



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

GC/EOR:sg
SSIC 4062
89-0903

Office of General Counsel

September 28, 1989

Mr. Lawrence C. Williams
Administrator
Alabama Credit Union Administration
State of Alabama
771 So. Lawrence St., Suite 103
Montgomery, AL 36130-0901

Dear Mr. Williams:

This is in response to your letter dated August 30, 1989, to Becky Baker, Secretary of the NCUA Board. Your letter requested information and prior opinions pertaining to compensation of credit union officials for lost pay.

Federal credit union directors cannot be reimbursed for lost pay. I have enclosed a copy of both the proposed and final NCUA regulations promulgated on this subject, as well as several legal opinions dealing with compensation of officials. I hope you will find this material to be helpful.

Please contact me if you have any further questions.

Sincerely

Hattie M. Ulan

HATTIE M. ULAN
Assistant General Counsel

Enclosures

FOIA

Vol. III, A4

committee at a public meeting. Therefore, the Secretary also finds that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register (5 U.S.C. 553).

List of Subjects in 7 CFR Part 948

Marketing agreements and orders.
Potatoes (Colorado).

For the reasons set forth in the preamble, 7 CFR Part 948 is amended as follows:

PART 948—IRISH POTATOES GROWN IN COLORADO

1. The authority citation for 7 CFR Part 948 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 948.297 is added to read as follows:

Note.—This section prescribes the annual assessment rate and will not be published in the Code of Federal Regulations.

§ 948.297 Expenses and assessment rate.

Expenses of \$43,552 by the San Luis Valley Potato Administrative Committee Area II are authorized, and an assessment rate of \$0.0036 per hundredweight of assessable potatoes is established for the fiscal period ending August 31, 1989. Unexpended funds may be carried over as a reserve.

Dated: August 3, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 88-17790 Filed 8-5-88; 8:45 am]
BILLING CODE 3410-02-B

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Organization and Operations of Federal Credit Unions; Compensation of Officials

AGENCY: National Credit Union Administration ("NCUA").

ACTION: Final rule.

SUMMARY: This amendment to § 701.33 of NCUA's Rules and Regulations: (1) Provides guidance for FCU indemnification of officials and employees; and (2) conforms the regulation to a recent change in section 112 of the Federal Credit Union ("FCU") Act (12 U.S.C. 1761a), permitting an FCU board of directors to compensate one board officer of its choosing. The regulation has also been given a new title which more accurately reflects the

content of the regulation: "Reimbursement, Insurance, and Indemnification of Officials and Employees."

EFFECTIVE DATE: September 7, 1988.

ADDRESS: National Credit Union Administration, 1776 G Street NW., Washington, DC 20450.

FOR FURTHER INFORMATION CONTACT: Allan Meltzer, Assistant General Counsel, or Julie Tamulevitz, Staff Attorney, Office of General Counsel, at the above address or telephone: (202) 357-1090.

SUPPLEMENTARY INFORMATION:

Background

On February 10, 1988, the NCUA Board issued a proposal to amend § 701.33 of NCUA's Rules and Regulations ("Compensation of Officials"). 53 FR 4992 (Feb. 19, 1988). The proposal had three parts:

1. To amend § 701.33(a) to provide that an FCU's board of directors may determine, and specify in their bylaws, which board officer may be compensated as such. This change was recommended to conform the regulation to section 112 of the FCU Act (12 U.S.C. 1761a), which was amended in 1982. Prior to that time, the treasurer was the only board officer who could be compensated as an FCU official.

2. To amend § 701.33 to permit an FCU to reimburse its officials for pay or leave (e.g., annual leave, leave without pay) actually lost while attending a meeting of the board of directors or of the supervisory or credit committees.

3. To amend § 701.33 to provide regulatory guidance to FCU's on indemnification and the purchase of insurance to provide for indemnification of its officials and employees. In the past, NCUA had interpreted section 107(2) (the authority to sue and be sued) and section 107(16) (the incidental powers clause) of the FCU Act (12 U.S.C. 1757(2), 1767(16)) as providing an FCU with the authority to indemnify its officials and employees under limited circumstances. However, no specific guidance had been given.

