

restoring a credit union's capital. NCUA seeks comment on whether to add, by regulation, all or a combination of some of the other FDIA § 38 content prerequisites and acceptability criteria enumerated above, and on the time frame for submitting and implementing a Net Worth Restoration Plan. In addition, NCUA welcomes input on this model generally, as well as on alternative and/or additional content prerequisites and acceptability requirements for credit union Net Worth Restoration Plans.

By the National Credit Union Administration Board on October 22, 1998.

Becky Baker,

Secretary of the Board.

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Organization and Operations of Federal Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The NCUA is proposing to incorporate into its regulations the agency's longstanding interpretation that federal credit unions (FCUs) are authorized, within limits, to make charitable contributions and donations. NCUA seeks to increase regulatory effectiveness by making it easier for FCUs to locate applicable rules regarding the making of charitable contributions and donations. NCUA seeks to increase regulatory effectiveness by making it easier for FCUs to locate applicable rules regarding the making of charitable contributions and donations.

DATES: Comments must be received on or before January 27, 1999.

ADDRESSES: Direct comments to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428. Fax comments to (703) 518-6319. *Please send comments by one method only.*

FOR FURTHER INFORMATION CONTACT: Frank S. Kressman, Staff Attorney, Division of Operations, Office of General Counsel, at the above address or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

NCUA has a policy of continually reviewing its regulations to "update, clarify and simplify existing regulations and eliminate redundant and

unnecessary provisions." Interpretive Rulings and Policy Statements (IRPS) 87-2, Developing and Reviewing Government Regulations. As part of this regulatory review program, NCUA also reviews its IRPS to determine their current effectiveness.

NCUA issued IRPS 79-6 to clarify its position on FCUs making charitable contributions and donations. 44 FR 56691 (October 2, 1979). In IRPS 79-6, NCUA acknowledged the benefits associated with FCUs making charitable contributions and donations. Also, NCUA stated that the making of charitable contributions and donations is an activity incidental to an FCU's business within the scope of powers set forth in the Federal Credit Union Act. 12 U.S.C. 1757(17).

As a result of the review of IRPS 79-6, NCUA seeks to increase regulatory effectiveness by making it easier for FCUs to locate applicable rules regarding the making of charitable contributions and donations. Accordingly, NCUA is proposing to add a new § 701.25 that will incorporate the policies of IRPS 79-6 into NCUA regulations. This new rule will be located in part 701 so it will be in the same place as other regulatory provisions regarding the organization and operations of FCUs. The language of the new rule is somewhat different from that of the IRPS, but the rationale and limitations are the same.

This proposal addresses charitable contributions and donations only and does not include political contributions and donations of FCUs, which are governed by the Federal Election Campaign Act (2 U.S.C. 441b). Additionally, all charitable contributions and donations by FCUs must be made in accordance with applicable Federal Credit Union Bylaws including those addressing conflicts of interest and FCU board of directors meetings. FCU Bylaws Art. XIX, § 4 and Art. VIII, § 8. Finally, NCUA intends that an FCU's board of directors, if it chooses, can establish a budget for charitable contributions and donations and authorize an executive committee of directors or appropriate FCU senior officials to disburse those funds in accordance with the proposal.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small entities (primarily those under \$1 million in assets). The NCUA has

determined and certifies that the proposed amendment, if adopted, will not have a significant economic impact on a substantial number of small credit unions. Accordingly, the NCUA has determined that a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined that the proposed amendments do not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget. .

Executive Order 12612

Executive Order 12612 requires NCUA to consider the effect of its actions on state interests. The proposal only applies to federal credit unions. NCUA has determined that the proposed amendment does not constitute a significant regulatory action for purposes of Executive Order 12612.

List of Subjects in 12 CFR Part 701

Charitable contributions, Credit unions.

By the National Credit Union Administration Board on October 22, 1998.

Becky Baker,

Secretary of the Board.

For the reasons set forth in the preamble, it is proposed that 12 CFR part 701 be amended as follows:

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, and 1789. Section 701.6 is also authorized by 31 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.*, 42 U.S.C. 1861 and 42 U.S.C. 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Part 701 is amended by adding § 701.25 to read as follows:

§ 701.25 Charitable contributions and donations.

(a) A federal credit union may make charitable contributions and/or donate funds only to:

(1) An organization that is a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code and is located in or conducts its activities in a community in which the federal credit union has a principal place of business; or

(2) An organization that is a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code

and operates primarily to promote and develop credit unions.

(b) The board of directors must approve charitable contributions and/or donations, and the approval must be based on a determination by the board of directors that the contributions and/or donations are in the best interests of the credit union and are reasonable given the financial condition of the credit union.

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Organization and Operations of Federal Credit Unions; Statutory Lien

AGENCY: National Credit Union
Administration (NCUA).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The NCUA proposes to update, clarify and convert to a regulation the provisions of its existing Interpretive Ruling and Policy Statement ("IRPS"), which implements the Federal Credit Union Act's authority to establish a statutory lien. Like the IRPS, the proposed rule will permit a federal credit union to impress a statutory lien upon the shares and dividends of a member, and to enforce that lien to satisfy the member's outstanding indebtedness to the credit union, even when such indebtedness is not secured by shares.

