poultry products inspection regulations as follows:

PART 317—LABELING, MARKING DEVICES, AND CONTAINERS

1. The authority citation for part 317 continues to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

2. Section 317.8 is amended by adding new subparagraphs (b)(37) and (b)(38) to paragraph (b) to read as follows:

§ 317.8 False or misleading labeling or practices generally; specific prohibitions and requirements for labels and containers.

* * * * *

(b) * * *

(37) The labels of sausages encased in natural casings made from meat or poultry viscera shall identify the type of meat or poultry from which the casings were derived, if the casings are from a different type of meat or poultry than the encased meat or poultry. The identity of the casing, if required, may be placed on the principal display panel or in the ingredient statement. Establishments producing, manufacturing, or using natural sausage casings are to maintain records documenting the meat or poultry source in accordance with part 320 of this chapter.

(38) The labels of sausages encased in regenerated collagen casings shall disclose this fact on the product label. The fact that the sausage is encased in collagen may be placed on the principal display panel or in the ingredient statement.

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

3. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f, 450; 21 U.S.C. 451–470; 7 CFR 2.18, 2.53.

4. Section 381.117 is amended by adding paragraphs (f) and (g) to read as follows:

§ 381.117 Name of product and other labeling.

* * * * *

(f) The labels of sausages encased in natural casings made from meat or poultry viscera shall identify the type of meat or poultry from which the casings were derived, if the casings are from a different type of meat or poultry than the encased meat or poultry. The identity of the casing, if required, may be placed on the principal display panel or in the ingredient statement. Establishments producing, manufacturing, or using natural sausage casings are to maintain records documenting the meat or poultry source in accordance with subpart Q of this part.

(g) The labels of sausages encased in regenerated collagen casings shall disclose this fact on the product label. The fact that the sausage is encased in collagen may be placed on the principal display panel or in the ingredient statement.

Done at Washington, DC, on July 31, 2001.

Thomas J. Billy,

Administrator.

[FR Doc. 01–19598 Filed 8–3–01; 8:45 am]

BILLING CODE 3410–DM–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 721

Federal Credit Union Incidental Powers Activities

AGENCY: National Credit Union Administration.

ACTION: Final rule.

SUMMARY: The National Credit Union Administration (NCUA) is issuing a final rule that revises a regulation by categorizing activities deemed to be within the incidental powers of a federal credit union (FCU). The final rule also describes how interested parties may request a legal opinion on whether an activity is within an FCU's incidental powers or apply to add new activities or categories to the regulation. The rule also clarifies the conflict of interest provisions applicable to activities authorized by this regulation.

DATES: The rule is effective September 5, 2001.

FOR FURTHER INFORMATION CONTACT: Michael J. McKenna, Senior Staff Attorney, or Chrisanthy J. Loizos, Staff Attorney, Office of General Counsel at the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428 or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

A. Background

On November 18, 1999, the NCUA Board (the Board) issued a request for comments in an Advance Notice of Proposed Rulemaking (ANPR) on whether the Board should restructure part 721 of NCUA's regulations and adopt provisions regarding incidental powers within the regulation. 64 FR 66413 (November 26, 1999). At the time, the Board envisioned that it would create four sections within part 721 and expand its test for analyzing the incidental powers of FCUs. After receiving the public's comments on the ANPR, the Board issued a Notice of Proposed Rulemaking on November 16, 2000. 65 FR 70526 (November 24, 2000).

In the proposed rule, the Board restructured part 721 into seven sections. The proposed rule established a definition for an incidental powers activity by using a three-prong test. The proposed rule also set out categories determined to be within an FCU's incidental powers. A majority of the proposed categories are activities NCUA has previously established as within the incidental powers of FCUs in legal opinions. The proposed rule identified the following twelve categories: Certification services, correspondent services, electronic financial services, excess capacity, financial counseling services, finder activities, marketing activities, monetary instrument services, operational programs, stored value products, and trustee or custodial services. Each category in the proposed rule contained examples of incidental powers activities.

The proposed rule provided that FCUs could seek advisory opinions from NCUA's General Counsel as to whether a proposed activity fits into one of the authorized categories or is otherwise an incidental powers activity. It also established a process for FCUs to petition NCUA to approve new activities or categories of activities. The proposed rule also allowed FCUs to receive compensation from any activity determined to be within their incidental powers. Finally, the proposed rule amended the conflicts of interest provision in part 721, to conform to similar conflict provisions in NCUA's regulations.

B. Overview of Regulation

Incidental Powers Authority

The legal authority for the expanded activities authorized by the final rule is the incidental powers provision of the Federal Credit Union Act (FCU Act), 12 U.S.C. 1757(17). The FCU Act expressly grants FCUs the power to, among other activities, purchase, hold and dispose of property; make loans to members; make certain investments; accept share, share draft and share certificate accounts; and sell and cash negotiable instruments. 12

U.S.C. 1757(4)–(7), (12), (15). The accompanying incidental powers provision states that 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 is incorporated.'' 12 U.S.C. 1757(17).

1. *Arnold Tours Standard.* To determine whether an activity is authorized under the incidental powers provision, NCUA has looked to whether the activity is convenient or useful in connection with the performance of an FCU's established activities pursuant to its express powers granted by the FCU Act. This standard was established in *Arnold Tours, Inc.* v. *Camp,* 472 F.2d 427 (1st Cir. 1972), for determining the incidental powers of national banks. *Accord Independent Insurance Agents of America, Inc.* v. *Hawke,* 211 F. 3d 638, 640 (D.C. Cir. 2000) (''Whether a particular banking device's nomenclature harkens to traditional banking activities is not dispositive''); *First National Bank of Eastern Arkansas* v. *Taylor,* 907 F.2d 775, 778 (8th Cir.), *cert. denied,* 498 U.S. 972 (1990) (''Incidental powers are not confined to activities considered essential to the exercise of express powers''); *M&M Leasing Corp.* v. *Seattle First National Bank,* 563F.2d 1377, 1382 (9th Cir. 1977), *cert. denied,* 436 U.S. 956 (1978) (''powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking''). In addition, *Arnold Tours* recognized certain ''agency or informational services'' that, although not necessarily rooted in an incidental power, represent a permissible ''goodwill'' service to customers when provided on a limited and largely uncompensated basis. 472 F.2d at 432.

The convenient or useful standard adopted in *Arnold Tours* has been acknowledged as proper for analyzing the incidental powers provision of the FCU Act. *American Bankers Association* v. *Connell,* 447 F. Supp. 296, 298 (D.D.C. 1978), *rev'd,* 595 F.2d 887 (D.C. Cir.), *cert. denied,* 444 U.S. 920 (1979). Relaxing that standard, a subsequent court pronounced it ''narrow and artificially rigid,'' preferring instead to focus on the ''essence'' of the service being provided and its functional equivalency to a permitted activity. *American Insurance Association* v. *Clarke,* 865 F.2d 278, 281, 284 (D.C. Cir. 1988).

For many years, NCUA has followed the reasoning of *Arnold Tours* in recognizing various activities either as incidental to an FCU's exercise of its express powers or simply as a permissible ''goodwill'' service to members. Upon a finding that an activity is either convenient or useful in connection with performance of an expressly granted power, NCUA has authorized FCUs to engage in a broad range of activities, including the authority to: Engage in marketing and promotional activities on behalf of the FCU, provide a variety of loan-related products, perform various payment and money exchange functions for members, make charitable donations and contributions, provide correspondent services, engage in consumer leasing, establish numerous products and services derived from share accounts, and perform various financial functions to assist member business transactions. In addition, NCUA has allowed FCUs to implement new operational programs so that FCUs and their members benefit from technological advancements in the financial services industry, such as: Electronic fund transfers, automated teller machines, payroll deduction and direct deposit services, debit cards, and wire transfer services. Further, NCUA has permitted various activities as informational or goodwill services for members, including promoting the products and services of third parties and permitting FCU endorsement, on a cost reimbursement basis. 50 FR 16462, 16463 (April 26, 1985) (final rule addressing insurance and group purchasing activities).

As shown in the Section-by-Section Analysis below, much of the final rule simply codifies the practices NCUA has approved through legal opinions over the years as incidental powers under *Arnold Tours.* Further relying on *Arnold Tours,* the final rule introduces a number of activities that, as explained below, similarly qualify as incidental powers because they are ''convenient or useful'' in performing an activity established under an express power.

2. *VALIC Standard.* The U.S. Supreme Court has broadened the standard for considering an expansion of the incidental powers of national banks. In *Nationsbank of North Carolina* v. *Variable Annuity Life Insurance Co. (VALIC),* 513 U.S. 251 (1995), the Court stated that the authorization of ''incidental powers * * * necessary to carry on the business of banking'' is an independent grant of authority, *id.* at 258, separate from the five activities specifically enumerated in the National Banking Act, 12 U.S.C 24(Seventh). *Accord Independent Insurance Agents,* 211 F. 3d at 640 (''enumeration of powers is only illustrative and Comptroller may authorize additional activities if encompassed by a reasonable interpretation''); *Norwest Bank Minnesota, N.A.* v. *Sween Corp.,* 118 F.3d 1255, 1259 (8th Cir. 1997) (analyzing whether activity is closely related to an express power and useful in carrying out business of banks). The Court rejected the argument that the powers of national banks are limited to the five specifically enumerated activities, regarding those activities as ''exemplary, not exclusive.'' 513U.S. at 258. The Court held that ''the 'business of banking' is not limited to the enumerated powers in section 24 (Seventh) and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated,'' provided that discretion is ''kept within reasonable bounds.'' *Id.* at 259 n.2.

