



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456
April 21, 1988

GCKEW:bhs
3300

Office of General Counsel

Darin W. Snyder
1311 E. Madison Park, #3
Chicago, IL 60615

Re: Executive Order 12612
(Your March 28, 1988, Letter)

Dear Mr. Snyder:

You have asked for information about the implementation of Executive Order 12612 in the National Credit Union Administration ("NCUA") and the duties of the implementing official for the agency. Mr. Robert M. Fenner, general counsel for the NCUA, is the designated implementation official. His duties include providing legal counsel to the NCUA's Chairman and staff.

Attached are copies of correspondence in which the issues underlying Executive Order 12612 are discussed. If you need any additional information, please contact me at (202) 357-1030.

Sincerely,

TIMOTHY P. MCCOLLUM
Assistant General Counsel

Attachments
CEW: bhs

FOIA Vol. 4, Part H



(1257)

GC/TPM:jrm
3600

TO: Office of Examination and Insurance
Regional Offices

FROM: Assistant General Counsel *Stump*
Timothy P. McCollum

SUBJ: Federalism Review for Proposed Regulatory Changes Under
Executive Order 12612

DATE: March 30, 1988

Attached is a copy of a letter to NASCUS President John Hale in which we agreed to set forth our evaluation of the effect a proposed or final NCUA rule will have on state credit union regulation. This is how we will be carrying our promise out.

For proposed regulatory changes, we are required to have a section at the end of "Supplementary Information" headed "Regulatory Procedures." After the statement on "Regulatory Flexibility Act" and "Paperwork Reduction Act," please henceforth include a statement titled "Executive Order 12612." If a proposed rule change will have an effect on FISCO's, state what it is, the extent to which state credit union regulatory interests have been considered and accommodated, and, if state law must give way to the NCUA rule, why further accommodation is not feasible. A similar analysis will be included if a proposal would only affect FCU's, but would preempt an area previously given over to state regulation.

If a proposal will have no effect on FISCO's or traditional regulation by states of FCU's, state: "The [proposed][final] rule does not affect state regulation of credit unions."

For your convenience, we also have attached a copy of Executive Order 12612.

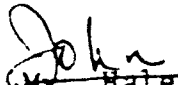
Attachment

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456
March 14, 1988

Office of General Counsel

Mr. John R. Hale
President
National Association of State Credit Union Supervisors
1600 Wilson Boulevard
Suite 905
Arlington, Virginia 22209

Re: NCUA Compliance With Executive Order 12612 on
Federalism (Your February 11, 1988, Letter)

Dear  Mr. Hale:

NCUA is, in our view, fully complying with Executive Order 12612 ("Federalism"). Following the October 26, 1987 issuance of this Order, NCUA reviewed the state preemption provisions contained in NCUA's Rules and Regulations and determined they were in compliance with the Executive Order.

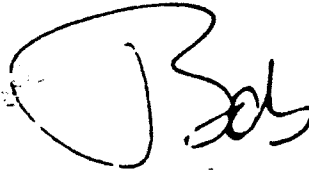
Your idea that NCUA include a section in the preamble to its regulations which specifically addresses the impact a regulation will have on federally-insured state-chartered credit unions (FISCU's) is a good one. We intend to include in the preamble to each regulation a section describing the effect on FISCU's. If we believe there is no effect, the section will state that fact and explain our reasoning. If there is an effect, the section will address the considerations set forth in Executive Order 12612. The content of the section will conform with the requirements of Section 6 of the Executive Order regarding the preparation of a Federalism Assessment.

In preparing opinions and drafting regulations, NCUA, as mandated by the Executive Order, has been considering the effect of its actions on state interests with the goal of minimizing Federal preemption of state laws. In a recent opinion (copy enclosed), the issue was whether NCUA's Rules and Regulations had preempted a New York State banking law. In light of Executive Order 12612, NCUA abstained from issuing an opinion until the matter had been initially acted upon by the State of New York.

Mr. John R. Hale
March 14, 1988
Page Two

Also, the NCUA Board recently issued a proposed rule regarding indemnification of Federal credit union officials and employees. In accordance with Executive Order 12612, NCUA has not proposed substantive indemnification provisions; it has proposed giving Federal credit unions the choice of following the indemnification provisions of the applicable state law or of the Model Business Corporation Act.

