



Senate Fiscal Agency
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BILL



ANALYSIS

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Senate Bill 975 (Substitute S-1 as enrolled)
Sponsor: Senator Michael J. Bouchard
Committee: Financial Services

Date Completed: 5-2-96

RATIONALE

In response to concerns that there would be increasing difficulty in attracting qualified and capable people to serve as bank directors or officers because of their potential liability, Public Act 311 of 1988 broadened the Banking Code's indemnification provisions. It was argued, at the time, that the measure would enhance the ability of banks to recruit and attract quality officials, bolster the banking industry in Michigan, and increase the ability of third parties to obtain compensation for their injuries. While the indemnification provisions were approved for the Banking Code, there was no similar measure applying to credit unions. (Federally chartered credit unions reportedly have the authority to indemnify officers and employees, but State-chartered credit unions do not.) Some people believe that State-chartered credit unions should be granted the same authority to indemnify their officials and employees that was statutorily granted to banks eight years ago.

In addition, banks, and, apparently, Federally chartered credit unions, can unilaterally increase the limit on an open-end credit agreement or line-of-credit loan. The credit union Act, however, does not specifically authorize State-chartered credit unions to raise the approved credit limit on those loans, so a lender must reapply to the financial institution if he or she wishes to increase the maximum amount of the loan. Some people believe that the credit union Act should permit these credit unions to raise the upper-limit of an open-ended credit agreement, so that they could compete more effectively with banks and Federally chartered credit unions.

CONTENT

The bill would amend the credit union Act to do all of the following:

- **Allow a credit union to indemnify its officials, employees, and agents for the purposes of legal actions.**
- **Require that a credit union official discharge the duties of his or her position in good faith and with a prudent degree of diligence, care, and skill.**
- **Allow a credit union to increase the approved limit on a line of credit or open-end credit agreement.**

For purposes of the bill's indemnification provisions, references to "the credit union" would include all other credit unions that became related to the credit union by a consolidation or merger and the resulting or continuing credit union. A person who was or had been an official, employee, or agent of a credit union that was consolidated or merged into another credit union, then, would stand in the same position with respect to the resulting or continuing credit union as the person would if he or she had served the resulting or continuing credit union in the same capacity.

Indemnification

Authorization. A credit union could indemnify a person who was a party to or was threatened to be made a party to a threatened, pending, or completed action, suit, or proceeding, other than an action by or in the right of the credit union, by reason of the fact that the person was or had been an official, employee, or agent of the credit union or was or had been serving, at the request of the credit union, as an official, employee, or agent of one or more credit unions or other enterprises.

Indemnification could be undertaken regardless of whether the action was a civil, criminal, administrative, or investigative action, whether it

was formal or informal, and whether the person acted as the credit union's official, employee, or agent for profit. Indemnification could be granted against expenses, including attorney fees, judgments, penalties, fines, and amounts paid in settlement that were actually and reasonably incurred by the person in connection with the action, suit, or proceeding, if the person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the credit union or its members, and, with respect to a criminal proceeding, if the person had no reasonable cause to believe his or her conduct was unlawful.

The termination of any action, suit, or proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo contendere or its equivalent, would not of itself create a presumption that the person did not act in good faith and in a manner that he or she reasonably believed to be in, or not opposed to, the best interests of the credit union or its members, and, with respect to a criminal proceeding, had reasonable cause to believe that his or her conduct was unlawful.

A credit union also could indemnify a person who was or had been a party to or was threatened to be made a party to any threatened, pending, or completed action or suit, by or in the right of the credit union, to procure a judgment in its favor by reason of the fact that he or she was an official, employee, or agent of one or more credit unions or other enterprises. Indemnification could be undertaken regardless of whether the person acted as an official, employee, or agent for profit. Indemnification could be granted against expenses, including actual and reasonable attorney fees, and amounts paid in settlement incurred by the person in connection with the action or suit, if the person acted in good faith and in a manner the person reasonably believed to be in, or not opposed to, the best interests of the credit union or its members.