Applying the reasoning of *VALIC* to sec. 1757, ''the business for which [a credit union] is incorporated'' is not limited to the express powers in that section. Rather than linking incidental powers to express powers, *VALIC* has provided the framework for the Board to adopt a broader and more flexible analysis, giving it discretion to authorize FCUs to engage in activities beyond those specifically enumerated in sec. 1757. Thus, activities may fall within an FCU's incidental powers if they qualify as either ''convenient or useful'' in connection with an express power or otherwise fall within the scope of ''the business for which [a credit union] is incorporated.''

NCUA has relied on the *VALIC* analysis in recent opinions. For example, a 1999 Office of General Counsel legal opinion authorized FCUs to maintain foreign currency accounts to facilitate member transactions. NCUA reasoned that, by maintaining a foreign bank account to facilitate member transactions, an FCU can: (1) Provide basic credit union services such as lending and deposit taking to members who, due to their residence in a foreign country, are unable to obtain these services from the FCU's domestic offices; and (2) benefit members by providing these services conveniently and at minimal cost in comparison to currency conversion expenses. A deposit account in a foreign bank, which is established for foreign currency exchanges and to facilitate basic services for members located in foreign countries, is closely related to an FCU's deposit taking and lending authority and is useful in carrying out the business of credit unions.

As Congress reiterated most recently in 1998, the FCU Act defines the business for which credit unions are incorporated—to promote thrift among members and to create sources of credit for provident or productive purposes. 12

U.S.C. 1752(1); Public Law No. 105–219, 112 Stat. 913, § 2 (1998). ''Thrift'' refers to ''wise economy in the management of money and other resources.'' *American Heritage Dictionary of the English Language* (4th ed. 2000) at 1802. A purpose is ''provident'' if it anticipates ''providing for future needs or events,'' *id.* at 1411; it is ''productive'' if it involves ''the creation of goods or services to produce wealth or value.'' *Id.* at 1399. NCUA has consistently construed the authority of FCUs broadly to afford them maximum flexibility in providing services to their members. 50 FR 16462, 16463 (April 26, 1985). In this instance, Congress's record of steadily expanding the range of expressly granted powers, combined with the legislative history encouraging NCUA to meet the needs of FCUs and their members, justify, if not require, a broad and ambulatory view of the business for which FCUs are incorporated.

A congressional priority in enacting the FCU Act in 1934 was to ''ensure that [credit unions] would remain responsive to members'' needs.'' *First National Bank & Trust Co.* v. *NCUA,* 988 F.2d 1272,1274 (D.C. Cir. 1993). To that end, Congress has since amended the FCU Act, steadily expanding the powers of FCUs, to ensure that they keep pace with changes and developments in the financial services marketplace. The power to make loans was expanded seven times between 1949 and 1987. 12 U.S.C. 1757(5). These amendments included: Raising the maximum maturities limits; extending the range of permissible loan types and purposes, such as loans to credit union service organizations (CUSOs) and participation loans; and even abandoning the limitation that loans be made for ''provident and productive purposes.'' The power to receive payments on shares, sec. 1757(6), was expanded five times between 1970 and 1980 and included amendments permitting FCUs to offer share certificates and share draft accounts, to accept certain types of nonmember deposits, and to receive payments on shares from the Central Liquidity Facility. The power to invest funds, sec. 1757(7) and (15), has been expanded nine times between 1937 and 1984, extending the list of permissible government guaranteed obligations and entities and allowing FCUs to invest in CUSOs, secondary market instruments, and mortgage-backed securities. The express power to sell and cash checks and money orders for a fee was added in 1959, and, in 1982, it was extended to ''similar money transfer instruments,'' allowing FCUs to charge a fee in excess of direct costs. 12 U.S.C. 1757(12).

In the course of expanding the powers of FCUs, Congress has repeatedly taken the opportunity to encourage NCUA to be flexible, innovative and responsive in meeting the needs of FCUs and their members. When Congress created NCUA in 1970, the same year that share insurance was introduced, it recognized that ''credit unions have become such a significant component of our society that they need and deserve a more responsive and independent regulatory agency.'' S. Rep. 91–518 at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2479, 2480. Further, Congress envisioned that NCUA would have ''a great responsibility and an opportunity to make real and substantial contributions to our society,'' and ''would be able to be more responsive to the needs of credit unions and to provide more flexible and innovative regulation.'' *Id.* at 2481.

When Congress amended the FCU Act in 1977 to add an extensive array of savings, lending and investment powers, it intended to ''allow credit unions to continue to attract and retain the savings of their members by providing essential and contemporary services,'' and acknowledged that credit unions are entitled to ''updated and more flexible authority granting them the opportunity to better serve their members in a highly-competitive and ever-changing financial environment.'' H.R. Rep. 95–23 at 7 (1977), *reprinted in* 1977 U.S.C.C.A.N. 105, 110. Congress acknowledged the difficulty in ''regulating contemporary financial institutions within the framework of an Act that has on a continuing basis required major updating by means of regulation.'' *Id.*

When Congress enacted the Garn-St. Germain Depository Institutions Act in 1982, which among other things, extended FCU real estate lending and investment powers, it noted that credit unions ''continue to face increasing competition from both within and outside of the financial system * * * as they prepare themselves for a future certain to contain a more rapidly changing financial marketplace than ever previously expected.'' S. Rep. No. 97–356 at 34 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3088. The purpose of the legislation, said Congress, is ''to help credit unions meet the challenges of today's rapidly changing and fiercely competitive financial market and to enhance NCUA's ability to more fairly and effectively carry out its responsibilities.'' *Id.* at 3089.

Following the example and encouragement of Congress to be flexible, innovative and responsive, the Board recognizes that the business of promoting thrift and providing access to credit for provident and productive purposes has witnessed a dramatic shift from the Depression-era economy of 1934, to a post-War, industrial boom economy, to the present information age economy. During this evolution, financial services and products have emerged and matured. Advances in technology and communications have improved, and will continue to improve, the delivery of financial services. The marketplace for financial services has expanded and diversified, and competition has intensified. It is, therefore, a reasonable exercise of discretion for the Board to expand the range of incidental powers accordingly to fit the contemporary business of credit unions. This will equip FCUs to deliver products and services that facilitate the modern day practice of thrift and the provident and productive use of credit.

For these reasons, the final rule authorizes as incidental powers under sec. 1757(17) certain activities that, even if not linked to an expressly granted power, nonetheless are convenient or useful in carrying out ''the business for which [credit unions] are incorporated,'' as that business has evolved since 1934; are a functional equivalent or logical outgrowth of activities within that business; and involve risks similar in nature to those already assumed as part of that business.

C. Safety and Soundness Considerations

The Board wants to emphasize that, while the final rule identifies categories of activities the Board has identified as within an FCU's incidental powers under the FCU Act, an FCU must comply with all applicable legal requirements and give due consideration to safety and soundness concerns before engaging in an incidental powers activity.[1] To carry out

[1] In addition to the FCU Act and NCUA's regulations, FCUs are subject to numerous other laws and regulations, including: Truth in Savings Act, Truth in Lending Act and Regulation Z, Equal Credit Opportunity Act and Regulation B, Electronic Funds Transfer Act and Regulation E, Preservation of Consumer's Claims and Defenses Rule, Fair Credit Reporting Act, Real Estate Settlement Procedures Act and Regulation X, Fair Debt Collection Practices Act, Home Mortgage Disclosure Act and Regulation C, Currency and Foreign Transactions Act, Flood Disaster Protection Act, Right to Financial Privacy Act, Soldier's and Sailor's Civil Relief Act, Fair Housing Act, Government Securities Act of 1986, Regulation G, Expedited Funds Availability Act and Regulation

Continued

its responsibilities, FCU management must consider whether its policies for new activities are realistic and carefully designed to enable the FCU to serve the interests and needs of the membership. In addition to meeting various legal requirements, many incidental powers activities require management to provide direction and instruction for officers, employees, and committees delegated the responsibility for implementing new activities and services.

FCU management is responsible for developing proper internal safeguards such as management oversight, internal controls and quality control. FCUs must examine the strategic risk, reputation risk, transaction risk and compliance risk before engaging in a new activity. In addition, management must exercise due diligence before devoting resources to a new activity or entering into any arrangements with third parties. Activities that involve the use of new technologies must rely on acceptable information systems and operations architecture. FCUs capable of providing advanced technological services must employ appropriate internal controls to minimize technological and legal risk and to address safety and soundness considerations. FCUs must also adjust their risk management process and insurance coverage to correlate with additional risk taken on by engaging in new activities.

NCUA has published guidance papers to assist FCUs in evaluating the risks and understanding the legal requirements involved in some of these activities. This guidance includes: (1) NCUA Letter to Credit Unions No. 01–CU–02 (February 2001), offering guidance on the privacy of consumer financial information; (2) NCUA Letter to Credit Unions No. 109 (September 1, 1989), discussing risks associated with certain computer operations; (3) NCUA Letter to Credit Unions No. 97–CU–5, addressing electronic financial services, (4) NCUA Letter to Credit Unions No. 00–CU–11, regarding risk management of outsourced technology services, and (5) NCUA Interpretive Ruling and Policy Statement 85–1, covering trustees and custodians of pension plans. NCUA's published guidance, along with NCUA's regulations, are available from the agency's website at *www.ncua.gov*. The Board also recommends that FCUs review interpretive letters and guidance issued by other federal financial institution regulators for assistance in understanding an activity's risks, for example, OCC Bulletin 2001–12 on bank-provided account aggregation services and OCC Advisory Letter 2000–9 on third-party risk. Depending on the activities an FCU undertakes, it may also need to consult with its own legal counsel and other professional advisers.

