

February 22, 2002

Ms. Maria J. Martinez
President/CEO
Border Federal Credit Union
200 Avenue C
Del Rio, Texas 78840

Re: Wire Transfer Services

Dear Ms. Martinez:

This is in response to your letter of February 14, 2002, inquiring about the authority of Federal Credit Unions (FCUs) to offer wire transfer services to persons within their fields of membership.

You note that your FCU has many individuals in its field of membership with familial ties to Mexico, and that these individuals frequently send funds to relatives in Mexico using wire transfer services that charge a fee of as much as 28% of the amount transferred. You would like to address this problem by offering wire transfer services to anyone in your field of membership. You indicate that by using your service an eligible individual can wire up to \$1,000 for a fee of only \$10. In fact, as you know, many other FCUs also have within their fields of membership foreign nationals of limited means who are unfamiliar with the U.S. financial system and reluctant to become members of the FCU. A number of these FCUs have also expressed interest in providing wire transfer services to these individuals as a way of both familiarizing them with the benefits of credit union membership and enabling them to avoid the higher fees assessed by other providers.

You ask whether and to what extent an FCU might be authorized, under incidental powers authority, to provide wire transfer services to persons in its field of membership. Unfortunately, the express authority of FCUs to provide money transfer services precludes offering wire transfer services on an unlimited or continuous basis to persons who are within the field of membership but have not joined the credit union. However, there are in our view at least three possible methods for FCUs to meet the needs of the individuals you have described in a manner that is consistent with the limitations of the FCU Act and the provisions of NCUA's regulations. An explanation follows.

FCUs may not provide unlimited wire transfer services to nonmembers.

Before 1959, the FCU Act was silent on the authority of FCUs to offer check cashing and money transfer services. Some FCUs routinely provided check cashing services both to members and to nonmembers in the field of membership. For example, payroll checks were cashed for any employee of the FCU's sponsor company. The Bureau of Federal Credit Unions concluded that FCUs lacked the authority to provide check-cashing services and litigation ensued. The courts

upheld the Bureau's position as reasonable, with little or no substantive analysis of the legal issues. See State Department Federal Credit Union v. Folsom, 238 F.2d 258 (D.C. Cir. 1956).

Congress then intervened in 1959, enacting Public Law 86-354, which, among other amendments to the FCU Act, established a new Section 107(12) authorizing FCUs to cash checks for members. Specifically, the language of the new Section 107(12) authorized FCUs "to sell to members negotiable checks (including travelers checks) and money orders and to cash checks and money orders for members for a fee which does not exceed the direct and indirect costs incident to providing such service." At the time of this amendment, Congress specifically considered extending the authority to include anyone in the FCU's field of membership, but rejected that option. See Record of Hearing before the Committee on Banking and Currency, U.S. Senate, on S. 1786, S. 1985 and H.R. 8305, August 21, 1959.

Section 107(12) was amended in 1982, by the Garn St. Germain Act, Public Law 97-320, to remove the limitation on fees and to authorize, in addition to dealing in checks and money orders, "other similar money transfer instruments." The legislative history clearly establishes that a purpose of the additional language was to authorize wire transfer services: "[P]resent law may not permit a Federal credit union to offer to its members the service of wire transfers or other modern substitutes for money orders...." Senate Report No. 97-536, p. 68.

Given this history of Section 107(12), it is clear both that wire transfers are included in the services authorized by the section and that, in the absence of some other authorization, the services are limited to members of the FCU. As suggested above, however, we believe there are options for FCUs to consider as they seek to meet the needs of the individuals you have described within the authority of the FCU Act and NCUA's regulations.

FCUs may establish a simplified membership program, with a non-dividend bearing membership account.

To overcome the reluctance of the individuals in question to become members of the FCU, an FCU may wish to establish a special membership program. The program could be designed to minimize both the cost and paperwork burden attendant to membership.

A special membership program might, for example, have the following attributes. First, membership would be established simultaneously with the first use of wire transfer services. While the new member would need to provide identification-related information and an address, the information required would be no greater than what would be needed to conduct the wire transfer in any event, and the credit union could assist the member with all forms related to both membership and the wire transfer. Second, a separate share account would be established for members who only want wire transfer services. The account would have a minimal par value and not earn dividends. The no-dividend feature would eliminate the need for a

taxpayer identification number. Third, the FCU itself could pay the initial share in the special account from its own funds or by contributing a portion of the fee from the first wire transfer. Alternatively, the FCU could permit the member to pay the par value in installments as provided in its bylaws. These funding methods would benefit members of limited means.