Public Comment

The NCUA Board received 86 comments: 73 from FCU's; 2 from state-chartered credit unions; 6 from credit union leagues; 3 from trade associations; and 2 from individuals.

A. Proposal To Amend Section 701.33 To Conform With Section 112 of the FCU Act (12 U.S.C. 1761a)

Few of the commenters addressed the first proposal. Those that did favored the change. The Board is amending

§ 701.33(a) to conform it to section 112 of the FCU Act.

Article VIII, Section 1 of the current FCU Bylaws permits an FCU's board of directors to designate the board officer, if any, that will be compensated. Some FCU's may be operating under older versions of the FCU Bylaws which either do not permit compensation of any board officer, or limit compensation to the financial officer (treasurer). These FCU's will have to adopt Article VII, Section 1 of the FCU Bylaws if they want to compensate a board officer, or if they want to compensate an officer other than the treasurer.

B. Proposal To Reimburse Officials for Pay or Leave Lost While Attending Board of Directors or Committee Meetings

All 86 commenters addressed the suggestion to authorize reimbursing officials for pay or leave actually lost while attending board or committee meetings: 62 were opposed; 22 were in favor; and 2 opposed the proposal, but favored reimbursing officials for pay or leave lost while attending credit union conferences and seminars. (Sixteen of the 22 commenters favoring the proposal also favored permitting officials to be reimbursed for pay or leave lost while attending credit union conferences and seminars.)

The primary reasons given for opposing the proposal concerned the credit union volunteer spirit—that reimbursement was contrary to that philosophy; that voluntarism is what makes credit unions different from other financial institutions; and that easing the reimbursement restriction further could endanger the tax-exempt status of credit unions. Commenters were also concerned about the possible effects of implementing such an authorization: Dissension among board members where some might receive more reimbursement than others; reluctance by some officials to publicly disclose their salaries; additional IRS reporting requirements for FCU's; difficulty with verifying officials' claims of lost pay or leave; and creation of an incentive to officials to hold meetings during working hours.

Commenters favoring the proposal to reimburse officials for lost pay or leave generally noted that the proposal would assist FCU's in obtaining and keeping qualified officials. Most of these commenters also asked that the proposed reimbursement be extended to credit union conferences and seminars. Many of those favoring the proposal stated their assumption that it is currently permissible to reimburse

officials for pay or leave actually lost while attending credit union conferences and seminars.

NCUA staff had recommended this proposal to the NCUA Board in response to FCU's expressing a need for reimbursement for lost pay and leave to attract and retain qualified volunteers. The comments received on the proposal, however, indicate the vast majority of FCU's feel such reimbursement is unnecessary and may be harmful to the credit union spirit. The NCUA Board has decided not to go forward with this proposal. The Board also hereby clarifies that under NCUA's current Rules and Regulations reimbursement of officials for lost pay or leave is not permitted.

C. Proposal To Permit Indemnification of FCU Officials and Employees

The NCUA Board's third proposed change to § 701.33 was also designed to encourage voluntary service. Establishment of guidelines for indemnification and the purchase of insurance to provide for indemnification. Thirty-five of the commenters addressed this proposal: 34 supported it and one opposed. In general, the commenters agreed that indemnification protection would enhance the ability of an FCU to attract volunteers, and many expressed the belief that such protection was a necessity in today's litigious society.

As to the proposed scope of the amendment, two commenters suggested that the definition of "official" be expanded to include *all* volunteers serving on FCU committees—the proposal had included only members of the credit and supervisory committees. Because the primary purpose of the indemnification provision is to encourage voluntarism, the NCUA Board concurs and is expanding the definition of "official" in the final amendment to read as follows: "An 'official' is a person who is or was a member of the board of directors, credit committee, supervisory committee, or other volunteer committee established by the board of directors."

Two commenters believed that NCUA should set the standards for indemnification rather than allow FCU's to elect to apply the standards of state law or the Model Business Corporation Act. The NCUA Board considered a range of possibilities—from imposing the clear Federal standard suggested to allowing state law to control entirely. A middle position has been found appropriate.