CC. FCUs are also subject to various state laws, such as commercial codes, abandoned property laws, and privacy laws.

D. Comments

1. General

In response to the proposed rule, the Board received comments on the following issues: the appropriateness of its incidental powers test, the proposed categories, suggested additions for the proposed rule, the application process for expanding the categories, the compensation provision, and the conflict of interest prohibitions. Although the Board actually received over three hundred comment letters or e-mail messages, NCUA staff has credited multiple comment letters from the same credit union as one comment, for a total of two hundred and seventy-two comment letters.

Two hundred and sixty commenters supported the proposed rule or expanding the incidental powers of FCUs in some manner. These commenters commended the Board for its review of the incidental powers of FCUs. Generally, the commenters noted that the proposal gives FCUs the ability to respond to growing member needs. A majority of these commenters supported the proposed rule because it removes regulatory uncertainty, allows FCUs to offer more services, provides income opportunities and allows FCUs to compete with other financial service providers. Several commenters noted that the regulation allows smaller credit unions that cannot afford to invest in credit union service organizations to offer expanded services to their members.

Three banking trade groups and two credit unions opposed the proposed regulation. Two banking trade groups requested that the proposed rule be withdrawn, arguing that NCUA lacks authority to interpret incidental powers in the manner proposed. These commenters stated that the incidental powers of FCUs must be incidental to the promotion of thrift or creating a source of credit. One commenter stated that FCU incidental powers must be directly tied to an expressly authorized activity. Another stated that FCUs have a limited mission in exchange for tax-exempt status. Two credit unions generally opposed the rule because it expands income generating opportunities.

2. Other Suggestions

NCUA received many comment letters from state-chartered credit unions fully supporting adoption of the proposed rule. Several of these commenters stated they will benefit from the expansion of FCU incidental powers because their state laws give state-chartered credit unions parity with FCUs operating in their states. Thirteen commenters asked for a ''wildcard'' or parity provision for FCUs whereby an FCU could engage in the same activities permitted for state-charters in the state in which the FCU is located. The FCU Act does not contemplate a parity provision as suggested by the commenters. In determining whether an FCU may engage in an activity under its incidental powers, an analysis under the FCU Act is required.

Four commenters asked that the rule also permit FCUs to engage in all of the activities permitted for CUSOs. The Board acknowledges that the final rule permits FCUs to engage in some activities traditionally performed by CUSOs. For example, both FCUs and CUSOs may offer income tax preparation. The authority of FCUs and CUSOs, however, is interpreted under separate provisions of the FCU Act. A CUSO is ''any organization as determined by the Board, which is established primarily to serve the needs of its member credit unions, and whose business relates to the daily operations of the credit unions they serve.'' 12 U.S.C. 1757(5)(D). Based on this statutory definition of a CUSO, the Board establishes the parameters for CUSOs in part 712. TheBoard evaluates the incidental powers of FCUs, however, based strictly on its interpretation of sec. 1757(17).

The Board presented the proposed rule in a plain English, question-and-answer format. Only two commenters disapproved of the question-and-answer format, stating it makes the rule awkward to read and difficult to understand and suggesting it is suitable only for appendices. The goal of plain language drafting is to minimize confusion, inadvertent errors and the amount of time interested parties must devote to understanding the rule. The Board believes, for many regulations including this one, it promotes regulatory comprehension, compliance and administrative efficiency.

E. Section-by-Section Analysis

Section 721.1 What Does This Part Cover?

This section describes the scope of part 721. The final rule covers the incidental powers of federally-

chartered, natural-person credit unions under 12 U.S.C. 1757(17).

Two commenters asked if the rule allows FCUs to provide expanded services to member business accounts or restricts these new powers to services for natural person members. An FCU may provide the activities and services authorized under part 721 to all of its members.

Several commenters raised questions about the application of part 721 to corporate credit unions. The Board generally interprets the powers of corporate credit unions in part 704 and does not intend part 721 to apply to corporate credit unions.

Section 721.2 What is an Incidental Powers Activity?

Following the reasoning of *VALIC* discussed in section C.1. *supra*, the Board believes that it is no longer necessary to link an incidental power directly to an express power granted in the FCU Act. Instead, an activity may generally be considered to fall within an FCU's incidental powers if it is ''necessary or requisite to enable it to carry on effectively the business for which it is incorporated.'' 12 U.S.C. 1757(17). For the reasons discussed above, the Board believes that the business of FCUs is to provide financial services to their members that, as contemplated by the FCU Act, facilitate the practice of thrift and the provident and productive use of credit.

Reflecting this view, the final rule retains the three-prong test, set forth in the proposed rule, to determine whether an activity is authorized as an appropriate exercise of an FCU's incidental powers: (1) Whether the activity is convenient or useful in carrying out the mission or business of credit unions consistent with the FCU Act; (2) whether the activity is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and (3) whether the activity involves risks similar in nature to those already assumed as part of the business of credit unions. An activity must meet all three criteria to qualify as an incidental power. The criteria are substantially similar to those used by the Office of the Comptroller of the Currency (OCC); however, for purposes of identifying the incidental powers of FCUs, they will be applied so as to take into account the distinctive features and functions of credit unions in the context of the business for which they are incorporated, as that business has evolved since 1934. Thus, while the Board may look to other laws and precedents in the financial services industry for guidance in applying these criteria, its analysis may produce a different result than in the case of other types of financial institutions.

Seventy-six commenters specifically supported the proposed three-prong test. Many of these commenters asked that the Board read the test broadly. Several of the commenters noted the similarity between the proposed criteria and the standard used by the OCC when authorizing activities for banks. These commenters found the test appropriate when considering the similarity of financial services offered by credit unions and other financial service providers.

One commenter suggested that, when NCUA analyzes the business of credit unions, it should defer to the marketplace as experienced by credit unions and their members. One commenter advocated changing the first prong of the test to replace the business of credit unions with an analysis of whether the activity is convenient and useful in meeting the economic and social well-being of members consistent with the FCU Act. Four other commenters suggested amending the third prong of the test. One recommended that NCUA look at whether the risks involved in a proposed activity exceed those already assumed as part of the business of credit unions. Another stated that the third prong of the test should require NCUA to analyze the way an FCU manages the risk associated with the proposed activity through a cost/benefit analysis. The Board believes that, after evaluating *Arnold Tours, VALIC* and the opinions of the OCC, the three-prong test adopted in the final rule is an appropriate method for determining whether an activity is a permissible exercise of an FCU's incidental powers.

Section 721.3 What Categories of Activities Are Preapproved as Incidental Powers Necessary or Requisite To Carry on a Credit Union's Business?

Section 721.3 establishes categories of activities the Board has determined to be within an FCU's incidental powers. The final rule also provides a mechanism for approving additional activities in § 721.04.

Eighty commenters supported including categories of approved activities as examples of incidental powers activities within the rule. Those commenters supporting a list generally approved of the identified categories and asked that the activities named within each category remain illustrative of permitted activities and not exclusive. One commenter suggested the rule clarify that FCUs have the authority to determine whether a proposed activity, not specifically given as an example in the rule, fits into one of the preapproved categories. Another commenter asked that the rule state that an activity is permitted unless it is expressly prohibited.

An FCU may only engage in activities that are either expressly authorized by statute or within the FCU's incidental powers. The final rule permits FCUs to analyze for themselves whether a particular activity, not provided as an example in one of the broad categories, falls into one of the preapproved categories. The analysis an FCU should follow in determining whether an activity is permissible is discussed below in the section-by-section analysis of § 721.4.

One commenter recommended that the rule require NCUA to review the list of categories biannually to determine if the agency should add new categories to the list, while two others asked for a periodic or annual review of the categories. The Board believes a periodic review requirement in the rule, itself, is unnecessary. The final rule establishes a procedure for FCUs to request amendments when they have identified activities that they contend are necessary or requisite to carry on their business. In addition, NCUA has a process for periodically updating, clarifying and simplifying all existing regulations. NCUA Interpretive Ruling and Policy Statement Number 87–2 (September 1987), 52 FR 35231 (September 18, 1987).

Ten commenters opposed using a list of categories within the regulation, stating that the use of list, although drafted with the intent of being illustrative, may be construed as precedent or exclusive over time. These commenters suggested that, instead of a list, NCUA should place the categories in a commentary or appendix to the regulation as examples of permitted activities. Forty-nine commenters disapproved of the use of categories in the rule and recommended that NCUA allow FCUs to determine on their own whether an activity is within their incidental powers. These commenters stated that the list of categories is restrictive and will become outdated. They also stated the process for expanding the list is cumbersome and time-consuming. Many suggested that the Board set a clear standard so that FCUs could determine their own incidental powers.

As discussed further below in connection with § 721.4, the final rule provides for regulatory approval to identify additional incidental powers activities, recognizing the deference to

which the NCUA as regulator is entitled in making this determination. The Board believes that regulatory identification of permissible activities, provided in the rule's list of categories or as approved through an application process, provides assurance to FCUs that the activities in which they engage are legal.

