

June 19, 1997

Denis J. Gastonguay, VP Support Services  
SEFCU  
P.O. Box 12189  
Albany, New York 12212-2189

Re: Statutory Lien  
(Your Letter postmarked April 14, 1997)

Dear Mr. Gastonguay:

You have raised several questions regarding statutory liens. Your questions stem from a statement on statutory liens that you state recently appeared in a NAFCU publication.

Question: We currently have a number of members who have a negative balance in their share draft accounts. The negative balance is due to returned check fees. Can we use our statutory lien to use money from other accounts to cover the deficiency?

Statement: NCUA only permits you to use your statutory lien to cover loans. Thus, you may transfer funds if the negative balance was created when you paid checks pursuant to an overdraft protection agreement. However, NCUA has opined that you may not transfer funds from another account when the negative balance was caused by fees you imposed.

Your specific questions, along with our answers, are set forth below.

1. *On what authority do you base your opinion?*

We would like to clarify that the statement above was made by NAFCU and not NCUA. The question asked of NAFCU was whether a federal credit union (FCU) could use its statutory lien authority, under Section 107(11) of the Federal Credit Union Act (Act), to cover a deficiency in a member's share draft account caused by returned check fees imposed by the FCU. NAFCU correctly stated that, in this situation, use of the statutory lien is inappropriate.

Section 107(11) provides that an FCU "shall have power . . . to impress and enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or charges payable by him." 12 U.S.C. §1757(11). In several legal opinion letters, we have stated that the statutory lien provided in Section 107(11) may be used only in the context of loans to members. As discussed below in response to question #4, an FCU may recover returned check fees under separate authority.

In the preamble to Interpretive Ruling and Policy Statement (IRPS) 82-5, NCUA states that it interprets Section 107(11) to authorize an FCU: "(a) to impress a lien at the time the loan is granted . . . and (b) to enforce the lien by applying the shares and dividends directly to the amount due on the loan without obtaining a court judgment." 47 Fed. Reg. 57,483 (Dec. 27, 1982) (attached). NCUA further states that an FCU "that has impressed a lien on a member's accounts possesses a lien on those accounts to the extent of the unpaid loan balance together with interest, fees, and other charges." *Id.* at 57,483. However, nowhere in IRPS 82-5 does NCUA state that an FCU can use its statutory lien authority to impress and enforce a lien to recover any obligations of a member other than loans.

It should also be noted that the IRPS requires an FCU to evidence its intent to impress a lien. It may do so

in several ways including: "noting the existence of the lien in the credit union's records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect." *Id.* at 57,483. There is a basic fairness involved in providing some notice to members that other accounts may be subject to a lien to offset indebtedness.

It is the responsibility of NCUA's Office of General Counsel to provide the public with interpretations of the Act, the NCUA Rules and Regulations, and other NCUA Board directives. 12 C.F.R. §790.2(8). We have interpreted Section 107(11) as only authorizing an FCU's use of the statutory lien in the context of loans to members.

*2. What does it matter how the account became negative?*

As stated above, the statutory lien provided in Section 107(11) has been applied only in the context of loans. A negative balance in a member's account created from returned check fees imposed by an FCU does not constitute a loan to the member for which the FCU could use the statutory lien to secure payment of the fees. In contrast, a negative balance created when an FCU pays a check pursuant to an overdraft protection agreement is, in essence, a loan to that member in the amount of the deficiency. Thus, an FCU would be permitted to use its statutory lien authority to secure payment of the amount lent in that scenario. If not stated elsewhere in accordance with IRPS 82-5, the overdraft protection agreement presumably provides notice to a member of the FCU's ability to impose a lien.

*3. Isn't the situation covered by Section 107, paragraph 11 of the Federal Credit Union Act?*

No, see answer to question 2.

*4. Can we not, as part of our disclosure include a provision to cover such situations?*

You propose to add a provision to your credit union's share disclosure documents stating that "if an account becomes negative because of fees imposed due to member

activities, i.e., insufficient funds check, the credit union reserves the right to transfer funds from the member's other accounts to cover the negative balance."

It is our opinion that an FCU may do so under its authority to receive payments on shares, 12 U.S.C. §1757(6), and the incidental powers clause, 12 U.S.C. §1757(17).

Any such policy of debiting a member's account to recover losses must be formally adopted by a nonstandard bylaw amendment or board resolution and made known to an FCU's membership. The policy should not be applied retroactively, and the language in the share account and service agreements should indicate the existence of such policy. Basically, we are concerned that members receive some type of prior notice of fees and charges. You should take note of §701.35(b) and (c) of the NCUA regulations that, briefly stated, require the accurate disclosure of the terms and conditions for an FCU's various accounts and permit the imposition of fees and charges in connection with the opening, maintaining, and closing of accounts.

We recommend that the FCU consult with its own counsel to determine if there are any other applicable federal or state laws that might prohibit SEFCU from adding such a provision. We note that certain types of accounts such as IRAs are subject to other laws that may complicate or preclude such a policy of debiting.

Sincerely,

Sheila A. Albin  
Associate General Counsel

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97-0423

cc: Dea Whayland, NAFCU