Under the final amendment, an FCU will be free to choose one of three options: No indemnification;

indemnification under the state enabling law applicable to its neighboring state-chartered credit unions; or indemnification under the Model Business Corporation Act. The only caveat is that any FCU bylaw or charter amendment relating to indemnification, like all other such amendments, must be approved by NCUA.

This approach maximizes FCU flexibility (particularly in states which have not enacted an indemnification-enabling statute applicable to credit unions), limits the instances where an FCU or NCUA must determine which state indemnification law is applicable, and accommodates state and local interests.

One commenter suggested that an FCU be authorized to combine provisions of state law and the Model Business Corporation Act in formulating its indemnification standards. An FCU should be able to elect to follow either state law or the Model Act, but not both, since each represents a unified whole. This option should provide adequate flexibility. Permitting an FCU to select portions of state law and the Model Act would likely lead to inconsistency and confusion.

The proposal provided that an FCU which elects to provide indemnification shall specify whether it will follow state law or the Model Act, and further provided that failure to make an election would be deemed a decision not to provide indemnification. Several commenters objected to this portion of the proposal, stating that an FCU should have the flexibility to provide indemnification on a case-by-case basis if appropriate, and that only an affirmative decision not to provide indemnification should be binding on an FCU. The NCUA Board agrees, and the language treating a failure to make an election as an affirmative decision not to provide indemnification has been deleted.

Several commenters objected to the language prohibiting 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." These commenters were concerned that NCUA could prevail in an administrative proceeding even though an official or employee acted in good faith. One commenter was concerned that this provision might have an inhibiting effect on officials or employees.

Under most state provisions and under the Model Business Corporation Act, indemnification is not available for an employee or official who acts

recklessly, wantonly, fraudulently, or in bad faith, receives an improper personal benefit, or does not have reason to believe that his actions are in the best interests of the FCU. This would generally be the case when NCUA prevails in an administrative action; the limitation on indemnification contained in the proposed regulation would therefore affect few, if any, cases. NCUA's interests are therefore adequately protected, and this provision has been deleted from the final rule.

As noted in the proposed amendment, the power to provide for indemnification does not relieve an FCU of its responsibility to determine whether indemnification is appropriate under the circumstances. NCUA will monitor indemnification provisions for consistency with the indemnification standards chosen, for the safety and soundness implications for the institution, and for their application in a given case.

Lastly, the final rule clarifies, as did the proposal, that the purchase of liability insurance is an acceptable method of providing indemnification protection to officials and employees.

D. Change in Title of the Regulation

Section 701.33 was previously entitled "Compensation of Officials." Based on certain of the comments received on the proposal, it appears that this title may have contributed to a misimpression that the regulation authorizes FCU's to compensate board and committee members. The regulation has been retitled "Reimbursement Insurance, and Indemnification of Officials and Employees." This title more accurately reflects the intent of the regulation.

Regulatory Procedures

Regulatory Flexibility Act

The NCUA Board has determined and certifies that these amendments will not have a significant economic impact on a substantial number of small credit unions. 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 amendments do not impose any paperwork requirements.

Executive Order 12812

The NCUA Board has determined that this amendment does not have significant federalism implications. The amendment has no effect on federally-insured, state-chartered credit unions.

The amendment attempts to put FCU's in virtually the same position as their state-chartered credit union neighbors. The sole differences are that an FCU will have the option of following the Model Business Corporation Act, and that any FCU bylaw or charter amendment relating to indemnification must be approved by NCUA. Thus the effect on state interests is likely to be minimal. The first difference is needed to accommodate FCU's in states without indemnification-enabling statutes and to ease the need on the part of FCU's and NCUA to determine what state law is appropriate. The second merely maintains NCUA's general oversight of FCU charters and bylaws.

List of Subjects in 12 CFR Part 701

Credit unions, Indemnification.
By the National Credit Union
Administration Board on July 27, 1988.
Becky Baker,
Secretary, NCUA Board.

Accordingly, NCUA amends 12 CFR Part 701 as follows:

PART 701—(AMENDED)

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

Authority: 12 U.S.C. 1753, 12 U.S.C. 1756, 12 U.S.C. 1757, 12 U.S.C. 1759, 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.

Section 701.31 is also authorized by 15 U.S.C. 1601 et seq., 42 U.S.C. 1981 and 42 U.S.C. 3601-3610.

