



NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

January 21, 1992

Arthur G. DeRusso,
President and Chief Executive Officer
Eastern Financial Credit Union
700 S. Royal Poinciana Blvd.
Miami Springs, Florida 33166

Re: FCU Director Serving as Consultant (Your
December 18, 1991, Letter)

Dear Mr. DeRusso:

You asked whether your serving on the board of directors of Eastern Financial Federal Credit Union ("Eastern") and acting as a paid consultant to Eastern would constitute a conflict of interest or a violation of law. We do not have sufficient facts to render a definitive opinion on this question. However, unless the services for which you receive compensation are of the type performed by board members, the mere fact of your dual service would not violate the Federal Credit Union Act (the "Act") or NCUA's Rules and Regulations, or create a conflict.

Background

You are currently Eastern's President and Chief Executive Officer. You anticipate retiring from that position in June, 1992. After your retirement, you will be retained by Eastern as a consultant for a "minimal fee." You are contemplating running for Eastern's board of directors, but question whether your simultaneous service as a board member and paid consultant would create a conflict of interest.

Analysis

Section 111(c) of the Federal Credit Union Act (the "Act"), 12 U.S.C. 1761(c), prohibits compensation of any federal credit union ("FCU") board member for his service as a board member. Section 111(c) would preclude Eastern from paying

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you for consulting services if those services are the same as those that you simultaneously perform as a director. On the other hand, if the consulting services are independent, additional services outside the scope of those traditionally performed by FCU directors, your compensation as a consultant would not violate Section 111(c). For example, we have previously stated that Section 111(c) does not bar an FCU from compensating a director for providing telephone repair services to the FCU, or for acting as a labor negotiator for the FCU. Your letter does not describe your proposed consulting duties, and we are therefore unable to determine whether they are similar to, or distinguishable from, the duties normally performed by FCU directors. Should you require additional guidance on whether the proposed consulting duties are distinguishable from those of a director, please contact us.

Section 112 of the Act, 12 U.S.C. 1761a, provides one exception to the prohibition on compensation of a director. Under Section 112, one board officer may be compensated as such. The title of the board officer entitled to compensation must be specified in the FCU's bylaws. Assuming that you were elected to the appropriate board officer position, you could be compensated for your duties performed in that position.

We note that an FCU may, through its bylaws, restrict employee service on the board of directors. Although under the Standard FCU Bylaws employees may serve as directors, two Standard Bylaw Amendments to Article VIII, Section 7 allow an FCU to limit the number of FCU employees who may serve on the board at a given time, or to bar directors and committee members from being paid employees. Neither of these provisions precludes an individual from being elected to the board. However, if elected, he must choose between serving as a director and being a paid employee. In the event that your position as consultant makes you an employee of Eastern, you would be subject to the restrictions of Article VIII, Section 7, if Eastern has adopted either version of that nonstandard bylaw amendment. While it does not appear to us, based on your letter, that as a consultant you would be an employee of Eastern, as opposed to an independent contractor, that determination would have to be made according to state corporate common law.

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Even if your dual service as a board member and consultant to Eastern is allowable under the Act, you would still be subject to the restrictions imposed by Article XIX, Section 4 of the Standard FCU Bylaws. That bylaw prohibits any FCU director from voting on or participating in deliberations concerning any matter affecting his pecuniary interest or the pecuniary interest of any organization (other than the FCU) in which he is directly or indirectly interested. Article XIX, Section 4 would require you to recuse yourself from any board discussion or vote relating to Eastern's retention of your consulting services.

As you may be aware, NCUA's Rules and Regulations contain a number of conflict of interest provisions applicable to FCU directors. Section 701.21(d)(5) of the Regulations (12 C.F.R. §701.21(d)(5)) prohibits preferential loans. Section 701.21(c)(8) (12 C.F.R. §701.21(c)(8)) concerns prohibited fees involving lending. Section 701.27(d)(6) (12 C.F.R. §701.27(d)(6)) restricts monetary benefits obtained through CUSOs. Section 701.36(e) (12 C.F.R. 701.36(e)) governs lease of property from FCU officers or directors. Section 703.4(e) (12 C.F.R. §703.4(e)) concerns investments. Section 721.2(c) (12 C.F.R. §721.2(c)) relates to income from offering the products and services of outside vendors to FCU members. Section 722.5 (12 C.F.R. §722.5) discusses appraiser independence requirements. While the facts in your letter do not raise specific concerns under any of these regulations, we suggest that you review them in order to avoid taking any action that would create a conflict in the event that you are elected to Eastern's board of directors.

Sincerely,



Hattie M. Ulan
Associate General Counsel

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