NATIONAL CREDIT UNION ADMINISTRATION
WASHINGTON, D.C. 20456

June 17, 1991

James K. Cook, Esq.
Schuchat, Cook & Werner
The Shell Building
Suite 250
1221 Locust Street
Saint Louis, Missouri 63103-2364

Re: Status of International Brotherhood of Electrical Workers, Local 309, Vacation Trust Fund Account (Your Letter of February 14, 1991)

Dear Mr. Cook:

On February 21, 1991, this Office received your letter requesting clarification of the December 18, 1990, letter from me to you regarding the above-referenced matter (the "December 18, 1990 Letter", attached). In your most recent letter you asked the following question: "Is the Local 309 Vacation Trust an irrevocable express trust within the meaning of Regulation 745.9-1 so that the separate interest of each beneficiary of the Trust Fund is separately insured (assuming that the separate interest meets other conditions for such insurance)?" The determination of the account type classification for National Credit Union Share Insurance Fund ("NCUSIF") purposes is made by the Liquidating Agent of a failed FCU during liquidation. For purposes of a trust account, the Liquidating Agent will look to the factors discussed in the December 18, 1990 Letter. An opinion letter from an attorney licensed under applicable local law regarding account classification type would certainly be persuasive to the Liquidating Agent appointed by the NCUA Board, but would not necessarily be determinative. The determination that you request can not be made by this Office at this time.

ANALYSIS

For a discussion of the potential account classifications for the Local 309 Vacation Trust Account, we would refer you to the thorough discussion in the December 18, 1990 Letter. Any

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determination of NCUSIF insurance is made only in the event of liquidation of an NCUSIF-insured credit union. "In the event of the liquidation of an insured credit union, the [NCUA] Board will promptly determine the insured accountholders thereof and the amount of the insured account or accounts of each such accountholder." 12 C.F.R. §745.200(a). The Board has delegated this authority. "The Agent for the Liquidating Agent... or his or her designee is authorized to make initial determinations with respect to insurance claims pursuant to the principles set forth in this Part, and to act on requests for reconsideration of the initial determination." 12 C.F.R. §745.201. This decision, in turn, may be appealed to the Board, and after a Board determination, may be appealed to Federal court. 12 C.F.R. §§745.202 - .203.

Furthermore, "[t]he amount of insurance on an insured account shall be determined in accordance with the provisions of Subpart A of this Part [12 C.F.R. §745.0 et seq.] and the FCU Act, provided, however, that no dividends shall be paid on shares if sufficient undivided or current earnings are not available for such purpose." 12 C.F.R. §745.200(b). The provisions of Subpart A have been described in detail to you in the December 18, 1990 Letter. An opinion letter from an attorney licensed in the applicable jurisdiction opining on the type of trust that the Local 309 Vacation Trust Fund constitutes under state law would certainly be of some assistance to a Liquidation Agent in a liquidation. However, it would not be determinative, because the determination would need to be made as of the time of the initiation of the liquidation. See 12 U.S.C. §1787.

We would like to clarify one paragraph in our December 18, 1990 letter to you. In the first full paragraph on page 5 of that letter, we stated that the NCUA Rules and Regulations would not be complied with if a third party was engaged to provide recordkeeping services in an irrevocable trust. If the trustee engages the services of the third party, we believe the trustee is constructively maintaining such records. That would be sufficient to meet the regulatory requirements.

In closing, we would suggest that the most you could do now would be to authorize an opinion from an attorney in the applicable jurisdiction as to the type of trust formed by the Local 309 Vacation Trust Fund documents. You may also wish

to update such an opinion on some kind of recurring basis. The NCUA is not in a position to make any determination at this time, nor, even if this Office did make such a determination, would it be binding upon the Liquidation Agent at the time of liquidation. We trust that you understand our response.