Sincerely,



ROBERT M. FENNER
General Counsel

JT:sg

Enclosure

operations to be carried out concurrently.

(2) Sites subject to flooding or slippage are to be avoided as sites for stockpiling. The soil map and interpretations for the proposed stockpiling site are to be used to determine soils that may be subject to flooding or slippage.

(3) Remove all woody vegetation and other materials that may interfere with placement or removal of stockpiled soil.

(4) Stockpile the topsoil separately from other excavated soil and spoil materials.

(5) Stockpile the B and/or C horizons or other approved substitute soil materials in a location separate from all other excavated soil and spoil materials.

(6) If stockpiled soil material will not be used for reconstruction within 30 calendar days, protect the stockpiles from erosion in accordance with 30 CFR 816.22 or 817.22.

§ 652.4 Soil reconstruction.

(a) *Planning considerations.* (1) Use of a soil survey to determine chemical and physical properties of the soil that exist prior to removal.

(2) Consider the use of specialized earthmoving equipment and other techniques that minimize soil compaction and create a favorable physical soil condition.

(3) Consider the use of chiseling, ripping, or equivalent treatment in the upper part of the B horizon before topsoil replacement to reduce compaction and to increase porosity.

(4) Consider alternatives for reconstruction that will result in a better drained, less erodible, and more productive soil than existed prior to mining.

(5) Minimize compaction by implementing reconstruction within favorable soil moisture ranges.

(6) Consider monitoring and correcting the density of lower layers while they can still be reached with ripping or chiseling equipment.

(7) Consider adding lime to the replaced B and/or C horizons to establish or improve the natural pH balance of the soil. Mixing by ripping or chiseling could improve the quality of the reconstructed soil if the natural pH is less than 6.2.

(b) *Specifications.* (1) Soil reconstruction of the topsoil, B and C horizons must be completed to a minimum depth of 48 inches or to the depth of the original Cr (soft rock) or R (bedrock) horizons if either was less than 48 inches.

(2) In circumstances where the pre-mining depth to the Cr or R horizons

was more than 48 inches and the quantities of stockpiled topsoil, B and C horizons are insufficient to reconstruct the original elevation, graded spoil material may be used to achieve the pre-mining elevation. The B and C horizon material must be placed on such graded spoil at a uniform thickness.

(3) Topsoil or an approved substitute soil material must be returned to the mined area and placed on the B and C horizons at a thickness not less than that of the pre-mined topsoil or to a minimum of 6 inches, if the surface layer before mining was less than 6 inches thick.

(4) The texture and reaction (pH) of the major horizons of the reconstructed soil must be within the range of characteristics of the pre-mined soil.

(5) Final grading of the reconstructed soil must provide positive surface drainage and uniform slopes. The average slope gradient must be within the range of the pre-mined prime farmland map units.

(6) Use the specifications found in Section IV of the local SCS Field Office Technical Guide for seeding, mulching, and other erosion control measures after replacement of the topsoil.

(7) The porosity of the topsoil and B and C horizons after reconstruction must permit root penetration.

(8) Seeding, mulching, and other erosion control measures must be completed as soon as weather conditions permit after replacement of the topsoil.

(9) Before spreading topsoil, the regraded areas must be scarified or otherwise treated in order to eliminate slippage surfaces and promote root penetration.

(10) Earthmoving and grading equipment traffic, which increases compaction, reduced porosity, and makes root penetration more difficult, must be kept to a minimum.

(11) The reconstructed subsoil of fragipan soils should meet the high capability root-medium requirements of State law if any.

(12) The topsoil, B horizon material, and C horizon material that are not used for reconstruction concurrently with mining or placed in stockpiles must be spread within the permit boundaries in accordance with 30 CFR 816.22 or 817.22.

Galen S. Bridge,

Deputy Chief for Programs.

[FR Doc. 88-3538 Filed 2-18-88; 8:45 am]

BILLING CODE 3410-10-8

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Compensation of Officials

AGENCY: National Credit Union Administration (NCUA)

ACTION: Proposed amendments.

