NATIONAL CREDIT UNION ADMINISTRATION
WASHINGTON, D.C. 20456

October 30, 1991

Raymond R. Brunner,
President
West-Aircomm Federal Credit Union
P.O. Box 568
Beaver, Pennsylvania 15009-0568

Re: Preemption of Pennsylvania Revenue Law

Dear Mr. Brunner:

You requested guidance from NCUA regarding a dispute between West-Aircomm Federal Credit Union ("West-Aircomm") and the Commonwealth of Pennsylvania Department of Revenue, involving the disposition of abandoned and unclaimed monies in accounts at West-Aircomm. It is our opinion that the Pennsylvania statute at issue is preempted in part by Section 701.35 of NCUA Rules and Regulations (the "Regulations"), 12 C.F.R. §701.35 (copy enclosed). It is also our opinion that NCUA, not the Department of Revenue, is the proper party to enforce the statute to the degree that it does apply. Our reasoning is set out below.

BACKGROUND

Earlier this year, the Department of Revenue audited West-Aircomm's records to determine whether West-Aircomm was in compliance with Pennsylvania's abandoned and unclaimed property law, 72 P.S. §§1301.1-1301.29. The auditor determined that West-Aircomm had improperly taken shares through application of late charges to dormant accounts, and owed the Department of Revenue $1,107.31, representing the amount wrongfully taken.

You contested the Department of Revenue's ruling, arguing that the funds in question were properly absorbed by late charges in accordance with Article III, Section 3 of West-Aircomm's bylaws. You also cited Section 701.35 of the

Regulations, which authorizes federal credit unions ("FCUs") to assess fees and charges. The Department of Revenue rejected your arguments, holding that West-Aircomm was not entitled to levy late charges against members' accounts, since the members were not informed of the late charges when they joined West-Aircomm.

You enclosed a copy of the most recent letter from the Department of Revenue to West-Aircomm. In that letter, dated September 5, 1991, the Department of Revenue's assistant counsel, Karen Galli, states, "We recognize that there are National Credit Union Association [sic] rules and regulations and those must be read in accordance with state law." Ms. Galli also says that "state law controls contract matters." Although Ms. Galli's letter does not discuss the issue of enforcement, you state in your letter that the Department of Revenue rejected your claim that NCUA had enforcement authority in disputes of this type.

ANALYSIS

We note at the outset that, although the charge in question is called a late charge, it appears in fact to be a dormant account fee, since it is applied to accounts with balances below $50, on which there has been no activity for three years. We will, therefore, refer to the charge as a dormant account fee. However, our preemption analysis would be the same for a late charge.

There are two issues involved in the dispute. First, there is a question of preemption of the Pennsylvania law. Second is the issue of the existence of a valid contract in order for West-Aircomm to impose dormant account fees on its members. These issues are discussed separately.

Preemption

Section 701.35 of the Regulations is derived from Section 107(6) of the Federal Credit Union Act, 12 U.S.C. §1757(6), which gives FCUs exclusive authority to determine "terms, rates and conditions" relating to their member accounts, subject only to limitations prescribed by the NCUA Board. The Federal Credit Union Act's grant of exclusive authority clearly evidences Congress' intent to preempt state law in this area. Any exercise of state authority in this area

would directly conflict with Section 107(6) of the Federal Credit Union Act, and with Section 701.35 of the Regulations. Accordingly, state statutes that conflict with Section 701.35 are preempted.

FCUs are empowered to impose fees and charges, including dormant account fees, by Section 701.35(c). That section states, "A Federal credit union may, consistent with this Section, other Federal law, and its contractual obligations, determine the types of disclosures, fees or charges . . . and all other matters affecting the . . . opening, maintaining or closing of a share, share draft or share certificate account. State laws regulating such activities are not applicable to Federal credit unions."

An FCU may set service fees on accounts at the FCU. The fees may be based on whether the account is active or inactive. For purposes of imposing a service fee, "inactive accounts" are defined by the individual FCU, and are not the same as escheatable funds as defined by state law. Fees and their applicability are determined by the FCU and are not subject to state law. Until such time as funds in an account are presumed abandoned (7 years under the Pennsylvania statute, 72 P.S. §1301.3), an FCU may set and levy any type of charge against the account, as permitted by Section 701.35, without regard to state law. The Pennsylvania statute, to the degree that it would prohibit West-Aircomm's assessment of dormant account fees, is preempted.

The Department of Revenue, on page 1 of its opinion, cites a Pennsylvania Attorney General opinion holding that, "service charges cannot be taken against an inactive account unless those charges have been taken against the account while it was active." The cited opinion, if followed, would prohibit the imposition of dormant account fees. Therefore, pursuant to Section 107(6) of the Federal Credit Union Act and Section 701.35 of the Regulations, the opinion and the law underlying it are preempted and do not apply to FCUs.

