(Final)

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR CH. VII

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

AGENCY: National Credit Union Administration (NCUA)

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

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

EFFECTIVE DATE: November 26, 1982.

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

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SUPPLEMENTARY INFORMATION: At its June 16, 1982, meeting, the NCUA Board issued for public comment a proposed Interpretive Ruling and Policy Statement (IRPS) regarding state examination of Federal credit union (FCU) records for purposes of determining compliance with state unclaimed property laws. (47 F.R. 26842, June 22,

1982.) The proposed IRPS designated those state agencies authorized under state law to conduct unclaimed property inspections as representatives of the NCUA Board for purposes of determining compliance with those laws. In addition, the NCUA Board set forth its position that enforcement of those laws remains exclusively within the jurisdiction of the Board, and that FCU's were not subject to the imposition of fees by the state for the inspection.

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

Analysis of Comments

1. Designation of state agencies

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

In addition to a claim that the door would be open for other examinations, several commenters expressed concern that the state would engage in fishing expeditions and would impose additional operational burdens on FCU's, e.g., FCU staff time, because state examiners may not be familiar with a credit union's operations. Other commenters considered the action contrary to the dual chartering concept and/or a relegation by the

NCUA Board of its responsibility and authority. Two commenters recognized the authority of the Board to designate any person to examine FCU records but disagreed with this action for several of the above stated reasons. They were also of the view that a designation should only be made when there is a strong showing of need.

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

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

2. Basis for inspection

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

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

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

3. Enforcement

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

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

4. Fees

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

State law normally provides that a fee to cover the cost of an inspection or examination will be imposed only where, after an inspection has been made, it is determined that the party inspected has not compl.ed with the state law. The Board

believes that where a state has reasonable cause to believe that an FCU has not complied with state law, it conducts an inspection, and finds violations, a fee is appropriate. The Board has amended the proposed IRPS to include such a provision. The Board is not, however, providing fee imposition authority to a state agency. The fee must be authorized under state law.

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

5. Retroactivity and Service Charge.

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

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

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

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

6. Miscellaneous Comments.

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

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

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

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

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

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

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

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

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

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

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

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

November 18, 1982

Rosemary Brady

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Secretary

National Credit Union Administration Board