

**SPECIAL STATE CREDIT UNION BOARD MEETING
HELD BY CONFERENCE CALL
OFFICE OF THE COMMISSIONER
DEPARTMENT OF FINANCIAL INSTITUTIONS
2000 SCHAFFER STREET, SUITE G
BISMARCK, NORTH DAKOTA**

November 18, 2014

A special meeting of the State Credit Union Board was called to order by Chairman Entringer in the Office of the Commissioner, Department of Financial Institutions, 2000 Schafer Street, Suite G, Bismarck, North Dakota, at 10:30 a.m., Tuesday, November 18, 2014, by conference call.

MEMBERS PRESENT: Robert J. Entringer, Chairman (*Office*)
Paul Brucker, Member (*Office*)
Don Clark, Member (*Fargo*)
Melanie Stillwell, Member (*Williston*)
Steve Tonneson, Member (*Minot*)

MEMBERS ABSENT: None

ALSO PRESENT: Aaron Webb, Secretary (*Office*)
Suzette Richardson, Administrative Staff Officer (*Office*)
Janilyn Murtha, Assistant Attorney General (*Office*)
Corey Krebs, Chief Examiner – Credit Unions (*Office*)

2015-2017 BUDGET – CREDIT UNION ASSESSMENTS

Chairman Entringer referred to the discussion held at the regular meeting on September 5, 2014, regarding the Department's proposal for an optional budget package to add an additional examiner to the credit union division.

Chairman Entringer indicated he, along with Chief Examiner Krebs and Assistant Commissioner Webb, met with the GAC of the Credit Union Association of the Dakotas (GAC) for their input on the proposal. Chairman Entringer indicated the GAC supported the optional budget package; however, requested the

following information from the Department (1) an explanation of the assessment increase from 2013 to 2014 (to be distributed by GAC to all credit unions); (2) provide what the assessment increase would be to support the optional budget package; and (3) compare what like-sized banks and credit unions pay for assessments.

Chairman Entringer explained he divided the proposed budget with the optional package in half; and the estimated annual assessment for credit unions based on the existing formula could be increased to 20%. Chairman Entringer explained credit union growth would impact the actual assessment increase.

Chairman Entringer explained the currently credit unions with up to \$25 million in assets pay assessments similar to banks; however, for credit unions with assets over \$25 million pay a significant larger assessment than banks. Chairman Entringer gave the example that the largest state-chartered credit union paid an assessment of \$103,000; however, a bank that same size would have paid an assessment of approximately \$74,000.

Chairman Entringer pointed out that there are only 21 state-chartered credit unions paying assessments compared to 74 state-chartered banks.

Chairman Entringer noted he is working on amending the credit union assessment formula to have five tiers with four to five credit unions in each tier, in order to prevent the larger sized credit unions bearing the brunt of the increased assessment fee. Chairman Entringer indicated the larger credit unions have criticized that they pay a higher percentage of the credit union division budget through their assessment fees; however, do not receive a comparable percentage of Department staff time.

Chairman Entringer concluded a decision needs to be made on whether to submit the optional budget package; adding that two plans were given to the GAC. Chief Examiner Krebs explained that while Plan A would be to go forward with the optional budget package, Plan B would include a scale-back in activities, including cutting down on follow-up examinations, as well as developing an alternating exam schedule with NCUA, where the Department would not assist in each examination, but follow the statutory examination requirements. Chief Examiner Krebs indicated another part of Plan B would be to limit participation in non-core requirements; i.e. NASCUS/NCUA committees.

Chairman Entringer stated that members of the GAC had indicated they felt Plan B was not an option; reiterating they did support the optional package budget, with the three conditions previously addressed. Chairman Entringer concluded that he is currently working on the assessment formula; adding another factor to consider is that the number of state-chartered credit unions will likely continue to decline.

In response to Member Brucker, Chairman Entringer indicated downgrading his and Assistant Commissioner Webb's time allocations to the credit union division will have to be considered if the optional package budget is submitted; as Chief Examiner Krebs will assume more of the credit union workload. Chairman Entringer agreed that the change in time allocations will absorb some of the 20% assessment increase.

In response to Member Brucker question whether the fees for various credit union applications are fair and covering staff time and costs, Chairman Entringer indicated this area has not been considered. Chairman Entringer stated that if assessment fees of banks and credit unions are compared, so should application fees; continuing as an example, a bank pays \$1,500 for a facility application compared to a credit union paying \$300 for a branch application.

Chairman Entringer indicated the Chief Examiner Krebs spends a fair amount of time on waiver requests; adding that a fee for those requests could be an option. Chairman Entringer continued he feels the Department should have the capability to bill for follow-up examinations, as this is definitely a fairness issue due to travel costs and examiner time that all credit unions are covering; however, this section of law was repealed in 1989.

Member Brucker indicated as a Board Member he feels it is impossible to determine if an additional credit union position is needed at this time and asked for Chairman Entringer's final recommendation.

Member Tonneson agreed the application fees should be reviewed and possibly changed to offset the 20% assessment increase.