SUMMARY: Pursuant to its regulatory review program, the NCUA Board proposes changes to § 701.33 of the NCUA Rules and Regulations. The proposed changes clarify statutory limits on compensation of officials and provide authority and guidelines for indemnification of officials and employees.

DATE: Comments must be received on or before May 19, 1988.

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

FOR FURTHER INFORMATION CONTACT: Robert Fenner, General Counsel, Allan Meltzer, Assistant General Counsel, or Julie Tamulevitz, Staff Attorney, Office of General Counsel, at the above address, or telephone (202) 357-1030.

SUPPLEMENTARY INFORMATION: In accordance with its policy to review existing regulations every three years, the NCUA Board has reviewed § 701.33 of the NCUA Rules and Regulations, "Compensation of Officials," and is proposing several amendments. Comments are requested on the proposed amendments.

Prior to 1982, section 112 of the FCU Act, 12 U.S.C. 1761a, provided that, with the exception of the treasurer, no board officer of an FCU could be compensated as such. In 1982, Congress amended the Act to allow FCU's to determine, and specify in their bylaws, which board officer (director) would be compensated. Section 701.33(a) of the NCUA Rules and Regulations currently provides that the treasurer is the only FCU official who may be compensated. The NCUA Board is proposing that § 701.33(a) be amended to conform to section 112 of the FCU Act, and that this section be redesignated as § 701.33(b)(1).

Section 111(c) of the FCU Act, 12 U.S.C. 1761(c), and § 701.33 (a) and (b) of the NCUA Rules and Regulations currently state that no member of the board of directors or of any other committee can, as such, be compensated, except that reasonable health, accident, and similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position, would not be considered compensation.

The question has repeatedly arisen whether it is permissible under section 111(c) for an FCU to reimburse officials for pay or leave (e.g., annual leave, leave without pay) lost while attending a meeting of the board of directors, or of the supervisory or credit committees. The NCUA Board requests comment on whether, under certain circumstances, the reimbursement of officials for lost pay or leave should be permitted.

Services performed by officials are prerequisite to the success of FCU's. An official's ability to serve, however, may be limited or discouraged by the attendant loss of pay or leave. To encourage voluntary service and fair treatment of officials, therefore, the Board proposes to amend § 701.33(b).

Proposed § 701.33(b)(2)(i) clarifies that where an official is required to use leave time to attend meetings of the board of directors, or of the supervisory or credit committees, or will not be paid by the official's employer while attending such meetings, reimbursement for pay and leave actually lost is proper. Where the employer permits an official to attend such meetings without the loss of pay or leave, or where the official is self-employed or cannot establish actual loss, reimbursement is not proper. Further, the proposed amendment would not permit reimbursement for lost pay or leave incurred while attending credit union conferences or similar events. (Payment or reimbursement of reasonable and proper costs of attending such events is, of course, permissible.)

The Board also proposes regulatory guidance on indemnification of officials and employees. As in the case of reimbursement for lost pay and leave, the NCUA Board believes that indemnification and the purchase of insurance to provide for indemnification can help encourage voluntary service.

An FCU has the authority pursuant to section 107(2) of the FCU Act, 12 U.S.C. 1757(2) (the authority to sue and be sued), and section 107(16) (the incidental powers clause) to indemnify its officials and employees. NCUA has in the past interpreted these provisions as authorizing an FCU to provide for indemnification of its officials and employees under limited circumstances. However, the neither section 107 nor any other provision of law or regulation provides specific guidance on the circumstances under which indemnification may be allowed. Proposed § 701.33(c) is designed to provide that guidance.

The Board believes that permitting indemnification in accordance with state corporate law would be proper under traditional federalism principles.

as set forth in Executive Order 12612 (52 FR 41635 (October 30, 1987)), which reflects a policy of minimum Federal regulatory preemption of state laws. The Board has further taken into account that state corporate law is readily accessible to FCU's and their counsel, and that the ability to follow state law guidelines should lessen the cost for FCU's choosing to implement indemnification provisions.

Although a diversity of law exists regarding indemnification among the states, NCUA's review has not uncovered anything which would be inconsistent with the powers and responsibilities of FCU's. State law and the Model Business Corporation Act would not allow indemnification for reckless, wanton, dishonest, or fraudulent conduct, or actions taken in bad faith. Only an FCU and its legal counsel can determine whether an FCU is included within the parameters of a state statute, but the Board wishes to caution that the courts, not the Board, would be the final arbiter as to the validity of an indemnification provision under state law.

