

credit union legal update

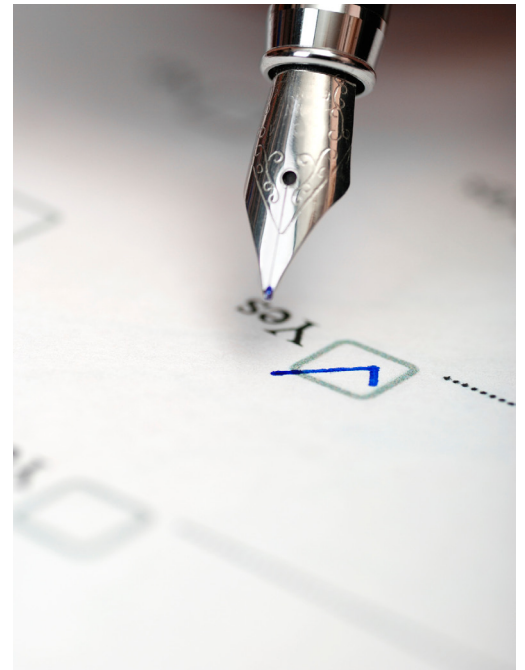
summer 2012

LOAN PARTICIPATION CONTRACT CHECKLIST

Loan participations have become important tools for credit unions to consider. When properly executed, loan participations tend to boost lending and increase “profits” during low loan demand. According to some recent reports from NCUA, nearly 1,500 federally-insured credit unions have reported activity in loan participations with total balances of nearly \$13 billion.

NCUA requires that those credit unions involved in loan participations enter into a written master participation agreement. However, NCUA has not provided any guidance as to what should or should not be included in the master participation agreement. The following are some suggested contract issues that should be considered as part of the due diligence analysis of a loan participation loan.

- Identification of roles and responsibilities of all parties involved
- Verification that all parties have performed independent financial analysis including valuation of assets pledged
- Requirement that each loan participant has reviewed the loan documents prior to closing
- Identification of loans sold with and without recourse
- Guarantors, if any, identified and appropriate due diligence
- Attention to servicing issues
- Buy-back rights
- Notice provisions
- Servicer rights, including fees, delinquencies, right to modifications
- Privacy and confidentiality issues
- Broker’s rights and responsibilities/payments
- Voting rights
- Custody of loan documents
- Separate trust accounts for funds
- Statutory liens
- Prepayment penalty
- Defaults



Unsure if your due diligence analysis or checklist is adequate? Consider a document review or audit by Kaufman & Canoles.

NCUA'S LIST OF REQUIRED POLICIES FOR BOARD OF DIRECTORS OF CREDIT UNIONS

	Required Policy		Regulation/Reference
1.	Asset Liability Policy <ul style="list-style-type: none"> Interest Rate Risk Policy 	Adopt written policy addressed interest rate risk management and implement effective IRR program as part of the asset liability program.	Interest Rate Risk, (proposed Mar. 24, 2011) (to be codified at 12 C.F.R. pt. 741).
2.	Authentication in an internet Banking Environment Policies (Online Member Authentication)	Compliance Required by January 2012. CU must adopt strategies to avoid hacking and cyber crime. Educate members re: electronic protection.	NCUA Letter to Credit Unions, 11-CU-09.
3.	Bank Secrecy Act Compliance Policy <ul style="list-style-type: none"> Customer Identification Program (CIP) Policy that is required by §326 of the Patriot Act Anti-Money Laundering Program 	CU must establish and maintain written compliance program for the BSA. CIP Policy prevents money laundering and terrorist financing scheme.	12 CFR § 748.2(b); pt. 751.214 for state-chartered credit unions
4.	Children's Online Privacy Protection ACT (COPPA) Compliance Policy	Adopt a policy for implementing COPPA that includes providing a privacy notice on website and a notice to parents.	16 C.F.R. pt. 312.4
5.	Compliance Policy/Program	Each CU should have a compliance officer that is responsible for general compliance. Additionally, officers in different divisions should be responsible for compliance in their divisions.	See Compliance Manual at 8.
6.	Consumer Leasing Act Policy	Adopt policy for implementing Reg. M.	Reg. M
7.	Credit by Banks and Persons Other than Brokers or Dealers for the Purpose of Purchasing or Carrying Margin Stock	Adopt comprehensive procedures for implementing Reg. U (if applicable).	Reg. U
8.	Credit Practices Policy	Adopt policy re: to credit practices.	12 CFR pt. 706
9.	Concentration Risk Policy	Adopt policies re: risks in business lending and adopt sound risk management practices.	NCUA Letter 10-CU-03; Supervisory Letter 10-CU-02
10.	E-Sign Act Policy	Adopt policy and procedure regarding use of electronic records.	NCUA Compliance Manual; E-Sign Act §101(C)(1).
11.	Electronic Fund Transfer Act Policy (EFT)	Adopt policy implementing Reg. E.	Reg. E
12.	Equal Credit Opportunity Act Policy	Ensure compliance with ECOA and adopt non-discrimination policy for credit transactions.	Reg. B
13.	Expedited Funds Availability Act Policy	Adopt policies to comply with Regulation CC an all related regulatory requirements. This includes adopting: <ul style="list-style-type: none"> Funds Availability Policy Notices of Changes in Availability Policy 	Reg. CC