In response to Member Tonneson, Chairman Entringer indicated the section providing the ability to bill for follow-up examinations was repealed in 1989, which is the year the Department became a special fund agency. Chairman Entringer agreed authority similar to Section 6-01-17.2 of the North Dakota Century Code should exist for credit unions; however, indicated he would first

inform the GAC as previously the Department had no credit union legislation changes planned for the upcoming session.

Member Tonneson indicated he thought the additional assessment authority would help offset the general assessment fee; adding it would be fairer to all credit unions that those that need more supervision and/or staff time to cover those expenses. Chairman Entringer explained the additional assessment fee would be based on exact costs. Members Brucker, Clark, and Stillwell agreed.

In response to Member Stillwell, Chairman Entringer indicated modifications to application fees would also have to be done by a legislative change. Chairman Entringer indicated the fees have not been changed in the past five to six years, although even increasing them may not make a significant difference in the revenue generated. Chairman Entringer concluded he feels increasing application fees would generate far less revenue than billing for follow-up examination fees.

Member Brucker suggested the Department prepare an evaluation of the following for the Board's future consideration: allocation changes of Chairman Entringer's and Assistant Commissioner Webb's time to the credit union division; changes to application fees; and charging for follow-up examination costs. Chairman Entringer indicated he will provide this information, as well as a proposed bill draft to the Board.

In response to Member Stillwell, Chairman Entringer indicated according to statute the Department must examine each credit union every 24 months and a change to that timetable would also require legislative action. Chairman Entringer explained credit unions with assets over \$250 million must be examined each year by NCUA; adding that the Department has accompanied NCUA in those examinations. Chairman Entringer noted that was a part of Plan B, wherein the Department would reduce the number of joint exams with NCUA.

Chief Examiner Krebs indicated the Department has usually been the lead in exams and been involved in the entire output; however, under Plan B the NCUA could conduct exams without state examiners present, or NCUA and the State would rotate years, or if the Department staff does accompany the NCUA on an exam the Department would not write the exam.

Chairman Entringer indicated he would prepare the requested information and a special meeting will be scheduled as the Board needs to make a decision on the optional budget package.

USE OF THE WORD “BANKING”

Assistant Attorney General Murtha referred to her Memorandum dated November 17, 2014, regarding the use of the words “bank”, “banker” or “banking” by a credit union.

Assistant Attorney General Murtha explained how parity statutes are used in other states. Assistant Attorney General Murtha indicated she began her research with the assumption that parity was used similarly throughout the United States; adding that is not the case, as of ten years ago 48 states had parity clauses, but varied from state to state. Assistant Attorney General Murtha reviewed examples of how different states view parity: some states limit parity within the statute language itself, i.e. can use parity unless it directly conflicts with a state law; some states allow for a per se pass through, i.e. if it is allowed at the federal level it is allowed at the state level, no matter if the result is a conflict of state law as federal law will trump. Assistant Attorney General Murtha indicated the vast majority of states reflect North Dakota law, which is that there is oversight by an agency or board that allows for that agency or board to make the determination if parity will be allowed for a specific item.

Assistant Attorney General Murtha explained the Board has the discretion on whether to allow or decline parity for an activity. Assistant Attorney General Murtha reviewed statutory rules of construction, found under Chapter 1 of the North Dakota Century Code, which outline the use of discretion by the Board.

Assistant Attorney General Murtha addressed her Memorandum which refers to Section 1-02-07 of the North Dakota Century Code as instructional on whether or not the Board could use parity, knowing that the result of doing so would contradict an existing state law in another Chapter. Assistant Attorney General Murtha explained this Section states if there is a conflict that is irreconcilable between a special/specific provision and a general provision, the special/specific provision will control.

Assistant Attorney General Murtha indicated in the case of the use of the words “bank”, “banker” or “banking” by a credit union it is very easily and

persuasively argued that the special provision is the specific prohibition on the use of the words “bank”, “banker” or “banking” by anyone other than banks or bank holding companies. Assistant Attorney General Murtha continued this rule of construction indicates the special/specific provision should prevail and parity should not be used; however, with the exception that unless the general provision was passed second and there is a manifest legislative intent that should prevail.

Assistant Attorney General Murtha indicated the Sections outlined in her Memorandum have been law for many years; however, were amended in 2007. Assistant Attorney General Murtha continued the Board’s legislative history of parity provision indicates it was the legislative intent that the Board not use the parity provision as simply a pass through for federal legislation; meaning the Board should have control over the application of parity.

Assistant Attorney General Murtha explained the State Banking Board parity provision was duplicated for the State Credit Union Board, and at a point was amended to remove the language “notwithstanding any state law to the contrary”. Assistant Attorney General Murtha explained this “notwithstanding” language would have allowed parity to trump a contrary state law.

Assistant Attorney General Murtha indicated she believes legislative history supports the finding that parity not be used a pass through for federal law, and that the Board does have discretion and should take into consideration other statutory rules of construction.

Assistant Attorney General Murtha highlighted that earlier this year an Opinion was issued on the Board’s use of the parity provision to allow for interstate branching, in conjunction with reciprocity. Assistant Attorney General Murtha explained the Opinion stated the parity provision could be used and in conclusion that it could be used to the extent there was not a state law to the contrary.

