



CREDIT UNION DEPARTMENT

DATE: June 18, 2020

TO: State Chartered Credit Unions

SUBJECT: Change 56 to Update the Texas Rules for Credit Unions

The attached pages constitute changes to the Texas Rules for Credit Unions. Your book of rules should be updated as follows:

REMOVE PAGES

INSERT

AMENDMENTS OR NEW RULES

91-73 thru 91-76

91-73 thru 91-76

Amended Section 91.1003

91-95 thru 91-100

91-95 thru 91-100

Amended Section 91.6001
Amended Section 91.6003
Amended Section 91.6004
Amended Section 91.6006
Amended Section 91.6010
Amended Section 91.6014

91-101 thru 91-104

91-101 thru 91-104

Readopted Section 91.7000

91-105 thru 91-108

91-105 thru 91-108

Readopted Section 91.8000

FOR YOUR RECORDS - Please keep this letter of transmittal behind the **Update Tab** of the Rules Section of your binder as a record to show your rules are up to date.

Subchapter J. Changes in Corporate Status

§91.1003. Mergers/Consolidations.

(a) **Definitions.** The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Acquirer credit union** - The credit union that will continue in operation after the merger/consolidation.

(2) **Acquiree credit union** - The credit union that will cease to exist as an operating credit union at the time of the merger/consolidation.

(3) **Merger inducement** - A promise by a credit union to pay to the members of another credit union a sum of money or other material benefit upon the successful completion of a merger of the two credit unions.

(4) **Substantial** - An amount that is large in size, value, or importance. For purposes of this section, an amount is substantial if it exceeds \$1,000.00 in total.

(b) Two or more credit unions organized under the laws of this state, another state, or the United States, may merge/consolidate, in whole or in part, with each other, or into a newly incorporated credit union to the extent permitted by applicable law, subject to the requirements of this rule. A credit union may not offer a merger inducement to another credit union's members as a means of promoting a merger of the two credit unions.

(c) **Notice of Intent to Merge/Consolidate.** The credit unions shall notify the commissioner in writing of their intent to merge/consolidate within ten days after the credit unions' boards of directors formally agree in principle to merge/consolidate.

(d) **Plan for Merger/Consolidation.** Upon approval of a proposition for merger/consolidation by the boards of directors, the credit unions must prepare a plan for the proposed merger/consolidation. The plan shall include:

(1) The terms and conditions of the merger/consolidation including a detailed description of any substantial remuneration, such as bonuses, deferred compensation, early payout of retirement benefits, severance packages, retainers, services agreements, or other substantial financial rewards or benefits that any board member or senior management employee of the acquiree credit union may receive in connection with the merger/consolidation;

(2) the current financial reports of each credit union;

(3) the combined financial reports of the two or more credit unions;

(4) an analysis of the adequacy of the combined Allowance for Loan and Lease Losses account;

(5) an explanation of any proposed adjustments to the members' shares, or provisions for reserves, dividends, or undivided profits;

(6) a summary of the products and services proposed to be available to the members of the acquirer credit union, with an explanation of any changes from the current products and services provided to the members;

(7) a summary of the advantages and disadvantages of the merger/consolidation;

(8) the projected location of the main office and any branch location(s) after the merger/consolidation and whether any existing office locations will be permanently closed; and

(9) any other items deemed critical to the merger/consolidation agreement by the boards of directors.

(e) **Submission of an Application to Merge/Consolidate to Department.**

(1) An application for approval of the merger/consolidation will be complete when the following information is submitted to the commissioner:

- (A) the merger/consolidation plan, as described in this rule;
- (B) a copy of the corporate resolution of each board of directors approving the merger/consolidation plan;
- (C) the proposed Notice of Special Meeting of the members;
- (D) a copy of the ballot form to be sent to the members;
- (E) the current delinquent loan summaries for each credit union;
- (F) a statement as to whether the transaction is subject to the Hart-Scott Rodino Act premerger notification filing requirements; and
- (G) a request for a waiver of the requirement that the plan be approved by the members of any of the affected credit unions, in the event the board(s) seek such a waiver, together with a statement of the reason(s) for the waiver(s).

(2) If the acquirer credit union is organized under the laws of another state or of the United States, the commissioner may accept an application to merge or consolidate that is prescribed by the state or federal supervisory authority of the acquirer credit union, provided that the commissioner may require additional information to determine whether to deny or approve the merger/consolidation. The application will be deemed complete upon receipt of all information requested by the commissioner.

(3) Notice of the proposed merger must be published in the *Texas Register* and Department Newsletter as prescribed in §91.104 (relating to Notice of Applications).

(f) Commissioner Action on the Application.