	Required Policy		Regulation/Reference
14.	Fair Credit Reporting Act Policy	Ensure procedures are in place for implementing and complying with FCRA.	FCRA
15.	Fair Debt Collection Practices Act Policy	Ensure procedures are in place for implementing and complying with FDCPA.	FDCPA
16.	Fair Housing Act Policy	Board must ensure that policy for implementing FHA does not tolerate illicit discrimination in any transaction relating to residential real estate.	FHA
17.	Financial Education Program for the Board of Directors	Implement a policy that makes available training for enhancing the financial knowledge of the directors.	NCUA Letter to Credit Unions, Re: Duties of Federal Credit Union Boards of Directors; NCUA Regulation §701.4, Letter No. 11-FCU-02 (Feb. 2011); 12 CFR pt. 701.4.
18.	Fiduciary Duties Policy	Adopt policy that specifies the fiduciary duties of the Board of Directors.	12 CFR §701.4
19.	Foreclosure and Repossession Policy	Adopt policy to address mortgage foreclosure concerns.	NCUA Accounting Manual for FCUs; See NCUA Letter to Credit Unions, Re: Residential Mortgage Foreclosure Concerns. Letter No. 11-Cu-01 (Jan. 2011).
20.	Flood Disaster Protection Act Policy or National Flood Insurance Act Compliance Policy	Adopt policy for implementing National Flood Insurance Act	FDPA; 12 CFR pt. 760
21.	Homeowner's Protection Act (HOPA)	Adopt HOPA compliance policies because NCUA may enforce HOPA.	HOPA
22.	Home Mortgage Disclosure Act Policy	Adopt policy for implementing HMDA when collecting and maintaining accurate data of covered loans/ applications.	Reg. C
23.	Interest Rate Risk Policy	Adopt policies as part of the Asset Liability Policies of the credit union.	12 CFR pt. 741
24.	Investment Policy	Adopt policies re: liquidity, investment objectives, cash deposits, etc.	12 CFR pt. 703.3
25.	Loan Participation Policy	Adopt policies re: member loan participation policies and procedures.	12 CFR pt. 701.22(b,c)
26.	Management Officials Interlocks Act Compliance Policy	Adopt compliance policy for Interlocks Act.	12 U.S.C. 1823(k), 3207; 12 CFR pt. 711.4-.6
27.	Office of Foreign Asset Control (OFAC) Policy and Procedure	Credit Unions must monitor all financial transactions performed by or through in order to detect entities/persons subject to OFAC laws and regulations.	Various OFAC laws and regulations.
28.	Privacy Policy	Adopt policy re: non-disclosure of nonpublic information.	12 C.F.R. pt. 716
29.	Preservation of Consumer Claims and Defenses Policy (Holder in Due Course)	Board must adopt policy for implementing the Preservation of Consumers' Claims and Defenses Rule.	FTC Holder in Due Course Rule – 12 C.F.R. pt. 433.2

