

January 28, 2004

Ms. Barbara Means  
AVP Regulatory Compliance  
Aon Integramark  
1145 Sanctuary Parkway, Suite 300  
Alpharetta, GA 30004

Re: Debt Cancellation Agreements.

Dear Ms. Means:

You have asked if a federal credit union (FCU) must obtain a state insurance license under NCUA's incidental powers rule before it may offer debt cancellation agreements to its members. No, an FCU may offer debt cancellation agreements to its members as an exercise of its incidental powers without having to obtain a state insurance license.

The FCU Act expressly empowers an FCU to make loans and extend lines of credit. 12 U.S.C. § 1757(5). Debt cancellation and debt suspension agreements (DCAs) are loan-related products that protect an FCU against credit-related risks and have been specifically pre-approved as an exercise of an FCU's incidental powers. 12 C.F.R. §721.3(g). Moreover, NCUA's lending regulation specifies that NCUA has the exclusive authority to regulate the rates, terms of repayment and other conditions of FCU loans and lines of credit. 12 C.F.R. §701.21(b)(1). Because a DCA is an agreement that affects the terms of repayment, any state law purporting to limit or affect an FCU's ability to offer or administer such a product is expressly preempted. 12 C.F.R. §701.21(b)(1)(ii).

As your letter notes, NCUA's incidental powers regulation provides that an FCU's exercise of an incidental power may be subject to "applicable state law" if the authorized activity is otherwise regulated or conditioned. 12 C.F.R. §721.5. Although states have traditionally regulated insurance activity, we do not think this language is applicable in this case because we do not believe an FCU that offers DCAs to its members is engaging in the business of insurance.

In an earlier legal opinion, we concluded that DCAs are not insurance products. OGC Legal Opinion 97-0632, September 12, 1997. That opinion relies on a federal appeals court decision that held that since a national bank may offer a DCA under its incidental powers authority, such contracts are not to be considered the "business of insurance" for purposes of state regulation. *First National Bank of Eastern Arkansas v. Taylor*, 907 F. 2d 775, 780 (8th Cir. 1990), cert. denied, 498 U.S. 972 (1990).

The analysis reflected in the 8th Circuit's opinion is applicable to FCUs. Like national banks, FCUs are federal instrumentalities created by federal law and do not depend upon state law for their existence or their authority. 12 U.S.C. §§1751-1795k. Furthermore, as is the case with national banks, the ability of an FCU to offer a DCA is specifically authorized as an incidental power. 12 C.F.R. §721.3(g). Finally, as with national banks, DCAs offered by credit unions are agreements between the lender and the borrower and do not involve third parties, and are thus distinguishable from traditional contracts of insurance. *Taylor*, 907 F.2d at 780.

Your letter indicates that the Commissioner of the Tennessee Insurance Division has asserted that DCAs are insurance products. We note, however, the Insurance Commissioner's formal Order finds that your firm

lacked standing to obtain a ruling and also had not described the existence of a controversy sufficient to warrant a finding that a conflict exists between Tennessee and federal law. In any case, we note that the Commissioner cites with approval a state attorney general opinion that acknowledges that national banks are authorized by federal law to offer DCAs. The attorney general's opinion finds that permitting state regulation of a national bank's capacity to enter into such contracts would be an impermissible restriction upon the lawful exercise of a power granted by Congress. The opinion concludes that a national bank engaged in the sale of DCAs is not subject to regulation by the state insurance department. Tenn. Op. Atty. Gen. No. 87-33 (1987).

We believe this same analysis is applicable to FCUs, which are similarly authorized by federal law to offer DCAs as incidental to their lending authority. 12 C.F.R. §721.3(g).

Sincerely,

Sheila A. Albin  
Associate General Counsel

OGC/RPK:bhs  
03-1039