(1) The commissioner may grant preliminary approval of an application for merger/consolidation conditioned upon specific requirements being met, but final approval shall not be granted unless such conditions have been met within the time specified in the preliminary approval.

(2) The commissioner shall deny an application for merger/consolidation if the commissioner finds any of the following:

(A) the financial condition of the acquirer credit union before the merger/consolidation is such that it will likely jeopardize the financial stability of the merging credit union or prejudice the financial interests of the members, beneficiaries or creditors of either credit union;

(B) the plan includes a change in the products or services available to members of the acquiree credit union that substantially harms the financial interests of the members, beneficiaries or creditors of the acquiree credit union;

(C) the merger/consolidation would probably substantially lessen the ability of the acquirer credit union to meet the reasonable needs and convenience of members to be served;

(D) the credit unions do not furnish to the commissioner all information requested by the commissioner which is material to the application;

(E) the credit unions fail to obtain any approval required from a federal or state supervisory authority; or

(F) the merger/consolidation would be contrary to law.

(3) For applications to merge/consolidate in which the products and services of the acquirer credit union after merger/consolidation are proposed to be substantially the same as those of the acquiree and acquirer credit unions, the commissioner will presume that the merger/consolidation will not significantly change or affect the availability and adequacy of financial services in the local community.

(g) Procedures for Approval of Merger/Consolidation Plan by the Members of Each Credit Union.

(1) The credit unions have the option of allowing their members to vote on the plan in person at a meeting of the members, by mail ballot, or both. With prior approval of the commissioner, a credit union may accept member votes by an alternative method that is reasonably calculated to ensure each member has an opportunity to vote.

(2) Members shall be given advance notice of the meeting in accordance with the credit union's bylaws. The notice of the meeting shall:

(A) specify the purpose of the meeting and state the date, time, and place of the special meeting;

(B) state the reasons for the proposed merger/consolidation;

(C) contain a summary of the merger plan and state that any interested person may obtain more detailed information about the merger from the credit union at its principal place of business, or by any method approved in advance by the commissioner;

(D) provide the name and location of the acquirer credit union;

(E) specify the methods permitted for casting votes; and

(F) if applicable, be accompanied by a mail ballot.

(h) Completion of Merger/Consolidation.

(1) Upon approval of the merger/consolidation plan by the membership, if applicable, the Certificate of Merger/Consolidation shall be completed, signed and submitted to the commissioner for final authority to combine the records. Necessary amendments to the acquirer credit union's articles of incorporation or bylaws shall also be submitted at this time.

(2) Upon receipt of the commissioner's written authorization, the records of the credit unions shall be combined as of the effective date of the merger/consolidation. The board of the directors of the acquirer credit union shall certify the completion of the merger/consolidation to the commissioner within 30 days after the effective date of the merger/consolidation.

(3) Upon receipt by the commissioner of the completion of the merger/consolidation certification, any article of incorporation or bylaw amendments will be approved and the charter of the acquiree credit union will be canceled.

Source: The provisions of this §91.1003 adopted to be effective May 11, 1998, 23 TexReg 4568; readopted to be effective November 19, 2001, 26 TexReg 9934; amended to be effective November 16, 2005, 30 TexReg 7434; amended to be effective November 11, 2007, 32 TexReg 7924; reviewed and amended to be effective November 8, 2009, 34 TexReg 7628; reviewed and readopted to be effective June 24, 2013, 38 TexReg 4392; reviewed and readopted to be effective July 14, 2017, 42 TexReg 3807; reviewed and amended to be effective November 23, 2017, 42 TexReg 6509; reviewed and amended to be effective May 31, 2020, 45 TexReg 3437.

§91.1005. Conversion to a Texas Credit Union.

(a) Authority to convert. A federal credit union or an out of state credit union is authorized to convert to a credit union incorporated under the laws of this state by Section 122.203 of the Act.

(b) Requirements for conversion. A credit union wishing to convert to a credit union incorporated under the laws of this state shall comply with the following requirements:

(1) Submit a complete application on a form and in a manner prescribed by the commissioner;

(2) Furnish evidence that the current federal or state regulatory agency having jurisdiction over the applicant has no preliminary objection to the conversion plan;

(3) Submit to a conversion examination by the department and pay the supplemental examination fee prescribed in Section 97.113 of this Title (relating to Fees and Charges). The commissioner may waive the examination or the fee, upon finding good cause;

(4) Furnish evidence confirming that the applicant has complied with all applicable requirements of and has completed the conversion in a manner satisfactory to the insuring organization and the current federal or state regulatory agency; and

(5) Furnish evidence that the applicant has established or will relocate its principal place of business in a specific location in the State of Texas.

