

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 (NCUA Letter No. 21 -1978)

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 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 the 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 claim; 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 CONNEL

Administrator