

Summer 2008

Legal Update

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Adverse Action – A Potential Litigation Trap for the Unwary

The Equal Credit Opportunity Act, as amended, and its implementing regulation, Regulation B, has been around since 1974. The law addresses the actions that a credit union is required to take when a request for a loan is denied. An adverse action notice must be mailed to the member.

Recently, a number of credit unions have been subject to consumer compliance litigation regarding the Equal Credit Opportunity Act, Regulation B, adverse action notices, and the Fair Credit Reporting Act. These lawsuits occur when a credit union denies a loan and a “non-uniform” adverse action notice or language is used. Some credit unions use language such as “limited credit experience,” “Beacon score does not meet credit union criteria,” or “does not meet credit union guidelines” as a specific basis or reason for denial.

Potential litigation could be minimized with some careful adherence to the law. A credit union should use the appropriate reasons for loan denial and provide an official statement of proper reasons in the adverse action notice. According to the regulations, the following are permitted reasons for credit denial, termination or other action taken concerning credit:

- credit application incomplete,
- insufficient number of credit references provided,
- unacceptable type of credit references provided,
- unable to verify credit references,
- temporary or irregular employment,
- unable to verify employment,
- length of employment,
- income insufficient for amount of credit requested,
- excessive obligations in relation to income,
- unable to verify income,
- length of residence,
- temporary residence,
- unable to verify residence,
- no credit file,
- limited credit experience,
- poor credit performance with us,
- delinquent past or present credit obligations with others,
- collection action or judgment,
- garnishment or attachment,
- foreclosure or repossession,
- bankruptcy,
- number of recent inquiries on credit bureau report,
- value or type of collateral not sufficient,
- other, specify: _____

Employment Law Update

The Equal Employment Opportunity Commission (EEOC) is the principal federal agency responsible for investigating employee charges of discrimination. The final statistics for charges handled by the EEOC during its fiscal year 2007 revealed sharp increases in the number of discrimination charges filed against Virginia employers. In FY 2006, the number of EEOC charges in Virginia rose over 32%. This was a substantially greater increase than the 9.3% national increase in charges handled by this federal agency. The EEOC also reported that it recovered \$345 million in monetary relief for charging parties in FY 2007, up 26% from the previous year.

The EEOC released a statement attributing the increase in charges to a combination of factors including changing economic conditions, increased diversity in the U. S. workforce, and a greater awareness of Federal anti-discrimination laws. The greater awareness of anti-discrimination laws is in part due to “outreach programs” the EEOC is offering to help educate the public. While the economy and employment rates may improve, increased diversity combined with the EEOC’s ongoing outreach efforts will probably result in further increases in EEOC charges in the foreseeable future.

These and other timely issues are discussed in the Kaufman & Canoles day-long Employment Law Update seminars. Also available are shorter supervisory training clinics to help employers avoid employment liability. In an effort to reduce employer expenses (especially gasoline), Kaufman & Canoles offers Supervisory Training webinars. For more information, visit our website at www.kaufmanandcanoles.com or contact Kerry Martinolich at (757) 624-3158.

Interested in Cutting Expenses? How About Debt Cancellation Insurance for Credit Life Insurance?

As credit unions look for ways to reduce their expenses, NCUA was recently asked whether a federal credit union could replace its credit life insurance programs with debt cancellation programs. The answer was a qualified yes. These changes would be allowed by NCUA if they were permitted under state law and also permitted under the terms of the credit life contracts. NCUA stated that credit life insurance policies are regulated under state law as insurance products and are offered by third-party insurers. Debt cancellation programs are contractual arrangements between creditors and borrowers without a third-party insurer. NCUA found that debt cancellation programs are permissible loan-related products for federal credit unions under the incidental power language of the law.

NCUA suggested that federal credit unions consult with legal counsel to determine if state laws and the credit life insurance contract terms permit conversion from credit life to debt cancellation programs. A copy of this NCUA opinion letter can be downloaded in PDF format at www.kaufmanandcanoles.com.