(c) Approval. The commissioner shall approve the conversion once the conditions required by this section have been met and the commissioner finds that the applicant: (1) is financially sound; (2) has no material supervisory problems; and (3) can reasonably be expected to conduct its operations in a safe and sound manner and in accordance with the laws of this state. The commissioner may approve the conversion conditioned upon specific requirements being met, but the certificate of incorporation shall not be issued unless such conditions have been met.

(d) Effective date. The conversion shall become effective immediately upon the issuance of the certificate of incorporation or on a stipulated date within 90 days of the conversion approval. On request and for good cause shown, the commissioner may grant a reasonable extension of the effective date.

Source: The provisions of this §91.1005 adopted to be effective July 2, 2006, 31 TexReg 5076; reviewed and readopted to be effective June 22, 2009, 34 TexReg 4549; reviewed and readopted to be effective June 24, 2013, 38 TexReg 4392; reviewed and readopted to be effective July 14, 2017, 42 TexReg 3807.

§91.1006. Conversions to a Federal or Out-of-State Credit Union.

(a) Authority to Convert. A credit union organized under the laws of this state is authorized to convert to a federal credit union or an out-of-state credit union by Sections 122.201 and 122.202 of the Act.

(b) Requirements for Conversion. A credit union wishing to convert to a federal credit union or an out-of-state credit union shall comply with the following requirements:

(1) Furnish evidence to the department that a conversion proposal has been approved by a two-thirds vote of the board of directors;

(2) Submit copies of all filings made with any state or federal regulatory agency and insuring organization with jurisdiction over any aspect of the conversion process;

(3) Furnish evidence confirming that the insuring organization and the acquiring state or federal regulatory agency have no preliminary objections to the plan;

(4) Submit a vote certification as required by Section 91.1008(c) of this chapter showing that the conversion proposal was approved by an affirmative vote of a majority of the eligible members of the credit union voting; and

(5) Furnish written evidence confirming that the credit union has met all of the conversion requirements of the insuring organization and the acquiring state or federal regulatory agency.

(c) Approval. The commissioner shall approve the conversion if all of the conditions required by this section have been met, unless the commissioner determines the conversion is being made to

Subchapter O. Trust Powers

§91.6001. Fiduciary Duties.

A credit union must conduct trust operations in accordance with applicable law and must exercise fiduciary powers in a safe and sound manner. All fiduciary activities shall be under the direction of the credit union's board of directors. In carrying out its responsibilities, the board may assign, by action duly entered in the minutes, any function related to the exercise of fiduciary powers to any director, officer, employee, or committee thereof.

Source: The provisions of this §91.6001 adopted to be effective August 10, 2003, 28 TexReg 6270; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and amended to be effective May 31, 2020, 45 TexReg 3437.

§91.6002. Fiduciary Capacities.

A credit union is subject to this chapter if it acts in a fiduciary capacity. A credit union acts in a fiduciary capacity when it acts in any of the following capacities:

- (1) Trustee.
- (2) Custodian.
- (3) Executor.
- (4) Administrator.
- (5) Guardian.
- (6) Receiver.

Source: The provisions of this §91.6002 adopted to be effective August 10, 2003, 28 TexReg 6270; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

§91.6003. Notice Requirements.

Intent. A credit union is required to notify the commissioner in writing of its intent to exercise fiduciary powers, at least 31 days prior to the anticipated commencement date of such fiduciary activities. The notice must contain:

- (1) A statement describing the fiduciary powers the credit union will exercise;
- (2) An opinion of counsel that the proposed activities do not violate law, including citations to applicable law;
- (3) A statement that the capital of the credit union is not less than the capital required by law of other financial institutions exercising comparable fiduciary powers;
- (4) Sufficient biographical information on proposed trust management personnel to enable the Department to assess their qualifications; and

(5) The physical address of each location where the credit union will conduct fiduciary activities.

Source: The provisions of this §91.6003 adopted to be effective August 10, 2003, 28 TexReg 6270; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and amended to be effective May 31, 2020, 45 TexReg 3437.

§91.6004. Exercise of Fiduciary Powers.

(a) **Supervisory Review.** Unless otherwise notified by the department, a credit union may exercise fiduciary powers on the 30th day after the credit union receives written confirmation from the Department that the notice required under §91.6003 of this title (relating to Notice Requirements) is complete and accepted for filing. The Department will consider the following factors when reviewing such a notice:

- (1) The credit union's financial condition.
- (2) The adequacy of the credit union's net worth position.
- (3) The credit union's overall performance.
- (4) The fiduciary powers the credit union proposes to exercise.
- (5) The availability and expertise of legal counsel.
- (6) The experience and expertise of proposed trust management personnel.
- (7) The needs of the members to be served.
- (8) Any other facts or circumstances that the Department considers appropriate.