DATES: Comments must be received on or before January 27, 1999.

ADDRESSES: Direct comments to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428. Fax comments to (703) 518-6319. *Please send comments by one method only.*

FOR FURTHER INFORMATION CONTACT: Steven W. Wideman, Trial Attorney, Division of Litigation & Liquidations, Office of General Counsel, at the above address or telephone: (703) 518-6557.

SUPPLEMENTARY INFORMATION:

A. Background

Section 107(11) of the Federal Credit Union Act, 12 U.S.C. 1757(11) (hereinafter "*§ 1757(11)*"), provides that a federal credit union "shall have [the] 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." Beginning in 1979, NCUA took

the position that a federal credit union could enforce the lien granted by *§ 1757(11)* only after it had obtained a court judgment on the debt, unless state law allowed enforcement of the lien without first obtaining such a judgment. NCUA, *Manual of Laws Affecting Federal Credit Unions* 1-17 (6/78 ed.); NCUA, *Credit Manual for Federal Credit Unions* 29 (12/79 ed.). Once the prerequisite judgment was obtained, the credit union could apply the member's shares to his or her outstanding loan balance.

In 1982, NCUA reconsidered this interpretation of *§ 1757(11)* because of experience indicating that it placed credit unions at a disadvantage compared to other financial institutions, which usually can offset a borrower's loan without first obtaining a court judgment. 47 FR 44340 (October 7, 1982). As a result, NCUA issued Interpretive Ruling and Policy Statement No. 82-5 ("IRPS 82-5"), reinterpreting *§ 1757(11)* to authorize a credit union to enforce the lien on the shares and dividends of a member without first obtaining a court judgment against the member, state law to the contrary notwithstanding. 47 FR 57483 (December 27, 1982). The NCUA Board concluded, and still maintains, that the reinterpretation of *§ 1757(11)* is more consistent with Congressional intent.

In 1987, NCUA issued Interpretive Ruling and Policy Statement No. 87-2 entitled "Developing and Reviewing Government Regulations," 52 FR 35231 (Sept. 18, 1987) ("IRPS 87-2"). IRPS 87-2 established the policy of reviewing all existing NCUA regulations every three years for the purpose of updating, clarifying and simplifying them, and eliminating redundant and unnecessary provisions. *Id.* at 35232. Following a plain English question and answer format, the proposed rule is intended to fulfill that purpose.

B. Principal Differences Between IRPS 82-5 and Proposed Rule

The principal difference between IRPS 82-5 and the proposed rule is the requirement in *§ 701.39(b)(1)* and (3) that the credit union give written notice to its member at the time it impresses a statutory lien on that member's account(s). But for such written notice, the member would not necessarily be aware when the credit union impresses a lien either by notation on its records of the member's account(s) or through a duly adopted by-law generally establishing a lien on members' accounts.

The proposed rule also resolves two ambiguities in IRPS 82-5 and recent editions of NCUA's "Examiner's

Guide." See, e.g., NCUA *Examiner's Guide* 9-96 (6/97 ed.). First, the rule reiterates NCUA policy permitting a statutory lien only to offset a member's outstanding indebtedness to the credit union, not to offset other outstanding financial obligations of the member to the credit union. Proposed *§ 701.39(a)(4)*. Second, the rule distinguishes a statutory lien from a share secured loan by emphasizing that until a statutory lien is enforced, following a member's default, the member is permitted to make withdrawals from the impressed account(s) even to a level below that of the outstanding indebtedness. Proposed *§ 701.39(c)(2)*.

C. Section 701.39(a)—What is a Statutory Lien?

1. Definition

The proposed rule defines a statutory lien under *§ 1757(11)* as a security interest in a member's shares and dividends equal to the amount of the member's indebtedness to the credit union. Proposed *§ 701.39(a)(1)*. The security interest established by the lien gives the credit union a superior claim over all other creditors when claims are asserted against the member's account(s). *Id.* at *§ 701.39(a)(2)*. See D. Bridewell, *Bridewell on Credit Unions* 710 (1942 ed.).

2. "Floating" Lien

The NCUA Board continues to believe that Congress intended for the statutory lien to be a "floating" lien. When a federal credit union impresses a lien on a member's accounts, it retains the lien on those accounts from that date forward through the term of the loan, to the extent of the unpaid loan balance together with interest, fees and other charges attributable to the loan. The lien "floats" as the outstanding balance of the indebtedness varies from time to time, and as the member's account balance is reduced by withdrawals or increased by deposits or dividend payments. When the statutory lien is enforced, it applies to all funds in the account at that point, the amount of which may well be less than the outstanding balance of the indebtedness.

3. Preemption

The proposed rule expressly provides that *§ 1757(11)* preempts state law. Proposed *§ 701.39(a)(3)*. This means that the proposed rule overrides the equitable right of set-off, as well as state statutory and decisional law governing a creditor's right to impress and enforce a lien. Many state laws require a