NCUA is the chartering and supervisory authority for all FCUs, including West-Aircomm. 12 U.S.C. §§1751 et seq.; see also 12 C.F.R. Part 701. In addition, NCUA examines and imposes requirements upon all credit unions insured by the National Credit Union Administration Share Insurance Fund. 12 U.S.C. §1781 et seq.; see also 12 C.F.R. Part 741. As the

regulator and insurer of FCUs, NCUA possesses authority, under the Federal Credit Union Act, to examine the books and records of FCUs. 12 U.S.C. §1756. Nonetheless, NCUA has long taken the position that states have a recognizable interest in abandoned property, and that FCUs must comply with state unclaimed property laws.

For that reason, NCUA, through Interpretive Ruling and Policy Statement 82-4, 47 Fed. Reg. 53326 (11/26/82) ("IRPS 82-4") (copy enclosed), exercised its designation power under 12 U.S.C. §1756, to permit states to examine FCUs for compliance with state escheat laws, where there is reasonable cause to believe that an FCU is in violation of such laws.[1] However, states conducting such examinations do so only under the limited authority designated to them by NCUA, and as representatives of the NCUA Board.

While NCUA allows states to examine FCUs for the limited purpose of determining compliance with escheat laws, it clearly has not given the states any power to regulate the fees and charges imposed by FCUs on their member accounts. The setting of fees and charges by FCUs is solely a matter of federal law, over which the states have no control. As Section 701.35 and IRPS 82-4 indicate, any state law prohibiting FCUs from setting and levying service charges (including dormant account fees) is prohibited. The Pennsylvania statute is preempted insofar as it prohibits an FCU from imposing such fees.

Contract Law

As noted above, Section 701.35(c) states that the fees imposed by an FCU must be consistent with its contractual obligations. Moreover, in setting forth its position that state examinations for compliance with escheat laws would be permitted, the NCUA Board specifically stated:

> 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

[1] We assume, for purposes of discussion, that the Department of Revenue had reasonable cause in this case.

> 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. 47 Fed. Reg. 53326 (11/26/82).

We disagree with the Department of Revenue's finding that West-Aircomm may not impose the fees in question because the members had no opportunity to assent to the fee contract. It appears to us that there is a valid contract for the dormant account fees. We have stated in the past that service fees (including dormant account fees) are usually permitted if (1) the account signature card states that accounts are subject to such fees; or (2) the account signature card makes the account subject to the regulations and bylaws (including changes thereto) of the FCU and an appropriate bylaw change is passed implementing the fee policy.

You provided us with one of West-Aircomm's standard account/membership signature cards. The card states that the member agrees, "to conform to its [West-Aircomm's] bylaws and amendments thereof." (Emphasis added.) The joint share agreement portion of the card also provides that the joint owners, "agree to the terms and conditions of the account as established by the credit union from time to time." (Emphasis added.) West-Aircomm's members agree, upon opening accounts, to be bound by such bylaws or conditions as West-Aircomm has at the time that their accounts are opened, or implements thereafter. West-Aircomm has adopted a bylaw providing for imposition of the dormant account fees, and its members assented to the fees by the terms of their membership/account agreements. Therefore, it appears that the fees are permissible.

Moreover, although NCUA does not require notification of the member before a dormant account fee is imposed, West-Aircomm notifies the member by mail before imposing the charge. West-Aircomm's notification policy contradicts the Department of Revenue's statement, on page 2 of its opinion, that, "In the case of an inactive account, the depositor has no opportunity when new service charges are made to either accept or refuse the changed conditions." The sending of the notifica-

tion letter gives the member the opportunity to make a deposit or withdrawal, thereby reactivating his account and avoiding the charge. In our view, a member's failure to take any action to avoid having the charge levied is tantamount to consent to its imposition. Although the contract question is one that would be determined in a state court, it seems to us that a valid contract for the dormant account fees exists.

We also note that, assuming that the Pennsylvania statute is in any way applicable to FCUs, its enforcement provisions are preempted. In the preamble to IRPS 82-4, the NCUA Board stated that 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 Board further stated that the imposition of fines and penalties under state law would fall within NCUA's enforcement jurisdiction. Accordingly, 72 P.S. 1301.23 and 1301.24 are preempted to the extent that NCUA, rather than the State, is the enforcement agency.

The Pennsylvania Credit Union League may be able to advise you further on resolving this matter. We suggest that you contact the League for additional guidance.

