

NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

October 2, 1990

Douglas A. Schafer, Esq.  
P.O. Box 869  
Tacoma, Washington 98401

Re: IRS Electronic Return Filing Program (Your  
April 17, 1990, Letter)

Dear Mr. Schafer:

We apologize for the delay in responding to your letter. You have asked us to reconsider our opinion that federal credit unions (FCUs) may participate in the Internal Revenue Service Electronic Return Filing Program (the IRS Program) on a cost-reimbursement only basis. We continue to believe that FCUs may not participate in the IRS Program for profit.

BACKGROUND

Mr. Donald E. Collins, President of C U Tax Services, Inc., your client, asked us in a letter dated February 28, 1990, whether an FCU may provide a service to electronically process members' federal income tax returns. On March 21, 1990, we responded by enclosing a prior letter from this Office on that issue. In that letter, dated January 18, 1989, to the President of Island FCU, we stated that Section 721.1 of NCUA's Rules and Regulations, 12 C.F.R. §721.1, authorizes an FCU to offer an electronic tax filing service, but that the FCU may be reimbursed only for administrative functions it performs for the vendor of such service. We stated that the FCU is responsible for determining that the amount it receives does not exceed the cost amount as defined in Section 721.2(a)(2).

Under the IRS program, a taxpayer entitled to a refund can file his or her tax return electronically by contacting a party which has been accepted by the IRS as an Electronic Re-

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Douglas A. Schafer, Esq.  
October 2, 1990  
Page 2

turn Originator (ERO). The ERO could be either a tax return preparer or simply an electronic return collector. In this case, the FCU would like to be an ERO serving as an electronic return collector. The ERO assists the taxpayer in completing an IRS electronic filing declaration and accepts the papers comprising the taxpayer's return. The ERO then delivers the return information to an IRS-accepted party, such as C U Tax Services, which has been engaged by the ERO to transmit the return information to the IRS (Transmitter).

A taxpayer filing electronically may request that the refund be directly deposited to his or her account at a financial institution. The IRS estimates that a direct deposit refund takes two weeks, compared to the six to eight weeks generally required for check refunds based on mailed-in returns. The guidelines for the IRS Program permit an ERO to assist a taxpayer in applying for a refund anticipation loan from the financial institution designated to receive direct deposit of the anticipated refund. The ERO may charge taxpayers a uniform flat fee for this assistance, but may not charge or share in any interest or other fees which are based on the amount of the loan.

Transmitters receive taxpayer return information from their client EROs, input it into their computers, transmit it to IRS computers using special protocols, receive IRS acknowledgments of previously transmitted returns, provide required reports and other information to their client EROs, and generally assist their client EROs in complying with the complex rules governing the IRS Program. An ERO may engage any IRS-accepted Transmitter, may change Transmitters from time to time, and may even serve as its own Transmitter if its volume warrants.

You question the applicability of Part 721 of NCUA's Rules and Regulations (12 C.F.R. Part 721) to an FCU's participation in the IRS Program, and you question the legal basis for any requirement that FCUs price their services to members under the IRS Program on a cost-reimbursement only basis. You request that we concur with your view that an FCU's participation in the IRS Program as an electronic return collector is a permissible FCU activity as an exercise of its incidental powers. You also ask that if we agree that FCUs may serve as electronic return collectors as an exercise of

Douglas A. Schafer, Esq.  
October 2, 1990  
Page 3

their incidental powers, we indicate if there are any legal constraints upon the pricing of such services to their members.

#### ANALYSIS

The FCU Act empowers an FCU to perform numerous activities including the exercise of "such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated." 12 U.S.C. §1757(17). In Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972), the court held that in order for an activity to be incidental for a national bank it must be useful or convenient in connection with the performance of one of its established activities pursuant to its express powers. This same test was applied to credit unions in ABA v. Connell, 447 F. Supp. 296 (D.D.C. 1978), rev'd on other grounds, 595 F.2d 887 (D.C. Cir. 1979). In addition to their express and incidental powers, FCUs may perform certain minor good will services for the convenience of their members. See Arnold Tours, 472 F.2d at 433.