2. Section 701.33 is revised to read as follows:

§ 701.33 Reimbursement, insurance, and 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, or other volunteer committee established by the board of directors.

(b) *Compensation*. (1) Only one board officer, if any, may be compensated as an officer of the board. The bylaws must specify the officer to be compensated, if any, 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 to a third party) for reasonable and proper costs 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 standards applicable to credit unions generally 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. A Federal credit union that elects to provide indemnification shall specify whether it will follow the relevant state law or the Model Business Corporation Act. Indemnification and the method of indemnification may be provided for by charter or bylaw amendment, contract or board resolution, consistent with the procedural requirements of the applicable state law or the Model Business Corporation Act, as specified. 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 the applicable state law or the Model Business Corporation Act.

[FR Doc. 88-17082 Filed 8-3-88 9:45 am]
BILLING CODE 7550-01-8

12 CFR Part 701

Loan Interest Rates

AGENCY: National Credit Union Administration.

ACTION: Final rule.

SUMMARY: The current 18 percent per year Federal credit union loan rate ceiling was scheduled to revert to 15 percent on September 10, 1988, unless otherwise provided by the NCUA Board. A 15 percent ceiling would restrict certain categories of credit and adversely affect the financial condition of a number of Federal credit unions. At the same time prevailing market rates and economic conditions do not justify a rate higher than the current 18 percent ceiling. Accordingly, the NCUA Board has established an 18 percent Federal credit union loan rate ceiling for the period from September 10, 1988 through March 9, 1990. Loans and line of credit balances existing prior to May 15, 1987 may continue to bear their contractual rate of interest, not to exceed 21 percent. Further, the NCUA Board is prepared to reconsider the 18 percent ceiling at any time should changes in economic conditions warrant.

EFFECTIVE DATE: September 10, 1988.

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

FOR FURTHER INFORMATION CONTACT: Charles H. Bradford, Chief Economist or Timothy P. McCollum, Assistant General Counsel, at the above address. Telephone numbers: (202) 357-1100 (Mr. Bradford); (202) 357-1030 (Mr. McCollum).

SUPPLEMENTARY INFORMATION:

Background

Public Law 96-221, enacted in 1979, raised the loan interest rate ceiling for Federal credit unions from 1 percent per month (12 percent per year) to 15 percent per year. It also authorized the NCUA Board to set a higher limit, after consultation with Congress, the Department of the Treasury, and other Federal financial agencies, for a period not to exceed 18 months, if the Board should determine that: (i) Money market interest rates have risen over the preceding six months; and (ii) prevailing interest rate levels threaten the safety and soundness of individual credit unions as evidenced by adverse trends in liquidity, capital, earnings, and growth.

On December 3, 1980, the NCUA Board met and determined that the foregoing conditions had been met.



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

Office of General Counsel

GC\RRD:sg
SSIC 4062
89-0713

July 31, 1989

Ms. Irma Lerma
President
U.I.W. Federal Credit Union
510 North Broad Ave.
Wilmington, CA 90744

Re: Compensation of Officials (Your July 10, 1989,
Letter)

Dear Ms. Lerma:

Your letter to Chairman Jepsen has been referred to this Office for a response. You ask whether a Federal credit union ("FCU") may reimburse members of your board of directors and credit committee for expenses, such as mileage, when these officials attend meetings to transact business of the credit union. The FCU Act and NCUA Regulations permit reimbursement for reasonable expenses incurred in the execution of such officials' credit union duties.

ANALYSIS

Section 111(c) of the FCU Act (12 U.S.C. §1761(c)) provides as follows:

No member of the board or of any other committee shall, as such, be compensated, except that reasonable health, accident, similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

Ms. Irma Lerma
July 31, 1989
Page 2

Section 112 of the FCU Act (12 U.S.C. §1761a) authorizes an FCU to compensate only one officer of the board of directors for service on the board.