(b) **Written Notice.** Prior to expiration of the 30-day period referred to in subsection (a) of this section, the commissioner may give the credit union written notice of denial or consent, which consent may include conditions.

(c) **Acceptance of Conditions.** Commencement of the exercise of fiduciary powers constitutes a credit union's confirmation of acceptance of all conditions imposed by the commissioner under subsection (b) of this section and shall be considered an enforceable agreement against the credit union for all purposes.

Source: The provisions of this §91.6004 adopted to be effective August 10, 2003, 28 TexReg 6270; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective on October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and amended to be effective May 31, 2020, 45 TexReg 3438.

§91.6005. Exemption from Notice.

A credit union does not need to provide notice under section 91.6003 (relating to notice requirements) to act as a trustee or custodian of any form of retirement, pension, profit sharing or deferred income accounts for its members, pension funds of self-employed individuals eligible for membership and pension funds of a company or organization whose employees are eligible for membership in the credit union if acting as such will only involve holding the funds on deposit and reporting information to the account holders and government agencies. All contributions to such fiduciary accounts, however, must be initially made to a share or deposit account in the credit union and the credit union may not directly or indirectly provide any investment advice for such fiduciary accounts.

Source: The provisions of this §91.6005 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

§91.6006. Policies and Procedures.

A credit union exercising trust powers shall adopt and follow appropriate written policies and procedures to maintain its fiduciary activities in compliance with applicable law. Among other relevant matters, the policies and procedures must address, where appropriate, the credit union's:

- (1) Brokerage placement practices;
- (2) Methods for ensuring that fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security;
- (3) Methods for preventing self-dealing and conflicts of interest;
- (4) Selection and retention of legal counsel who is readily available to timely review trust instruments or other documents creating the credit union's fiduciary status and advise the credit union and its fiduciary officers and employees on all fiduciary related matters; and
- (5) Investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution.

Source: The provisions of this §91.6006 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and amended to be effective on May 31, 2020, 45 TexReg 3438.

§91.6007. Review of Fiduciary Accounts.

(a) Pre-acceptance review. Before accepting a fiduciary account, a credit union shall review the prospective account and related instruments and documents to determine whether it can properly administer the account.

(b) Initial post-acceptance review. Upon the acceptance of a fiduciary account for which a credit union has investment discretion, the credit union shall conduct a prompt review of all assets of the account to evaluate whether they are appropriate for the account.

(c) Annual review. At least once during every calendar year, a credit union shall conduct a review of all assets of each fiduciary account for which the credit union has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account.

Source: The provisions of this §91.6007 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

§91.6008. Recordkeeping.

A credit union shall adequately document the establishment and termination of each fiduciary account and shall maintain adequate records for all fiduciary accounts. All records pertaining to a fiduciary account shall be separate and distinct from other records of the credit union.

Source: The provisions of this §91.6008 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

§91.6009. Audit.

At least once during each calendar year, a credit union shall arrange for a suitable audit by a certified public accountant in accordance with generally accepted standards for attestation engagement. The audit must ascertain whether the credit union's internal control policies and procedures provide reasonable assurance of three things:

- (1) The credit union is administering fiduciary activities in accordance with applicable law and the trust instrument or other documents creating the fiduciary responsibility;
- (2) The credit union is properly safeguarding fiduciary assets; and
- (3) The credit union is accurately recording transactions in appropriate accounts in a timely manner.

Source: The provisions of this §91.6009 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

§91.6010. Custody of Fiduciary Assets.

- (a) A credit union shall place assets of fiduciary accounts in the joint custody or control of not fewer than two fiduciary officers or employees designated for that purpose by the board of directors.
- (b) A credit union shall keep assets of fiduciary accounts separate from the assets of the credit union. Except as otherwise authorized by applicable law and as may be in the best interests of the beneficiaries of the fiduciary account, a credit union shall keep assets of each fiduciary account separate from all other accounts.

Source: The provisions of this §91.6010 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and amended to be effective May 31, 2020, 45 TexReg 3438.

§91.6011. Trust Funds.

All monies received by a credit union as fiduciary on trust business shall be deposited in a specially designated account or accounts, shall not be commingled with any funds of the credit union and shall remain on deposit until disbursed or invested in accordance with powers and duties of the credit union in its capacity as such fiduciary.

Source: The provisions of this §91.6011 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

§91.6012. Compensation, Gifts, and Bequests.

A credit union may not permit its directors, officers, or employees to retain any compensation for acting as co-fiduciary with the credit union in the administration of a fiduciary account, except with the specific approval of the board of directors. In addition, a credit union may not permit any fiduciary officer or employee to accept a bequest or gift of fiduciary assets, unless the bequest or gift is directed or made by a relative of the director, officer, or employee or is specifically approved by the board of directors.

