NATIONAL CREDIT UNION ADMINISTRATION
WASHINGTON, D.C. 20456

March 19, 1992

Tom Peterson, Consultant
The Mann Financial Group, Inc.
P.O. Box 16010
Tampa, Florida 33617

Re: Employee Retirement Plan - MacDill Federal Credit Union (Your January 30, 1992, Letter)

Dear Mr. Peterson:

You requested our opinion on the legality of a supplemental executive retirement plan (the "Plan") that MacDill Federal Credit Union wishes to offer to certain of its key personnel. In order to be permissible for federal credit unions ("FCUs"), a retirement plan must comply with the Federal Credit Union Act (the "Act") and NCUA's Rules and Regulations (the "Regulations"). While we do not have sufficient information to determine whether the Plan complies with the Act and the Regulations, the relevant criteria are discussed below. The Plan must also satisfy safety and soundness requirements, as explained below.

An FCU employee benefit plan must also comply with tax, labor and any other federal or state statutes or regulations. We offer no opinion as to the legality of the Plan under such statutes and regulations. We would strongly urge MacDill to consult with private counsel on those issues before entering into the Plan.

Background

According to your letter, the Plan is what is commonly known as a "reverse split dollar" plan. Under the Plan, MacDill would purchase an "investment-oriented" life insurance policy, with the executive as insured and owner. The executive would endorse a large percentage of the face amount

(death benefit) to MacDill, in return for MacDill's agreement to fund the Plan (by which we assume you mean that MacDill will pay the premiums) during the executive's tenure. The endorsement under this type of plan generally lasts beyond retirement, so that MacDill would receive all of its cumulative contributions from the ultimate death benefit. Upon retirement, the executive would have access to the policy cash values, to the extent that he does not jeopardize MacDill's interest.

You represent that the Plan is exempt from ERISA regulations and would not involve MacDill as a fiduciary. You also state that MacDill would eventually receive back 100% of its costs.

Analysis

Section 113(12) of the Act, 12 U.S.C. 1761b(12), authorizes an FCU's board of directors to "provide for the hiring and compensation of officers and employees," subject to the limitations of the Act and the FCU's bylaws. Article VIII, Section 7 of NCUA's Standard FCU Bylaws provides that the board "shall employ, fix the compensation, and prescribe the duties of such employees as may in the discretion of the board be necessary . . . ." Section 701.19(a) of the Regulations, 12 C.F.R. §701.19(a), permits an FCU, as part of employee compensation, to make provisions for reasonable retirement benefits for its employees and officers, either individually or collectively with other credit unions. Any retirement plan must be maintained in accordance with the applicable laws governing employee benefit plans and any applicable regulations promulgated by the Secretary of the Treasury, the Secretary of Labor, or any other federal or state authority exercising jurisdiction over such plans.

An FCU has no general trust powers and only limited authority to act as trustee or custodian of an employee benefit plan. An FCU may only act as a trustee or custodian of plans qualifying under Sections 401(d) or 408 of the Internal Revenue Code (IRA and Keogh accounts). 12 C.F.R. Part 724. (See, 12 U.S.C. 1787(k)(3).) Since the Plan is for the benefit of FCU employees and is neither an IRA nor a Keogh, MacDill may not act as Plan trustee or custodian.

An FCU may act as a non-trustee fiduciary for employee benefit plans. However, under Section 701.19(b) of the Regulations, 12 C.F.R. 701.19(b), if the FCU acts as a fiduciary as defined by ERISA and its implementing regulations, it must obtain "appropriate liability insurance" in accordance with Section 410(b) of ERISA. ERISA defines a fiduciary as a person exercising "any discretionary authority or discretionary control respecting management of such plan or exercis[ing] any authority or control respecting management or disposition of its assets," or a person rendering "investment advice for a fee or other compensation" or having "any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. §1002(21)(A). NCUA Letter to Credit Unions Number 21 (copy enclosed) includes guidelines for determining what constitutes "appropriate liability insurance."

You represent that MacDill would not be a fiduciary under the Plan. In order to avoid being a fiduciary, an FCU must lack any discretion as to the payment of funds under the proposed plan. It must transfer all discretionary duties under the plan to a trustee, such as the insurer or another party having fiduciary liability insurance pursuant to ERISA. 29 U.S.C. §1112. These discretionary duties include plan administration responsibilities and decisions as to vesting and payees, in the event of the death of an employee after vesting.

An FCU's retirement plan may only cover certain parties. The Act permits one director elected by the board as an officer to be compensated as a board officer. 12 U.S.C. §1761a. All other board and committee members must serve without compensation. 12 U.S.C. §1761(c). The Regulations interpret the statutory provisions to prohibit compensation to all officials, except for one compensated board officer to be specified in the FCU's bylaws. 12 C.F.R. §701.33(b). "Official" is defined to include persons who are or were members of the board, credit committee, supervisory committee, or other volunteer committee established by the board. 12 C.F.R. §701.33(a). The term "compensation" includes life insurance for officials. 12 C.F.R. §701.33(b)(2)(ii). Due to these legal limitations, the proposed plan may not be used for any official, except the one compensated board officer, as that term is defined in Section 701.33 of the Regulations.

We do not believe, however, that it is appropriate for an FCU to provide its compensated board officer with a retirement plan. Those who serve on an FCU board are elected for limited terms and do not serve the FCU full time. Providing a retirement plan to such an individual seems to us to be excessive compensation. The plan may, if otherwise permissible, be used for FCU employees.

