimed property laws.

The state authorities so designated may, at reasonable times and upon reasonable notice to a Federal credit union, review a Federal credit union's records solely to ensure compliance with applicable state unclaimed property laws upon a reasonable cause to believe that the Federal credit union has failed to comply with such laws.

The NCUA Board does, however, maintain its position that it has exclusive enforcement jurisdiction over Federal credit unions. Therefore, any violations of unclaimed property laws should be reported to the appropriate NCUA regional office.

A reasonable fee may be assessed to cover the cost of the inspection only if a Federal credit union has been found to be in violation of the law and such fee is authorized under state law.

By the National Credit Union Administration Board November 18, 1982.

November 18, 1982

Rosemary Brady

ROSEMARY BARDY
Secretary
National Credit Union Administration Board

Accordingly, it has been determined that the provisions of the proposed rule should be adopted as the final rule with a technical revision. In developing and publishing the proposed revision of the color certification relating to the United States Standards of Grades of Extracted Honey was inadvertently retained in 7 CFR 1434.17(c). Since the appropriate color certification procedures are fully contained in the ASCS Specification for Unprocessed Honey, § 1434.17(c) has been revised to delete the unnecessary provisions. It is not believed that this change is of such significance as to warrant further public comment.

List of Subjects in 7 CFR Part 1434

Honey, Loan programs—agriculture, Price support programs, Warehouse.

PART 1434—[AMENDED]

Final Rule

Accordingly, 7 CFR 1434.17(b) and (c) are revised to read as follows:

§ 1434.17 Determination of quality.

* * * * *

(b) *Quality for settlement* (1) *Farm storage in eligible containers.* When honey is delivered to CCC in eligible containers from farm storage, its quality and color shall be determined by the Processed Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service (AMS), in accordance with the ASCS Specifications for Unprocessed Honey on the basis of samples drawn by ASCS representatives supervising delivery. Samples shall not be drawn until the producer has designated all lots. Single containers shall not be considered as lots unless necessitated by color or floral source. The cost of quality and color determinations for a maximum of four lots shall be for the account of CCC.

(2) *Identity-preserved warehouse-stored.* When honey stored identity-preserved in containers in an approval warehouse is delivered to CCC, its quality and color shall be determined by the Processed Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service (AMS), in accordance with the ASCS Specifications for Unprocessed honey on the basis of samples drawn by ASCS representatives supervising delivery. The cost of such determination shall be for the account of CCC.

(c) *Segregation by color.* Table honey in eligible containers shall, insofar as is practicable, be segregated into lots by color to conform with the color categories which are set forth in the ASCS Specifications for Unprocessed Honey.

* * * * *

Authority: Sec. 4, 62 Stat. 1070, as amended (15 U.S.C. 714b); Sec. 5, 62 Stat. 1072, (15 U.S.C. 714c); secs. 201, 401, 63 Stat. 1052, as amended, 1054, as amended (7 U.S.C. 1446, 1421).

Signed at Washington, D.C., on January 28, 1985.

Everett Rank,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 85-2700 Filed 1-31-85; 8:45 am]

BILLING CODE 3410-05-M

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Share, Share Draft, and Share Certificate Accounts

AGENCY: National Credit Union Administration.

ACTION: Final rule.

SUMMARY: The NCUA Board adopts an amendment to the regulations concerning disclosures, fees, and time for crediting of deposited funds relating to share, share draft, and share certificate accounts. Recognizing the dual chartering system for credit unions, the Board, by way of this final rule, is formally stating its position on its jurisdiction to regulate Federal credit unions ("FCU's"). The rule interprets and implements the provisions in Section 107(6) of the Federal Credit Union Act ("Act") (12 U.S.C. 1757(6)) authorizing FCU's to receive payments on shares, share certificates, and share drafts, "subject to such terms, rates, and conditions as may be established by the board of directors [of an FCU], within the limitations prescribed by the Board."

EFFECTIVE DATE: February 1, 1985.

ADDRESS: National Credit Union Administration, 1776 G Street, NW., Washington, D.C. 20456.

FOR FURTHER INFORMATION CONTACT: Robert Fenner, Director, Department of Legal Services, or Steven Bisker, Assistant General Counsel, at the above address. Telephone (202) 357-1030.

SUPPLEMENTARY INFORMATION:

Background

On November 27, 1984, (49 FR 46552) the NCUA Board published a proposal to add two new paragraphs, (c) and (d), to Section 701.35 of the NCUA Rules and Regulations. The Board requested public comment on the proposed rule.

As discussed in the preamble to the proposed rule, the Board considered an amendment to the rule necessary in order to clarify its intent in previously deregulating Section 701.35, because of recent actions by several states attempting to regulate Federal credit unions. This final rule provides that policies with respect to disclosures, fees or charges, time for crediting of deposited funds, and other matters affecting the opening, maintaining or closing of a share, share draft or share certificate account, shall be determined by an FCU's member-elected board of directors, free from regulatory restrictions. This action will ensure the continued efficacy of the NCUA Board's previous deregulation of FCU share account activity and furthers the Board's longstanding support of a viable dual chartering system.

The Board received a total of 25 comments—16 from FCU's, 1 from a state chartered credit union, 5 from credit union leagues and trade associations, 2 from state regulatory authorities, and 1 from a law firm. All of the commenters, except those from the state regulatory authorities and the state credit union, supported the proposed amendment.

Analysis of Comments

Crediting of deposited funds

The majority of the commenters stated that, although they currently have policies whereby checks (drafts) deposited into their members' accounts are given credit immediately (treated as if they were cash deposits), they still support the Board's position that such policies should be decided by an FCU's board of directors and not dictated by statute or regulation. Further, the commenters stressed that, in any event, they should not be subject to state laws since that would be inconsistent with the dual chartering system and would result in regulatory conflicts.