	Required Policy		Regulation/Reference
30.	Purchasing & Payment Authorization Policy	As part of the security policy, CUs must maintain policy for verifying identities of members.	12 CFR pt. §748
31.	Service-members' Civil Relief Act Policy	Adopt policy for implementing SCRA.	See Compliance Manual; 50 U.S.C. App. § 526.
32.	Real Estate Settlement Procedures Act	Adopt policy for implementing RESPA and Reg. X. This includes explaining coverage of regulation, exemption, and disclosure requirements.	24 CFR pt. §3500; Reg. X
33.	Records Preservation Program and Record Retention Policy	Adopt vital records preservation program and document retention policy.	12 CFR pt. § 749
34.	Reimbursement for Providing Financial Records Policy	Adopt policy for implementing Reg. S for collecting expenses associated with assembling and copying subpoenaed members' records.	Reg. S
35.	Reserves on Transaction Accounts	Adopt policy for implementing Regulation D.	Reg. D.
36.	Risk-Based Lending Policies (See also, Concentration Risk Policy)	Policies that define parameters of risks assumed and internal controls; manage risks; implement information systems or monitoring information.	See NCUA Letter to Credit Unions, Re: Risk-Based Lending, Letter No. 99-CU-05 (June 1999).
37.	Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act) Compliance Policies	Establish written policies providing basic framework for compliance with SAFE Act.	12 CFR pt. § 761 and Appendix A; NCUA Letter to Credit Unions, RE: Compliance Deadline for SAFE Act, Letter No. 10-CU-13 (Aug. 2010).
38.	Security Program	Each CU must institute a written security program to protect CU from robberies, etc.	12 CFR pt. § 748
39.	Third Party Vendor Policy (Indirect Lending Policies)	Adopt comprehensive policies re: indirect lending, including underwriting and monitoring.	NCUA Letter to Credit Unions, Re: Indirect Lending and Appropriate Due Diligence, Letter No. 10-CU-15 (Aug. 2010).
40.	Truth in Savings Act Compliance Policy	Adopt policy for implementing Truth in Savings Act, this includes adopting policies related to activities like: <ul style="list-style-type: none"> • Account opening disclosures; • Dividend calculations • Subsequent disclosures • Member inquiries • Training • Record retention • Advertising • Monitoring 	12 CFR pt. § 707.2
41.	Truth in Lending Act	Adopt policy for implementing Truth in Lending Act.	Reg. Z

BOARD COMPENSATION

Most understand and acknowledge the fundamental principle that a Board member of a federal credit union is a volunteer who serves without compensation. What is defined as compensation? Is an award to recognize their service compensation, and if so, how large can the award be? Section 701.33 of the NCUA rules and regulations addresses reimbursement, insurance and indemnification of officials. Generally speaking, the rule is that only one Board officer may be compensated as an officer of the Board. The bylaws must specify the officer to be compensated, as well as the specific duties of each of the Board officers. No other official may receive compensation for performing the duties or responsibilities of the Board or a committee position to which the person has been elected or appointed.

The NCUA rule is silent on awards or gifts. However, the rule does provide that compensation does not include the reasonable and proper costs incurred by an official in carrying out the responsibilities of the position, if the payment is determined by the Board of Directors to be necessary or appropriate in order to carry out the official business of the credit union. The payment must also be in accordance with written policies and procedures, including documentation requirements, established by the Board of Directors. Payments may include the payment of travel costs for officials, and one guest per official.

In a relatively recent NCUA opinion, the Office of General Counsel concluded that a \$250 Visa gift card to be awarded as a volunteer service award to a director or committee member for a substantial length of service of five years or greater was acceptable. NCUA concluded that the award does not constitute compensation so long as the award is “nominal in value” and proportionate to the period of service it covers. Previously (1993), NCUA concluded that a gift with a maximum value of \$50 per year was acceptable since it was nominal.

Board members and committee members volunteer because they want to serve, help and assist. Unlike some bank directors, credit union officials do not seek compensation. It seems challenging to identify whether or not even a Christmas gift could be viewed as compensation. If it is a nominal value, a gift should not be found to be compensation.

What are credit unions to do? Although there is very little written on the subject, a standard of \$50 per gift would presumably be viewed as a nominal gift. A copy of this opinion of the General Counsel can be downloaded in PDF format at <http://tiny.cc/g75ngw>.

