

June 3, 2009

Bret S. Eberhardt, Financial Consultant
AXA Advisors, LLC
8742 Lucent Blvd, Suite 600
Highlands Ranch, CO 80129

Re: Investment Advice Services.

Dear Mr. Eberhardt:

You have asked if federal credit unions (FCUs) can offer investment advice services. An FCU employee cannot provide investment advice that would subject the employee or FCU to federal or state securities laws. An FCU, however, can establish a shared employee arrangement with a third-party registered investment adviser so that an FCU employee can act as an employee of a third-party registered investment adviser. An FCU may also act as a finder or offer investment adviser services through a credit union service organization (CUSO).

You have indicated your firm is in discussions with a credit union to provide investment products and financial adviser services to its members. One of the products you offer is an investment advisory account. These accounts have a fee-based structure. The adviser is paid an annual fee based on the percentage of the account's assets. In exchange for this fee, the adviser provides continuing advice to the accountholder. Firms and individuals offering advisory account services must be registered as Registered Investment Advisers (RIA). 15 U.S.C. §80-3(a). You note that banks are exempt from the registration requirements. You have asked if FCUs have a similar exemption from the RIA registration requirements. No, they do not.

Investment adviser services are subject to the regulation and oversight of the Securities and Exchange Commission (SEC), in accordance with the Investment Advisers Act of 1940 (Advisers Act). See 15 U.S.C. §§80b-1 – 80b-21; 17 C.F.R. §§275.0-2 – 275.222-2. Under the Advisers Act, an investment adviser is “any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities” 15 U.S.C. §80-2(a)(11). Although banks are specifically excluded from this definition, 15 U.S.C. §80b-2(a)(11)(A), FCUs are not.

There is no authority under the FCU Act for FCUs to act as RIAs or to provide investment advice. See NCUA Letter to Credit Unions No. 150 (Dec. 1993). We

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have noted in a prior legal opinion that, while NCUA's incidental powers rule permits FCU employees to offer financial counseling, it does not provide any authority for an FCU to offer investment advice through its employees. OGC Op. 03-0308 (May 1, 2003); *see also* 66 Fed. Reg. 40852 (Aug. 6, 2001). If a credit union wishes to offer the option of investment adviser services to its members, it can do so in one of three ways.

The first way is through a shared employee with a broker, dealer, or RIA. In this type of arrangement, the FCU employee is acting in a dual capacity as an employee of the FCU and the third-party investment adviser. A shared employee may provide investment advice when doing so exclusively on behalf of and under the control of the third-party RIA but not in the employee's capacity as an FCU employee. An investment adviser program must be structured to make clear when a shared employee is acting on behalf of and under the control of the third-party RIA and not as an FCU employee. *See* OGC 01-0742 (August 21, 2001).

Second, an FCU may act as a finder under the incidental powers rule. 12 C.F.R. §721.3(f). As a finder, an FCU may introduce or otherwise bring together an outside vendor of investment adviser services to its members so the two parties may separately and independently negotiate a transaction.

Finally, an FCU may wholly or partly own a CUSO that provides investment adviser services. A CUSO, however, may have to register as an RIA. Whether the CUSO must register is an issue legal counsel for the CUSO should consider and on which we defer to the SEC.

If you have further questions about registration under federal securities laws, you should contact the SEC and, if under state law, the appropriate regulator. For questions regarding this opinion, please feel free to contact Staff Attorney Pamela Yu or me.

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

GC/PWY:bhs
09-0511

cc: Region V