Some of the commenters asked that NCUA expand the list of categories identified; however, they did not suggest particular activities or categories. Several commenters specifically requested that NCUA add particular categories or additional activities within the existing categories. These comments are reflected below in the discussion of each category.

Certification Services

The Board has identified various certification services, such as notary services, electronic signature authentications and signature guarantees, as within the incidental powers of an FCU.

The provision of notary services has been an exercise of an FCU's incidental powers for many years. A notary administers oaths, verifies the identity of a signer, attests to the verification, records signatures, and authenticates commercial transactions. By providing notary services to members, an FCU facilitates transactions for its members that require the certification of signatures. This service allows for timely processing of credit union transactions as compared with sending members elsewhere for notarizations. Therefore, this service is convenient and useful in carrying out an FCU's business by allowing it to operate efficiently and effectively.

Similarly, the Board has determined that the authentication of electronic signatures is analogous to notarization. Like a notary, a certification authority (CA) verifies the identity of the signer and authenticates the signature or electronic equivalent in accordance with contractually agreed upon standards. Like the OCC, the Board finds that the CA activity is the functional equivalent of notary and other authentication services provided by credit unions, and a logical outgrowth of identification and verification methods. *See* OCC Conditional Approval No. 267 (January 1998). The risks borne by an FCU acting as a CA are similar to a notary's risk of improper verification and are similar to those risks inherent in providing electronic services.

FCUs, as eligible guarantor institutions, are permitted to issue signature guarantees for the transfer of securities. 17 CFR 240.17Ad-15. A signature guarantor warrants the authority of the signer as well as the genuineness of the signature. FCUs may offer signature guarantees for stock transfers and U.S. Treasury transactions, as provided by law, under their incidental powers because this type of identity verification is the functional equivalent or logical outgrowth to the provision of notarial services. Like notary services, this activity conveniently facilitates members' financial transactions. The final rule also includes share draft certifications as an example of a permissible certification service. NCUA's longstanding position has been that the certification of share drafts is convenient and useful to an FCU in carrying out its express authority to offer share draft accounts to its members.

Correspondent Services

Correspondent services have been an exercise of an FCU's incidental powers for many years. Correspondent services are services or functions provided by an FCU to another credit union that the FCU is authorized to perform for its own members or as part of its operation. Parties to a correspondent credit union arrangement must establish a written agreement addressing the credit unions' responsibilities under the service arrangement. Correspondent services may include receiving share and loan payments, disbursing share withdrawals and loan proceeds, cashing share drafts, cashing and selling money orders, processing loans, and performing other back office operations or member services for another credit union. An FCU, however, cannot be in the business of managing other credit unions. One commenter suggested that the category of correspondent services include loan servicing, escrow services and internal audits. The Board agrees that these are additional examples of correspondent services and has added them to the rule.

A correspondent service is offered in the same manner it is performed within the FCU's operation and entails the same risks as those assumed by the FCU for its operation. Correspondent service agreements enable credit unions to extend a greater array of services to their members. This activity is convenient and useful to a recipient of a correspondent service in carrying out many of its express powers when the credit union may have difficulty in performing the service on its own. Often, correspondent service programs are implemented when distance prevents members' ready access to their own credit union's place of business. Correspondent relationships also allow credit unions to assist other credit unions that lack resources or expertise.

One commenter noted that the proposed rule and preamble did not address the interplay of the proposed rule with 12 CFR 701.26, Credit Union Service Contracts. This commenter stated that the proposed rule either conflicts with § 701.26 or works to negate it. The Board wishes to clarify any perceived inconsistencies on this issue. The rule governing credit union service contracts covers contracts between FCUs and third party vendors or other organizations for assets or services related to an FCU's daily operations. It also allows an FCU to represent another credit union in contractual arrangements with vendors, but § 701.26 does not give FCUs the authority to provide services, like data processing, directly to other credit unions. 54 FR 48110 (November 21, 1989). FCUs are authorized to provide their services directly to other credit unions under various express powers and the incidental powers clause of the FCU Act, as discussed above. Therefore, the Board does not believe that a conflict exists between the correspondent services permitted under the final rule and § 701.26 because these rules govern two different types of activities.

Electronic Financial Services

The final rule provides that FCUs may offer, through electronic means and facilities, any activity, function, product or service they are otherwise authorized to provide under their express or incidental powers. FCUs may establish their own web sites to promote credit union services and effect member transactions, such as electronic bill payment, bill presentment, account aggregation, account inquiries and transfers. Web sites have become the electronic equivalent of newsletters, office signs and teller services. They provide a convenient and useful means for FCUs to carry out their business.

Through a transactional web site, an FCU may advertise and communicate with its members and others within its field of membership. Features, such as electronic bill payment and bill presentment, allow members to schedule payments and complete transactions without handwritten drafts or visits to a brick and mortar facility. As noted by the OCC, the risks confronted in providing financial services over the Internet are similar to the risks associated with the permissible activities of providing these services via electronic means generally. OCC

Interpretive Letter No. 742 (August 1996).

As part of the electronic delivery of traditional products or services, the Board believes FCUs have the authority under their incidental powers to engage in new activities or services due to the changing commercial environment, such as Internet access. By providing Internet access services to its members, an FCU offers its members a device to receive electronic products and services from the FCU. It also assures the FCU that members will access the FCU's home page when they initially connect to the Internet, positioning the FCU to market its products successfully. Members using the FCU's Internet access and transactional web site can retrieve account information and process transactions just as they would through tellers, automated teller machines or telephone response systems.

Similarly, account aggregation services over the Internet enable FCUs to serve as their members' primary financial institution. In providing this service, an FCU may gather a member's publicly available and personal account information from a variety of sources on the Web, allowing convenient access to the member's information. Members grant FCUs access to their information because they view their FCU as a trusted financial intermediary. Account aggregation services are convenient and useful to an FCU's offering of loans, share drafts and share certificates, all expressly granted powers. With access to their consolidated financial portfolio, members have the opportunity to evaluate and compare similar products sold by the FCU. The FCU may also offer members the ability to initiate transactions or obtain financial advice as a result of this service.

One commenter suggested that the electronic financial services category include automated teller machines. Four commenters suggested that the rule place account aggregation services within the category of electronic services. The Board agrees with both of these suggestions and has included these services as examples in the rule.

Excess Capacity

The Board recognizes that, in planning for future expansion and offering new products and services to their members, FCUs should be able to sell their excess capacity as a matter of good business practice. The sale of excess capacity offers FCUs the opportunity to provide financial services to its members, even though member demand for the services does not initially meet the FCU's capacity. The opportunity to sell excess capacity may involve leasing excess office space, sharing employees, or using data processing systems to process information for third parties. As the business of FCUs is to provide financial services to their members, the Board believes that the sale of excess capacity is within an FCU's incidental powers under two conditions: (1) The FCU properly established the service or made the investment with the good faith intent of serving its members; and (2) the FCU reasonably anticipates that the excess capacity will be taken up by the future expansion of services to its members.

Two commenters suggested that NCUA allow low-income credit unions and credit unions serving the underserved to build or acquire real property without a plan for the FCU's future use in order to facilitate the services to others within the low-income community. The Board does not find legal justification for establishing a different analysis of the incidental powers of FCUs that relies on the field of membership of an FCU. FCUs, including low-income credit unions and credit unions serving the underserved, may sell a service or the use of an asset in excess of the FCU's needs only under the conditions identified in this rule.

Four commenters asked for a liberalization of the concept of excess capacity. These commenters stated that an FCU should not need to anticipate that its members will eventually use any excess capacity; they should be allowed simply to take advantage of economies of scale that result from, for example, processing larger volumes of daily transactions or purchasing technology. The Board does not agree with these commenters. NCUA has consistently held the position that an FCU has limited authority in the leasing of fixed assets and the sale of excess data processing capacity. FCUs are not in the business of providing others with data processing capacity or any other service that is not within their express or incidental powers; rather, they are cooperative financial institutions organized to provide financial services to their members.

Another commenter stated that the regulatory text does not include the two-prong analysis for excess capacity as discussed in the proposed rule's preamble. The absence of this language, the commenter stated, allows for an interpretation that is broader than suggested by the preamble's discussion. The Board agrees that clarification of the definition of excess capacity is necessary and has inserted the excess capacity analysis into the final rule.

Financial Counseling Services

The Board believes that, as part of providing credit and saving opportunities for their members, FCUs have the responsibility of promoting provident planning through consumer education and responsible investment. Educating and counseling members in financial matters is convenient and useful to an FCU in exercising its express powers of lending and receiving shares. Members who are well-informed and educated in financial matters tend to be prudent and responsible when obtaining financial products and repaying debt, which in turn reduces losses at an FCU. The Board believes it is part of the business of FCUs to provide financial counseling services to their members including estate planning, income tax preparation and filing, and investment and retirement counseling. One commenter recommended that this category include debt and budget counseling. The Board has added this example to the final rule.