Source: The provisions of this §91.6012 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

§91.6013. Bond Coverage.

A credit union is required to maintain a bond for protection and indemnity of members, in reasonable amounts against dishonesty, fraud, defalcation, forgery, theft, embezzlement, and other similar insurable losses with an insurance or surety company authorized to do business in this state. Coverage against such losses shall include all agents who do not otherwise provide protection and indemnity for the credit union, directors, officers, and employees of the credit union acting independently or in collusion or combination with any person or persons whether or not they draw salary or compensation.

Source: The provisions of this §91.6013 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

§91.6014. Errors and Omissions Insurance.

The credit union shall procure errors and omission insurance sufficient to mitigate the risks involved in fiduciary activities, but at no time shall errors and omissions insurance coverage be less than five hundred thousand dollars. A credit union shall conduct and document the annual analysis of the appropriateness of the current coverage.

Source: The provisions of this §91.6014 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and amended to be effective May 31, 2020, 45 TexReg 3438.

§91.6015. Litigation File.

A credit union shall keep an adequate record of all pending litigation to which it is a party in connection with its exercise of fiduciary powers.

Source: The provisions of this §91.6015 adopted to be effective August 10, 2003, 28 TexReg 6271; readopted to be effective November 11, 2007, 32 TexReg 7936; reviewed and readopted to be effective October 24, 2011, 36 TexReg 7570; reviewed and readopted to be effective October 19, 2015, 40 TexReg 7672; reviewed and readopted to be effective February 10, 2020, 45 TexReg 1244.

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Subchapter P. Other Forms of Equity Capital

§91.7000. Certificates of Indebtedness.

(a) General. No credit union may issue certificates of indebtedness pursuant to this section or amend the terms of such certificates unless it has obtained a written letter from the commissioner stating that the commissioner does not object ("non-objection letter"). All requirements of the provisions of this section must be met before a non-objection letter will be issued.

(b) Form of application; supporting information. Applications must be in the form prescribed by the commissioner and shall include all information and exhibits required by the application instructions.

(c) Requirements as to certificates. Certificates of Indebtedness issued pursuant to this section shall meet all of the following requirements:

(1) Form of certificate. Each certificate evidencing subordinated debt issued by a credit union pursuant to this section shall:

(A) Bear on its face, in bold-face type, the following legends:

(i) "This certificate is not a share account or deposit and it is not insured by the United States or any other insuring organization or fund"; and

(ii) "This certificate is not eligible for purchase by any credit union or a credit union service organization thereof without the prior written approval of the Credit Union Commissioner of the State of Texas."

(B) Clearly state that the certificate –

(i) Is subordinated to all other claims of the credit union's creditors;

(ii) Is totally unsecured; and

(iii) May not be used as collateral for any loan by the issuing credit union.

(C) Shall include within its terms the right of the issuing credit union to prepay the obligation, which shall, at a minimum, include the right to prepay any amount without premium or penalty any time during the fifteen months prior to the maturity date;

(D) Shall contain the following statement:

"Notwithstanding anything to the contrary in this certificate (or in any related documents); (i) if the NCUA or other insuring organization shall be appointed liquidating agent for the issuer of this certificate ("the issuer") and in its capacity as such shall cause the issuer to merge with or into another credit union, or in such capacity shall sell or otherwise convey part or all of the assets of the issuer to another credit union or shall arrange for the assumption of less than all of the liabilities of the issuer by one or more credit unions, the NCUA or other insuring organization shall have no obligation, either in its capacity as liquidating agent or in its corporate capacity, to contract for or to otherwise arrange for the assumption of the obligations represented by this certificate in whole or in part by any credit union or credit unions which results from any such merger or which has purchased or otherwise acquired from the NCUA or other insuring organization as liquidating agent for the issuer, any of the assets of the issuer, or which, pursuant to any arrangement with the NCUA or insuring organization, has assumed less than all of the liabilities of the issuer. To the extent that obligations represented by this certificate have not been assumed in full by a credit union with or into which the issuer may have been merged, as described in this paragraph (A), and/or by one or more credit unions which have succeeded to all or a portion of the assets of the issuer, or which have assumed a portion but not all of the liabilities of the issuer as a result of one or more transactions entered into by the NCUA or other insuring organization as liquidating agent for the issuer, then the holder of this certificate shall be entitled to payments on this obligation in

accordance with the procedures and priorities set forth in any applicable law. (ii) In the event that the obligation represented by this certificate is assumed in full by another credit union, which shall succeed by merger or otherwise to substantially all of the assets and the business of the issuer, or which shall by arrangement with the NCUA or insuring organization assume all or a portion of the liabilities of the issuer, and payment or provision for shall have been made in respect of all matured installments of interests upon the certificates together with all matured installments of principal on such certificates which shall have become due otherwise than by acceleration, than any default caused by the appointment of a liquidating agent for the issuer shall be deemed to have been cured, and any declaration consequent upon such default declaring the principal and interest on the certificate to be immediately due and payable shall be deemed to have been rescinded. (iii) This certificate is not eligible to be purchased or held by any credit union or credit union service organization thereof. The issuer of this certificate may not recognize on its transfer books any transfer made to a credit union or any credit union service organization thereof and will not be obligated to make any payments of principal or interest on this certificate if the owner of this certificate is a credit union or any credit union service organization thereof."