TRUTH-IN-LENDING – STILL HYPER-TECHNICAL

In a recent federal court case dealing with Truth-In-Lending and Notices of Rescission, the presiding Judge wrote, “In the world of the Truth-In-Lending Act, it often seems that no detail is too insignificant to matter;” “we have called TILA hyper-technical in the past;” and it will continue to be found as hyper-technical for perhaps years to come.

The case in question dealt with a judgment against a mortgage lender. The lawsuit was brought more than two years after the closing of the loan and the claim in the lawsuit was an alleged disclosure violation. It appears that the borrower signed and retained one copy of the Notice of Right to Cancel closing document which stated he had only three days after closing to rescind the mortgage. The borrower argued that he had only received one copy of the Notice, whereas Truth-In-Lending required that he receive two copies of the Notice.

The Court argued that, although the difference between one and two copies may seem to be an “empty formality,” there is no room for any kind of substantial compliance. “Two copies means two copies, not one.” The borrower was allowed the opportunity to rescind the mortgage loan. Readers of this newsletter should be reminded of how complex and how “hyper-technical” the Truth-In-Lending Act is and continues to be.

MEDICAL LEAVE DUE TO PREGNANCY

What if your credit union is not subject to the federal Family and Medical Leave Act (FMLA)? How should you handle requests for time off for “maternity leave?”

The short answer is that an employee who is out on medical leave due to pregnancy must be treated just like any other employee who is on medical leave due to any temporarily disabling medical condition. In general, an employer must offer the same benefits to employees temporarily disabled by pregnancy as to employees who are temporarily disabled by any other medical condition. So when considering requests for medical leave due to pregnancy, you must consistently apply the same policies that you would follow for any request for medical leave due to any temporary disability. “Maternity leave” should be coordinated with the employer’s paid and unpaid leave policies just like any medical leave for any temporary medical condition.

This same principle -- treating all employees on medical leave for temporary medical conditions, including pregnancy consistently -- applies to other benefits which may be provided while on leave. This may include provision of health care coverage; sick leave, vacation and PTO accruals; pay increases; etc. Job reinstatement and/or consideration for vacant positions should be handled in the same consistent manner.

Employers may ask employees if they intend to return to work following medical leave due to pregnancy, as long as all employees going out on medical leave for any reason are asked the same question. The employee’s answer should be documented. If an employee affirmatively acknowledges that she will not be returning from medical leave, written confirmation can be requested and employment may be considered to end through resignation when the employee departs for medical leave.

“Maternity leave” should also be coordinated with your short term disability (STD) insurance policy. Depending on how your credit union’s STD plan is structured, you may be able to require employees to re-pay STD benefits if they do not return to work following STD leave for reasons other than ongoing disability. This policy would need to apply to all employees going on STD leave for any medical reason, not just the employees going on leave due to pregnancy.

If your credit union maintains group health care coverage for employees who are out on temporary medical leave, you can also consider a policy which requires employees to reimburse the credit union for premiums in the event the employee does not return to work following leave for reasons other than ongoing disability.

Two caveats: (1) Even if your credit union is not subject to the federal FMLA, you must consider whether a state FMLA or similar law applies. At least ten states and the District of Columbia currently have such laws in effect. These state laws may require covered employers to provide protected leave and reinstatement rights, as well as provide certain notices, to eligible employees. (2) Consider avoiding the term “maternity leave,” and use the more appropriate designation of “medical leave.” If your credit union is providing “maternity leaves” which are longer than leaves for temporary medical purposes, you may be opening the door to a “paternity leave” requirement as well.

FYI

Questions about FMLA and other employment related topics will be addressed at K&C’s 28th Annual Employment Law Update on July 19th at the Hampton Roads Convention Center. Mention this newsletter when you register and receive a 10% discount off of the registration fee. See page 7 for further seminar details.

ETC., ETC., ETC.

