



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

May 13, 1987

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4630

Office of General Counsel

Mr. Michael Prokup
Black, Epstein, Prokup and McCarthy
502 Turner St.
Allentown, PA 18102

Dear Mr. Prokup:

This is in response to your letter regarding the status of Individual Retirement Accounts (IRA's) held at Federal credit unions ("FCU's").

You stated in your letter that your client, the APCI Federal Credit Union (FCU) offers IRA accounts to its members. Initially, the FCU invested the proceeds from the IRA accounts into money market funds consisting of government securities. The FCU later sold the government securities, realizing a gain upon the sale. Your question is whether the gain is attributed to the FCU, or whether it is allocated to the IRA participants.

FCU's do not have general, discretionary trust powers. However, under Section 724.1 of the NCUA Rules and Regulations (12 C.F.R. §724.1), FCU's do have the authority to serve as trustee or custodian of IRA and Keogh accounts, provided the funds of such accounts are invested in share accounts or share certificate accounts of the FCU. In IRPS 85-1, a copy of which is enclosed, this Office determined that FCU's could serve as trustee or custodian of self-directed IRA and Keogh accounts, provided the funds of such accounts were initially deposited in share accounts or share certificate accounts at the FCU, and any subsequent transfer to other assets were at the discretion and direction of the FCU member.

You stated that self-directed IRA's are not at issue. We would note, however, that in the case of self-directed IRA's it is the member that is purchasing the assets, not the FCU. The FCU is merely the custodian of the assets. The member will realize any gains or losses resulting from the transactions. This is not the case with IRA and Keogh accounts that are not self-directed.

In the case of IRA and Keogh accounts that are not self-directed, proceeds from the accounts will be comingled with other credit union funds. An FCU does not have the authority to hold funds

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from these accounts on behalf of individual members and then make investment decisions on their behalf. From the members' perspective, their IRA or Keogh investment is in their accounts at the FCU. The FCU, in turn, invests these monies in its normal course of business (e.g., loans to members, investments in government securities, etc.). With respect to your client, the IRA trust account application which APCI FCU uses specifically recognizes that funds from IRA accounts are invested in the FCU. As seen, therefore, any gain (loss) realized from the sale of the government securities is attributable to the FCU and not to IRA or Keogh accounts of its members.

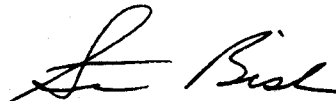
You state in your letter that in advertising its IRA program, the FCU stated that:

Currently, we are quoting a 13.25% interest rate on any funds invested in our Individual Retirement Accounts in the quarter beginning October 1, 1982, and ending on December 31, 1982. Each quarter after that we will be quoting exactly what rate we will be paying for the next quarter.

FCU's do not pay interest; instead, they pay dividends. While an FCU can state that based on its prior dividend record it anticipates a certain dividend rate, it can not guarantee a rate. A dividend can only be declared where there are sufficient earnings and profits after providing for required reserves and expenses. The above-quoted statement is erroneous in that it refers to interest rather than dividends, and because it guarantees a certain rate. Future advertising should be modified accordingly.

We hope this has been of assistance.

Sincerely,



STEVEN R. BISKER
Assistant General Counsel

JT:sg

Enclosure

NATIONAL CREDIT UNION ADMINISTRATION
Trustees And Custodians of Pension Plans
Interpretive Ruling and Policy Statement Number 85-1

AGENCY: National Credit Union Administration (NCUA)

ACTION: Interpretive Ruling and Policy Statement Number 85-1

SUMMARY: The NCUA Board has determined that Federal credit unions (FCU's) may offer self-directed IRA and Keogh accounts and act as the custodians of such accounts.

EFFECTIVE DATE: November 14, 1985

COMMENTS: Although this is a final ruling, comments will be accepted until January 20, 1986. Send comments to Rosemary Brady, Secretary, NCUA Board, 1776 G Street, N.W., Washington, D.C. 20456. The NCUA Board will review all comments and determine whether substantive amendments to this ruling or amendments to NCUA's regulations are appropriate.

FOR FURTHER INFORMATION CONTACT: Steven Bisker, Assistant General Counsel, or Yvonne Gilmore, Staff Attorney, at the above address, or telephone (202) 357-1030.

SUPPLEMENTARY INFORMATION:

The NCUA Board has determined that FCU's may offer and act as custodians for self-directed IRA and Keogh accounts. Part 724 of NCUA's Rules and Regulations (12 C.F.R. Part 724) authorizes FCU's to act as trustee or custodian of IRA and Keogh accounts (established, respectively, pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") and the Self-Employed Individual Retirement Act of 1962) of its members where the funds are invested in shares and share certificates of the credit union. However, Part 724 does not state whether, as custodians of such accounts, FCU's may, at the direction of the member, facilitate transfers of funds to other assets. This Interpretive Ruling and Policy Statement clarifies the authority of FCU's to perform that service for their members, i.e., to serve as custodians for self-directed IRA and Keogh accounts.

Part 724 of the NCUA Rules and Regulations was first promulgated in 1975 as Section 721.4. The preamble to that Section expressly acknowledged that IRA and Keogh plans established at FCU's were limited to investments of funds in share and share certificate accounts at the FCU until issues concerning other possible investment activity were resolved. 40 Fed. Reg. 25582 (June 17, 1975).