Sincerely,

Hattie M. Ulan

Hattie M. Ulan
Associate General Counsel

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91-0226

NATIONAL CREDIT UNION ADMINISTRATION
WASHINGTON, D.C. 20456

December 13, 1990

James K. Cook, Esq.
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1221 Locust Street
Saint Louis, Missouri 63103-2364

Re: National Credit Union Share Insurance Fund -- Status of Vacation Trust Fund Account (Your Letter of November 8, 1990)

Dear Mr. Cook:

You requested a legal opinion on the following question: "If the assets of the Vacation Fund (the "Vacation Trust Fund") are deposited in the Electrical Workers Credit Union (the "EWCU"), will the individual interest of each employee for whom contributions have been made, be separately insured up to the current $100,000 maximum by the National Credit Union Administration?" In general, the National Credit Union Share Insurance Fund ("NCUSIF") only insures member accounts in a NCUSIF-insured credit union. Thus, only the interests in the Vacation Trust Fund held by members in the EWCU will be insured by the NCUSIF. Furthermore, it is unclear whether the account would be insured as an irrevocable trust account, revocable trust account or single ownership account. Each of these account classifications as they might relate to the proposed account is discussed below.

BACKGROUND

Local 309 of the International Brotherhood of Electrical Workers ("Local 309"), the Southwestern Illinois Division, Illinois Chapter, NECA ("SID"), and several named trustees (the "Trustees") are parties to the Local 309 Amended Trust Agreement of April 1, 1981. This Amended Trust Agreement was in turn amended by a First Amendment, dated February 1, 1989 (together the Amended Trust Agreement and the First Amendment

are referred to as the "Trust Agreement"). The original trust agreement was entered into on December 4, 1974. Section 5.01 of the Trust Agreement states that it is an irrevocable trust, created pursuant to the Labor Management Relations Act of 1947, 29 U.S.C. §185(c)(5), and that the title rests with the Trustees. Section 5.03 of the Trust Agreement states that it is created for the exclusive benefit of employees, dependents and beneficiaries; Section 5.04 states that no contributions made by an employer may revert to the employer, except in the circumstance of an erroneous overpayment. However, the Trust Agreement may be amended by SID or Local 309 (Trust Agreement, §6.01) or by the mutual consent of these two parties (Trust Agreement, §7.01).

You state in your letter that the purpose of the Trust Agreement is to provide a pooled trust fund [the "Vacation Trust Fund"] as a vehicle for collection of employer contributions to provide compulsory paid vacations to employees (the "employee-beneficiary") in the electrical construction industry within the territorial jurisdiction of Local 309. The applicable collective bargaining agreement requires employers to contribute 7% of each employee's gross hourly wage to the Vacation Trust Fund, which, due to continuous assessments, has an average balance of about $1 million at any one time.

According to a telephone conversation between you and Martin Conrey, Staff Attorney, on December 6, 1990, some of the employee-beneficiaries are not members of Local 309, but are temporarily in the jurisdiction of Local 309 from another local of the International Brotherhood of Electrical Workers. Furthermore, you stated in the same conversation that not all employee-beneficiaries are members of EWCU.

Presently, you state that the Vacation Trust Fund is held by a bank, which also maintains the records of the individual interest of each employee-beneficiary in the Vacation Trust Fund. The Trustees are considering transferring the Vacation Trust Fund to an account at EWCU, an Illinois state-chartered, NCUSIF-insured credit union whose field of membership includes Local 309 members and employees of the Local 309 office and of the EWCU. It is contemplated that either the EWCU, Local 309 or another party paid by the Trustees could provide the recordkeeping services for the Vacation Trust Fund.

ANALYSIS

The NCUSIF generally insures only member accounts in a federally-insured credit union. 12 U.S.C. §1781(a). The term "member account" is defined as:

> a share, share certificate, or share draft account of a member of a credit union of a type approved by the [NCUA] Board which evidences money or its equivalent received or held by a credit union in the usual course of business and for which it has given or is obligated to give credit to the account of the member [and other credit union and public unit accounts, and certain nonmember accounts at credit unions serving low-income members]. 12 U.S.C. §1752(5).