Section 701.33(b) of the NCUA Rules and Regulations (12 C.F.R. §701.33(b)) provides, in part:

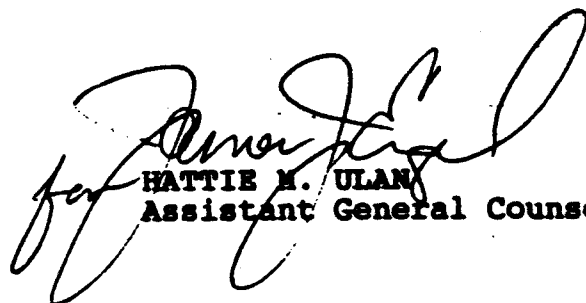
(1) Only one board officer, if any, may be compensated as an officer of the board.... No other official may receive compensation for performing the duties or responsibilities of the board....

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

(i) payment (by reimbursement to an official or direct credit union payment to a third party) for reasonable and proper costs incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed;

Your letter did not describe in detail the circumstances surrounding your FCU's reimbursement of expenses. You did state that some related to mileage expenses incurred when the FCU officials "attended meetings to transact business of the credit union." In general, mileage and other reasonable and proper expenses incurred while attending credit union-related meetings and conferences are reimbursable expenses. Enclosed is an opinion letter concerning payment of mileage expenses incurred by board members while attending board meetings. We have contacted your Supervisory Examiner concerning this issue.

Sincerely,


HATTIE M. ULAN
Assistant General Counsel

Enclosure
cc: Rick Ducker (Region VI)



GC/HMU:bhs
3500

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

January 17, 1989

Office of General Counsel

Gerald E. Toland
President/CEO
La Dotd Federal Credit Union
P.O. Box 44244
Baton Rouge, LA 70804-4244

Re: Mileage Expense for Directors to Attend
Monthly Directors' Meetings (Your
December 1, 1988, Letter)

Dear Mr. Toland:

A Federal credit union ("FCU") can make a reasonable reimbursement to members of the board of directors for mileage expenses to and from monthly board meetings pursuant to the FCU Act and the NCUA Regulations. A decision to make such reimbursement is a policy matter to be made by the board of directors of each individual FCU.

Section 112 of the FCU Act provides that only one board officer may be compensated. Section 111(c) of the FCU Act (12 U.S.C. §1761(c)) provides, in part:

No member of the board or of any other committee shall, as such, be compensated, except that ... the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

Section 701.33(b) of the NCUA Rules and Regulations (12 C.F.R. §701.33(b)) interprets Section 111 of the FCU Act. It repeats the prohibition on compensation and further provides, in part:

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

Gerald E. Toland
Page Two
January 17, 1989

(i) payment (by reimbursement to an official or direct credit union payment to a third party) for reasonable and proper costs incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed;

It has been longstanding NCUA policy that reimbursement for "reasonable expenses incurred" includes mileage expenses to and from FCU board meetings. A decision on whether or not to make such reimbursement rests with the board of directors of each FCU.

Sincerely,

Hattie M. Ulan

HATTIE M. ULAN
Acting Assistant General
Counsel

HMU:bhs



GC/RMF:bhs
4361

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

January 13, 1989

Office of General Counsel

Richard Rivas
General Manager
Unit 1 Federal Credit Union
P.O. Box 830
Lockport, NY 14094-0830

Dear Mr. Rivas,

This is in response to your letter of December 12, 1988, to Chairman Jepsen requesting clarification of NCUA's position on reimbursement of lost wages.

As you know, in February of 1988, the NCUA Board proposed an amendment to NCUA's regulations to allow reasonable reimbursement for Federal credit union directors and committee members who lose leave or pay from their regular jobs when attending credit union board or committee meetings. The public comments in response were overwhelmingly opposed to such reimbursement. Commenters cited the tradition of voluntarism as one of the cornerstones of credit union philosophy, and expressed concern that the proposal would eliminate an important characteristic of credit unions that sets them apart from profit-oriented financial institutions.

In response to the public comments, the NCUA Board continued the prohibition against reimbursement for lost pay or leave. Reimbursement of all reasonable expenses continues to be permissible.

In your letter of December 12, 1988, you cite an apparent inconsistency in NCUA's implementation of the rule. Specifically, Ms. Ulan of our Office of General Counsel stated in her letter to you of November 29, 1988, that it is not possible to grant exceptions to the rule. Several of your directors have indicated, however, that in a presentation by another member of NCUA staff at a recent meeting of the General Motors Council of Credit Unions in New Orleans, they were told that exceptions might be given in certain cases.

