

July 2, 2004

John P. Smith, Director
Missouri Division of Credit Unions
2410-A Hyde Park Road
P.O. Box 1607
Jefferson City, Missouri 65109

Re: Member Business Loan (MBL) Regulation.

Dear Mr. Smith:

The purpose of this letter is to clarify NCUA's position that federally insured state-chartered credit unions (FISCUs) may only engage in business lending under the terms of NCUA's MBL regulation or a state member business lending regulation approved by the NCUA Board. Our view is that state law parity provisions do not provide a legal basis for FISCUs to elect to engage in business lending under some provisions of NCUA's regulation while relying on other provisions of a previously approved state regulation. In addition to circumventing congressional intent, such a self-directed, piecemeal approach to regulation raises safety and soundness concerns as well as supervisory problems both for NCUA and state regulators.

On August 7, 1998, the Credit Union Membership Access Act (CUMAA) was enacted to, among other things, amend the FCU Act to impose a limit on the amount of outstanding MBLs made by federally insured credit unions (FICUs). As of that date, an FICU may not make any MBL that would result in a total amount of such loans equaling more than the lesser of 1) 1.75 times the FICU's actual net worth; or 2) 1.75 times the minimum net worth required for a well capitalized FICU. 12 U.S.C. §1757a(a). The MBL provisions enacted under CUMAA also created exceptions to the aggregate limit, definitions, and a grandfather provision. 12 U.S.C. §1757a. We note that the NCUA Board has sole authority to determine the qualifications for the exceptions to the aggregate limit. 12 U.S.C. §1757(b)(1)-(2)(a).

All FICUs, including state-chartered credit unions, must comply with the federal statute's limitations on MBLs and any interpretations of the statute issued by the NCUA Board. 12 U.S.C. §§1757a, 1766(a). The NCUA Board is the only government agency with the regulatory authority to prescribe rules implementing CUMAA. *Id.* NCUA has adopted and amended its MBL rule, Part 723, in consultation and cooperation with credit union state supervisory agencies (SSAs). 12 C.F.R. Part 723. Generally, FICUs are required to comply with Part 723 as a condition to receiving federal share insurance coverage. 12 C.F.R. §741.203(a).

While the NCUA Board may not transfer its interpretive authority to another agency, it has chosen to delegate authority to SSAs under certain conditions. NCUA's MBL rule states that the NCUA Board may exempt FISCUs from the rule if NCUA approves a state's MBL rule for its FISCUs. 12 C.F.R. §723.20. "In making this determination, the Board is guided by safety and soundness considerations and reviews whether the state regulation minimizes the risk and accomplishes the overall objectives" of NCUA's MBL rule. *Id.* An SSA, therefore, does not have the ability to interpret the CUMAA provisions but may make its case to the Board that its proposed MBL rule is consistent with NCUA's interpretation and MBL rule. Once approved, the FISCUs chartered by the SSA are no longer subject to Part 723 but must comply with all of the terms of the state rule. 12 C.F.R. §741.203(a).

A state that has received an exemption from NCUA's MBL rule must seek a similar exemption determination from the Board for any subsequent amendments to its rule. 68 Fed. Reg. 56537, 56546 (Oct.

1, 2003). If a state received an exemption from the Board before NCUA amended its rule, the preamble to the most recent MBL rule amendment provides three options for an SSA: 1) rescind its current MBL rule and require its charters to comply with NCUA's new rule; 2) maintain its rule as the Board had approved it; or 3) seek approval from the Board to adopt any variances from the rule the Board previously approved, in accordance with the process outlined in §723.20. *Id.*

An SSA may not maintain a previously approved MBL rule and permit its FISCUs to rely on new provisions in NCUA's MBL rule without obtaining an exemption from the NCUA Board. The parity provision found in Missouri's credit union statutes permits an FISCU to "exercise such additional powers, with the approval of the director, as federally chartered credit unions may be authorized under federal statutes." MO. REV. STAT. §370.071(2). While parity provisions generally are very useful in assuring that state and federal charters are on a level playing field in terms of permissible activities, this is not an instance where parity may be asserted because it disrupts a cohesive regulatory scheme.

NCUA's MBL rule is to be read as a whole regulatory scheme for compliance with the CUMAA restrictions and all FCUs are subject to the rule in its entirety. Likewise, when the NCUA Board exempts a state rule, it does so with the expectation that FISCUs will be subject to the entire rule as presented to and reviewed by the Board. An SSA cannot pick and choose additional provisions from NCUA's rule for its FISCUs that are outside of the four corners of the state's exempted rule approved by the NCUA Board.

In addition, all FISCUs must adhere to NCUA's MBL rule unless they are operating under an exempt state MBL rule as a condition of insurance coverage. 12 C.F.R. §741.203. If an SSA's interpretation of its state's exempted rule or other law permits FISCUs to operate under authorities that have not been approved by the NCUA for that state, then those FISCUs must comply with NCUA's MBL rule despite the existence of a state MBL rule. *Id.*

As you are aware, the NCUA Board granted an exemption to Missouri on September 7, 2000, and Missouri adopted its current MBL regulation soon thereafter. MO. CODE REGS. ANN. tit. 4, §100-2.045. Since the approval of the Missouri rule, NCUA adopted changes to Part 723 and related regulations that went into effect on October 31, 2003. 68 Fed. Reg. 56537 (Oct. 1, 2003). Our view is that, at this point, there are three options available for your office to consider: (1) continue to use the exemption for the current Missouri rule the NCUA Board approved in September 2000; (2) rescind the current Missouri rule so that Missouri FISCUs can use the NCUA MBL rule that went into effect in October 2003; or (3) submit a revised rule to the NCUA for consideration for a new exemption. Please let us know if you have any questions.

Sincerely,

/s/

Sheila A. Albin
Associate General Counsel

OGC:CJL/bhs
04-0507