The term "member" is defined as "those persons enumerated in the credit union's field of membership who have been elected to membership in accordance with the FCU Act or state law in the case of state credit unions...." 12 C.F.R. §745.1(b). Section 745.0 of the NCUA Rules and Regulations states:

> These rules [on share insurance] do not extend insurance coverage to persons not entitled to maintain an insured account or to account relationships that have not been approved by the [NCUA] Board as an insured account. Where there are multiple owners of a single account, generally only that part which is allocable to the member(s) is insured. 12 C.F.R. §745.0.

The law is very clear that the NCUSIF insures only member accounts, with only a few exceptions under limited conditions. The State of Illinois, Department of Financial Institutions, Credit Union Division, would need to determine if accounts are legally established member accounts. However, even if an account may legally be created under state law, the NCUA still makes a final determination as to the insurability of the account. (55 Fed.Reg. 43087, 43088 (October 26, 1990) (enclosed)).

NCUSIF share insurance will vary depending upon the classification of the account. The share account that would be opened for the Vacation Trust Fund could be a treated as a

custodial single ownership account, revocable trust account or irrevocable trust account. Although the Trust Agreement states that the trust is irrevocable, the Trust Agreement also may be amended by the parties. Furthermore, you stated in a telephone conversation with Martin Conrey on December 6, 1990, that you were not sure if the trust was revocable or irrevocable under the Trust Agreement, as it can be modified, and under the law in light of the passage of the Employee Retirement Income Security Act of 1974, as amended, (29 U.S.C. §§1001 et seq.), since the creation of the Vacation Trust Fund.

It is critical that if the account is to be insured as an irrevocable trust, with maximum NCUSIF insurance of up to $100,000 for each beneficiary, that the trust be an irrevocable express trust under state law. "A trust which does not meet local requirements, such as one imposing no duties on the trustee or conveying no interest to the beneficiary, is of no effect for insurance purposes." 12 C.F.R. Part 745, Appendix, §G. At this time, the NCUA has insufficient information to make this determination. Assuming an irrevocable express trust exists under state law, then "all trust interests (as defined in subsection 745.2(d)(4)), for the same beneficiary, deposited in an account and established pursuant to valid trust agreements created by the same settlor (grantor) shall be added together and insured up to $100,000 in the aggregate, separately from other accounts of the trustee of such trust funds or the settlor or beneficiary of such trust arrangements." 12 C.F.R. §745.9-1. A "trust interest" is defined as the "interest of a beneficiary in an irrevocable express trust...." 12 C.F.R. §745.2(d)(4). In order for an account to receive irrevocable trust status, the value of the trust interest must be capable of determination without evaluation of contingencies, except for those covered by present worth tables under the Federal Estate Tax Regulations. 12 C.F.R. §745.2(d)(1). Certain recordkeeping requirements must be met in order for an account to be insured as an irrevocable trust account.

In connection with each trust account, the credit union's records must indicate the name of both the settlor and the trustee of the trust and must contain an account signature card executed by the trustee indicating the fiduciary capacity of the trustee. In addition the interests of the benefi-

> ciaries under the trust must be ascertainable from the records of either the credit union or the trustee, and the settlor or beneficiary must be a member of the credit union. If there are two or more settlors or beneficiaries, then either all the settlors or all the beneficiaries must be members of the credit union. 12 C.F.R. Part 745, Appendix, §G.

Thus, if the account is an irrevocable trust account, either the credit union or the trustee must maintain records of beneficiary interests. A third party may not be engaged to performs such recordkeeping services under the NCUA Rules and Regulations.

A revocable trust account is treated as a single ownership account, unless the named beneficiary is a spouse, child, or grandchild of the owner of the account. 12 C.F.R. §745.4. This would not seem to be the case with the Vacation Trust Fund account.

The single ownership account classification includes accounts held by agents, nominees or custodians. These accounts are aggregated with other accounts of the principal and insured up to $100,000. 12 C.F.R. §745.3(a)(2). In the event that the Vacation Trust Fund account was not determined to be an irrevocable trust account under state law, it would probably be classified as a single ownership account.