With appropriate limitations, an FCU may provide wire transfer services as a promotional activity pursuant to its incidental powers.

A second alternative for meeting the needs of the individuals you have described arises out of the incidental powers authority of FCUs and NCUA's recently issued incidental powers regulation. 12 C.F.R. Part 721.

One of the activities recognized in the new regulation as a permissible exercise of an FCU's incidental powers is marketing. The regulation provides, in this regard, that "marketing activities are the activities or means you use to promote membership in your credit union and the products and services you offer to your members." 12 C.F.R. 721.3(h).

Our opinion is that, in the situation you have described of an FCU with a segment of its field of membership comprised of individuals with a special need for wire transfer services and a reluctance to join the FCU, providing wire transfers on a limited basis would be a permissible marketing activity. The purposes of providing limited wire transfers would be to promote membership and familiarize the users of the service with the benefits of membership. These purposes are directly consistent with the recognized purposes of marketing activities as stated in the regulation.

The limitations, which would be established by the FCU, should be narrowly drawn and clearly designed to ensure that the marketing program does not become a substitute for membership or result in providing wire transfers on an unlimited or continuous basis. Appropriate limitations might include placing restrictions on the number of times an individual uses the service, or on the period of time for which the individual uses the service, before joining the credit union. It should be clear that providing the service is used as an opportunity to promote and encourage membership. While it is not feasible or appropriate to delineate precise conditions in this letter, it should be clear from all of the circumstances, and from results over time, that the purpose of the program is to bring the individuals into the FCU's membership.

Providing wire transfers on a limited basis as a marketing activity does not establish a continuing customer relationship between the FCU and the individual. It is distinguished, in that respect, from establishing a share account or providing a loan, and in our opinion it does not violate field of membership limitations and it does not conflict with the statutory restriction against providing wire transfers as an ongoing or continuous service to nonmembers.

An FCU may in appropriate circumstances provide wire transfer services as a

charitable activity.

Section 701.25 of NCUA's regulations recognizes the authority of FCUs to make charitable contributions and establishes certain limitations and approval requirements. The limitations are that the recipient of the contribution is "not organized for profit" and "conduct(s) activities" within a community where the FCU has a place of business. While the regulation was drafted primarily with organizational recipients in mind, it does not preclude an FCU from making charitable contributions directly to individuals, so long as they are residents of an area where the FCU has a place of business.

Thus, an FCU might properly decide to donate staff time and other resources to providing wire transfer services to needy individuals, as defined by the FCU. This approach would not prevent the FCU from passing on to the recipient the actual cost as assessed by a third party organization for effecting the wire transfer, so long as the FCU did not add to or receive a portion of the third party fee. Also, requirements of Section 701.25(b) concerning board of directors' approval must be met.

Other Record Keeping and Reporting Requirements.

The foregoing alternatives do not alter the requirement that FCUs comply with other record keeping and reporting requirements applicable to wire transfers. Examples of regulations with potential applicability include Department of Treasury OFAC Regulations and Department of Treasury Financial Record Keeping and Reporting of Currency and Foreign Transactions Regulations, found in Parts 500 and 103 respectively of Title 31 of the Code of Federal Regulations. For example, Section 103.33(e) establishes detailed record keeping and customer identification requirements for wire transfers in excess of \$3,000. Note, in this connection, that Section 103.33(e)(2) imposes additional verification and record-keeping requirements for individuals who are not established customers. Generally, a member will be an established customer and a nonmember will not.

Also, the recent passage of the U.S.A. Patriot's Act requires the Treasury Department and the financial institution regulators, including NCUA, to establish regulations setting forth minimum standards for financial institutions and their customers regarding verification of customer identity. This regulation has not yet been issued but could affect how you verify identity in future transactions. The U.S.A. Patriot's Act also requires Treasury to make recommendations to Congress regarding the most effective way to verify the identity of foreign nationals seeking to open accounts at U.S. institutions.

While the three alternatives outlined above for providing wire services to individuals in your field of membership may not fully accomplish your objective, we believe they present useful options, consistent with the limitations of the FCU Act and the provisions of NCUA's regulations, for FCUs to consider in an effort to offer a valuable service to underserved segments of their fields of membership.

We appreciate your interest in this issue. Please let me know if you have any further thoughts or questions.

Sincerely,

Robert M. Fenner
General Counsel

OGC/RMF:bhs
SSIC 3000
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