Another point stressed by the commenters was the democratic form of ownership of FCU's. They believed that if the policies of an FCU were unacceptable to its members, the officials of the FCU would be replaced at the next annual election. Therefore, the system provides its own mechanism of enforcement and protection for the members. As one commenter stated: "* * * as member owned and controlled financial institutions, [FCU's] cannot afford to alienate their 'customers.' If we did, the elected officials and management would be job hunting."

One commenter opposed to the rule expressed the opinion that FCU's should be required to follow state laws

mandating "check hold" policies and specified disclosures. It is this commenter's belief that only through compliance with state laws governing all financial institutions in the state will the consumer be treated equitably.

The Board is equally concerned with the fair treatment of FCU members. However, for the reasons stated above, the Board does not agree that regulations are necessary. Moreover, a review of NCUA's consumer complaint handling process indicates only a very limited number of complaints concerning share account disclosures, funds availability and other share account policies. In sum, share account deregulation is working well in FCU's. To allow the states to regulate would infringe on NCUA's jurisdiction in this area and would be inconsistent with the dual chartering system.

Fees

A number of commenters stated that they do not charge fees to their members. However, they agreed that the matter of determining what fees, if any, to charge members should be a matter to be decided by an FCU's board rather than dictated by regulation.

One commenter, a state regulatory agency, was particularly concerned about the impact of this regulation on the state's right to escheat abandoned accounts. The commenter was concerned with the possibility that service charges assessed against inactive (dormant) accounts might absorb accounts or portions thereof. The Board previously addressed this issue in its Interpretive Ruling and Policy Statement 82-4, Examination For Compliance with State Unclaimed Property Laws. (47 FR 53325 (November 26, 1982)). The Board stated that: "To the extent that such charges are either authorized or not prohibited by the Federal Credit Union Act, NCUA Rules and Regulations or Board policy, and are provided for in the contract with the member, it is the Board's position that state law prohibiting such charges would be preempted."

The Board is confident that FCU's will continue to serve their members well, and does not believe that the issue of fees is one that requires regulatory control at this time.

Broader Rule

A few commenters expressed their support for the rule but states that it does not go far enough. One commenter suggested that the Board incorporate into the rule a restatement of the statutory authority granted FCU's in Section 107(6) of the Act to receive payments on shares, share certificates and share drafts subject to such terms, rates, and conditions as established by an FCU's board of directors. Inasmuch as the rule does not replace or alter the authority in the Act, the Board does not believe it is necessary to restate the authority provided by the Act.

Another commenter stated that the laws of its state impose sales taxes on charges pertaining to FCU member accounts and services and require FCU's to collect such taxes from their members and remit them to the local government. The sales tax applies to such charges as: check/draft printing charges, account maintenance fees, NSF charges, etc. The commenter suggested that the Board address this issue in the rule. The issue of taxation is addressed in a separate section of the Act. Section 122 of the Act (12 U.S.C. 1768) specifies the liability of FCU's for paying taxes and the role of FCU's in collecting taxes. The issue raised by the commenter is more appropriately dealt with within the ambit of Section 122, rather that this rule which relies upon Section 107(6) as its principal statutory basis.

Effective Date of the Rule

This final rule will be effective upon publication. The rule provides greater authority to FCU's and relieves restrictions. Further, since several states now purport to regulate FCU's in this area, it is necessary to have the rule become effective immediately in order to eliminate uncertainty.

Regulatory Procedures

Regulatory Flexibility

The NCUA Board hereby certifies that the final rule will not have a significant economic impact on a substantial number of small credit unions because the rule will increase their management flexibility and reduce their paperwork burdens. A Regulatory Flexibility Analysis is, therefore, not required.

Financial Regulation Simplification Act

Since this final rule reduces burdens and delay would cause unnecessary harm, the NCUA Board finds that full and separate consideration of all the requirements of the Financial Regulation Simplification Act is impracticable. The NCUA Board has, however, considered most of these policies, as set forth in the preamble above.

List of Subjects in 12 CFR Part 701

Credit unions, Share drafts, Share certificates, Funds availability, Fees, Disclousres.

(12 U.S.C. 1757(6), 1766(a), and 1789(a)(11))

By the National Credit Union Administration Board on the 24th day of January, 1985.

Rosemary Brady,

Secretary of the Board.

Accordingly, the NCUA rules and regulations in 12 CFR Chapter VII are amended as follows:

PART 701—[AMENDED]

§ 701.35 [Amended]

Section 701.35 is amended by adding two new paragraphs, (c) and (d), to read as follows:

* * * * *

(c) A Federal credit union is empowered to determine the types of disclosures, fees or charges, time for crediting of deposited funds, and all other matters, not inconsistent with this Section, affecting the opening, maintaining or closing of a share, share draft or share certificate account. To the extent that state law attempts to regulate such activity, it is not applicable. Nothing herein is intended, however, to allow a Federal credit union to amend or modify its contract with a member unilaterally unless it has previously reserved the right to do so.

(d) For purposes of this section, "state law" means the constitution, statutes, regulations, and judicial decisions of any state, the District of Columbia, the several territories and possessions of the United States, and the Commonwealth of Puerto Rico.

[FR Doc. 85-2838 Filed 1-31-85; 8:45 am]

BILLING CODE 7535-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 85-NM-07-AD; Amdt. 39-4994]

Airworthiness Directives; McDonnell Douglas Model DC-9 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that would require inspection of the fuselage lower skin in the immediate area surrounding the VHF antenna, on certain McDonnell Douglas DC-9 series airplanes. This amendment is prompted by reports of cracks in the skin adjacent to the mounting holes for the VHF antenna. If allowed to go undetected,