Sincerely,

Hattie M. Ulan

Hattie M. Ulan
Associate General Counsel

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[illegible] The [illegible] shall [illegible] informed in [illegible] is accepted for [illegible]. Before the end of the [illegible]-day [illegible] NCUA [illegible] written notice to the individual and the credit union of disapproval or approval of the proposed official or employee. If, after the 30-day period has ended, the individual has not been informed in writing of NCUA's disposition, the individual shall be considered approved.

(2) Waiver of prior notice requirement. Parties may petition the appropriate Regional Director for a waiver of the prior notice required under this section. Waiver may be granted if it is found that delay could harm the credit union or the public interest. Any waiver shall not affect the authority of NCUA to issue a Notice of Disapproval within 30 days of the waiver or within 30 days of any subsequent required notice.

(3) Election of directors or credit committee members. (i) In the case of the election of a new member of the board of directors or credit committee member at a meeting of the members of a federally insured credit union, prior notice is not required. However, a completed notice must be filed with the appropriate Regional Director within 48 hours of the election.

(ii) If a director or credit committee member is disapproved by NCUA, the board of directors of the credit union may appoint its own alternate, to serve until the next annual meeting, contingent upon NCUA approval.

(e) *Commencement of service.* A proposed director, committee member or senior executive officer may begin to serve temporarily until the credit union and the individual are notified in writing of NCUA's approval or disapproval of the proposed addition or employment.

(f) *Notice of disapproval.* NCUA may disapprove the individual's serving as a director, committee member or senior executive officer if it finds that the competence, experience, character, or integrity of the individual with respect to whom a notice under this section is submitted indicates that it would not be in the best interests of the members of the credit union or of the public to permit the individual to be employed by, or associated with, the credit union. The Notice of Disapproval will advise the parties of their rights of appeal pursuant to part 747 subpart L of NCUA's Regulations (12 CFR 747.1201 et seq.).

PART 741—[AMENDED]

1. Part 741, Requirements for Insurance, is amended as follows:

2. The authority citation for part 741 [illegible] to read as follows:

Authority: [illegible]

§§ 741.8–741.12 [Redesignated as §§ 741.9–741.13]

3. Sections 741.8, 741.9, 741.10, 741.11 and 741.12 are redesignated as §§ 741.9, 741.10, 741.11, 741.12 and 741.13, respectively.

4. A new § 741.8 is added to read as follows:

§ 741.8 Reporting requirements for credit unions that are newly chartered or in troubled condition.

Any federally insured credit union chartered for less than 2 years or any credit union defined to be in troubled condition as set forth in § 701.14(b)(3) must adhere to the requirements stated in § 701.14(c) concerning the prior notice and NCUA review. Credit unions must submit required information to both the appropriate NCUA Regional Director and their state supervisor. NCUA will consult with the state supervisor before making its determination pursuant to § 701.14(d)(2) and (f). NCUA will notify the state supervisor of its approval/disapproval no later than the time that it notifies the affected individual pursuant to § 701.14(d)(1).

[FR Doc. 90-25383 Filed 10-25-90; 8:45 am]
BILLING CODE 7535-01-M

12 CFR Part 741

Requirements for Insurance

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final amendment.

SUMMARY: A limited number of states authorize state-chartered credit unions to offer "uninsured membership shares." These shares are at risk to the member [illegible] credit union. The purpose of this final amendment is to provide that, as a condition of federal share insurance, federally insured state-chartered credit unions may not offer these uninsured shares. This amendment will only affect a small number of credit unions.

EFFECTIVE DATE: November 26, 1990.

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

FOR FURTHER INFORMATION CONTACT: Michael J. McKenna, Office of General Counsel, at the above address or telephone (202) 682-9630.