One commenter supported the ability of FCUs to offer financial counseling, but asked NCUA to provide guidance regarding registration requirements and cross-jurisdictional issues that may arise between NCUA and other regulators, such as the Securities and Exchange Commission. As discussed further in the analysis of § 721.5, the final rule identifies activities that are within the incidental powers of FCUs, but an FCU must still comply with other legal requirements pertaining to an identified activity. Depending on the particular activity, an FCU may be subject to other federal, state or local law. Some of these legal requirements may be extensive and it would be impossible to incorporate them completely within this rule. Just as an FCU is responsible for making its own determination regarding the safety and soundness of a particular activity, it is incumbent on an FCU to apprise itself of any legal requirements associated with the activity.

Two commenters asked that the final rule permit financial planning under the category of financial counseling. Five commenters suggested that the final rule include brokerage services in a category, such as financial counseling. One commenter supported the proposed rule's description of financial counseling but believed that the proposed rule conflicted with NCUA Letter to Credit Unions No. 150 (Letter 150), which governs sales of nondeposit investment products through third parties. This commenter asked that NCUA discuss the interplay between Letter 150 and this category.

The final rule defines financial counseling services as advice, guidance or services that an FCU offers to its members to promote thrift or to otherwise assist members in financial matters. Under this activity, FCUs may counsel members about financial matters, such as setting budgets, establishing financial goals, and managing tax liabilities. Other examples within this category may include counseling members on money management, paying down debt, saving for the future, types of investments, and diversification principles. This category applies only to financial counseling provided by an FCU to its members and does not encompass activities that require SEC registration as a broker, dealer or investment adviser.

Letter 150 provides guidance for third party sales of securities to FCU members, a finder activity. Third party sales of securities entail an FCU introducing its members to vendors who engage in the sale of nondeposit investment products. This differs from an FCU directly providing financial counseling, as defined above, to its members. Therefore, as a result of the final rule, Letter 150 remains unchanged with the exception of the Letter's paragraph f. Paragraph f of Letter 150 limits reimbursement to an FCU from a third party vendor at the total direct and indirect costs of any administrative functions the FCU performed for the vendor. As addressed in detail in the following category and in the discussion regarding § 721.6, the final rule removes compensation restrictions on finder activities as contemplated in Letter 150. FCUs, should note however, that they may be subject to other regulatory restrictions regarding commissions or fees paid to an FCU in conjunction with the sale of mutual funds or nondeposit investment products.

Finder Activities

The final rule allows FCUs to engage in finder activities through their role as financial service providers and intermediaries of financial services. The rule authorizes an FCU to introduce or otherwise bring together outside vendors with its members for the negotiation and consummation of transactions. Another fundamental aspect to finder activities is providing information to members about the products or services of third parties.

The Board believes that finder activities are member services that are necessary or requisite to enable FCUs to carry on their business effectively. FCUs can serve as their members' primary financial institution by bringing members together with providers of services and products. Although the FCU does not act as a broker, the FCU may negotiate group discounts or benefits on behalf of its membership with vendors. Additionally, these referrals enhance the quality of service FCUs offer their members and afford the FCU the opportunity to promote its own products as well. Examples of finder activities include placing third party vendor advertisements in the FCU's account statements, newsletters or as a link to the vendor's web site on the FCU's home page.

One commenter requested that NCUA offer guidance that distinguishes finder activities from marketing activities. Under the category of finder activities, FCUs are authorized to act as an intermediary between their members and outside parties for the sole purpose of bringing the parties together. Although this activity may subject an FCU to reputation risk by identifying particular vendors to its membership, an FCU does not represent the vendor or the member when the two parties negotiate or enter into a transaction. Finder activities differ from the category of marketing activities because, as the ''finder,'' an FCU simply identifies an outside party with a product or service the FCU believes its members would be interested in obtaining. The category of marketing activities consists of an FCU's promotion or marketing of its own products and operation.

One commenter asked that the finder activities category include the finding of real estate brokers and agents, but that NCUA warn FCUs to comply with other applicable laws, such as the Real Estate Settlement Procedures Act. Similarly, another commenter suggested that the rule authorize FCUs to offer real-estate services under their finder authority, including assistance to members in finding a home mortgage loan, real estate broker or real estate agent. One commenter asked that NCUA allow debt and budget counseling to members through third-party arrangements. An FCU may act as a finder for a variety of products or services that it finds suitable to introduce to its members. An FCU may find real estate brokers or insurance companies, among the numerous possibilities. Therefore, the Board, has removed any reference to a particular product or service in the final rule. This category simply provides examples of types of finder activities.

The proposed rule specifically noted that the offering of a third party's insurance products as an example in the category of finder activities. One commenter found that the insurance products or activities listed in the category could be construed to limit an FCU's offering of insurance products to only those listed, all of which are related to the share or loan products. One commenter stated that the activities listed in the rule should include property and casualty insurance products. Another commenter requested that this category also include long-term care insurance products. One commenter found the regulatory text unclear as to whether FCUs could offer automobile, term and whole life, homeowner's liability, and healthcare insurance products. As mentioned above, the Board recognized from the comment letters that, for clarity, the rule should avoid references to particular products offered by third party vendors. Therefore, while insurance products from third party insurers are examples within the category of finder activities, the Board has removed this reference from the regulatory text. FCUs are not limited in the types of products they may introduce to their members. Rather, an FCU must exercise judgment and due diligence when choosing to introduce or bring together an outside vendor with its members.

The Board notes that the final rule describes finder activities to include the sale of statistical information about an FCU's membership and consumer financial information to outside vendors to facilitate the sale of their products to members. The Board reminds FCUs that, as discussed throughout the preamble, although an activity is authorized as within an FCU's incidental powers, an FCU must comply with all applicable laws prior to engaging in the activity. FCUs must comply with NCUA's privacy of consumer financial information regulation (12 CFR part 716), the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*) and any applicable state laws before selling or otherwise communicating consumer information to third parties.

Loan-Related Products

This category recognizes the ability of FCUs to engage in credit-related activities to protect the FCU against credit-related risks. The FCU Act grants FCUs the express authority to lend. 12 U.S.C. 1757(5) In a lending transaction, the terms of a loan include interest rates, payment dates, and the consequences of default, such as repossession. This category provides examples of activities, services, or products an FCU may negotiate and provide to its members that are incidental to the exercise of an FCU's express power to lend. The Board notes, however, that FCUs must ensure that members receive all of the necessary consumer protections provided in

applicable laws and regulations, such as the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226, so that members make informed choices about whether to purchase these ancillary products or services.

In the proposed rule, the Board identified debt cancellation and debt suspension agreements as permissible activities within the incidental powers of FCUs. The proposed rule, however, placed these activities within the category of finder activities. Three commenters asked that the final rule create an additional category for certain two-party agreements such as debt cancellation, payment suspension and waiver products. The Board agrees that these two-party agreements between an FCU and its member are not finder activities but activities engaged in directly by the FCU with its member to mitigate loan loss.

Both debt cancellation and debt suspension agreements provide a convenient and useful way for an FCU and its members to manage the risk of nonpayment due to financial hardship. FCUs receive compensation for assuming the risk of nonpayment and the additional cost of foregoing the collection of principal or interest. These agreements are appropriate financial tools for FCUs and their members. They provide a source of compensation to the FCU for the credit risk implicit in a lending transaction, and they protect the member from credit damage during a period of financial hardship. Similarly, FCUs may negotiate compensation for uninsured physical damage loss to repossessed property used in a lending transaction.

To clarify the extent of this category further, the Board also has identified two, additional products that NCUA has long considered to be within the incidental powers of FCUs: Leases and letters of credit. The preamble of the Board's recent final leasing regulation contains a discussion regarding an FCU's authority to engage in direct or indirect leasing. 65 FR 34581 (May 31, 2000). A letter of credit is a commitment on the part of the issuing FCU that it will pay a draft presented to it under the terms of credit. If the obligation is to be discharged by the payment of money into a share account, the letter of credit is incidental to the creation of the account. If the obligation is to be discharged by a loan to the member, then the letter of credit is incidental to the FCU's loan commitment under its lending authority. In either case, the letter of credit is incidental to an expressly granted power.

Marketing

This section states that credit union management may use its longstanding incidental power to advertise and market its services in any legally permissible manner. The Board received no comments on this category and has adopted it in the final rule as proposed. The Board has added language to the final rule to clarify that an FCU may market membership in the credit union, as well as the products and services offered to members.

Monetary Instruments

This section allows an FCU to provide monetary instrument services to its members. This section derives from and expands on the express authority of an FCU ''to sell to members negotiable checks (including travelers checks), money orders and other similar money transfer instruments; and to cash checks and money orders for members, for a fee. * * *'' 12 U.S.C. 1757(12).

The section allows an FCU to maintain deposits in foreign financial institutions to facilitate member transactions. The provision does not, however, allow an FCU to maintain foreign accounts for speculative purposes.

Two commenters requested that this provision include check-cashing authority for nonmembers. As noted above however, this section of the rule is based on expressed statutory authority that is limited to members. Also, one commenter requested the authority to offer international monetary transfer services to both members and nonmembers. International monetary transfers for members are included as a permissible service in this section.

There may be circumstances where it would permissible to provide a monetary service to a nonmember, for example cashing paychecks issued by the credit union's sponsor company. Any other circumstance that might warrant the provision of monetary services to certain nonmembers would necessarily be addressed on a separate basis, outside the scope of this section.