Indemnification could not be made for a claim, issue, or matter in which the person had been found liable to the credit union, unless and only to the extent that the court determined upon application that, despite the adjudication of liability, but in view of all circumstances of the case, the person was fairly and reasonably entitled to indemnification for the expenses that the court considered proper.

To the extent that an official, employee, or agent of a credit union was successful, on the merits or

otherwise, in defense of an action, suit, or proceeding or in defense of any claim, issue, or matter in the action, suit, or proceeding, he or she would have to be indemnified against expenses, including actual and reasonable attorney fees, incurred by him or her in connection with the action, suit, or proceeding and an action, suit, or proceeding brought to enforce the mandatory indemnification.

If a person were entitled to indemnification under the bill for a portion of expenses, including attorney fees, judgments, penalties, fines, and amounts paid in settlement, but not for the total amount of the expenses, a credit union could indemnify the person for the portion for which the person was entitled to be indemnified.

Determination. Indemnification, unless ordered by a court, could be made by the credit union only as authorized in the specific case upon a determination that indemnification of an official, employee, or agent was proper in the circumstances because he or she met the bill's applicable standard of conduct. This determination could be made in any of the following ways:

- By a majority vote of a quorum of the board, consisting of directors who were not parties to the action, suit, or proceeding.
- If a quorum described above were not obtainable, by a majority vote of a committee of directors who were not parties to the action. The committee would have to consist of at least two disinterested directors.
- By independent legal counsel in a written opinion.
- By the members.

Payment of Expenses: Repayment Obligation. Expenses incurred in defending a civil or criminal action, suit, or proceeding could be paid by the credit union in advance of the final disposition of the action, suit, or proceeding, upon receipt of an undertaking by or on behalf of a credit union official, employee, or agent to repay the expenses if it were ultimately determined that the person was not entitled to be indemnified by the credit union. The undertaking would have to be by unlimited general obligation of the person on whose behalf advances were made, but it would not have to be secured.

Other Rights. Indemnification or advancement of expenses provided for under the bill would not be

exclusive of other rights to which a person seeking indemnification or advancement of expenses might be entitled under the credit union's bylaws or a contractual agreement. The total amount of expenses advanced or indemnified from all sources could not exceed the amount of actual expenses incurred by the person seeking indemnification or advancement of expenses. Indemnification provided under the bill would continue as to a person who ceased to be an official, employee, or agent and would inure to the benefit of the person's heirs, executors, and administrators.

Official's Discharge of Duties

An official of a credit union would have to discharge the duties of his or her position "in good faith and with that degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances in a like position". In discharging his or her duties, a credit union official could rely upon the opinion of the credit union's legal counsel, upon the report of an independent appraiser selected with reasonable care by the credit union's board or an officer of the credit union, or upon financial statements of the credit union represented to the official to be correct by the general manager or the officer of the credit union having charge of its records, or as stated in a written report by an independent public or certified public accountant, or firm of accountants, fairly to reflect the credit union's financial condition.

Line of Credit or Open-End Credit Agreement

The Act allows a credit union, upon written application by a member, to approve a line of credit or other open-end credit agreement and to grant loan advances to the member within the limit of that open-end credit agreement. If an open-end credit agreement has been approved, an additional loan application is not required as long as the aggregate indebtedness does not exceed the approved limit. The bill specifies that, except to the extent that it had contracted to the contrary, a credit union could unilaterally increase the approved limit, or increase the approved limit upon the member's request, and that reapplication would not be required for a loan as long as the indebtedness did not exceed the higher approved limit as subsequently established by the credit union.

MCL 490.16 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

By adopting the indemnification provisions that were enacted for banks in 1988, the bill would allow State-chartered credit unions to offer the same protections to their officials, employees, and agents that banks have been able to offer to their officers and personnel for the past eight years. This would ensure that credit unions were able to recruit and attract employees and directors on an equal footing with other types of financial institutions. The bill also would expand the ability of State-chartered credit unions to offer lending services to approved and trustworthy customers without requiring those lenders to go through additional application procedures. Since banks and Federally chartered credit unions already have these abilities, State-chartered credit unions may be at a competitive disadvantage. The bill would enable these credit unions to compete with other types of financial institutions.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: M. Barsch

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.