



NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

November 1, 1991

James D. Geer
Chairman, Supervisory Comm.
B.F. Goodrich Employees
Federal Credit Union
10 Eastwood
Tuscaloosa, AL 35404

RE: Reimbursement of Spousal Expenses
(Your Letter of June 29, 1991)

Dear Mr. Geer:

Chairman Jepsen has forwarded your letter to me for response. In your letter you asked whether National Credit Union Administration ("NCUA") policy regarding reimbursement for spousal expenses has changed since the letter of October 20, 1989, to Mr. J. Alvin George, Chairman, Financial Federal Credit Union of San Diego (the "1989 Opinion"). It has not. You also request response to four questions: (1) Why are examiners not taking exception to such expenses?; (2) What "officials" are intended to be covered under the 1989 Opinion and under the Federal Credit Union ("FCU") Act and NCUA Rules and Regulations?; (3) What employees of an FCU are intended to be so covered as set forth under question number two above?; and (4) Is Mr. Allen Carver [Region III Director] authorized to advise credit union officials that auditors will simply not take exception to such expenses?

After consultation with the Office of Examination and Insurance, I can assure you that NCUA examiners are taking exception to such expenses. As the enclosed January 10, 1991 letter to Durant Abernethy, Senior Vice President and General Counsel, Credit Union National Association (the "1991 Opinion") states, the FCU Act and NCUA Rules and Regulations prohibit compensation of board and committee members, with three exceptions. These are: (1) one board member may be compensated; (2) limited insurance protection; and (3) reimbursement of necessary business costs incurred in carry-

FOIA

VOL. III, A.4

James D. Geer
November 1, 1991
Page 2

ing out FCU responsibilities. Employees of an FCU are not covered by this prohibition and may be reimbursed for reasonable spousal expenses as a legitimate employment perquisite. Finally, Mr. Carver has not advised credit union officials that examiners will never take exception to credit union payment of such expenses. In fact, his examiners have done so on numerous occasions, and his regional office staff regularly tell callers that such payments are not permitted.

ANALYSIS

Section 111(c) of the FCU Act prohibits any "member of the board or of any other committee" of an FCU from being compensated as such, except for certain insurance protection, "and the reimbursement of reasonable expenses incurred in the execution of the duties of the position." 12 U.S.C. §1761(c). The NCUA Rules and Regulations specifically excludes from the definition of compensation "payment ... for reasonable and proper costs incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed." 12 C.F.R. §701.33(b)(2)(i). Section 112 of the FCU Act provides that "one board officer may be compensated as an officer of the board." 12 U.S.C. §1761a (emphasis added). Thus, the FCU Act and NCUA Rules and Regulations prohibit most board and committee members from being compensated, except that the reimbursement of reasonable expenses incurred in the execution of duties of the position and the provision of certain insurance coverage are not considered compensation.

This prohibition on the receipt of compensation applies to officials. The NCUA defines "official" as "a person who is or was a member of the board of directors, credit committee or supervisory committee, or other volunteer committee established by the board of directors." 12 C.F.R. §701.33(a). The Office of Examination and Insurance has assured me that examiners are ordered to enforce spousal reimbursement violations. NCUA examiners are to note any impermissible item of spousal reimbursement, and to treat it as an examiner's finding. If the practice still exists at the next examination, it would be treated as any other repeat exception. Flagrant, abusive or material exceptions are to be dealt with immediately by a record of action. Examiners are, as always, urged to use sound judgment and common sense in this area.

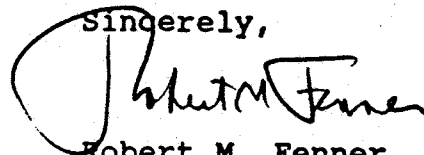
James D. Geer
November 1, 1991
Page 3

A different legal analysis applies when the expenses are incurred by the spouse of an FCU employee rather than the spouse of an FCU official. In brief, the expenses of the spouse of an FCU official are not reimbursable, as explained in the 1991 Opinion, while the expenses of the spouse of an FCU employee may be reimbursable as legitimate compensation to the employee. As long as the reimbursement is part of the employee's compensation package, there is no legal objection to the reimbursement of the expenses of the spouse of an FCU employee. It should be noted, however, that abuse of this practice could raise safety and soundness concerns. We also suggest that credit unions consult with their tax advisors regarding federal and local tax treatment of spousal reimbursements, e.g. whether the reimbursement is taxable income to the employee recipient.

