

November 18, 2005

Lawrence G. Gallagher, Esq.
150 N. Michigan Avenue
Suite 2700
Chicago, Illinois 60601

Re: Payout Priority of Deferred Compensation Claims
in Involuntary Liquidations.

Dear Mr. Gallagher:

You have asked if deferred compensation constitutes "wages and salaries" as that term is used in NCUA's regulation regarding payment priorities in involuntary liquidations. No, deferred compensation is not "wages and salaries" but is in the same payment category with general creditors.

NCUA is an independent federal agency that has a number of roles. NCUA is the chartering authority for federal credit unions (FCUs) and, through the National Credit Union Share Insurance Fund (NCUSIF), provides share account insurance to all FCUs and, following application to and approval by NCUA, to federally-insured state chartered credit unions (FISCUs). 12 U.S.C. §§1754, 1781-1790d. Share insurance provided by NCUSIF is backed by the full faith and credit of the United States.

The full faith and credit of the United States only applies to NCUA's obligations in its capacity as an agency. The full faith and credit of the United States does not back the obligations of credit unions. As discussed below, when acting as a liquidating agent and obliged to pay the obligations of a liquidated credit union, NCUA does so from the assets of the liquidated credit union. As an agency, however, NCUA has no liability for the claims of creditors of FCUs or FISCUs.

NCUA has the authority to place FCUs and FISCUs into liquidation. 12 U.S.C. §1787. As liquidating agent for an insolvent, federally-insured credit union, NCUA succeeds to all rights, titles, powers and privileges of the credit union by operation of law. 12 U.S.C. §1787(b)(2); 12 C.F.R. §709.2. As liquidating agent, NCUA is authorized to "realize upon the assets of the credit union." 12 U.S.C. §1787(b)(2)(E). The FCU Act specifically provides for NCUA as liquidating agent to determine claims against the credit union, prescribe by regulation procedures for the determination of claims, and make a distribution of credit union assets. 12 U.S.C. §1787(b)(3), (4) and (11). NCUA's obligation to pay insured deposits exists under legal authority that is separate and apart from its role as liquidating agent. 12 U.S.C. §1787(d), (k).

When paying creditor claims in an involuntary liquidation, NCUA as liquidating agent adheres to payout priorities established by regulation. 12 C.F.R. §709.5. The payout priorities of Part 709 of NCUA's regulations parallel those the FDIC has established. 12 C.F.R. §360.3. Part 709 is the exclusive regulatory mechanism for insolvent, federally-insured credit unions to liquidate. Secured creditors receive their security first. 12 C.F.R. §709.5(a). To the extent a secured creditor's claim exceeds the value of his security, it has an unsecured claim against the credit union. 12 C.F.R. §709.5(b)(5).

Unsecured claims against the liquidation estate are prioritized in nine categories. 12 C.F.R. §709.5(b). The first four categories cover administrative costs and expenses of the liquidation; wages and salaries, including vacation, severance, and sick leave pay; taxes due and owing; and debts due and owing to the United States, including NCUA. The fifth category is for general creditors and secured creditors to the extent their respective claims exceed the value of their security for those claims. The sixth through ninth categories cover claims of owners of capital and the NCUSIF.

You are particularly interested in which category claims for employee deferred compensation would fall. For purposes of this discussion, "deferred compensation" generally refers to a promise made by an employer to make remunerative payment(s) to an employee in a subsequent or ensuing taxable year of the employee, regardless of whether the employee's rights to that payment are vested or nonvested. Claims for employee deferred compensation fall into the fifth category for general creditors and secured creditors to the extent their respective claims exceed the value of their security. 12 C.F.R. §709.5(b)(5). Employee deferred compensation does not fall into the second category, which includes claims for wages and salaries, including vacation, severance, and sick leave pay. 12 C.F.R. §709.5(b)(2). NCUA's long standing view is that the second category pertains only to current wages and salaries, and does not include deferred compensation.

Please feel free to contact Staff Attorney Frank Kressman or me with any questions or if we can be of further assistance.

Sincerely,

Sheila A. Albin
Associate General Counsel