The primary issue requiring further study was that of the legal authority of Federal credit unions to serve as trustee or custodian of IRA and Keogh plans wherein funds are invested in assets other than share or share certificate accounts in the credit union. This issue arises from the fact that Federal credit unions do not have general, discretionary trust powers. The Employee Retirement Income Security Act, however, recognizes federally insured credit unions as being among the qualifying trustees or custodians of IRA and Keogh trusts, for purposes of the individual accountholder obtaining certain tax benefits, and does not limit the investment of trust funds to share and share certificate accounts of the credit union. (See 26 U.S.C. §§401(d), 408(a) and (h).) Further, Section 207(c)(3) of the Federal Credit Union Act (12 U.S.C. §1787(c)(3)) addresses insurance coverage of IRA and Keogh retirement accounts at federally insured credit unions, thus separately establishing the authority of Federal credit unions to offer IRA and Keogh accounts when the funds are invested in shares and share certificates in the credit union. NCUA has determined that these provisions, read together, provide sufficient authority for Federal credit unions to offer and serve as trustee or custodian of IRA and Keogh accounts where all funds are initially deposited to a share or share certificate account at the credit union and any subsequent transfers to other assets are solely at the discretion and direction of the credit union member establishing the account. Such activity is both incidental to the FCU's authority to offer IRA and Keogh share accounts and is also

consistent with ERISA's recognition of insured credit unions as qualifying custodians, for tax purposes, of IRA and Keogh trusts.

As stated in the text of NCUA's Interpretive Ruling, set forth below, the establishment of self-directed IRA and Keogh accounts at FCU's will require an FCU to engage only in custodial duties with no exercise of investment discretion. Further, the FCU will not be permitted to provide investment advice. The FCU will simply arrange for the purchase or sale of assets upon the instructions of the member. The IRA or Keogh participant will bear the risks of his investment decisions. Additionally, it is noted that the part of the IRA or Keogh account invested in other than shares or share certificates at the FCU will not be insured by the National Credit Union Share Insurance Fund. The FCU shall take appropriate measures to ensure that this fact is understood by the member.

Although this IRPS does not mandate specific requirements concerning recordkeeping and segregation of assets, FCU's must operate in accordance with applicable laws and regulations governing IRA and Keogh trust accounts and consistent with principles of sound custodial (trust) administration, including the segregation and/or adequate identification of corresponding assets of IRA and Keogh accounts, whether held by the credit union or, under a contractual safekeeping arrangement, with a third party. An FCU should take steps to assure that individual member account records reflect all assets bought and sold on behalf of the member. In addition, an FCU should maintain proper records to verify, among other things, the account for which each

transaction was effected, a description of the asset, the purchase (or sale) price of the asset, the trade date, and the name or other designation of the broker-dealer or other person (entity) from whom the asset was purchased or sold. Such information will also be used, in part, in preparation of forms required to be filed with the Internal Revenue Service by all custodians and trustees of IRA and Keogh accounts.

It is not NCUA's intention, through this interpretative ruling, to authorize FCU's to handle member orders to buy or sell securities or to otherwise engage in activities that would require registration by the FCU as a broker-dealer and trigger related responsibilities under Securities and Exchange Commission (SEC) regulations and Federal securities laws. Thus, in order to offer self-directed Ira and Keogh accounts to members, and to serve as custodian for such accounts, it will be necessary for the FCU to have an arrangement with a securities broker-dealer, pursuant to which the broker-dealer receives all buy and sell orders from the member and executes the securities trade.

A review of previous SEC "no action" letters with respect to FCU involvement in brokerage-related activities indicates that FCU's may solicit members to participate in self-directed IRA or Keogh accounts, and will not be required to register, provided that: (1) the FCU does not exercise investment discretion or render investment advice, (2) the broker-dealer performs all brokerage functions and is clearly identified as the one performing such functions, and (3) FCU employees perform only clerical and ministerial functions. Clerical and ministerial

functions would include distributing promotional materials to members, assisting members in completing account opening forms, and effecting debits or credits to the member's share account related to the purchase and sale of securities and receipt of dividend income from the securities.

Lastly, under SEC rules, an FCU could share in commissions and, assuming the FCU satisfies the conditions described above, it would not have to register as a broker-dealer. However, Part 721 of the NCUA Rules and Regulations (12 C.F.R. Part 721), concerning FCU insurance and group purchasing activities, would limit the amount of compensation that an FCU could receive. In performing its administrative (ministerial) functions in the execution of its members' buy and sell orders, an FCU could only be reimbursed for its direct and indirect costs related to the administrative services it provides.

INTERPRETIVE RULING AND POLICY STATEMENT 85-1

Trustees and Custodians of Pension Plans

A Federal credit union may act as trustee or custodian of individual retirement plans of its members established pursuant to the Employee Retirement Income Security Act of 1974 or self-employed retirement plans established pursuant to the Self-Employed Individuals Retirement Act of 1962, provided that:

- 1) all contributions of funds are initially made to a share or share certificate account in the credit union;
- 2) any subsequent transfer of funds to other assets is solely at the direction of the member and the Federal credit union exercises no investment discretion and provides no investment advice with respect to plan assets (i.e., the credit union performs only custodial duties);
- 3) the member is clearly notified of the fact that National Credit Union Share Insurance Fund coverage is limited to funds held in share or share certificate accounts of NCUSIF-insured credit unions; and
- 4) the Federal credit union complies with all applicable provisions of the Federal Credit Union Act and the National Credit Union Administration Rules and Regulations, and applicable laws and regulations as may be promulgated by the Secretary of Labor, the Secretary of the Treasury, or any other authority exercising jurisdiction over such trust or custodial accounts.

By the National Credit Union Administration Board on
November 14, 1985.

Rosemary Brady

ROSEMARY BRADY
Secretary of the Board