

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 721

RIN 3133-AD12

Incidental Powers

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed Rule.

SUMMARY: NCUA proposes to amend its regulation governing a federal credit union's (FCU's) incidental powers by adding illustrations of permissible activities under the categories of correspondent services, operational programs, and finder activities. These amendments will provide useful information to FCUs by clarifying and updating the illustrations regarding permissible activities.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods

(Please send comments by one method only):

- NCUA Web Site:

http://www.ncua.gov/news/proposed_regs/proposed_regs.html.

Follow the instructions for submitting comments.

- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on Notice of Proposed Rulemaking (Incidental Powers)” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

FOR FURTHER INFORMATION CONTACT: Justin M. Anderson, Staff

Attorney, Office of General Counsel, at the above address or telephone (703) 518-6540.

SUPPLEMENTARY INFORMATION.

A. Background.

NCUA’s policy is to review regulations periodically to “update, clarify and simplify existing regulations and eliminate redundant and unnecessary provisions.”

Interpretive Ruling and Policy Statement (IRPS) 87-2, Developing and Reviewing

Government Regulations. NCUA notifies the public about the review, which is conducted on a rolling basis so that a third of its regulations are reviewed each year. This proposed rule is the result of NCUA's 2007 review under IRPS 87-2, which covered the middle third of the regulations, including part 721. The proposed changes are intended to update and clarify the regulation.

Part 721 describes the incidental powers an FCU may exercise under the incidental powers authority in the Federal Credit Union Act (Act), which provides an FCU may "exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it was incorporated." 12 USC 1775(17). The current part 721 resulted from a rulemaking involving an advance notice of proposed rulemaking in 1999, a proposed rule in 2000, and a final rule in 2001 that replaced the former group purchasing rule. 64 FR 66413 (Nov. 26, 1999); 65 FR 70526 (Nov. 24, 2000); 66 FR 40845 (Aug. 6, 2001). The former group purchasing rule permitted FCUs to endorse and make available insurance plans and other third party products to their members and to perform administrative functions on behalf of the vendors. 12 CFR 721.1 (as codified in the CFR as of January 1, 2000). Until the revision in 2001, the former group purchasing rule had been in place with little change since 1985 and recognition of a broad range of other activities as permissible under the incidental powers authority of the Act appeared only in legal opinions NCUA's Office of General Counsel (OGC) issued. 66 FR at 40845-46.

Briefly summarized, the current incidental powers rule: provides a standard derived from well-established case law for recognizing an incidental powers activity; incorporates into broad, “pre-approved” categories of activities the activities legal opinions had recognized; describes an application process for adding new activities and seeking advisory opinions from NCUA’s OGC on whether an activity would fit within an existing category; cautions FCUs to comply with any laws, regulations, or legal opinions applicable to the activities; expressly permits FCUs to earn income from their incidental powers activities; and sets out conflict of interest provisions. 12 CFR Part 721. The rule specifically states the examples of activities within each category are provided as illustrations and “not as an exclusive or exhaustive list.” 12 CFR 721.3. The broad categories include certification services, correspondent services, electronic financial services, excess capacity, financial counseling services, finder activities, loan-related products, marketing activities, monetary instrument services, operational programs, stored value products, and trustee or custodial services.

The Board believes it will be helpful to clarify certain provisions and update the rule by adding examples of activities that have been recognized as permissible incidental powers activities since 2001. Also, since 2001, questions have arisen from time to time about the sale of third party insurance products, negotiation of discounts, endorsements, and provision of administrative services to support the sale of a third party’s products or services. As noted in the preamble to the proposed rule in 2000, the Board intended to incorporate the concept of group

purchasing, particularly with regard to insurance products, into the category of finder activities. 65 FR at 70527. Further, the Board specifically noted that it contemplated the negotiation of “membership-wide rates or benefits with vendors” as part of being a finder of products, not only insurance. *Id.* Although the continued permissibility of activities covered by the former group purchasing rule was addressed in preambles in the rulemaking several years ago, the Board believes it will be helpful to add language to the regulatory text under the finder activities category regarding negotiation of discounts, sale of third-party insurance products, and administrative functions on behalf of third-party vendors.

B. Proposed Changes.

Section 721.3(b): Correspondent Services with Foreign Credit Unions

The proposed rule would recognize that FCUs may provide correspondent services to foreign as well as federal or state-chartered credit unions. Generally, correspondent service agreements address circumstances where a credit union, as a service to another credit union, provides a service to a member of the other credit union, for example, where the geographic location of the member does not permit the member’s own credit union to provide the service. A typical service would be receipt of funds from a member by another credit union for credit to the member’s account with his or her credit union where the member is located some distance from his or her credit union. The current rule permits correspondent

services between “credit unions” and NCUA regulations generally define credit union to mean a federal or state chartered credit union. 12 CFR 700.2(d). In 2006, an OGC legal opinion recognized as permissible an FCU receiving funds from a member of a foreign credit union that the FCU would then transmit to the member’s credit union located in a foreign country. OGC Op. 05-0915 (March 3, 2006) (available on the NCUA website at ncua.gov). To update this category in the rule, the Board proposes to revise this provision to permit FCUs to provide correspondent services to both foreign and domestic credit unions. The Board cautions, however, that credit unions should consult United States and international laws before engaging in any transaction with a foreign credit union.