While an FCU investing on its own behalf is subject to the investment restrictions set forth in the Act, 12 U.S.C. §§107(7), (8) and (15), and the Regulations, 12 C.F.R. Part 703, those provisions do not apply when the FCU as employer is acting pursuant to is authority to provide retirement benefits to employees. For example, while an FCU may not purchase an annuity for investment, it may purchase one pursuant to an employee retirement plan. The funds in the annuity would not be subject to FCU investment restrictions. Similarly, a retirement plan may be funded by a life insurance policy and the FCU may receive surplus amounts that are not needed to fund the plan obligations to the employee, even though the FCU may not invest in a life insurance policy for its own account.

The plan must also meet safety and soundness requirements, in that the benefits to the employee should be reasonable and in proportion to the benefit received by the FCU in providing the plan; it must not result in a concentration of FCU credit or assets in the funding vehicles; the FCU must be able to recapture the premiums paid, or to transfer the value of those premiums to another policy, in the event that the employee does not become vested in the plan; the plan must not be administered in a discriminatory manner; the administrator of the plan must have adequate fiduciary liability coverage; and the insurance carrier providing the policy should have a high insurance industry rating. Safety and soundness are judged by NCUA's Regional Offices, and MacDill should, before adopting the plan, consult with the Region III Office to ensure that the plan satisfies the stated safety and soundness concerns and any others that the Region may have.

Again, we suggest that, in addition to reviewing the proposed plan in light of the foregoing discussion, MacDill consult

its own counsel to determine whether the plan complies with any other applicable federal or state statutes or regulations.

Sincerely,

Hattie M. Ulan

Hattie M. Ulan
Associate General Counsel

Enclosure

cc: MacDill FCU
H. Allen Carver, Region III Director

CG/MRS:sg
SSIC 3601
92-0204

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

Office of the Administrator

June 27, 1978

TO THE BOARD OF DIRECTORS OF THE FEDERAL CREDIT UNION ADDRESSED

Re: Fiduciary Liability Insurance

Federal credit unions maintaining pension plans for their employees and for officers who are compensated in conformance with the Federal Credit Union Act are required, pursuant to Section 701.19(b) of the NCUA Rules and Regulations, to obtain "appropriate liability insurance as provided under Section 410(b) of the Employee Retirement Income Security Act of 1974 ["ERISA"]". In this letter the above requirement is explained in light of the rules and regulations issued under ERISA to date by the U.S. Department of Labor ("Labor"). Federal credit unions may rely on the explanations set out in this letter when complying with Section 701.19(b). However, this explanation is subject to modification when Labor issues additional regulations under ERISA or when the extent of potential fiduciary liability under ERISA is further clarified by court decisions or by actions of Federal agencies having responsibility under ERISA.

A. Amount of Insurance Coverage Required

Section 701.19(b) requires that Federal credit unions maintaining pension plans for their employees or compensated officers obtain an appropriate amount of fiduciary liability insurance. The term "appropriate" is not defined in Section 701.19, and the board of directors of a Federal credit union should use its discretion when selecting an amount of fiduciary liability insurance coverage. Some factors to be considered are the number of participants in the pension plan and the total amount of benefits to be provided under the pension plan. Alternative pension plans which do not necessitate that a Federal credit union obtain fiduciary liability insurance, as explained below, should also be considered.

B. Pension Plans Subject to the Insurance Requirements of Section 701.19(b)

Section 701.19(b) requires that in connection with a pension plan for its employees or compensated officers, a Federal credit union occupying the position of a "fiduciary" as that term is defined in ERISA or the rules and regulations issued by Labor must obtain fiduciary liability insurance.

Not covered under section 701.19(b) is the case where a Federal credit union is acting as a trustee or custodian for an IRA account for its employees or compensated officers. Thus, no fiduciary liability insurance is required for Federal credit unions maintaining such accounts. As provided in section 701.19(a), where a Federal credit union is acting in the capacity of a trustee or custodian for a pension plan for its employees or compensated officers, the plan must be an IRA maintained in accordance with section 721.4 of the NCUA Rules and Regulations.

Fiduciary insurance is required whenever a Federal credit union occupies the position of a "non-trustee" type of fiduciary, for example, where it is in the position to exercise some form of discretionary control respecting management of a pension plan. This would be the case if a Federal credit union is the sponsor of a pension plan, even if some other parties were named as trustees or custodians.

In the case of a pension plan sponsored and maintained by an insurance company or party other than a Federal credit union, applicable regulations of Labor provide that a Federal credit union can provide certain administrative functions for the pension plan and not be considered a plan fiduciary, provided that the Federal credit union does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to money or property of the plan. In such a case where a Federal credit union is not a plan fiduciary, no insurance under section 701.19(b) is required.

Several of the permissible administrative functions named in the Labor regulations are as follows:

1. Application of rules determining eligibility for participation or benefits;

2. Calculation of services and compensation credits for benefits;

3. Preparation of employee communication material;

4. Maintenance of employee service records;

5. Preparation of reports required by Government agencies;

6. Collection of contributions and application of contributions as provided in plan;

7. Processing of claims; and

8. Making recommendations to others for decisions with respect to plan administration.

C. Reliance on Opinions of Attorneys or Government Agencies

Due to the complexities of the issues involved, a Federal credit union should rely on the written opinion of its attorney or a Government agency having regulatory responsibility under ERISA in order to determine if it occupies the position of a fiduciary as set out in Section 701.19(b) of the NCUA Rules and Regulations, except in cases where the pension plan is an IRA maintained in the Federal credit union.

In order to avoid confusion, such an opinion should address the specific pension plan in which the employees or compensated officers of the Federal credit union are participating.

This Administration is considering proposing an amendment to Section 701.19(b) which would require that each Federal credit union wishing to avoid the insurance requirements of that section obtain a written opinion to the effect that it is not a fiduciary with respect to its pension plan, as suggested above.

LAWRENCE CONNELL
Administrator

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