The proposal would give FCU's the additional option of using the standards set forth in the Model Business Corporation Act, both because the Act provides an extremely clear and compelling set of standards and because many state statutes, at least on their face, do not apply directly to FCU's. An alternative would be for NCUA to establish its own regulatory standards. That action does not appear to be either necessary or advisable, in view of the flexibility afforded by the Model Act and the various state laws. For convenience of commenters, the relevant portions of the Model Business Corporation Act are set forth as an Appendix to this proposal. (The Appendix is not intended as a part of the proposal.)

FCU's would be able to elect to have no indemnification or to follow *either* the Model Act or the relevant state law. The election must be contained in an FCU charter or bylaw amendment, or in a contract or board resolution. Failure to make an election will be considered a determination by the FCU not to provide indemnification.

The proposal would specifically exclude indemnification of officials and employees for expenses, penalties or other payments incurred in an administrative proceeding brought by the National Credit Union Administration unless the official substantially prevails on the merits. To allow indemnification under such circumstances would lessen the

deterrent effect of administrative actions.

Section 701.33(c)(2) would make clear that, while an FCU may choose to follow the indemnification provisions of either state law or the Model Business Corporation Act, NCUA's procedural requirements regarding charter or bylaw amendments would still apply. Thus, a particular state statute providing for indemnification *only* through a charter amendment voted by the members would be inconsistent with NCUA procedures, which provides only for a vote of members to *recommend* a charter amendment to the NCUA Board for approval. This should not be an impediment to indemnification since the proposal would allow FCU's to follow the provisions of the Model Business Corporation Act, and FCU's choosing to follow state law in states which do not require specific procedures may choose to provide indemnification by means of an employment contract or board resolution, neither of which require NCUA approval.

Section 701.33(c)(3) clarifies that FCU's are free to purchase insurance, such as directors and officers liability insurance, that protects officials and employees against liability asserted against them and arising out of the performance of their official duties. Credit unions customarily have purchased this insurance as a method of providing indemnification.

Finally, the proposal would add a new § 701.33(a), defining the term "official" for purposes of § 701.33 as a current or former member of the board of directors, credit committee or supervisory committee. The definition would clarify which individuals an FCU may indemnify. The inclusion of former FCU officials would allow an FCU to continue indemnification of an individual who is no longer an official but is sued for activities relating to official FCU duties performed as an official. Similarly, the proposal would permit indemnification of former employees.

Consistent with its statutory and regulatory responsibilities, NCUA monitor indemnification provisions both for consistency with the indemnification standards chosen and for the safety and soundness implications for the institution. Also it is emphasized that the power of an FCU's board to provide for indemnification implies the responsibility to determine whether, under the particular circumstances, indemnification is appropriate.

Regulatory Procedures**Regulatory Flexibility Act**

The NCUA Board has determined and certifies that the proposed amendments will not have a significant economic impact on a substantial number of small credit unions because the changes are directed at clarification and reduction of regulatory confusion and interpretive burdens, rather than creation of new regulatory restrictions. Therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The proposed amendments do not contain any collection of information requirements.

List of Subjects in 12 CFR Part 701

Credit unions. Compensation of officials. Indemnification.

By the National Credit Union Administration Board on February 10, 1988.
Becky Baker.

Secretary, NCUA Board.

Accordingly, NCUA proposes to amend 12 CFR Part 701 as follows:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

1. The authority citation for Part 701 is revised to read as follows:

Authority: 12 U.S.C. 1755, 12 U.S.C. 1756, 12 U.S.C. 1757, 12 U.S.C. 1759, 12 U.S.C. 1761, 12 U.S.C. 1761a, 12 U.S.C. 1761b, 12 U.S.C. 1766, 12 U.S.C. 1767, 12 U.S.C. 1782, 12 U.S.C. 1784, 12 U.S.C. 1787, 12 U.S.C. 1789, and 12 U.S.C. 1798.

2. It is proposed that § 701.33 be revised to read as follows:

§ 701.33 Compensation of officials; indemnification of officials and employees.