- Andy Keeney recently presented two sessions of a program entitled “Risks and Liabilities of Loan Participations” at the Police Officers Credit Union Conference. The PowerPoint presentations for both sessions can be downloaded at <http://tiny.cc/tju3fw> and <http://tiny.cc/xhu3fw>.
- The Kaufman & Canoles webinar entitled “Executive Compensation Issues for Credit Unions” was recently held with featured presenters Shad Fagerland and Andy Keeney. The webinar can be viewed at <http://www.kaufcan.com> and then click on Events.
- A NAFCU televised webinar focusing on “Powers of Attorney and Subpoenas – The Risks, Abuses and Potential Liabilities to Credit Unions” was recently conducted by Andy Keeney, and this PowerPoint presentation can be found at <http://tiny.cc/llu3fw>.
- When it comes to facilities issues, “the devil is in the details.” A checklist prepared by Terry Murphy is ideal for credit unions’ use. The checklist can be found at <http://www.kaufcan.com>.
- Having difficulty understanding the concept of trusts and how they impact or could impact a credit union? A recent article by Vonda Chappell entitled “Trusts 101” can be viewed at <http://tiny.cc/9t5ngw>.
- If your credit union grants mortgage loans in several states, you may benefit from the American College of Mortgage Attorneys Mortgage Law Summary which provides detailed analysis and commentary on the mortgage laws and mortgage requirements for each state. To order a copy of the Mortgage Law Summary, go to https://www.acmaatty.org/commerce/lawSummary/MortLawSummary_pub.cfm.

28TH ANNUAL EMPLOYMENT LAW UPDATE PUTTING THE PIECES TOGETHER - JULY 19TH

Knowing that companies are dealing with many pieces of the employment law puzzle, K&C is pleased to announce a program designed to help employers solve the employment law puzzle. The final showing of the 28th Annual Employment Law Update “Putting the Pieces Together” will be held at the Hampton Roads Convention Center on Thursday, July 19th.

The K&C Employment Law Team will present a variety of educational workshops and will feature several representatives from a number of government agencies, as well as an intriguing lunchtime presentation by James Shoemaker, a lawyer who specializes in suing employers. Attendees will also have a chance to view an educational and entertaining mock filing of an EEOC charge by a “problem” employee against his former employer, as well as attend a number of timely topics including: What Employers Should Know About Social Media; Avoiding Discrimination Claims; Handling Unemployment Claims; Current Wage-Hour Issues; Safe Interviewing/Hiring Practices; and more.

The 28th Annual Employment Law Update will provide employers with valuable tips to piece together their employment law puzzles and reduce potential liability. For more information, visit our website at www.kaufCAN.com or contact Julia Rhody at (757) 624.3232.

This program has been approved for 6 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org. The use of this seal is not an endorsement by HR Certification Institute of the quality of the program. It means that this program has met HR Certification Institute’s criteria to be pre-approved for recertification credit.



KAUFMAN & CANOLES

attorneys at law

P.O. Box 3037

Norfolk, VA 23514

IN THIS ISSUE

- Loan Participation Contract Checklist
- List of Required Policies for Boards of Directors of Credit Unions
- Board Compensation
- Medical Leave Due to Pregnancy
- Truth-In-Lending - Still Hyper-Technical

Visit our website at www.kaufCAN.com
for timely updates or to register for our seminars.

E. Andrew (Andy) Keeney has been committed to the representation of credit unions for over three decades. In addition to serving as the in-house attorney for the State Department Federal Credit Union and the Pentagon Federal Credit Union, he has represented many credit unions, leagues and associations, as well as the NCUA. His practice also includes legal services and representation in real estate development activities. If you have further questions regarding any of these topics, please contact Mr. Keeney in our Norfolk Office.

150 W. Main Street, Suite 2100
Norfolk, VA 23510
(757) 624.3153 direct
(757) 624.3169 fax
eakeeney@kaufcan.com



This Credit Union Legal Update was edited by E. Andrew Keeney of Kaufman & Canoles. This newsletter is provided to clients and friends of Kaufman & Canoles. If you would like to be added to the Kaufman & Canoles mailing list or if your name, title, company, or address needs to be revised, please notify Julia Rhody at jhrody@kaufcan.com.

Copyright © 2012. Kaufman & Canoles. All Rights Reserved. The contents of this publication are intended for general information only and should not be construed as legal advice or a legal opinion on specific facts and circumstances.