Virginia Notary Law Updated . . . Again

You may recall that effective July 1, 2007, there were a number of changes that were mandated under the Virginia Notary law. The General Assembly has been at it again. Effective July 1, 2008, there are new or “improved” changes. For example, a Notary now may complete and attach a “loose” certificate when notarizing a signature or signatures on a document. The certificate must include the name of each person whose signature is being notarized. Additionally, any document that does not include the notarial certificate wording on the same page as the signature is now considered valid if the document appears to be properly notarized.

Benefits for CUSO Employees

A CUSO is a separate and distinct legal entity. Many CUSOs are wholly-owned or majority-owned by the sponsor federal credit union. For a CUSO to remain competitive and recruit top management and employees, often a comprehensive employment package is necessary. NCUA was recently asked if a federal credit union could provide employee benefits to the employees of the CUSO. The intention was for the credit union to obtain, administer, and pay for all of the employee benefits. NCUA opined that this approach was not acceptable and not permissible. Under an alternate proposal offered for consideration, the federal credit union would obtain and administer employee benefits for CUSO employees as part and parcel of a program for the employees of the credit union. The federal credit union would not pay for the benefits for CUSO employees. The amounts or costs would be kept separate. It was anticipated that because the credit union added the CUSO employees to the overall employee base, a larger employee group would be created and conceivably a savings could be achieved.

NCUA concluded that, because of the administrative convenience and the cost savings that could be provided, federal credit unions are authorized to obtain and administer employee benefits for CUSO employees. After all, this approach would not affect the legal separateness of the federal credit union and the CUSO. The corporate veil would be protected. The CUSO would pay in advance for its share of the cost of benefits attributable to its employees or otherwise reimburse the federal credit union. Assuming the CUSO complies with state insurance and other applicable laws, NCUA held in the affirmative. A copy of this NCUA opinion letter can be downloaded in PDF format at www.kaufmanandcanoles.com.

Educational Travel Costs for Volunteers and a Guest, Revisited

Question: We are aware that credit unions may pay for the travel costs incurred by volunteers and their guest. Is there a limitation on how many trips the credit union may cover in a given year?

Answer: No. The Federal Credit Union Act allows credit unions to compensate one board official for his or her duties. Credit unions may not compensate any other credit union volunteer. NCUA regulations, however, define “compensation” in a way that allows credit unions to benefit volunteers in certain situations without violating the general prohibition against compensation. The definition of compensation excludes the payment or reimbursement of certain travel expenses incurred by a credit union volunteer and his or her guest. The regulatory exclusion covers “reasonable and proper” travel-related costs incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed. The payment must be determined by the board of directors to be necessary or appropriate in order to carry out the official business of the credit union, and is in accordance with written policies and procedures, including documentation requirements, established by the board of directors. The regulation contains no explicit limitations on the number of trips or the dollar amount of travel-related costs that credit unions may cover. Instead, the regulation permits each credit union’s board of directors to determine what is reasonable and proper.

(Reprinted with permission from the NAFCU Book of Answers)

NCUA Rules on Free Space and Use of Sponsor's Name

NCUA recently issued two short, but very significant, branch or facility-related opinion letters which could impact many credit unions.

For federal credit unions, the opportunity for “free space” in federal buildings is a most important aspect to an impacted credit union’s financial statement, as well as its opportunity to provide quality service to its members. For years many have complied with the so-called 95% rule. With the growth of a credit union’s membership base, how to measure 95% is critical. Does the 95% calculation apply to a credit union’s total membership, or only against the number of members who actually use the allotted credit union “free” space? Fortunately, NCUA concluded that for credit unions utilizing “free space and services” in government buildings, the 95% calculation is applied to the number of members who actually use the allotted space. A copy of this NCUA opinion letter can be downloaded in PDF format at www.kaufmanandcanoles.com.