(2) Limitations as to term and prepayment.

(A) No certificate of indebtedness issued by a credit union pursuant to this section shall have an original period to maturity of less than seven years. During the first six years that such a certificate is outstanding, the total of all required sinking fund payments, other required prepayments, and required reserve allocations with respect to the portion of such six years as have elapsed shall at no time exceed the original principal amount or original redemption price, thereof multiplied by a fraction, the numerator of which is the number of years that have elapsed since the issuance of the certificate and the denominator of which is the number of years covered by the original period to maturity.

(B) No voluntary prepayment of principal shall be made and no payment of principal shall be accelerated without the approval of the commissioner if the credit union's net worth ratio is below 6% or, if after giving effect to such payment, the credit union's net worth ratio would fall below 6%.

(d) Offering circular. The credit union shall submit the proposed offering circular to the Department. The offering circular must state the following in bold print:

"These certificates have not been approved by the Texas Credit Union Department nor has the Texas Credit Union Department approved this offering circular."

(e) Supervisory objection. Generally, the commissioner will not issue a non-objection letter where:

(1) The proposed issue fails to transfer risk away from the National Credit Union Share Insurance Fund or other insuring organization and onto the certificate holders.

(2) Information submitted in connection with the application or otherwise available to the Department indicates that the credit union will not be able to service the proposed debt. Evaluation of the issuer's ability to service debt should be prospective, based upon the issuer's business plan.

(3) The ratio of subordinated debt included as equity capital to the credit union's net worth requirements exceeds one-third, after giving effect to the proposed issue.

(4) The proposed deployment of the proceeds of the proposed issue is contrary to the credit union's business plan, is unrealistic in its assumptions, or is inconsistent with the principles of safety and soundness.

(5) The credit union has failed to comply with the terms and conditions imposed upon previous subordinated debt issuances, or has failed to comply with any outstanding enforcement action, written agreement or any other significant supervisory requirement.

(f) Additional requirements. The commissioner may impose on the credit union such requirements or conditions with regard to certificates or the offering or issuance thereof as the commissioner may deem necessary or desirable for the protection of purchasers, the credit union, the National Credit Union Share Insurance Fund, or other insuring organization, as the case may be.

(g) Limitation on offering period. Following the date of the issuance of a non-objection letter, the credit union shall have an offering period of not more than one year in which to complete the sale of the certificates of indebtedness issued pursuant to this section. The commissioner may in his discretion extend such offering period if a written request showing good cause for such extension is filed with the Department not later than 30 days before the expiration of such offering period or any previous extension thereof.

(h) Policies and Procedures. Before any offers or sales of the certificates are made on the premises of the credit union or its credit union service organization, the credit union shall submit to the Department a set of policies and procedures for such sale of certificates that is satisfactory to the Department.

(i) Records. A credit union shall establish and maintain certificate of indebtedness documentation practices and records that demonstrate the credit union appropriately administers and monitors certificate of indebtedness-related activities. The credit union's records should adequately evidence ownership, balances, and all transactions involving each certificate. The credit union may maintain records on certificate of indebtedness activities in any format that is consistent with standard business practices.

(j) Disclosures.

(1) In connection with the purchase of a certificate of indebtedness by a person from the issuing credit union or its credit union service organization, the credit union and/or the credit union service organization must disclose to the person that:

(A) The certificate of indebtedness is not a share or deposit;

(B) The certificate of indebtedness is not insured by the National Credit Union Share Insurance Fund or any other insuring organization;

(C) There is investment risk associated with the certificate of indebtedness, including the possible loss of value; and

(D) The credit union may not condition an extension of credit on a person's purchase of a certificate of indebtedness.

(2) The disclosures required by paragraph (1) above must be provided orally and in writing before the completion of the sale of a certificate of indebtedness. If the sale of a certificate of indebtedness is conducted by telephone, the credit union may provide the written disclosure required by paragraph (1) by mail within three business days beginning the first business day after the sale, solicitation, or offer.

(3) A credit union may provide the written disclosures required by paragraph (1) through electronic media instead of on paper, if the person affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the person may retain or obtain later, for example, by printing or storing electronically (such as by downloading).

