NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

April 14, 1989

GC/JT:bhs
3500

Office of General Counsel

Walter H. Hotz, Esq.
Hotz & Associates, P.C.
Suite 150
11 La Vista Perimeter Office Park
Tucker, Georgia 30084

Re: Ability of a Federal Credit Union to License Software Developed for its Own Internal Use to a Third Party for the Purpose of Said Third Party Marketing Such Software and Paying the Royalties to the Credit Union (Your March 6, 1989 Letter)

Dear Mr. Hotz:

You have asked whether a Federal credit union ("FCU") may enter into an agreement with a third party where the third party will market the FCU's software and pay the FCU royalties on the sales. An FCU has the authority to sell or lease its own computer software. This activity is subject to Section 701.26 of NCUA's Rules and Regulations (12 C.F.R. 701.26).

BACKGROUND

An FCU you represent has developed computer software programs for its own use. A software marketing company is interested in sublicensing the FCU's software. The FCU would be compensated for each sublicense. The marketing company intends to enhance the programs, develop manuals for them, and market them. The FCU would receive all enhancements and modifications free of charge.

ANALYSIS

Section 701.26 of NCUA's Rules and Regulations (12 C.F.R. 701.26 provides:

> (a) A Federal credit union may act as a representative of and enter into a contractual agreement with one or more credit unions or other organizations for the purpose of sharing, utilizing, renting, leasing, purchasing, selling, and/or joint ownership of fixed assets or engaging in activities and/or services

which relate to the daily operations of credit unions. Agreements must be in writing, and shall advise all parties subject to the agreement that the goods and services provided shall be subject to examination by the NCUA Board to the extent permitted by law.

(b) Where any agreement calls for, or requires, the payment in advance of the actual or estimated charges for more than 3 months such payment shall be deemed an investment in a credit union service organization and subject to the limitations delineated in Sections 107(7)(I) and 107(5)(D) of the Federal Credit Union Act (12 U.S.C. 1757(5)(I) and 1757(5)(D)).

When Section 701.26 of the Regulations was revised in 1982, it was the intention of the NCUA Board to consolidate three existing regulations (Sections 701.26, 701.27-1, and 701.28) and to set the parameters for credit unions entering into agreements involving fixed assets or activities and/or services which relate to the daily operations of credit unions. (See 47 F.R. 30460, 7/14/82.)

Under the old Section 701.27-1(f), an FCU "utilizing data processing for the maintenance of its own account records may lease or sell its software." The consolidated regulation (current Section 701.26) was not intended to limit this specific authority; hence, FCU's continue to have the authority to lease or sell their software subject to Section 701.26. This authority is limited to the sale of an FCU's own software and is authorized pursuant to Section 107(4) of the FCU Act (12 U.S.C. 1757(4)), the authority to "purchase, hold, and dispose of property necessary or incidental to [an FCU's] . . . operations." An FCU can not be in the business of producing computer software for sale.

We should also point out that courts have held that a national bank can not market data processing and computer services to the general public pursuant to its incidental powers provision. (See, e.g., National Retailer Corp. v. Valley National Bank, 411 F. Supp. 308 (D. Ariz. 1976) aff'd, 604 F.2d 32 (9th Cir. 1979).) We do not believe that an FCU's sale of its computer software violates the ruling in Valley National Bank. However, FCU's should be aware of any applicable case law.

Sincerely,

Hattie M. Ulan

HATTIE M. ULAN
Assistant General Counsel