As we stated in the 1991 Opinion, in cases where an FCU directly pays or reimburses the spouse, the payment will be deemed attributable to the official or employee unless clear evidence exists that the payment is for the legitimate separate and independent services performed by the spouse on behalf of the FCU. Performance of some incidental service is not sufficient to establish a spouse's presence as having a bonafide business purpose. We would also recommend careful evaluation of conflict of interest considerations in any such situation and recommend advice of counsel supporting any payment before it is made.

We refer you to the 1989 Opinion and 1991 Opinion for our reasoning supporting the NCUA spousal reimbursement policy regarding officials. We appreciate your comments and trust this clarification responds to your request.

Sincerely,



Robert M. Fenner
General Counsel

GC/MEC:sg
SSIC 4062
91-0717
Enclosure



NATIONAL CREDIT UNION ADMINISTRATION *Martin*

WASHINGTON, D.C. 20456

January 10, 1991

Mr. Durant S. Abernethy III
Senior Vice President
and General Counsel
Credit Union National Association, Inc.
P.O. Box 431
Madison, WI 53701-0431

Re: Spousal Expenses
(Your January 9, 1990, Letter)

Dear Mr. Abernethy:

This letter responds to your request for clarification of the NCUA position on federal credit union ("FCU") expense payments for spouses of officials accompanying the officials on FCU business trips. After much additional research and deliberation, we stand by the position stated in our October 20, 1989, letter from James J. Engel, Deputy General Counsel, to J. Alvin George, Chairman, Financial Federal Credit Union of San Diego (enclosed). As we have stated previously, payment of spousal expenses benefits the official and spouse, not the FCU, and is therefore deemed a form of compensation. As you know, with limited exceptions, compensation of board and committee members is prohibited by Section 111(c) of the FCU Act (12 U.S.C. §1761(c)).

ANALYSIS

Section 111(c) of the FCU Act prohibits any "member of the board or of any other committee" of an FCU from being compensated, as such, except for certain insurance protection, "and the reimbursement of reasonable expenses incurred in the execution of the duties of the position." Section 701.33(b)(2)(i) of NCUA's Rules and Regulations (12 C.F.R. §701.33(b)(2)(i)) specifically excludes from the definition of compensation "payment ... for reasonable and proper costs

Mr. Durant S. Abernethy III

January 10, 1991

Page 2

incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed." Section 112 of the FCU Act provides that "one board officer may be compensated as an officer of the board" (12 U.S.C. §1761a, emphasis added).

Thus, the FCU Act and NCUA Rules and Regulations prohibit compensation of board and committee members, with three exceptions. First, one board officer may be compensated. (For such an individual, spousal reimbursement would be a permissible form of compensation.) Second, limited insurance protection is permissible. Insurance protection, however, is not relevant to the issue at hand. Third, reimbursement of costs is permitted if "incurred by an official in carrying out [his or her] responsibilities...." 12 C.F.R. §701.33(b)(2)(i). Expenses incurred either by or on behalf of the spouse, however, are distinct from expenses of the official and generally have nothing to do with official responsibilities to the credit union. Even if we were to determine that it is possible to allow reimbursement of spousal expenses under existing statutory and regulatory standards, we would find such a position difficult to support in light of the credit union community's rejection of the NCUA proposal to allow reimbursement of officials for lost pay in connection with attendance at board and committee meetings (See 53 Fed.Reg. 29640 (August 8, 1988)).

Though this is an issue of NCUA oversight, the federal tax laws do provide some useful guidance. Section 162 of the Internal Revenue Code (26 U.S.C. §162) allows as a deduction "all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including-- ... (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business." The applicable Internal Revenue Service ("IRS") regulation reads: "[w]here a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses." 26 C.F.R. §1.162-2(c). Mere social activity, the attendance of a few seminar sessions, the typing of a few letters, and

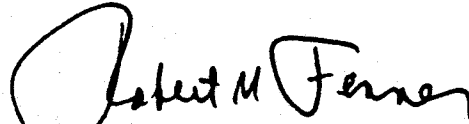
Mr. Durant S. Abernethy III
January 10, 1991
Page 3

minor or occasional nursing and secretarial services do not qualify as being sufficiently bona fide business purposes. See cases in 26 U.S.C.S. §162, fn. 249 and [1990] 2 Stand. Fed.Tax Rep. (CHH) Para. 1350.21.

We should clarify that in cases where an FCU directly pays or reimburses the spouse, the payment will be deemed attributable to the official unless clear evidence exists that the payment is for separate and independent services performed by the spouse. We would also recommend careful evaluation of conflict of interest considerations in any such situation and recommend advice of counsel supporting the payment before it is made.

We appreciate your comments and trust this clarification responds to your request.

Sincerely,



ROBERT M. FENNER
General Counsel

GC/MEC:sg
SSIC 4062
90-0117A