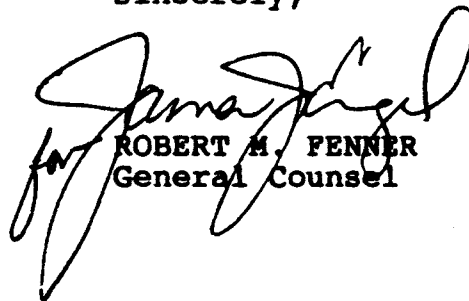
Richard Rivas
Page Two
January 13, 1989

Having discussed this matter with Regional Director Allen Carver, who prepared the New Orleans presentation, it is my understanding that he indicated that special consideration might be given to situations where, at the time that NCUA's final rule was adopted, firm plans and commitments had already been made for attendance at meetings such as educational seminars and credit union conferences. I have discussed this matter with Chairman Jepsen, as well as Regional Director Bryan in Albany, and we all believe that this is a fair and reasonable approach. To the extent that our letter of November 29 seemed to preclude this type of case-by-case consideration, we apologize for the confusion created. If these circumstances apply to your credit union, you should follow up with your examiner and Mr. Bryan.

We do not have immediate plans to revisit the broader issue of reimbursement of lost leave or pay. As you may know, however, we review all of our regulations on a three-year cycle. Proposed rule changes are generally distributed to credit unions by both NCUA and the credit union trade associations. We encourage your participation in the comment process.

Again, thank you for writing, and I trust this clears up the confusion that existed.

Sincerely,



ROBERT M. FENNER
General Counsel

RMF:bhs

cc: Chairman Jepsen
Allen Carver
Foster Bryan



GC/RD.59
4061

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

November 29, 1988

Office of General Counsel

Mr. Richard T. Rivas
Unit No. 1 Federal Credit Union
P.O. Box 830
Lockport, NY 14094-0830

Re: Reimbursement for Wages Lost While Attending
Conferences (Your August 26, 1988, Letter)

Dear Mr. Rivas:

You have requested a waiver of NCUA's prohibition against reimbursement of Federal credit union ("FCU") board or committee members for salary lost while attending a conference or training course. The prohibition is absolute; we cannot grant a waiver.

Background

Your FCU has had difficulty finding quality training programs for your supervisory committee members because of your location in western New York state. Your FCU has made arrangements for the New York State Credit Union League to provide on-site training classes. These classes were arranged on the assumption that the FCU could reimburse the committee members for their lost wages while attending these classes.

Relevant Statute and Regulation

Section 111 of the FCU Act [12 U.S.C. 1761] provides:

(c) No member of the board or of any other committee shall, as such, be compensated, except that reasonable health, accident, similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

Section 701.33(b) of the NCUA Rules and Regulations [12 C.F.R. 701.33(b)], which has just been amended [53 Fed. Reg. 29640 (August 8, 1988)], provides, in part:

(1) Only one board officer, if any, may be compensated as an officer of the board. The bylaws must specify the officer to be compensated, if any, 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 to a third party) for reasonable and proper costs incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed;

Recent Section 701.33 Amendment

When the NCUA Board presented a proposal to amend Section 701.33 to the public for comment, it suggested narrowly expanding the rule to permit reimbursing FCU officials for pay or leave actually lost while attending FCU board or committee meetings. (See 53 Fed. Reg. 4992 (Feb. 19, 1988).) Sixty-two of 86 commenters opposed even this narrow expansion. After reviewing the comments, the Board stated:

The primary reasons given for opposing the proposal concerned the credit union volunteer spirit -- that reimbursement was contrary to that philosophy; that voluntarism is what makes credit unions different from other financial institutions; and that easing the reimbursement restriction further could endanger the tax-exempt status of credit unions. Commenters were also concerned about the possible effects of implementing such an authorization. Dissension among

Mr. Richard T. Rivas
November 29, 1988
Page 3

board members where some might receive more reimbursement than others; reluctance by some officials to publicly disclose their salaries; additional IRS reporting requirements for FCU's; difficulty with verifying officials' claims of lost pay or leave; and creation of an incentive to officials to hold meetings during working hours.