(4) The disclosures provided shall be conspicuous and designed to call attention to the nature and significance of the information provided.

(k) Sales Activities. A credit union must, to the extent practicable:

(1) Keep the area where the credit union conducts transactions involving certificate of indebtedness physically segregated from areas where shares and deposits are routinely accepted from members;

- (2) Identify the area where certificate of indebtedness activities occur; and
- (3) Clearly delineate and distinguish those areas from the areas where the credit union's share- and deposit-taking activities occur.

(l) Referrals. Any person who accepts deposits from members in an area where such transactions are routinely conducted in a credit union may refer a member who seeks to purchase a certificate of indebtedness to a qualified person who sells that product only if the person making the referral receives no additional compensation for making the referral.

(m) Reports. Within 30 days after completion of the sale of the subordinated debt issued pursuant to this section, the credit union shall transmit a written report to the Department stating the number of purchases, the total dollar amount of certificates sold, and the amount of net proceeds received by the credit union. The credit union's report shall clearly state the amount of subordinated debt, net of all expenses that the credit union intends to have counted as equity capital. In addition, the credit union, shall submit to the Department, certification of compliance with all applicable laws and regulations in connection with the offering, issuance, and sale of the certificates.

(n) Equity capital. When a certificate of indebtedness has a remaining maturity of 5 years, the amount of the certificates that may be considered equity capital shall be reduced by a minimum of 20% of the original amount of the certificate per year. The equity capital shall be reduced by a constant monthly amortization to ensure the recognition of subordinated debt is fully amortized when the certificate matures or is prepaid.

(o) Prohibited practices.

(1) A credit union may not engage in any practice or use any advertisement at any office of, or on behalf of, a credit union that could mislead any person or otherwise cause a reasonable person to reach an erroneous belief with respect to:

(A) the fact that a certificate of indebtedness a credit union sells or offers for sale is not insured by the National Credit Union Share Insurance Fund or other insuring organization;

(B) the fact that there is an investment risk, including the potential that principal may be lost and that the certificate may decline in value; or

(C) the fact that the approval of an extension of credit to a person by the credit union or credit union service organization may not be conditioned on the purchase of a certificate of indebtedness from the credit union or credit union service organization.

(2) No credit union shall directly or indirectly:

(A) employ any device, scheme or artifice to defraud,

(B) make any untrue statement of a material fact or omit to state a material fact necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, or

(C) engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any certificate of indebtedness.

Source: The provisions of this §91.7000 adopted to be effective March 14, 2004, 29 TexReg 2638; reviewed and readopted to be effective June 23, 2008, 33 TexReg 5352; reviewed and readopted to be effective July 18, 2012, 37 TexReg 4958; reviewed and readopted to be effective July 31, 2016, 41 TexReg 5448; reviewed and readopted to be effective May 11, 2020, 45 TexReg 3524.

Subchapter Q. Access to Confidential Information

§91.8000. Discovery of Confidential Information.

(a) **Policy.** The legislature has determined that certain information is confidential and, with limited exceptions, should not be disclosed. See Texas Finance Code, §126.002. Non-disclosure under this section protects the stability of credit unions by preventing disclosures that could adversely impact the institutions. Inappropriate disclosures can result in substantial harm to credit unions and to those persons and entities (including other financial institutions) that have relationships with them. For example, the department may criticize a credit union in an examination report for a financial weakness that does not currently threaten the solvency of the credit union. If improperly disclosed, the criticism can lead to adverse impacts such as the possibility of a "run," short-term liquidity problems, or volatility in costs of funds, which in turn can exacerbate the problem and cause the failure of the credit union. These failures lead to reduced access to credit and greater risk to depositors. Further, since specific loans may be criticized in an examination report, confidentiality of the information protects the financial privacy of borrowers. Finally, protecting confidential information from disclosure facilitates the free exchange of information between the credit union and the regulator, encourages candor, and promotes regulatory responsiveness and effectiveness. Information that does not fall within the meaning of confidential information as defined in this section may be confidential under other definitions and controlled by other laws, and is not subject to this section.

(b) **Disclosure prohibited.** Pursuant to Finance Code §126.002, the department has an absolute privilege against disclosure of its confidential information. Discovery of confidential information from a person subject to §126.002 must comply with subsection (c) of this section. Only a person to whom confidential information has been released pursuant to §126.002 or this rule may disclose that information to another, and only in accordance with that section and this rule.