(a) *Official*. An "official" is a person who is or was a member of the board of directors, credit committee or supervisory committee.

(b) *Compensation*. (1) Only one board officer may be compensated as an officer of the board. The bylaws must specify the officer to be compensated, as well as the specific duties of each of the board officers. No other official may receive compensation for performing the duties or responsibilities of the board or committee position to which the person has been elected or appointed.

(2) For purposes of this section, the term "compensation" specifically excludes:

(i) Payment (by reimbursement to an official or direct credit union payment) for reasonable and proper costs, including pay or leave actually lost due to attendance at meetings of the board

of directors, or of the supervisory or credit committee, incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed;

(ii) Provision of reasonable health, accident and related types of personal insurance protection, supplied for officials at the expense of the credit union; *Provided*, That such insurance protection must exclude life insurance; must be limited to areas of risk, including accidental death and dismemberment, to which the official is exposed by reason of carrying out the duties or responsibilities of the official's credit union position; must cease immediately upon the insured person's leaving office, without providing residual benefits other than from pending claims, if any; and

(iii) Indemnification and related insurance consistent with paragraph (c) of this Section.

(c) *Indemnification*. (1) A Federal credit union may indemnify its officials and current and former employees for expenses reasonably incurred in connection with judicial or administrative proceedings to which they are or may become parties by reason of the performance of their official duties.

(2) Indemnification shall be consistent either with the general standards of corporate law in the state in which the principal or home office of the credit union is located, or with the relevant provisions of the Model Business Corporation Act, but may in no event permit indemnification for expenses, penalties, or other payments incurred in an administrative proceeding brought by the National Credit Union Administration, unless the official or employee substantially prevails on the merits. A Federal credit union that elects to provide indemnification shall specify whether it will follow the Model Business Corporation Act or the relevant state law. Failure to elect to provide indemnification will be considered a decision not to provide it. Indemnification and the method of indemnification may be provided for by charter or bylaw amendment, contract or board resolution, consistent with procedural requirements of applicable state law or the Model Business Corporation Act. A charter or bylaw amendment must be approved by the National Credit Union Administration.

(3) A Federal credit union may purchase and maintain insurance on behalf of its officials and employees against any liability asserted against them and expenses incurred by them in their official capacities and arising out of the performance of their official

duties to the extent such insurance is permitted by applicable state law or the Model Business Corporation Act.

Note.—The following Appendix will not appear in the Code of Federal Regulations.

Appendix—Model Business Corporation Act, Subchapter E Indemnification

Section 8.30 Subchapter definitions.

In this subchapter:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" include counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(5) "Official capacity" means: (i) When used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an individual other than a director, as contemplated in section 8.56, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

(6) "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, and whether formal or informal.

Section 8.51 Authority to indemnify.

(d) Except as provided in subsection (d), a corporation may indemnify an individual, made a party to a proceeding because he is or was a director, against liability incurred in the proceeding if:

- (1) He conducted himself in good faith; and
- (2) He reasonably believed:
 - (i) In the case of conduct in his official capacity with the corporation, that his conduct was in its best interests; and
 - (ii) In all other cases, that his conduct was at least not opposed to its best interests; and

(3) In the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interests of the participants and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(d) A corporation may not indemnify a director under this section:

(1) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) In connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

Section 8.52 Mandatory indemnification.

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.

Section 8.53 Advance for expenses.

(a) A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to

a proceeding in advance of final disposition of the proceeding if:

(1) The director furnishes the corporation a written affirmation of his good faith belief that he has met the standard of conduct described in section 8.51;

(2) The director furnishes the corporation a written undertaking, executed personally or on his behalf, to repay the advance if it is ultimately determined that he did not meet the standard of conduct; and

(3) A determination is made that the facts then known to those making the determination would not preclude indemnification under this subchapter.

(b) The undertaking required by subsection (a)(2) must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(c) Determinations and authorizations of payments under this section shall be made in the manner specified in section 8.55.

Section 8.54 Court-ordered indemnification.

Unless a corporation's articles of incorporation provide otherwise, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification if it determines:

(1) The director is entitled to mandatory indemnification under section 8.52, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; or

(2) The director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he met the standard of conduct set forth in section 8.51 or was adjudged liable as described in section 8.51(d), but if he was adjudged so liable his indemnification is limited to reasonable expenses incurred.