NCUA also addressed the question of whether or not a credit union could operate branch offices under a different name than that of the insured credit union. Previously, by NCUA Letter to Credit Unions No. 99-CU-17, NCUA provided guidance to credit unions about the use of multiple names. NCUA regulations generally prohibit federally-insured credit unions from using any advertising, displays, signs, or other promotional material that is inaccurate or deceptive. Many credit unions desire to personalize and promote a particular branch based on location or other identification. Signage other than the credit union’s name or logo is preferred. NCUA ruled that a federal credit union can operate branch offices under a different name than the name of the insured credit union if reasonable steps are taken to ensure that all members are fully apprised of the use of different names. Signage should reflect that the branch office is a division or branch of a particular credit union. A copy of this NCUA letter to credit unions can be downloaded in PDF format at www.kaufmanandcanoles.com.

NCUA Goes Green

A lengthy opinion of the Office of General Counsel for NCUA concluded that NCUA is “going green.” NCUA ruled that a federally-insured credit union may, under federal law, and under the NCUA records retention regulations, preserve original documents regarding current loans to members in electronic format instead of paper format. NCUA reiterated that retention of records required by other statutes and regulations may be done electronically as long as the electronic form is accurate and capable of being reproduced for later reference. This is certainly good news for all that desire to “save trees” and enhance and protect the environment.

NCUA’s records preservation program regulations describe the obligations for a federally-insured credit union to maintain a records preservation program. NCUA does not recommend a particular format for record retention. NCUA’s opinion stated that credit unions should ensure that the reproduction is acceptable for submission as evidence in a legal proceeding. Whether a reproduction will be acceptable in a legal proceeding may vary from state to state. NCUA encouraged credit unions to consult with legal counsel. A copy of this NCUA opinion letter may be downloaded in PDF format at www.kaufmanandcanoles.com.

Etc., Etc., Etc. . . .

- Some law enforcement officials have suggested that credit unions check out the website www.CreditBoards.com, a blog that is allegedly used by criminals to notify each other of other credit unions that are “easy” marks for fraud. Search the blog for your credit union and we hope, for your sake, you are not listed.

- Foreclosures?? If you are looking for a summary of the foreclosure laws or procedures state by state for all 50 states, look no further. The American College of Mortgage Attorneys publishes a National Mortgage Law Summary for \$75. Write to the American College of Mortgage Attorneys, 15245 Shady Grove Road, Suite 130, Rockville, MD 20850 or email them at acma@mgmtsol.com and mention Andy Keeney’s name to achieve the \$75 price.

- Andy Keeney was honored to be listed in the “Who’s Who in America’s Credit Unions” directory. The honor recognizes those who have helped build the credit union movement into what it is today. Thanks go to the many that nominated Andy.

- NAFCU offers a compliance blog which many view as a helping hand for credit union compliance officers. Previously, the blog has mentioned Kaufman & Canoles and provided a link to Kaufman & Canoles’ website. You can view the blog at www.nafcucomplianceblog.typepad.com.

- Business continuity and preparedness continues to be a hot topic. The Federal Financial Institutions Examination Council are clearly focused on this issue and recently issued a revised Business Continuity Booklet. The revised booklet includes enhancements to the business impact analysis and testing discussions. It addresses emerging threats and lessons learned in recent years. The booklet also stresses the responsibility of credit union management and their Boards of Directors to address business continuity planning. Further information and online access to the revised booklet can be found at www.ffeic.gov/ffeicinfobase/html_pages/it_01.html.

- ABNB FCU recently sponsored a seminar entitled “CUSOs, Affiliated Business Relationships and Title Insurance.” The speakers were Andy Keeney of Kaufman & Canoles and Skip Sacks of Stewart Title. Please email Andy at eakeeney@kaufcan.com if you would like a copy of the PowerPoint presentation from this seminar.

- Inside Business recently interviewed Andy Keeney and Bob Smartschan of Kaufman & Canoles about the increased threat to credit unions by “pirates” who might steal or otherwise abuse the credit union’s web address or domain name. A reprint of the article entitled “Cybersquatters Infringe on Local Financial Institutions” can be downloaded at www.kaufmanandcanoles.com.

- Kaufman & Canoles was selected by Inside Business as one of the Best Places to Work 2008. The firm placed second overall in the large employer category. A panel of independent judges evaluate each nominated employer and score it on the criteria of company culture, family friendliness, compensation, employee development and community involvement.