Section 721.3(f): *Finder activities.*

Finder activities is the category of incidental powers that allows FCUs to introduce its members to an outside vendor so that the two sides may negotiate and consummate a transaction. 12 CFR 721.3(f). The proposed amendments clarify that finder activities include an FCU’s negotiation of group discounts and the performance of administrative functions for outside vendors. As noted previously, the negotiation of group discounts was contemplated under the old group purchasing rule and “performing administrative functions on behalf of the vendors” was expressly included in the old rule. See also OGC Op. 02-0221 (April 26, 2002) (available on the NCUA website at ncua.gov) (An FCU, as a finder, may provide information about vendors, perform administrative functions

for the parties, and negotiate group discounts or benefits on behalf of its membership). The Board believes the additional language will be a helpful clarification.

The proposed amendment would add language elaborating that vendors may be providers of non-financial products or financial products, including insurance. As noted above, the former group purchasing rule permitted FCUs to endorse and make available insurance plans and other third party products to their members and, in revising Part 721, the Board did not intend to limit previously permissible activities. Further, as noted above, the Board stated, when it was revising Part 721, that it considered promotion of third party insurance covered by the finder activities category. The Board believes specifically noting insurance as an example in the regulation will be a helpful clarification.

The Board also proposes to add language to §721.3(f) clarifying that FCUs may act as finders for the financial products of other financial institutions. The incidental powers rule does not limit the types of vendors or products and services an FCU may promote or facilitate, and the Board believes an FCU bringing its members together with another financial institution may significantly benefit members where an FCU does not or is unable to provide to provide the product or service.

Nevertheless, as with any incidental powers activities, but particularly here where the product may be a regulated investment or financial product, FCUs must be particularly mindful of the provisions of §721.5. This section states that, in engaging in any incidental powers activity, FCUs must comply with all applicable law and regulations. See also OGC Op. 02-0221 (April 26, 2002) (available on the NCUA website at ncua.gov) (FCU, as finder, may offer its members depository products of other financial institutions but should clearly understand legal and safety and soundness issues related to the activity). Further, FCUs must be mindful that, although the rule generally permits them to perform administrative functions in connection with finder activities, in connection with the sale of financial products, FCUs must be cautious that these functions do not create an agency or brokerage relationship and trigger compliance problems under any applicable laws or regulations. FCUs unclear as to the permissibility of a particular function should consult with their own private legal counsel with expertise in the activity or may consult with NCUA's OGC.¹

¹ For example, the Board notes FCUs should consult the Real Estate Settlement Procedures Act (RESPA) when accepting fees from a third party, as a finder of mortgage related products. NCUA's incidental powers rule permits FCUs to earn income for those activities determined to be incidental to its business. 12 CFR 721.6. RESPA, however, prohibits financial institutions from accepting fees or payments for referring members to settlement service providers in mortgage related transactions. 24 CFR 3500. FCUs acting as a finder of mortgage related products should consult RESPA to determine if the acceptance of fees in a particular transaction is prohibited.

Section 721.3(j): Payroll Services.

The proposed rule adds payroll services to the operational programs category. Generally, this category describes programs an FCU can establish to deliver products and services that enhance member service and promote safe and sound operation. 12 CFR 721.3(j). Payroll services permit an FCU to make disbursements from a business member's account to third parties, as well as deduct the appropriate amounts for income taxes and employee-paid benefit premiums. In a 2006 opinion letter, NCUA recognized that payroll services are related to other permissible activities, such as electronic financial services and payroll deductions, and concluded providing payroll services is a permissible operational program. OGC Op. 05-1204 (February 15, 2006) (available on the NCUA website at nca.gov).

REGULATORY PROCEDURES

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under \$10 million in assets). This proposed rule adds to the language of preexisting permissible activities for FCUs. The proposed rule, therefore, will not have a significant economic impact on a

substantial number of small credit unions and a regulatory flexibility analysis is not required.

Paperwork Reduction Act

NCUA has determined that the proposed amendments will not increase paperwork requirements and a paperwork reduction analysis is not required.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999 - Assessment of Federal Regulations and Policies on Families

NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR part 721

Credit unions, functions, implied powers, and insurance.

By the National Credit Union Administration Board on May 22, 2008.

Mary Rupp

Secretary of the Board

For the reasons stated in the preamble, the National Credit Union Administration proposes to amend 12 CFR part 721 as set forth below:

PART 721 – Incidental Powers

1. The authority citation for part 721 continues to read as follows:

Authority: 12 U.S.C. 1757(17), 1766 and 1789.

2. Amend §721.3 as follows:

a. Amend the first sentence in paragraph (b) by adding the phrase "including foreign credit unions" after the words "other credit unions."

b. Revise paragraph (f) to read as follows:

(f) Finder activities. Finder activities are activities in which you introduce or otherwise bring together outside vendors with your members so that the two parties may negotiate and consummate transactions and include vendors of non-financial products, vendors that are other financial institutions, and vendors of financial products such as insurance and securities. Finder activities may include endorsing a product or service, negotiating group discounts on behalf of your members, offering third party products and services to members through the sale of advertising space on your website, account statements and receipts, and selling statistical or consumer financial information to outside vendors to facilitate the sale of their products to your members. You may perform administrative functions on behalf of vendors to facilitate transactions between your members and another institution.

c. Amend the second sentence in paragraph (j) by adding "payroll services" after the phrase "payroll deduction."