* * *

NCUA staff had recommended this proposal to the NCUA Board in response to FCU's expressing a need for reimbursement for lost pay and leave to attract and retain qualified volunteers. The comments received on the proposal, however, indicate the vast majority of FCU's feel such reimbursement is unnecessary and may be harmful to the credit union spirit. The NCUA Board has decided not to go forward with this proposal. The Board also hereby clarifies that under NCUA's current Rules and Regulations reimbursement of officials for lost pay or leave is not permitted.

Conclusion

In large part because of the credit union community's overwhelming opposition to allowing FCU's to reimburse officials for lost pay or leave, the Board has established an absolute rule against it in Section 701.33. No waiver is possible.

Sincerely,

Hattie M Ulan

HATTIE M. ULAN
Acting Assistant General Counsel

RRD:sg



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

June 8, 1988

GC/JS:sg
3600

Office of General Counsel

Mr. Bobby E. Coomer
Director
L & N Federal Credit Union
8628 Glaser Road
Fern Creek, Kentucky 40291

Re: Compensation of Federal Credit Union Officials for
Attendance at Conferences (Your May 19, 1988, Letter)

Dear Mr. Coomer:

A Federal credit union ("FCU") may not reimburse board members for salary lost while attending credit union conferences or similar events. NCUA has issued a request for comments on a possible change in its regulations to permit reimbursement for wages or salary actually forfeited to attend FCU board and committee meetings. The request, however, does not include a proposed change to reimburse officials for lost work time while attending conferences.

Section 111 of the FCU Act [12 U.S.C. 1761] provides:

(c) No member of the board or of any other committee shall, as such, be compensated, except that reasonable health, accident, similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

Sections 701.33(a) and (b) of the NCUA Rules and Regulations [12 C.F.R. 701.33(a), (b)] provide:

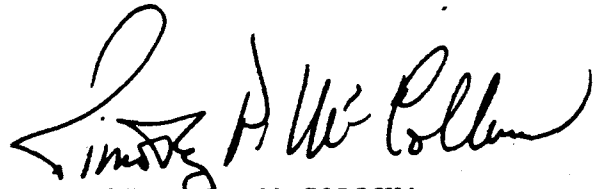
(a) With the exception of the treasurer, no director or member of a credit committee or supervisory committee may receive compensation for performing the duties or responsibilities of the board of [sic] committee position to which the person was elected or appointed.

Mr. Bobby E. Coomer
June 8, 1988
Page Two

(b) For purposes of this section, the term 'compensation' specifically excludes (1) reasonable and proper costs incurred by or on behalf of an official (whether on a reimbursement basis or directly by the credit union) in carrying out the responsibilities of the position to which the person was elected or appointed

We have consistently stated that the Section 701.33(b)(1) allowance of reimbursement, though including costs associated with a director's or officer's attendance at schools and conferences on behalf of the credit union, is limited to out-of-pocket monetary costs. More specifically, direct costs for travel, meals and lodging are reimbursable expenses under Section 701.33, but indirect costs, such as wages actually lost while attending such activities, are not. On February 10, 1988, NCUA proposed eliminating this distinction for FCU officials' attendance at board and committee meetings. But, this is only a proposal and would not, in any event, permit reimbursement for lost wages for carrying out any other official responsibility.

Sincerely,



TIMOTHY P. MCCOLLUM
Assistant General Counsel

DJS:sg



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

GC/RD:jrm
4061

March 31, 1988

Office of General Counsel

Bettye P. Machen
Chairman of the Board
Naval Air Federal Credit Union
160 Newtown Road
Virginia Beach, VA. 23462

Re: Compensation of Federal Credit Union
Officials (Your March 3, 1988, Letter)

Dear Mrs. Machen:

You have asked whether it is permissible for a Federal credit union ("FCU") to reimburse board members for salary lost while attending credit union conferences or schools. An FCU may not. NCUA has issued a request for comments on a possible change in its regulations to permit reimbursement for wages or salary actually forfeited to attend FCU board and committee meetings; the request does not include a proposed change to reimburse officials for lost work time attending conferences or schools.

