July 9, 2004

Harold E. Feeney, Commissioner
Texas Credit Union Department
914 East Anderson Lane
Austin, Texas 78752-1699

Re: Texas Member Business Loan (MBL) Regulation.

Dear Mr. Feeney:

The purpose of this letter is to clarify NCUA's position about a state supervisory authority (SSA) applying a general lending rule to waive requirements found in the state's MBL rule approved by the NCUA Board. We believe an SSA may only grant waivers from MBL requirements if the NCUA Board approved the type of waivers permitted and the procedure for authorizing waivers when it granted the state rule exemption. An SSA in a state that has received an exemption from NCUA's MBL rule cannot use a general waiver provision to grant MBL waivers without approval from the NCUA Board.

The NCUA Board granted an exemption from NCUA's MBL rule to Texas on November 18, 1999, and approved amendments to Texas' MBL rule (Texas rule) on January 23, 2003. 7 TEX. ADMIN. CODE §91.709. We note that neither of the proposals presented to the NCUA Board for review addressed types of waivers permitted or a procedure for waivers similar to those in NCUA's MBL rule. 12 C.F.R. §§723.10-.11.

There is a general lending regulation in the Texas Administrative Code that, by its terms, grants you discretion to permit waivers of lending requirements. 7 TEX. ADMIN. CODE §91.701(e). Waivers, if any, granted under this provision for any requirements in the Texas MBL rule approved by the NCUA Board are impermissible. The potential application of this waiver provision in the general lending regulation was not presented to the NCUA Board as part of its approval of the Texas MBL rule. NCUA Board did not analyze the impact of waived requirements when reviewing the Texas rule and did not authorize your office to grant waivers from the requirements in the Texas rule.

NCUA must approve the scope of waivers permitted for federally insured state-chartered credit unions (FISCUs) operating under an exempt state rule. Otherwise, an FISCU could seek a waiver from many conditions imposed in the rule that may not be waived in NCUA's rule or under the Federal Credit Union Act. 12 C.F.R. §723.10. Furthermore, a state's waiver process must adequately

address NCUA's role for waiver approvals. See 12 C.F.R. §723.11. "Being part of the process allows NCUA, as the insurer of credit unions, to ensure that all waiver requests are properly reviewed." 64 Fed. Reg. 28721, 28725 (May 27, 1999). NCUA's responsibilities remain the same regardless of whether a state operates under NCUA's MBL rule or receives an exemption for its own rule.

When the NCUA Board exempts a state rule, it does so with the understanding that FISCUs in that state will be subject to the entire rule as presented to and reviewed by the Board. This is discussed in the attached legal opinion, OGC Opinion 04-0507, dated July 2, 2004. An SSA cannot authorize additional lending authority outside of the four corners of the state's exempted rule approved by the NCUA Board.

We understand that your office may want to accommodate Texas FISCUs that seek relief from some of the Texas rule's requirements and, in our view, your office has two options to achieve this goal. You can seek approval from the NCUA Board to amend the Texas rule by placing waiver guidelines and a waiver process in the Texas rule. Alternatively, you can rescind the current Texas rule so that Texas FISCUs can use the NCUA MBL rule that went into effect in October 2003 and obtain waivers as provided in NCUA's MBL rule. Please let us know if you have any questions.

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

OGC:CJL/bhs
04-0702
Enclosure

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 its 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