(c) **Discovery of confidential information.** A credit union, governmental agency, credit union service organization, service provider, or insuring organization that receives a subpoena or other form of discovery for the release of information that is confidential under §126.002 of the Act shall promptly:

- (1) notify the department of the request;
- (2) provide the department with a copy of the discovery documentation and, if requested by the department, a copy of the requested information; and

(3) move for a protective order, or its equivalent under applicable rules of procedure. In addition, prior to the release of confidential information, such credit union, governmental agency, credit union service organization, service provider, or insuring organization must obtain a ruling on its motion in accordance with this section. Confidential information may be released only pursuant to a protective order, or its equivalent, in a form consistent with that set out in this section and only if a court with jurisdiction has found that:

- (A) the party seeking the information has a substantial need for the information;
- (B) the information is directly relevant to the legal dispute in issue; and
- (C) the party seeking the information is unable without undue hardship to obtain its substantial equivalent by other means.

(d) Discretionary filings by department. On receipt of notice under subsection (c) of this section, the department may take action as may be appropriate to protect confidential information. The department has standing to intervene in a suit or administrative hearing for the purpose of filing a motion for protective order and in camera inspection in accordance with this section.

(e) Motion for protective order, or equivalent, and in camera inspection. The movant shall ask the court to enter an order in accordance with this section regarding the release of confidential information. If necessary to resolve a dispute regarding the confidential status or direct relevance of any information sought to be released, the party seeking the order shall move for an in camera inspection of the pertinent information. Until subject to a protective order, or its equivalent, confidential information may not be released, and, if necessary, the party seeking an order shall request the court officer to deny discovery of such confidential information.

(f) Protective order or equivalent. An order obtained pursuant to the terms of this section must:

(1) specifically bind each party to the litigation, including one who becomes a party to the suit after the order is entered, each attorney of record, and each person who becomes privy to the confidential information as a result of its disclosure under the terms of the order;

(2) describe in general terms the confidential information to be produced;

(3) state substantially the following in the body of the order:

(A) absent court order to the contrary, only the court reporter and attorneys of record in the cause may copy confidential information produced under the order in whole or part;

(B) the attorneys of record are custodians responsible for all originals and copies of confidential information produced under the order and must insure that disclosure is limited to those persons specified in the order;

(C) confidential information subject to the order and all information derived there from may be used only for the purposes of the trial, appeal, or other proceedings in the case in which it is produced;

(D) confidential information to be filed or included in a filing in the case must be filed with the clerk separately in a sealed envelope bearing suitable identification, and is available only to the court and to those persons authorized by the order to receive confidential information, and all originals and copies made of such documents and records must be kept under seal and disclosed only in accordance with the term of the protective order;

(E) confidential information produced under the order may be disclosed only to the following persons and only after counsel has explained the terms of the order to the person who will receive the information and provided that person with a copy of the order;

(i) to a party and to an officer, employee, or representative of a party, to a party's attorneys (including other members and associates of the respective law firms and contract attorneys in connection with work on the case) and, to the extent an attorney of record in good faith determines disclosure is necessary or appropriate for the conduct of the litigation, legal assistants, office clerks and secretaries working under the attorney's supervision;

(ii) to a witness or potential witness in the case;

(iii) to an outside expert retained for consultation or for testimony, provided the expert agrees to be bound by the terms of the order and the party employing the expert agrees to be responsible for the compliance by its expert with this confidentiality obligation; and

(iv) to the court or to an appellate officer or body with jurisdiction of an appeal in the case;

(F) at the request of the department or a party, only the court, the parties and their attorneys, and other persons the court reasonably determines should be present may attend the live testimony of a witness or discussions or oral arguments before the court that may include confidential information or relate to such confidential information. The parties shall request the court to instruct all persons present at such testimony, discussions, or arguments that release of confidential information is strictly forbidden;

(G) a transcript, including a deposition transcript, that may include confidential information subject to non-disclosure is subject to the order. The party requesting the testimony of a current or former department officer, employee, or agent shall, at its expense, furnish the department a copy of the transcript of the testimony once it has been transcribed.

(H) Upon ultimate conclusion of the case by final judgment and the expiration of time to appeal, or by settlement or otherwise, counsel for each party shall return all copies of every document subject to the order for which the counsel is custodian to the party that produced the confidential information; and

(I) Production of documents subject to the order does not waive a claim of privilege or right to withhold the documents from a person not subject to the order.

(4) Paragraph (3)(A), (B) and (E) - (H) of this subsection are subject to modification by the court for good cause before the conclusion of the proceeding, after giving the department notice and an opportunity to appear.

Source: The provisions of this §91.8000 adopted to be effective March 14, 2004, 29 TexReg 2638; reviewed and readopted to be effective June 23, 2008, 33 TexReg 5352, amended to be effective July 12, 2009, 34 TexReg 4513; reviewed and readopted to be effective July 18, 2012, 37 TexReg 4958; reviewed and readopted to be effective July 31, 2016, 41 TexReg 5448; reviewed and readopted to be effective May 11, 2020, 45 TexReg 3524.

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