One credit union commenter requested authority to provide services under this category to an underserved community. As stated in the excess capacity discussion, the Board does not find legal justification for establishing a different analysis of the incidental powers of FCUs based upon an FCU's field of membership. The Board notes, however, that there are two other ways in which low-income individuals may receive FCU services. First, FCUs may apply to add underserved areas to their fields of membership without regard to the location of the underserved area. The requirements and process for adding an underserved area are set out in the NCUA Field of Membership and Chartering Manual (NCUA Chartering Manual). NCUA Chartering Manual, Chapter 3, Section III. Once added, anyone in the underserved area is eligible to join the credit union. Second, an FCU with a low-income designation may open share accounts, including regular share, share certificate and share draft accounts, for nonmembers. 12 U.S.C. 1757(6); 12 CFR 701.32. 701.34; NCUA Chartering and Field of Membership Manual (Chartering Manual), Chapter 3, Section II.B.

Operational Programs

The final rule identifies certain operational programs as within an FCU's incidental powers. Operational programs are programs that an FCU establishes within its business to establish or deliver products and services that enhance member service and promote safe and sound operation. One commenter asked NCUA to expand the operational programs category to include the following activities: Money orders, remote cash dispensing, savings bond purchases and redemptions, drafts (vehicle and sight), collections, traveler's checks, cashier's checks, tax payment services, treasury security redemptions, and wire transfers. Another commenter suggested that the category of operational programs include, in addition to safe deposit boxes, other repositories for items of value. The Board has included several of these suggestions in the final rule. The Board excluded the remaining suggested programs because they are already within an FCU's express powers, within another incidental powers activity category such as monetary instruments, or substantially similar to examples in this category.

Stored Value Products

This category in the final rule identifies stored value products or alternate media as within an FCU's incidental powers. As noted in an OCC decision, these products represent a member's prepayment for a merchant's goods or services and are, therefore, a form of bill payment. OCC Interpretive Letter No. 718 (April 1996). An FCU simply transfers funds from a member's share account to a merchant's account. The FCU acts as an intermediary by transferring funds from a member to a merchant, a traditional role for FCUs. Therefore, the activity poses no more additional risk than that already assumed by credit unions.

Two commenters suggested that the definition of stored value products should include products to which an FCU transfers non-monetary information of value to members. These commenters did not elaborate on the type of information or product they envisioned. The Board has determined to leave this category unchanged from the proposed but recognizes that developing technology may affect future interpretation of this category.

Trustee or Custodial Services

Although FCUs do not have express trust powers under the FCU Act, they have long served as trustees and custodians where that authority has been granted under other provisions of law such as the Internal Revenue Code. Under this authority, FCUs are able to provide individual retirement accounts (IRA), education saving accounts such as the Roth IRA, and other savings opportunities that are of importance to modest savers. The ability of FCUs to provide these saving opportunities to their members fits within the historic role of FCUs in encouraging thrift among their members and creating a source of credit for provident purposes.

Four commenters suggested that NCUA authorize FCUs to offer full trust company services to members. The Board disagrees. Under the National Bank Act, the OCC is authorized to ''grant by special permit to national banks * * * the right to act as trustee, executor, administrator * * * or in any other fiduciary capacity in which State banks, trust companies, or other corporations * * * are permitted to act'' in the state in which the bank is located. 12 U.S.C. 92a. The FCU Act does not provide equivalent authority for FCUs to act in a fiduciary capacity for its members.

Two commenters suggested that this category include medical savings accounts. Likewise, one of these commenters recommended that the category of trustee or custodial services include special accounts for first-time homebuyers or other similar accounts authorized under state law. The Board will not include the accounts suggested by the commenter at this time. The Board is considering an amendment to part 724 to authorize FCUs to serve as trustees for tax-deferred medical savings accounts but has not yet made a determination. *See* 64 FR 55871, 55872 (October 15, 1999). As for those accounts created under state law, NCUA evaluates each statute to ascertain whether an FCU has only limited custodial responsibilities under the governing law.

Section 721.4 How May a Credit Union Apply To Engage in an Activity That Is Not Preapproved as Within a Credit Union's Incidental Powers?

This section allows FCUs to seek approval from NCUA to engage in an activity that is not within the ambit of the broad categories in the rule. It provides that an application for a new activity is treated as an application to amend the regulation. It does not set time frames in which NCUA must respond to a request for a new activity or category although the preamble to the proposed rule states that ''NCUA will endeavor to respond * * * within 60 days as to whether it will propose an amendment.'' 65 FR 70526, 70531 (November 24, 2000). This section also permits FCUs to seek an advisory opinion from NCUA's Office of General Counsel before engaging in the petition process to determine whether a proposed activity fits into one of the authorized categories or is otherwise within an FCU's incidental powers. Thirty-three commenters supported the proposed application process. Seven commenters approved of an application process but suggested that NCUA amend the process. One commenter supported the voluntary nature of the process and agrees that FCUs will rarely need to use the process.

Nine commenters asked that the proposed rule place a time limitation on NCUA to respond to an applicant seeking approval of an activity or category not previously approved as within the incidental powers authority. These commenters suggested various time frames. The Board believes that setting a time frame to act on an application could result in less activities being approved. These activities may involve complex issues that require not only a thorough legal analysis but an assessment of risk. The Board's experience in dealing with the issue of incidental powers leads it to believe that maximum flexibility is necessary when reviewing these applications. Although the applicant may want an expeditious decision, most importantly, it wants a correct decision. This decision is not only important for the applicant but also for the agency and the National Credit Union Share Insurance Fund. The Board, therefore, is not setting a definitive time frame for rendering a decision, but will attempt to notify an applicant anytime a decision cannot be reached within 60 days. The Board is cognizant of the need for an applicant to receive a decision as soon as reasonably possible. Accordingly, every effort will be made to process and consider all applications expeditiously for approval of an activity or category not previously approved as within the broad incidental power categories.

One commenter supported the NCUA's Office of General Counsel's authority to determine whether an activity not found within the list of categories is permissible under the incidental powers of an FCU. One commenter disagreed with this approach. One commenter requested that the final rule clarify that an FCU need only seek an advisory opinion from the Office of General Counsel if a proposed activity clearly fails to fall within one of the preapproved categories. This commenter is correct. If a proposed activity does not appear to fall within one of the preapproved categories, FCUs may seek an advisory opinion from the Office of General Counsel as to whether the activity fits within a category or is otherwise an incidental powers activity.

A number of commenters misconstrued the Board's description of the review and approval process for activities that are not provided as examples within the preapproved categories. In general, these commenters were confused about when the General Counsel advisory opinion process is used and when it would be necessary to apply to the Board to amend the regulation. Forty-nine commenters generally opposed the use of categories and the application process. Many of these commenters found the application process burdensome and recommended a more streamlined process or no application process at all. Again, the Board believes some of these commenters misconstrued how the Board intends the process to work.

The Board wishes to clarify how it intends the process to work and the analytic steps an FCU should follow in determining if an activity is permissible. The activities listed under the broad categories are intended as illustrations, not an exhaustive list of what is permissible under the categories set out in the rule. Therefore, the first step, if an FCU does not find an activity identified in the rule, is to consider whether, although not listed as a specific example, it is within the ambit of one of the broad categories in the rule. If an FCU concludes that it is within the ambit of one of the broad categories of the rule, an FCU need not contact NCUA for a legal opinion or apply for an amendment of the rule. FCUs are encouraged to consult with their own legal counsel in making this determination.

Second, if an FCU is not sure if an activity fits within a preapproved category, it may request a legal opinion

or consult informally with NCUA's Office of General Counsel. AnFCU is not required to obtain an opinion from NCUA's Office of General Counsel, however, there are several advantages in doing so. If it is unclear whether an activity is permissible, an FCU runs the risk of engaging in an impermissible activity and being subject to supervisory action. NCUA, not FCUs, has the discretion to determine if an activity is within an FCU's incidental powers. The Office of General Counsel, which is specifically authorized to provide the public with legal interpretations of the FCU Act andNCUA regulations, 12 CFR 790.2(b)(8), may determine that an activity is already covered by one of the rule's broad categories although not specifically identified. The Office of General Counsel may also, as it has done in the past, render a legal opinion that an activity is a permissible exercise of an FCU's incidental powers even though the activity is not covered by the broad categories in the rule. The Board contemplates that new activities identified by the Office of General Counsel will be routinely added to the rule as part of the Office of General Counsel's ongoing regulatory review process.

Third, an FCU may go through the application process set out in the rule. The Board wants to reiterate that it believes the application process will rarely be necessary because of the manner in which the categories are set out in § 721.3.

One commenter stated that the rule should require an FCU applicant to include only a description of the proposed activity, an explanation of how the activity qualifies as an incidental power and any other information as necessary to describe the activity. This commenter noted that the rule should not require the applicant to provide any business considerations in the application. Two commenters stated that NCUA's determination to approve an activity should not be based on whether it is a good business decision for the particular applicant but whether the activity is within the incidental powers of all FCUs. In general, the Board agrees that business considerations should not be part of the decision on whether an activity is deemed incidental and has modified the rule accordingly. Three commenters requested that the final rule clarify that an activity approved for one applicant is permissible for all FCUs. The Board agrees with this comment and is clarifying that once an activity is approved for one credit union it is legally permissible for all FCUs to engage in this activity.