Part 721 governs third-party vendor plans whether they are offered as an incidental activity or as a good will service. An FCU may endorse a plan and perform administrative functions on behalf of a vendor pursuant to Section 721.1. Section 721.2(b)(3) governs FCU reimbursement for all group purchasing plans other than insurance and provides that an FCU may only receive its costs for administrative functions performed. We note that in the preamble to the latest revision to Part 721, NCUA stated that "a Federal credit union may engage in an insurance or group purchasing activity for the purpose of generating income only if that activity is expressly authorized or is properly incidental to the exercise of an express power." 50 Fed. Reg. 16462 (April 26, 1985). This language may appear to suggest that any insurance or group purchasing activity incidental to an express power may be engaged in for profit; at this time, however, the only activity involving an outside vendor that NCUA has determined may be engaged in for profit is the sale of insurance which is directly related to an extension of credit by the credit union or directly related to the opening or maintenance of a share, share draft or share certificate account. See 12 C.F.R. §721.2(b)(1). The preamble to Part 721 stated fur-

Douglas A. Schafer, Esq.  
October 2, 1990  
Page 4

ther, "Federal credit union involvement in other insurance and in group purchasing of other goods and services will continue to be limited to a cost reimbursement basis." Consequently, even if the provision of electronic tax filing services were within an FCU's incidental power, the FCU would still be limited by Part 721 to cost-reimbursement if it provided such services through a third-party vendor.

Furthermore, even if an FCU elected to serve as both ERO and Transmitter (thereby eliminating the vendor), it would still be limited to cost-reimbursement, as in our opinion the provision of electronic tax filing services is not incidental to an express power. Our discussion of the bases you suggested for viewing the activity as incidental follows.

You argued that enabling FCU members to earn dividends on their tax refunds within two weeks, rather than six to eight weeks, was incidental to the promotion of thrift. While electronic filing might enable FCU members to begin earning dividends on their refunds sooner, the promotion of thrift is not an express power from which an incidental power can flow. The express powers of FCUs are set forth at 12 U.S.C. §1757(1)-(16) of the FCU Act. Rather than being an express power, the promotion of thrift is an aspect of the general mission of FCUs. Section 101 of the Act defines an FCU as "a cooperative association organized . . . for the purpose of promoting thrift among its members and creating a source of credit for provident and productive purposes." 12 U.S.C. §1752(1). Thus, since the promotion of thrift is not an express power, the provision of electronic tax filing services cannot be "incidental" to that power, within the meaning of 12 U.S.C. §1757(17).

You also argued that assisting FCU members with the direct deposit of their tax refunds into their share accounts was incidental to the business of receiving shares and making loans. Since FCUs have express power to receive shares and make loans under Section 107 of the FCU Act, see 12 U.S.C. §1757(5), (6), the provision of electronic tax filing services would be authorized as an incidental power if it were "useful or convenient" in connection with those powers. See Arnold Tours, supra. In our opinion, there is no reasonable nexus between electronic tax filing and receiving shares and making loans, since tax filing is not strongly tied to those

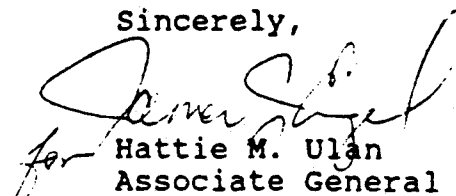
Douglas A. Schafer, Esq.  
October 2, 1990  
Page 5

express powers and is not necessary for their exercise. The provision of electronic tax filing services, therefore, is not authorized as an incidental power, despite the fact that such services might be convenient for FCU members.

We note, however, that an FCU may become involved in the IRS Program, either directly or through a third-party vendor, under the good will service authority set forth in Arnold Tours. In that case, the court ruled that national banks were not entitled to operate travel agencies under a statutory incidental powers clause, but noted with approval that banks perform certain incidental "good will" services, such as obtaining travel tickets and providing travel information, for the convenience of their customers, without receiving compensation for such services. The court stated that there was "a difference between supplying customers with financial and informational services helpful to their travel plans and developing a clientele which looks to the bank not as a source of general financial advice and support but as a travel management center." 472 F.2d at 433.

Just as assisting customers with their travel plans is a service logically provided by banks, we believe that assisting members with their taxes is a service logically provided by credit unions. As with travel services, however, there is a difference between assisting FCU members with their taxes and developing a clientele which looks to the FCU not as a general financial source but as a tax planning center. Accordingly, FCUs may provide electronic tax filing services for the convenience of their members, without receiving compensation for such services.

Sincerely,

  
for Hattie M. Ulan  
Associate General Counsel

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