SUPPLEMENTARY INFORMATION

A. Background

In general, the aggregate of a member's individual share accounts in a federally insured credit union is insured up to $100,000 by the National Credit Union Share Insurance Fund (NCUSIF). There may be as many as thirteen state statutes, however, that authorize state-chartered credit unions to have uninsured membership shares. The amount of a member's uninsured share may be as little as a few dollars or as much as several thousand dollars, depending on state law and the policies of the individual credit union. In any case, a situation is presented where, even though the member may have significantly less than $100,000 in his combined individual share accounts, an initial amount of the member's funds is not insured.

The NCUA has a number of concerns with uninsured membership shares:

—Section 207(k)(1) of the FCU Act (12 U.S.C. 1787(k)(1)) states in part that "the term 'insured account' means the total amount of the account in the member's name (after deducting offsets) less any part thereof which is in excess of $100,000" and that "in determining the amount due any member, there shall be added together all accounts maintained by him * * *." Thus, the FCU Act does not appear to contemplate uninsured membership shares; rather, it indicates an intent to provide insurance coverage on all of the first $100,000. This is consistent with the purpose of share insurance: to protect the average saver.

—Federally insured credit unions are required to place an official sign, regarding federal insurance coverage up to $100,000, at all branches and at all teller stations or windows where insured shares are received (see 12 CFR 740.3). Also, many credit unions routinely advertise federal insurance coverage up to $100,000. NCUA is concerned that if [illegible] insured credit unions require or offer uninsured membership shares, confusion will inevitably result, even where good faith efforts are made to disclose the uninsured status of the account. The failure of a credit union offering these accounts is likely to result in substantial adverse public reaction, litigation, and potentially increased liability to the National Credit Union Share Insurance Fund.

—There appears to be no effective and coherent plan, on the part of some

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[illegible] of policy as to [illegible] accounts to deal with [illegible] issues that must be addressed by [illegible] such questions [illegible] addressed, including whether [illegible] capital accounts are used first to absorb losses, what type of notice is to be provided to members, whether the members are obligated to replenish the shares and whether the credit union is obligated at any point to restore amounts used to absorb losses.

— Proponents of the uninsured membership share concept argue that these shares serve as an additional source of capital to support more rapid asset growth and to enable credit unions to fund new programs and services. While NCUA encourages sound levels of asset growth, it is concerned with the potential for the use of uninsured share to support excessive rates of growth. It is noted that federal credit unions, and the vast majority of state-chartered credit unions, continue to successfully use the traditional method of building capital, *i.e.*, setting aside earnings to both support reasonable rates of asset growth and improve overall capital levels.

B. Comments

The NCUA Board published a proposed rule prohibiting uninsured membership shares on May 3, 1990, with a sixty-day comment period (*see* 55 FR 18613). Forty comments were received. Fifteen of the commenters were state-chatered credit unions and ten were federal credit unions. Six of the commenters were credit union leagues and six were state agencies. Three comments were received from national credit union trade associations.

C. Discussion

The commenters were split on the desirability of the proposed amendment. Most of the commenters supporting the prohibition cited NCUA's concerns set forth in the proposed rule and noted above as the basis of their position, with a number of commenters specifically [illegible] shares will lead to significant confusion among members concerning insurance coverage. A number of commenters believe that the practice is inherently unsafe and unsound.

Half of the commenters disagreed with the proposed rule. Ten commenters stated that uninsured membership shares are a necessary mechanism to accumulate capital. Six commenters disapproved of a blanket prohibition on uninsured membership shares but recommended allowing uninsured [illegible] with a similar [illegible] [illegible] Section 301(c) and [illegible]

Six commenters believe that NCUA [illegible] to prohibit uninsured [illegible] shares in state-chartered [illegible] These stated that section [illegible] of the FCU Act requires an [illegible] from credit unions applying for NCUSIF insurance "not to issue or have outstanding any account * * * the form of which, by regulation or in special cases, has not been approved by the Board except for accounts authorized by State law for State credit unions." These commenters believe that this language expressly permits the states to determine which member accounts are permissible for federally insured state-chartered credit unions.