Section 8.55 Determination and authorization of indemnification.

(a) A corporation may not indemnify a director under section 8.51 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because he has met the standard of conduct set forth in section 8.51.

(b) The determination shall be made:

(1) By the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(2) If a quorum cannot be obtained under subdivision (1), by majority vote of a committee duly designated by the board of directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding;

(3) By special legal counsel

(i) Selected by the board of directors or its committee in the manner prescribed in subdivision (1) or (2); or

(ii) If a quorum of the board of directors cannot be obtained under subdivision (1) and a committee cannot be designated under subdivision (2), selected by majority vote of the full board of directors (in which selection directors who are parties may participate); or

(4) By the shareholders, but shares owned by or voted under the control of directors who are at the time parties to the proceeding may not be voted on the determination.

(c) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subsection (b)(3) to select counsel.

Section 8.56 Indemnification of officers, employees, and agents.

Unless a corporation's articles of incorporation provide otherwise:

(1) An officer of the corporation who is not a director is entitled to mandatory indemnification under section 8.52, and is entitled to apply for court-ordered indemnification under section 8.54, in each case to the same extent as a director;

(2) The corporation may indemnify and advance expenses under this subchapter to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director; and

(3) A corporation may also indemnify and advance expenses to an officer, employee, or agent who is not a director to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

Section 8.57 Insurance.

A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under section 8.51 or 8.52.

Section 8.58 Application of subchapter.

(a) A provision treating a corporation's indemnification or advance for expenses to directors that is contained in its articles of incorporation, bylaws, a resolution of its shareholders or board of directors, or in a contract or otherwise, is valid only if and to the extent the provision is consistent with this subchapter. If articles of incorporation limit indemnification or advance for expenses, indemnification and advance for expenses are valid only to the extent consistent with the articles.

(b) This subchapter does not limit a corporation's power to pay or reimburse expenses incurred by a director in connection with his appearance as a witness in a proceeding at a time when he has not been made a named defendant or respondent to the proceeding.

[FR Doc. 88-3403 Filed 2-18-88; 8:45 am]

BILLING CODE 7535-01-M

12 CFR Parts 790 and 791

Description of Office, Disclosure of Official Records, Availability of Information, Promulgation of Regulations; Rules of Board Procedure

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed amendments.

SUMMARY: The NCUA Board proposes to amend Part 791 of its Rules to (1) streamline and clarify Board procedure, and (2) set forth updated provisions concerning the issuance of NCUA regulations. Concurrently, it is proposed that § 790.10 of NCUA's Rules and a related Appendix be repealed. Section 790.10 and the Appendix contain

outdated provisions related to issuing regulations.

DATE: Comments must be received on or before May 19, 1988.

ADDRESS: Send comments to Becky Baker, Secretary, National Credit Union Administration Board, 1776 G Street NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary, NCUA Board, regarding Rules of Board Procedure, or Julie Tamulevitz, Staff Attorney, regarding the issuing of NCUA Rules and Regulations, at the above address or telephone (202) 357-1100 (Ms. Baker) or (202) 357-1030 (Ms. Tamulevitz).

SUPPLEMENTARY INFORMATION: Section 790.10 of NCUA Rules and regulations sets forth NCUA's procedures for issuing regulations. The NCUA Board believes that the substance of this section would be more appropriately located in Part 791 covering "Rules of Board Procedure." In addition, § 790.10 is outdated and unclear. The Board is therefore proposing to delete § 790.10 and to add a new § 791.8 that will address this subject. The title of part 790 and its Scope section (§ 790.1) would be revised to reflect the proposed deletion of § 790.10, and the Scope section has been rewritten in plain words.

The Board also proposes to delete Appendix A to Part 790 entitled "Final Report In Response to Executive Order No. 12044: Improving Government Regulations." The Appendix has been superseded by NCUA Policy Statement 87-2, which contains current procedures for developing and reviewing regulations.

Under the proposed amendments, current Part 791 is divided into two subparts. Subpart A contains Rules of Board Procedure. Subpart B sets forth procedural requirements for issuing regulations.