FACTS

Your FCU held a board meeting on January 26, 1988, at which time a motion was made and passed to reimburse board members for salary lost while attending credit union conferences and schools up to eight days per year per board member. It was also decided that such reimbursement extended to persons taking leave without pay even though they have leave or vacation time available.

ANALYSIS

Section 111 of the FCU Act [12 U.S.C. 1761] provides:

* * *

(c) No member of the board or of any other committee shall, as such, be compensated,

Bettye P. Machen
March 31, 1988
Page Two

except that reasonable health, accident, similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

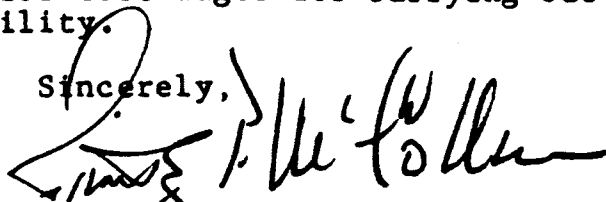
Sections 701.33(a) and (b) of the NCUA Rules and Regulations [12 C.F.R. 701.33(a), (b)] provide:

(a) With the exception of the treasurer, no director or member of a credit committee or supervisory committee may receive compensation for performing the duties or responsibilities of the board of committee position to which the person was elected or appointed.

(b) For purposes of this section, the term 'compensation' specifically excludes (1) reasonable and proper costs incurred by or on behalf of an official (whether on a reimbursement basis or directly by the credit union) in carrying out the responsibilities of the position to which the person was elected or appointed

We have consistently stated that the Section 701.33(b)(1) allowance of reimbursement, though including costs associated with a director's or officer's attendance at schools and conferences on behalf of the credit union, is limited to out-of-pocket monetary costs. More specifically, direct costs for travel, meals and lodging are reimbursable expenses under Section 701.33, but indirect costs such as wages actually lost while attending such activities are not. On February 10, 1988, NCUA proposed eliminating this distinction for FCU officials' attendance at board and committee meetings. But this is only a proposal and would not, in any event, permit reimbursement for lost wages for carrying out any other official responsibility.

Sincerely,



TIMOTHY P. MCCOLLUM
Assistant General Counsel



GC/HMU:bhs
3600

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

April 14, 1989

Office of General Counsel

Marko Arezina, Treasurer
VDN Federal Credit Union
218 Crescent Drive
Lower Burrell, PA 15068

Re: Compensation of Directors
(Your Letter of March 13, 1989)

Dear Mr. Arezina:

You asked whether or not it is permissible for a Federal credit union ("FCU") to pay each member of the board of directors \$30.00 for attendance at each board meeting. Unless the \$30.00 represents a reasonable payment of expenses board members incur in attending the meetings, the payments would not be permitted under the FCU Act and the National Credit Union Administration ("NCUA") Rules and Regulations.

Section 111(c) of the FCU Act (12 U.S.C. §1761(c)) provides as follows:

No member of the board or of any other committee shall, as such, be compensated, except that reasonable health, accident, similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

Section 112 of the FCU Act (12 U.S.C. §1761a) does authorize an FCU to compensate one officer of the board of directors.

Section 701.33(b) of the NCUA Rules and Regulations (12 C.F.R. §701.33(b)) provides, in part:

(1) Only one board officer, if any, may be compensated as an officer of the board.... No other official may receive

Marko Arezina, Treasurer

Page Two

April 14, 1989

compensation for performing the duties or responsibilities of the board....

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

(i) payment (by reimbursement to an official or direct credit union payment to a third party) for reasonable and proper costs incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed;

Unless the \$30.00 payments qualify as reasonable and proper costs as set forth in Section 701.33(b)(2)(i) of the NCUA Regulations, they would not be permitted under the FCU Act or the NCUA Regulations.

Sincerely,

Hattie M. Ulan

HATTIE M. ULAN
Assistant General Counsel

HMU/bhs

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 mixing 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 3410-10-01

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 FCUs 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.

This 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 officials'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 8.50 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.

(a) 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 of 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 20458.

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary, NCUA Board, regarding Rules of Board Procedure, or Julie Tamuleviz, 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. Tamuleviz).

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 "for" 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.