The NCUA Board disagrees with the commenters' analysis. The Board believes that the commenters are misconstruing section 201(b)(7) of the FCU Act. The fact that a credit union does not have to receive approval by the NCUA Board for state-authorized accounts does not mean that if the practice is unsafe and unsound, the NCUA Board may not prohibit the account as a condition of insurance. Any other interpretation could lead to absurd results. It would allow the states to permit any type of account, without regard to risk to the Share Insurance Fund.

Twelve commenters disagreed with NCUA's reasoning that confusion may arise among members about the uninsured status of uninsured membership shares which may cause adverse public reaction and litigation and could be a threat to the NCUSIF if a credit union offering these accounts failed. These commenters believe that concerns in this area could be adequately addressed by regulation of uninsured shares. In regard to increased liability to the NCUSIF, these commenters believe that, because the shares are uninsured, the only risk would come from inadequate disclosure, which NCUA can regulate. Numerous [illegible] proposed regulations cited the disclosure problem as the primary reason for their support of the prohibition.

Nine commenters disagreed with NCUA's concern that there is no coherent plan by credit unions offering or planning to offer uninsured membership shares for dealing with losses on these types of accounts. The commenters believe that NCUA can promulgate regulations to create an effective and coherent plan concerning how to deal with losses that must be [illegible] by uninsured members of shares.

Although NCUA could regulate this [illegible] the NCUA Board is aware that this type of activity presents potential safety and soundness problems dissuades the Board at this time from encouraging the development of uninsured membership share through the regulation of disclosure requirements and plans for losses.

Ten commenters disagreed with NCUA's concern that the traditional mechanisms for raising capital are adequate and that uninsured membership shares may be used to support excessive growth. The commenters believe that these accounts will serve as additional capital to absorb investment, loan and/or operating losses. They believe any concern about unhealthy asset growth can be handled by regulation. While it might be possible to reduce this concern though regulation, variances in state laws concerning uninsured membership shares make the adoption of a uniform system of regulation by NCUA impractical, and the Board continues to believe that any benefits of such action are outweighted at this time by the concerns expressed in the Background discussion above. The Board has adoted the proposed amendment in final form without modification.

Regulatory Requirements

Paperwork Reduction Act

The proposed amendment does not contain any paperwork requirements.

Regulatory Flexibility Act

The NCUA Board has determined and certifies that the proposed amendment will not have a significant economic impact on a substantial number of small credit unions. Accordingly, the Board has determined that a Regulatory Flexibility Analysis is not required.

Executive Order 12612: Effect on the States and State-Chartered Credit Unions

The NCUA Board is aware of only [illegible] state-chartered credit unions that currently offer uninsured membership shares. Under the rule, those credit unions should coordinate with their appropriate Regional Director to either pay out the uninsured shares or convert them to insured shares status. Although the amendment does restrict federally insured state-chartered credit unions from implementing authority granted under state law, the NCUA believes that the protection of the NCUSIF warrants the prohibition. Since the number of

...final regulation, as a matter of policy, the government will not have a substantial direct effect 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.

List of Subjects in 12 CFR Part 741

Credit unions, Uninsured member shares.

By the National Credit Union Administration Board on October 19, 1990.

Becky Baker,

Secretary of the Board.

Accordingly, NCUA amends its regulations as follows:

PART 741—REQUIREMENTS FOR INSURANCE

1. The authority citation for part 741 is revised to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1781 through 1790 and Public Law 101–73. Section 741.11 also issued under 31 U.S.C. 3717.

2. A new § 741.14 is added to read as follows:

§ 741.14 Uninsured membership shares.

Any credit union that is insured pursuant to title II of the Act may not offer membership shares that, due to the terms and conditions of the account, are not eligible for insurance coverage. This prohibition does not apply to shares that are uninsured solely because the amount is in excess of the maximum insurance coverage provided pursuant to part 745.