Rules of Board Procedure

Section 102(d) of the Federal Credit Union Act, 12 U.S.C. 1752a(d), grants the NCUA Board the discretion to adopt such rules as it sees fit for the transaction of its business. Proposed Rules of Board Procedure were adopted at the first NCUA Board Meeting in September 1979. A final rule was adopted in March 1980. The purpose of these proposed amendments is to update and streamline the Rules of Board Procedure, based on the experience of the past seven years, current and changing needs, and the desire to provide flexibility for the Board in carrying out its responsibilities.

Section 791.2 ("Number of Votes Required for Board Action"), would be amended by inserting the word "any"

between the words "or" and "action." This amendment clarifies that both notation votes and votes at Board meetings are subject to the two-of-three majority rule.

Subsection (a) of § 791.4 ("Notation Voting") is redesignated as § 791.4(b). Conversely, § 791.4(b) ("Board Meetings") is redesignated as Section (a). This change emphasizes that the primary method of acting is through action taken at Board meetings; the secondary method is action taken by notation voting. For purposes of clarification, reference to Subpart C of Part 790, Public Observation of Board Meetings, has been added to § 791.4(a)(1).

Proposed § 791.4(b) ("Notation Voting") would amend the definition of notation voting contained in current § 791.4(a) to provide that notation voting is the circulation of written memoranda and voting sheets to the office of each Board member. The present requirement that each Board member must personally receive the written memoranda and voting sheet is difficult to accomplish in the case of out-of-town or out-of-reach Board members.

For clarification purposes, proposed § 791.4(b)(2) would revise current § 791.4(a)(2) to provide for the use of a Notation Vote Sheet to record actions taken by notation vote. The first sentence of the current section, which provides for an "approval with suggested administrative changes" option on the notation vote sheet, has been deleted as unnecessary.

It is proposed that current § 791.4(a)(3)(ii) be deleted. The history of Board operations has shown that the failure of any Board member to respond to a notation vote within the prescribed time frame is not a good indication the member wants the matter considered at a Board meeting. Experience has been that the Board member has been on travel or otherwise unavailable. With the deletion of current § 791.4(a)(3)(ii), current § 791.4(a)(3)(i) would become § 791.4(b)(3). The title of proposed § 791.4(b)(3) would become "Veto of Notation Voting."

History has shown that the business to come before the Board can be accomplished, with few exceptions, at a monthly meeting. Past experience bears out that the scheduling of Board meetings on a day certain is not a feasible plan. The Board proposes that § 791.5 ("Scheduling of Board Meetings"), which requires that meetings be held each Thursday, be amended to provide that regular meetings be held monthly.



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

January 7, 1988

GC/TPM:wpm
3320

Office of General Counsel

John J. Bishar, Jr., Esq.
Cullen and Dykman
1010 Franklin Avenue
Garden City, NY 11530-0755

RE: Bethpage Federal Credit Union/Preemption of New
York State Banking Law Section 590 and Rules
Promulgated Thereunder (Your June 22, 1987, Letter)

Dear Mr. Bishar:

In light of Executive Order 12612 [52 Fed. Reg. 41685 (October 30, 1987)], we must decline to render the opinion you have asked for until a Federal credit union (FCU) has been refused relief under New York State law.

Sections 1 and 2 of Executive Order 12612 require NCUA to accommodate state interests to the maximum extent possible in its:

regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

NCUA's declaring Section 590 of the New York Banking Law and regulations promulgated thereunder preempted to the extent they purport to govern FCU's would, in our view, be an "action" having a "direct effect" on New York State.


Subdivision 6 of New York Banking Law Section 590 gives Federal credit unions a possible escape valve without requiring NCUA action:

The [New York State] banking board is hereby authorized and empowered, consistent with the declaration of policy set forth in this article, to exempt by rule or regulation from any or all of the provisions of this article any or all exempt organizations [including Federal credit unions] with respect to credit

line mortgages, installment loans and home
improvement loans.

We therefore abstain from rendering an opinion on the extent
Federal credit union law preempts Section 590 until an FCU has
been denied relief under subdivision 6 of that section.

Sincerely,



Timothy P. McCollum
Assistant General Counsel

TPM:wpm