

LETTER OPINION
93-L-258

September 9, 1993

Commissioner Gary D. Preszler
Department of Banking and
Financial Institutions
State Capitol
600 E Boulevard Avenue
Bismarck, ND 58505-0080

Dear Commissioner Preszler:

Thank you for your August 6, 1993, letter asking whether it would be legally permissible for a credit union to purchase an excess deposit insurance policy.

Credit Unions and similar financial institutions can exercise only the powers conferred upon them by the legislative body authorizing their creation either by express terms or by necessary implication. Iowa Credit Union League v. Iowa Department of Banking, 268 N.W.2d 165, 171 (Iowa 1978); Divide County v. Baird, 212 N.W. 236, 238 (N.D. 1927). For a credit union to proceed with a new activity, it must show that the new activity is allowed by statute in express terms or is necessary or requisite to an expressed power. Iowa Credit Union League, 268 N.W.2d at 171.

A credit union is "a cooperative, nonprofit association organized for the purposes of encouraging thrift among its members, creating a source of credit at a fair and reasonable rate of interest, and providing an opportunity for its members to improve their economic and social condition." North Dakota Century Code (N.D.C.C.) ? 6-01-02(7). Credit unions have the authority to receive the savings of their members on shares or deposits, to make loans, to deposit monies in financial institutions authorized to receive deposits, to invest in certain securities, to

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borrow money, to sue and be sued, and to hold and convey real estate. N.D.C.C. ? 6-06-06. State chartered credit unions may also engage in any activity in which they could engage if they were federally chartered and which is authorized by the State Credit Union Board's rules. N.D.C.C. ? 6-06-06(11). Finally, a credit union is authorized "[t]o exercise any incidental power necessary or requisite to enable the credit union to carry out effectively the business for which it is incorporated." N.D.C.C. ? 6-06-06(12).

N.D.C.C. ? 6-06-06.1 requires every state chartered credit union, except for the North Dakota Central Credit Union, to insure their accounts with the National Credit Union Administration (NCUA). If NCUA deposit insurance was not required or even not expressly authorized, the procurement of this insurance would be permissible as an incidental power, necessary, convenient, and expedient to carry out the business for which the credit union was incorporated. N.D.C.C. ? 6-06-06(12). See Weir v. United States, 92 F.2d 634, 637 (7th Cir. 1937).

The National Credit Union Administration Board is authorized to insure the member accounts of credit unions organized under state law when such credit unions meet NCUA eligibility requirements. 12 U.S.C. ? 1781(a). Member accounts in insured credit unions are insured to a maximum of \$100,000. 12 U.S.C. ? 1787(k)(1). For example, "[f]unds owned by an individual and deposited [are] . . . insured up to \$100,000 in the aggregate." 12 C.F.R. ? 745.3(a)(1). "Joint accounts are insured separately from individual accounts up to a maximum of \$100,000 provided that each of the co-owners has personally signed an account signature card and has a right of withdrawal on the same basis as the other co-owners." 12 C.F.R. ? 745.8(b).

An apparent concern with the safety of deposits in amounts that exceed the federal government's insurance limit of \$100,000 prompts the credit unions' desire

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for excess deposit insurance. Because this activity is not expressly authorized by statute, whether it is legally permissible depends on whether it can be said to constitute an "incidental power" under N.D.C.C. ? 6-06-06(12). The test is whether the purchase of an excess insurance policy is closely related to the exercise of an express power and useful to carry out the established business of a credit union. See First National Bank of Eastern Arkansas v. Taylor, 907 F.2d 775, 778 (8th Cir. 1990) ("The 'incidental powers' of national banks are not limited to activities that are deemed essential to the exercise of express powers. Rather, courts have analyzed the issue by asking whether the activity is closely related to an express power and is useful in carrying out the business of banking."); Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972).

Whether providing excess deposit insurance constitutes an incidental power turns on factual determinations which rest within the jurisdiction of the State Credit Union Board. Although not determinative, it is interesting to note that the National Credit Union Administration Board has promulgated a rule that requires every federally-insured credit union to notify its members if excess deposit insurance is terminated. See 12 C.F.R. ? 741.10. Although I cannot provide a definitive answer to your question, I trust that you will find the foregoing discussion useful.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dc/krb