Assistant Attorney General Murtha reiterated that the Board does have discretion on whether or not to take action under the parity provision.

In response to Member Clark’s question on what precipitated the 2007 legislative amendment, Assistant Attorney General Murtha explained the initial bill draft referred to banking legislation. Assistant Attorney General Murtha continued the State Banking Board had a parity provision within a Section of the North Dakota Century Code; however, wanted to create a new Section regarding parity so

it could be easily found. Assistant Attorney General Murtha continued this language mirrored the State Credit Union Board parity language; however, at that time parity language was more permissive, meaning it basically stated a state-chartered credit union could basically do anything a federally chartered credit union was allowed subject to rule by the State Credit Union Board. Assistant Attorney General Murtha explained when the Legislative Committee reviewed the State Banking Board's request for the parity section, the State Credit Union Board's parity provision was added to this same bill, and both were amended to make the language the same. Assistant Attorney General Murtha indicated instead of the parity language being passive "subject to rule", the language was changed to indicate "subject to rule or order by the Board", which gives the Boards oversight of the use of parity.

Assistant Commissioner Webb added that prior to the 2007 legislative change, what was allowed under federal law applied to state-chartered credit unions; however, after 2007 the State Credit Union Board has to expressly authorize the parity power.

In response to Member Brucker, Assistant Attorney General Murtha explained if the State Credit Union Board declined to use the parity provision to authorize the use of the verb "banking" by a state-chartered credit union, the statute would need to be changed or an additional provision in the North Dakota Century Code would need to be submitted. Assistant Attorney General Murtha added that the State Credit Union Board does have the discretion to issue an Order allowing state-chartered credit unions to use the verb "banking"; however, she believes the analysis that supports whether this is a proper use of the Board's discretion is less persuasive than the analysis that supports the Board not using this discretion.

Assistant Commissioner Webb indicated when looking at the prohibition on use of the term "bank" it also includes the verb "banking"; therefore, the argument that the word can be used in a title versus as a verb would be addressed in the statute itself.

Chairman Entringer explained what precipitated this issue are complaints of the use of the protected words: bank or banking by credit unions in advertising, websites, etc. Chairman Entringer indicated he drafted a Memorandum to possibly send to all credit unions informing them they could not use those terms, as well as detailing two options that are available in the statute: (1) the Commissioner or any aggrieved party could seek a restraining Order barring an institution using the

protected words, and (2) there is penalty of \$100 per day the institution is in violation. Chairman Entringer continued that Department staff met with Greg Tschider after he reviewed this Memorandum; however, Mr. Tschider indicated the GAC was operating under a previous Opinion based on the pre-2007 legislative change.

Chairman Entringer indicated he informed Mr. Tschider that Assistant Attorney General Murtha was preparing a Memorandum on this issue for the Board and would provide a copy to him; however, stressed that he feels the Board needs to make a decision on whether it wants to use parity or seek a legislative change.

Chairman Entringer indicated he agrees with Assistant Attorney General Murtha that the best option would be to amend the statute; however, it may not be successful. Chairman Entringer stated he does not believe either the option for parity or a legislative change is a good option; adding he believes there will be a considerable amount of disagreement from other parties if the Board issues an Order to grant parity on this issue, and a legislative change will also be fought by other parties. Chairman Entringer continued a proposed legislative change would have to be presented by the industry.

In response to Member Stillwell, Chairman Entringer indicated he discussed these options with Mr. Tschider, not the GAC.

In response to Member Tonneson, Assistant Attorney General Murtha and Chairman Entringer agreed that federal credit unions can use the word “banking” as a verb. Chairman Entringer continued that federal law supersedes the state law regarding federal credit unions. Member Tonneson indicated he understands the use of the word “bank” as a noun; however, federal credit unions being able to using the word “banking” as a verb to describe an action when state-chartered credit unions cannot seems to be a discrepancy. Chairman Entringer continued that the problem is that the words “bank, banking, or banker” are specifically outlined in the statute.

Chairman Entringer stated this statute is not unusual across the nation; adding that any entity that wants to use the words “bank, banking, or banker” can ask the Department for a waiver. Chairman Entringer continued that he has to determine whether the public would be confused that using these words in a name leads to the conclusion this entity is regulated by the Department.

In response to Member Brucker, Chairman Entringer agreed making a decision on this matter could be delayed until after the Board has had time to consider the options addressed today. Members Stillwell, Clark, and Tonneson agreed. Chairman Entringer indicated he would provide this information to Mr. Tschider and the GAC. Member Tonneson added he feels Chairman Entringer should indicate any proposed legislation on this issue would need to be introduced by the GAC versus the Board.

Assistant Attorney General Murtha added from a general counsel perspective, the legislative option avoids the possible contention of what falls under the Board's discretion.

The Board went into closed session at 11:20 a.m. to review the Supervisory Reports of Examination pursuant to North Dakota Century Code 6-01-07.1, and to discuss any confidential records pursuant to North Dakota Century Code 44-04-19.2.

Robert J. Entringer, Chairman

Aaron K. Webb, Secretary