NATIONAL CREDIT UNION ADMINISTRATION
WASHINGTON, D.C. 20456

May 20, 1992

Annabeth Hellmers
Manager
Louisiana National Guard
Federal Credit Union
P.O. Box 237
Arabi, LA 70032

Re: Joint Accounts in Louisiana
(Your Letter of April 30, 1992)

Dear Ms. Hellmers:

You requested a legal opinion regarding two issues: (1) Is there a discrepancy in Section 109 of the Federal Credit Union ("FCU") Act ("Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member....") and Louisiana law?; and (2) Is the manner in which the FCU terminates a deceased member's joint account subject to legal challenge? In response to your questions: (1) no discrepancy exists; and (2) your handling of joint accounts, which seems to be in accord with the NCUA Accounting Manual for FCUs, comports with our interpretation of Louisiana law. However, the Regional Office would be in a better position to determine if any safety and soundness problems arise from your account handling procedures, which are not described in any detail in your request letter.

ANALYSIS

The operative Louisiana statute permits joint accounts with right of survivorship. In pertinent part, it reads:

> §664. Money deposited in a joint account.
> A. Money deposited in shares in a credit union domiciled in this state in a joint account under the names of two or more persons may, with any interest or dividend thereon, be paid to either of said persons, whether or not the other is living, and the receipt or acquittance of the person so paid shall

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be a valid, sufficient, and complete release and discharge of the credit union for any payment so made. La.Rev.Stat.Ann. §6:664(A).

The language of this statute indicates that credit union joint accounts are legally "joint accounts with right of survivorship" and not "common tenancy accounts". In any event, NCUA has authority to determine the account classifications for purposes of the National Credit Union Share Insurance Fund regardless of contrary state law. Final Amendment, 55 Fed.Reg. 43087, 43088 (October 26, 1990) (enclosed). We understand from your letter that this result is in accord with the legal opinion of the Louisiana Credit Union League. The joint account language is also properly reflected in your joint membership agreement, which is almost identical to Form FCU 123. See NCUA Accounting Manual for FCUs, §5030.1.5, pp. 5-15 to 5-18 (Nov. 1989). We trust that this has been responsive to your request.

Sincerely,

Hattie M. Ulan

Hattie M. Ulan
Associate General Counsel

cc: H. Allen Carver
Region III Director

Enclosure

GC/MEC:sg
SSIC 7000
92-0514

must file a notice to that effect. The credit union submitting the notice shall be notified in writing of the date on which all required information is received and the notice is accepted for processing. Before the end of the 30-day period beginning on the date NCUA accepts the information for processing, the Regional Director will issue a 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 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1781 through 1790, and Pub. L. 101–73. Section 741.9 is also authorized by 31 U.S.C. 3717.

§§ 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

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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 in the event of liquidation of the 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 federally 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

credit unions offering or planning to offer these accounts, to deal with losses that must be absorbed by uninsured shares. Important questions are not addressed, including whether other capital accounts are used first to absorb losses, what type of notice is to be provided to members, whether the member is 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 stating that uninsured membership 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 membership shares with a limit placed on the amount of share, typically somewhere between $100.00 and $200.00.

Six commenters believe that NCUA has no authority to prohibit uninsured membership shares in state-chartered credit unions. They stated that section 201(b)(7) of the FCU Act requires an agreement 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 commenters agreeing with the 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 absorbed by uninsured membership shares.

Although NCUA could regulate this area, the NCUA Board's belief 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 four federally insured 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

affected credit unions is minimal, the amendment 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]

BILLING CODE 7535-01-M

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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 executive 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.