[FR Doc. 90–25385 Filed 10–25–90; 8:45 am]

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12 CFR Part 747

Rules of Practice and Procedure

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is adding a new subpart L to part 747 of its Regulations. Along with new §§ 701.14 and 741.18, issued concurrently with this action, subpart L implements recent amendments to the Federal Credit Union Act requiring prior notice and NCUA approval of senior management changes in certain federally insured credit unions.

DATES: November 26, 1990.

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

FOR FURTHER INFORMATION CONTACT: Michael J. McKenna, Staff Attorney, Office of General Counsel, at the above address or telephone (202) 682-9630.

SUPPLEMENTARY INFORMATION:

A. Background

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) amended the FCU Act by adding a new section 212 (12 U.S.C. 1791). Section 212 requires specified categories of federally insured credit unions to furnish NCUA with a least 30 days' notice before adding any individual to the board of directors or credit or supervisory committees or employing and individual as a senior executuve officer. A federally insured credit union is covered by the notice requirement if the credit union: (1) Has been chartered less than 2 years, or (2) is otherwise is a "troubled condition," as defined in § 701.14 of NCUA's Regulations. Section 212 also prohibits the credit union from adding the individual to the board or committee, or employing the individual as a senior executive officer, if NCUA issues a Notice of Disapproval. NCUA is adding subpart L to part 747 of its Regulations to set forth the rights that an individual or a credit union may exercise and procedures which must be followed when NCUA issues a Notice of Disapproval pursuant to section 212 of the FCU Act.

B. Comments

The NCUA Board issued a proposed rule on March 20, 1990 (55 FR 12855, 4/6/90). Fifty comments were received. Thirty of the commenters were federal credit unions. Four commenters were state credit union leagues and three were national credit union trade associations. Two comments were received from state regulatory agencies. Comments were also received from a law firm and a banker's trade association. As many commenters favored the proposed rule as opposed it, with most commenters recommending at least one change in the final regulation.

A number of commenter found the time frame set forth in the proposed rule excessive and potentially unworkable. Other commenters found the substance of the notice and appeal provisions confusing.

Having considered these comments, and after further staff review, the Board has made substantial revisions in order to clarify the final rule.

C. Section-by-Section Discussion

Section 747.1201 sets forth the scope of subpart L. It is substantially the same as in the proposed rule. Reference has been added to the credit and supervisory committees in order to clarify that the rule does not apply to other internal committees of the credit union.

Section 747.1202 sets forth criteria the NCUA Board or its designee will use to issue a Notice of Disapproval, i.e., that the individual's competence, experience, character, or integrity indicate that it would not be in the best interest of the members of the credit union or of the public to permit the individual to be associated with the credit union. The two subsections of the proposed rule have been combined, with no change in substance.

Section 747.1203 sets forth procedures to be followed where a Notice of Disapproval is issued. This section provides that the notice will be served on the credit union and the individual and describes the required content of the Notice. This section has been revised to clarify that, prior to deciding whether to appeal to the NCUA Board, the individual and the credit union may request the Regional Director's reconsideration. This information will be contained in the Notice of Disapproval.

Section 747.1204 sets forth procedures for an appeal to the NCUA Board or its designee of a disapproval by the Regional Director. This section provides that, within 15 days after receipt of a Notice of Disapproval or a denial of a request for reconsideration, the individual or credit union may submit an appeal to the NCUA Board. The section states that the appeal shall be in writing and describes the required contents of the appeal. Appeals will be decided by the board within 90 days of receipt of all required information. The section replaces §§ 747.1204 and 747.1205 of the proposed rule, which had proposed oral hearing procedures for appeals. The Board has determined, based on considerations of time, costs, and agency resources, that appeals on the written record are preferable to oral hearings.

New § 747.1205(a) of subpart L provides that a failure to file an Appeal, either to the initial determination or a decision on a request for reconsideration, is a failure to exhaust administrative remedies and the determination or decision will be deemed to have been accepted by, and binding upon, the individual or credit union. Section 747.1205(b) sets forth those jurisdictions where a petitioner may seek judicial review.