Finally, most of the commenters who objected to the application process favored a flexible approach that they contend is similar to the OCC's. They advocated an incidental powers analysis whereby NCUA establishes broad parameters of what constitutes a permissible activity so that FCUs could determine whether an activity falls within their incidental powers. These commenters requested that the final rule grant FCU boards of directors or their private attorneys the ability to assess whether an activity is legal without seeking approval from the NCUA. Many commenters also objected to the statement in the proposed rule's preamble that indicates NCUA may reach a different conclusion in its analysis of incidental powers than the OCC. Two commenters suggested that NCUA should routinely review the powers granted to banks and conclude that these activities are permissible for FCUs unless they pose safety and soundness concerns or are contrary to the FCU Act. These commenters apparently misunderstand the OCC's approach.

Banks and their operating subsidiaries may engage in activities the OCC has authorized through regulations as within the powers of a bank. In addition, the OCC determines whether a novel activity is within the business of banking or incidental thereto, through interpretive letters that rely on the facts presented by the applicant. As explained earlier, NCUA has the authority and responsibility to determine whether an activity is incidental. The Board believes it cannot and should not delegate that authority and responsibility. The Board is concerned about potential safety and soundness concerns as well as the problems that could ensue if an FCU invested a significant amount of personnel and dollars in an activity that was later determined to be impermissible. Finally, an FCU's incidental authority is different than the incidental authority of a bank and, therefore, requires a distinct and separate analysis.

Section 721.5 What Limitations Apply to a Credit Union Engaging in Activities Approved Under This Part as Within a Credit Union's Incidental Powers?

This section acknowledges the distinction between an FCU's authority to engage in an activity deemed to be within its incidental powers and the requirement that an FCU comply with any conditions or regulations that apply to the activity. When engaging in an authorized activity, FCUs must comply with conditions or constraints on the activity established in applicable federal and state law, NCUA regulations, and legal opinions. For example, FCUs are responsible for ensuring their compliance with applicable state licensing laws relating to insurance sales. Another example is the use of raffles in promotional activities that may be regulated or prohibited under local law. The regulation does not preempt FCUs from compliance with these laws.

One commenter suggested that the Board remove this section as unnecessary because FCUs are already obligated to obey such laws. The Board disagrees. The Board believes that including this provision enhances awareness of the compliance risk involved in new activities. Before engaging in any of the activities identified in the final rule, FCUs must ascertain whether they need to obtain licenses or meet other legal requirements before engaging in an activity.

Section 721.6 May a Credit Union Derive Income From Activities Approved Under This Part?

The proposed rule provided that an FCU may receive unlimited compensation from its incidental powers activities. For finder activities, the proposed rule would allow FCUs to charge third parties that solicit members through the FCU.

One hundred and forty-one commenters agreed that compensation should be unlimited. Although FCUs are currently authorized to conduct administrative work in connection with a group purchasing activity and receive reimbursement of their cost amount for extending group purchasing plans, many commenters supported the proposal because they stated a need to increase income due to decreasing operating and interest rate margins. Those in support of this provision uniformly stated that only the business decisions of FCU directors should limit the amount of income an FCU receives when engaging in incidental powers activities. Two credit union commenters objected to the ability of FCUs to obtain unlimited compensation from their incidental powers. In light of the overwhelming number of comments in favor of proposed § 721.6 and the fact that this derivation of income is simply an extension of fees the FCU already has received in connection with the current group purchasing authority, the Board is adopting this section in the final rule as proposed.

Section 721.7 What Are the Potential Conflicts of Interest for Officials and Employees When Credit Unions Engage in Activities Approved Under This Part?

This section prohibits senior management employees, officials, and their immediate family members from receiving any compensation or benefit, directly or indirectly, from activities covered in the regulation. Of the twenty-four commenters that expressed an opinion on the conflicts of interest provision, fourteen stated that the provision is adequate. One stated that the provision prevents the misappropriation of funds and is in the best interests of an FCU's membership. Nine commenters suggested several amendments to this section. One commenter suggested that the reference to ''indirectly receiving'' requires clarification because it could be subject to wide interpretation. The preamble to the proposed rule stated that this section only prohibits compensation that is linked to products or services provided by third party vendors. In addition, the NCUA Board provided an example of compensation that is not prohibited. 65 FR 70526, 70531 (November 24, 2000).

One commenter requested that the final rule clarify proposed § 721.7(a). Two commenters believed that the reference to compensation received ''directly or indirectly'' could disallow salaries for senior management. The Board is clarifying that this conflicts of interest section does not prohibit salaries for senior management.

Four commenters stated that the rule should allow senior management to receive bonuses or incentives for finder activities or other incidental powers activities. The Board disagrees. As with other activities that can lead to significant abuse, the Board believes senior management should be primarily concerned with the financial health of the institution and be free from the undue influences of third party vendors. Such a prohibition is a good policy for the FCU, its members and ultimately senior management officials. Avoiding the appearance of a conflict of interest will insulate senior management from charges that their business decisions are based on their own pecuniary interest. This type of conflict of interest provision adopted in the final rule has worked extremely well in the context of other NCUA regulations and the Board believes such a provision is necessary in the context of expanded incidental powers activities.

One commenter asked that the rule establish an exception allowing an official to receive dividends from publicly traded corporations if the official does not have a material ownership interest in the corporation. The Board wishes to clarify that the conflict of interest provision does not apply to the situation presented by this commenter.

One commenter stated that § 721.7(b) is inconsistent with the conflicts provision of NCUA's lending regulation, which governs compensation in connection with any loan made by an FCU. 12 CFR 701.21(c)(8). This commenter asserted that many third party loan-related products and services will be offered under part 721 and that compensation arrangements related to these products and services will be subject to different requirements under the two rules. The Board appreciates the need to provide further guidance regarding the final rule's conflict of interest provision and has amended the language in the final rule to simplify this provision consistent with the Board's intent and other conflict of interest provisions throughout NCUA's regulations.

As noted above, the final rule prohibits compensation to a senior management employee, official, or his or her immediate family member that is received directly or indirectly by such individual as a result of third-party products or services. The Board does not prohibit compensation to these individuals, however, if the compensation is: (1) Fixed in amount; (2) not related to the amount of products sold or services used; and (3) received by no more than one director or official of the credit union, who is recused from the credit union decision concerning its business with the third party vendor. The Board again provides the following example of permissible compensation:

> An FCU official, Ms. Smith, is also on the board of directors of Company DMH, which sells phone cards. Ms. Smith is paid $5,000 a year by Company DMH for her services as a director. The FCU contracts with Company DMH to provide prepaid phone cards to its members. Ms. Smith is not involved in the decision making process, and her compensation from the DMH Company is not linked to the FCU's phone card sales.

The rule also prohibits compensation to non-senior management employees or their immediate family members that is received directly or indirectly by such individual as a result of third-party products or services, unless the FCU's board of directors has established written policies regarding third-party compensation and has determined that no conflict of interest exists. This provision allows employees to receive compensation from persons other than the FCU provided that the employee's relationship with the third-party does not conflict with the interests of the FCU or its members.

Under this exception, an employee may not receive a commission or other compensation from a third-party for referring members to the third-party because an inherent conflict exists in the employee's promotion of a particular third-party product or service for the employee's pecuniary interest. If the employee's motivation is purely self-interest, this incentive works to the detriment of the FCU or its members. The final rule, however, allows the FCU to pay incentives to non-senior management employees in connection with incidental powers activities when an FCU's board of directors determines that an incentive or bonus is an appropriate means to promote its business as an FCU. In addition, the final rule permits employees to receive compensation from a third-party when no conflict of interest exists, such as in a dual employment scenario when the employee's position outside of the FCU does not affect the FCU.

These restrictions are consistent with the intent of NCUA's other conflicts of interest provisions. The Board, however, maintains that conflicts of interest provisions tailored to particular activities are still necessary. Therefore, individuals affiliated with FCUs are still required to comply with conflicts of interest provisions within other sections of NCUA's regulations. The final rule provides that where a specific conflicts of interest provision applies to a particular activity, that provision controls the conduct of the parties. For example, the conflicts of interest provision in the lending regulation was adopted to ''ensure that lending decisions are made in the best interests of the credit union and its members, and not in the personal interests of individual officials or employees.'' 48 FR 52475 (November 18, 1983). The Board continues to believe that this provision in the lending regulation is necessary to promote the safety and soundness of FCUs. Therefore, individuals subject to the conflicts of interest provision in the lending rule remain subject to this provision when offering loan-related products, an activity authorized under part 721.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. For purposes of this analysis, credit unions

under $1 million in assets will be considered small entities.

The Board has determined and certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule identifies activities that FCUs are authorized to engage in under their incidental powers without imposing any additional regulatory burden or expense to credit unions. Accordingly, NCUA has determined that a Regulatory Flexibility Analysis is not required.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. The Office of Management and Budget has determined that this is not a major rule.

Paperwork Reduction Act

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

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory 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. This rule applies only to federally-chartered credit unions. It will not have substantial direct effects on the states, on the relationship 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 the 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 rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Part 721

Credit unions.

By the National Credit Union Administration Board on July 26, 2001.

Becky Baker,

Secretary of the Board.

For the reasons stated above, NCUA amends 12 CFR Chapter VII by revising part 721 to read as follows:

PART 721—INCIDENTAL POWERS

Sec.

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

§ 721.1 What does this part cover?

This part authorizes a federal credit union (you) to engage in activities incidental to your business as set out in this part. This part also describes how interested parties may request a legal opinion on whether an activity is within a federal credit union's incidental powers or apply to add new activities or categories to the regulation. An activity approved in a legal opinion to an interested party or as a result of an application by an interested party to add new activities or categories is recognized as an incidental powers activity for all federal credit unions. This part does not apply to the activities of corporate credit unions.