Sincerely,

Hattie M. Ulan

Hattie M. Ulan
Associate General Counsel

Enclosures

cc: Attorney Karen Galli, Pennsylvania Dept. of Revenue
Daniel L. Murphy, Region II Director

GC/MRS:sg
SSIC 3320
91-0926

§701.35 Share, Share Draft, and Share Certificate Accounts.

(a) Federal credit unions may offer share, share draft, and share certificate accounts in accordance with Section 107(6) of the Act (12 U.S.C. §1757(6)) and the board of directors may declare dividends on such accounts as provided in Section 117 of the Act (12 U.S.C. §1763).

(b) A Federal credit union shall accurately represent the terms and conditions of its share, share draft, and share certificate accounts in all advertising, disclosures, or agreements, whether written or oral.

(c) A Federal credit union may, consistent with this Section, other Federal law, and its contractual obligations, determine the type of disclosures, fees or charges, time for crediting of deposited funds, and all other matters affecting the opening, maintaining or closing of a share, share draft or share certificate account. State laws regulating such activities are not applicable to Federal credit unions.

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

§701.36 FCU Ownership of Fixed Assets.

(a) *A Federal credit union's ownership in fixed assets shall be limited as described in this chapter.*

(b) *Definitions*—As Used in This Section:

(1) Premises includes any office, branch office, suboffice, service center, parking lot, other facility, or real estate where the credit union transacts or will transact business.

(2) Furniture, Fixtures, and Equipment includes all office furnishings, office machines, computer hardware and software, automated terminals, heating and cooling equipment.

(3) Fixed Assets means premises and furniture, fixtures and equipment as these terms are defined above.

(4) Investments in fixed assets means:

(i) any investment in real property (improved or unimproved) which is being used or is intended to be used as premises;

(ii) any leasehold improvement on premises;

(iii) the aggregate of all capital and operating lease payments pursuant to lease agreements for fixed assets;

(iv) any investment in the bonds, stock, debentures, or other obligations of a partnership or corporation, including any entity described in Section 701.27, holding any fixed assets used by the Federal credit union and any loans to such partnership or corporation; or

(v) any investment in furniture, fixtures and equipment.

(5) Abandoned premises means former Federal credit union premises from the date of relocation to new quarters, and property originally acquired for future expansion for which such use is no longer contemplated.

(6) Immediate family member means a spouse or other family members living in the same household.

(7) Shares mean all savings (regular shares, share drafts, share certificates, other savings) and retained earnings means regular reserve, reserve for contingencies, supplemental reserves, reserve for losses and undivided earnings.

(8) Senior management employee means the credit union's chief executive officer (typically this individual holds the title of President or Treasurer/Manager), any assistant chief executive officers (e.g., Assistant President, Vice President or Assistant Treasuer/Manager) and the chief financial officer (Comptroller).

(c) *Investment in Fixed Assets.*

(1) No Federal credit union with $1,000,000 or more in assets, without the prior approval of the Administration, shall invest in fixed assets if the aggregate of all such investments exceeds 5 percent of shares and retained earnings.

(2) A Federal credit union shall submit such statement and reports as the NCUA regional director may require in support of any investment in fixed assets in excess of the limit specified above.

(3) If the Administration determines that the proposal will not adversely affect the credit union, an aggregate dollar amount or percentage of assets will be approved for investment in fixed assets. Once such a limit has been approved, and unless otherwise specified by the regional director, a Federal credit union may make future acquisitions of fixed assets, provided the aggregate of all such future investments in fixed assets does not exceed an additional 1 percent of the shares and retained earnings of the credit union over the amount approved.

(4) Federal credit unions shall submit their requests to the NCUA regional office having jurisdiction over the geographical area in which the credit union's main office is located. The regional office shall inform the requesting credit union, in writing, of the date the request was received. If the credit union does not receive

(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.

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

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

1982.) The proposed IRPS designated those state agencies authorized under state law to conduct unclaimed property inspections as representatives of the NCUA Board for purposes of determining compliance with those laws. In addition, the NCUA Board set forth its position that enforcement of those laws remains exclusively within the 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

ROSEMARY BARDY

Secretary

National Credit Union Administration Board

NATIONAL CREDIT UNION ADMINISTRATION

INTERPRETIVE RULING AND POLICY STATEMENT

IRPS 82-4

DATE: November 29, 1982

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR CH. VII

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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.

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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.

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4. Fees

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

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

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

5. Retroactivity and Service Charge.

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

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

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

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

6. Miscellaneous Comments.

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

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

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

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

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

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

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

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

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

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

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

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

November 18, 1982

Rosemary Brady

ROSEMARY BARDY
Secretary
National Credit Union Administration Board