§ 721.2 What is an incidental powers activity?

An incidental powers activity is one that is necessary or requisite to enable you to carry on effectively the business for which you are incorporated. An activity meets the definition of an incidental power activity if the activity:

(a) Is convenient or useful in carrying out the mission or business of credit unions consistent with the Federal Credit Union Act;

(b) Is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and

(c) Involves risks similar in nature to those already assumed as part of the business of credit unions.

§ 721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

The categories of activities in this section are preapproved as incidental to carrying on your business under § 721.2. The examples of incidental powers activities within each category are provided in this section as illustrations of activities permissible under the particular category, not as an exclusive or exhaustive list.

(a) *Certification services.* Certification services are services whereby you attest or authenticate a fact for your members' use. Certification services may include such services as notary services, signature guarantees, certification of electronic signatures, and share draft certifications.

(b) *Correspondent services.* Correspondent services are services you provide to other credit unions that you are authorized to perform for your members or as part of your operation. These services may include loan processing, loan servicing, member check cashing services, disbursing share withdrawals and loan proceeds, cashing and selling money orders, performing internal audits, and automated teller machine deposit services.

(c) *Electronic financial services.* Electronic financial services are any services, products, functions, or activities that you are otherwise authorized to perform, provide, or deliver to your members but performed through electronic means. Electronic services may include automated teller machines, electronic fund transfers, online transaction processing through a web site, web site hosting services, account aggregation services, and Internet access services to perform or deliver products or services to members.

(d) *Excess capacity.* Excess capacity is the excess use or capacity remaining in facilities, equipment, or services that: You properly invested in or established, in good faith, with the intent of serving your members; and you reasonably anticipate will be taken up by the future expansion of services to your members. You may sell or lease the excess capacity in facilities, equipment or services such as office space, employees and data processing.

(e) *Financial counseling services.* Financial counseling services means advice, guidance or services that you offer to your members to promote thrift or to otherwise assist members on financial matters. Financial counseling

services may include income tax preparation service, electronic tax filing for your members, counseling regarding estate and retirement planning, investment counseling, and debt and budget counseling.

(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. Finder activities may include offering third party products and services to members through the sale of advertising space on your web site, account statements and receipts, or selling statistical or consumer financial information to outside vendors to facilitate the sale of their products to your members.

(g) *Loan-related products.* Loan-related products are the products, activities or services you provide to your members in a lending transaction that protect you against credit-related risks or are otherwise incidental to your lending authority. These products or activities may include debt cancellation agreements, debt suspension agreements, letters of credit and leases.

(h) *Marketing activities.* Marketing activities are the activities or means you use to promote membership in your credit union and the products and services you offer to your members. Marketing activities may include advertising and other promotional activities such as raffles, membership referral drives, and the purchase or use of advertising.

(i) *Monetary instrument services.* Monetary instrument services are services that enable your members to purchase, sell, or exchange various currencies. These services may include the sale and exchange of foreign currency and U.S. commemorative coins. You may also use accounts you have in foreign financial institutions to facilitate your members' transfer and negotiation of checks denominated in foreign currency or engage in monetary transfer services for your members.

(j) *Operational programs.* Operational programs are programs that you establish within your business to establish or deliver products and services that enhance member service and promote safe and sound operation. Operational programs may include electronic funds transfers, remote tellers, point of purchase terminals, debit cards, payroll deduction, pre-authorized member transactions, direct deposit, check clearing services, savings bond purchases and redemptions, tax payment services, wire transfers, safe deposit boxes, loan collection services, and service fees.

(k) *Stored value products.* Stored value products are alternate media to currency in which you transfer monetary value to the product and create a medium of exchange for your members' use. Examples of stored value products include stored value cards, public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, postage stamps, electronic benefits transfer script, and similar media.

(l) *Trustee or custodial services.* Trustee or custodial services are services in which you are authorized to act under any written trust instrument or custodial agreement created or organized in the United States and forming part of a pension or profit-sharing plan, as authorized under the Internal Revenue Code. These services may include acting as a trustee or custodian for member retirement and education accounts.

§ 721.4 How may a credit union apply to engage in an activity that is not preapproved as within a credit union's incidental powers?

(a) *Application contents.* To engage in an activity that may be within an FCU's incidental powers but that does not fall within a preapproved category listed in § 721.3, you may submit an application by certified mail, return receipt requested, to the NCUABoard. Your application must describe the activity, your explanation, consistent with the test provided in paragraph (c) of this section, of why this activity is within your incidental powers, your plan for implementing the proposed activity, any state licenses you must obtain to conduct the activity, and any other information necessary to describe the proposed activity adequately. Before you engage in the petition process you should seek an advisory opinion from NCUA's Office of General Counsel, as to whether a proposed activity fits into one of the authorized categories or is otherwise within your incidental powers without filing a petition to amend the regulation.

(b) *Processing of application.* Your application must be filed with the Secretary of the NCUA Board. NCUA will review your application for completeness and will notify you whether additional information is required or whether the activity requested is permissible under one of the categories listed in § 721.3. If the activity falls within a category provided in § 721.3, NCUA will notify you that the activity is permissible and treat the application as withdrawn. If the activity does not fall within a category provided in § 721.3, NCUA staff will consider whether the proposed activity is legally permissible. Upon a recommendation by NCUA staff that the activity is within a credit union's incidental powers, the NCUA Board may amend § 721.3 and will request public comment on the establishment of a new category of activities within § 721.3. If the activity proposed in your application fails to meet the criteria established in paragraph (c) of this section, NCUA will notify you within a reasonable period of time.

(c) *Decision on application.* In determining whether an activity is authorized as an appropriate exercise of a federal credit union's incidental powers, the Board will consider:

(1) Whether the activity is convenient or useful in carrying out the mission or business of credit unions consistent with the Act;

(2) Whether the activity is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and

(3) Whether the activity involves risks similar in nature to those already assumed as part of the business of credit unions.

§ 721.5 What limitations apply to a credit union engaging in activities approved under this part?

You must comply with any applicable NCUA regulations, policies, and legal opinions, as well as applicable state and federal law, if an activity authorized under this part is otherwise regulated or conditioned.

§ 721.6 May a credit union derive income from activities approved under this part?

You may earn income for those activities determined to be incidental to your business.

§ 721.7 What are the potential conflicts of interest for officials and employees when credit unions engage in activities approved under this part?

(a) *Conflicts.* No official, employee, or their immediate family member may receive any compensation or benefit, directly or indirectly, in connection with your engagement in an activity authorized under this part, except as otherwise provided in paragraph (b) of this section. This section does not apply if a conflicts of interest provision within another section of this chapter applies to a particular activity; in such case, the more specific conflicts of interest provision controls. For example: An official or employee that refers loan-related products offered by a third-party to a member, in connection with a loan made by you, is subject to the conflicts

of interest provision in § 701.21(c)(8) of this chapter.

(b) *Permissible payments.* This section does not prohibit:

(1) Payment, by you, of salary to your employees;

(2) Payment, by you, of an incentive or bonus to an employee based on your overall financial performance;

(3) Payment, by you, of an incentive or bonus to an employee, other than a senior management employee or paid official, in connection with an activity authorized by this part, provided that your board of directors establishes written policies and internal controls for the incentive program and monitors compliance with such policies and controls at least annually; and

(4) Payment, by a person other than you, of any compensation or benefit to an employee, other than a senior management employee or paid official, in connection with an activity authorized by this part, provided that your board of directors establishes written policies and internal controls regarding third-party compensation and determines that the employee's involvement does not present a conflict of interest.

(c) *Business associates and family members.* All transactions with business associates or family members not specifically prohibited by paragraph (a) of this section must be conducted at arm's length and in the interest of the credit union.

(d) *Definitions.* For purposes of this part, the following definitions apply.

(1) *Senior management employee* means your chief executive officer (typically, this individual holds the title of President or Treasurer/Manager), any assistant chief executive officers (e.g. Assistant President, Vice President, or Assistant Treasurer/Manager), and the chief financial officer (Comptroller).

(2) *Official* means any member of your board of directors, credit committee or supervisory committee.

(3) *Immediate family member* means a spouse or other family member living in the same household.

[FR Doc. 01–19103 Filed 8–3–01; 8:45 am]

BILLING CODE 7535–01–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–298–AD; Amendment 39–12355; AD 2001–15–20]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F.28 Mark 1000, 2000, 3000, and 4000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Fokker Model F.28 Mark 1000, 2000, 3000, and 4000 series airplanes, that requires a one-time inspection to detect the presence of filler plates of the engine support fittings, and corrective action, if necessary. The actions specified by this AD are intended to detect and correct fatigue and stress corrosion in the U-shaped upper and lower legs of the engine support fittings, which could result in reduced structural integrity of the engine support structure. This action is intended to address the identified unsafe condition.

DATES: Effective September 10, 2001.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 10, 2001.

ADDRESSES: The service information referenced in this AD may be obtained from Fokker Services B.V., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Fokker Model F.28 Mark 1000, 2000, 3000, and 4000 series airplanes was published in the **Federal Register** on June 11, 2001 (66 FR 31192). That action proposed to require a one-time inspection to detect the presence of filler plates of the engine support fittings, and corrective action, if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 22 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required actions, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $2,640, or $120 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is