NATIONAL CREDIT UNION ADMINISTRATION
WASHINGTON, D.C. 20456

July 10, 1991

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Re: Correspondent Credit Union Services Offered Under a Trade Name (Your Letter of May 13, 1991)

Dear Mr. Hotz:

You requested an opinion regarding a credit union providing correspondent credit union services to other credit unions under a trade name. For federal credit unions ("FCUs"), the correspondent credit union services proposed are permissible if certain conditions are met. The loan participation rule must be followed, and, as for the correspondent services, the board of directors of each credit union must set policies and limitations, the services agreement must be memorialized in writing, surety coverage must be provided, an Operating Manual should be maintained and other safety and soundness measures met. The use of a trade name under which to conduct correspondent services is permissible under the conditions imposed in this letter.

BACKGROUND

Your client (the "Big Credit Union") proposes to enter into loan participation agreements (the "Loan Participation Agreements") with other credit unions (the "Smaller Credit Unions") in order to facilitate the offering of a national credit card (the "Credit Card") to the members of the Smaller Credit Unions. You did not provide this Office with copies of the Loan Participation Agreements or the master agreement with the Credit Card company to review.

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It is proposed that: (1) Big Credit Union would arrange with Credit Card company for the right to offer and issue the Credit Card under the trade name approved by the Credit Card company for the Big Credit Union correspondent service (the "Trade Name"); and (2) the Loan Participation Agreements with Smaller Credit Unions will: (a) allocate Credit Card account numbers among the Smaller Credit Unions; (b) require that periodic disclosures/monthly statements be generated in the Trade Name only; (c) require Big Credit Union to administer the Credit Card lines of credit, process the payments and maintain compliance with contractual and regulatory requirements; and (d) set forth other correspondent services offered by Big Credit Union (e.g., Smaller Credit Unions will have access to Big Credit Union's connections with nationwide automated teller services and clearinghouses).

ANALYSIS

Loan Participations

Section 701.22 of the NCUA Rules and Regulations requires that participation loans must be made within the limitations of the board of directors' written participation loan policies, provided:

> (1) no FCU shall obtain an interest in a participation loan if the sum of that interest and any (other) indebtedness owing to the FCU by the borrower exceeds 10 per centum of the FCU's unimpaired capital and surplus; (2) prior to final disbursement, a written participation agreement shall be properly executed, acted upon by the FCU's board of directors or the investment committee and retained in the FCU's office. The agreement shall include provisions which identify the participation loan or loans; and (3) A FCU may sell to or purchase from any participant the servicing of any loan in which it owns a participation interest. 12 C.F.R. §701.22(b).

Originating FCU lenders shall originate loans only to members, retain an interest of at least 10% of the face amount of each loan, retain the original or copies of the loan documents, and obtain approval of the loan from the credit committee or loan officer. 12 C.F.R. §701.22(c). Participating FCU lenders shall participate only in loans they are empowered to grant made to either their own members or members of participating credit unions, retain the original or a copy of the written participation loan agreement and a schedule of the loans covered by the agreement, and obtain

the approval of their board of directors or investment committee of the disbursement of proceeds to the originating lender. 12 C.F.R. §701.22(d). The Loan Participation Agreements must comply with the requirements of Section 701.22 of the NCUA Rules and Regulations.

Credit Union Correspondent Services

Until Part 721 of the NCUA Rules and Regulations was revised in 1982 (47 Fed. Reg. 44243 (Oct. 7, 1982)), former Section 721.3 provided for pilot programs relating to electronic funds transfer through remote service units, loan programs, and other operational systems with the approval of the NCUA Board. Under the authority of this regulation, adopted in 1974, the NCUA Board promulgated IRPS 80-6, "Statement of Interpretation and Policy Correspondent Credit Unioning Programs" (May 13, 1980). In IRPS 80-6, the NCUA Board determined that if FCUs met the guidelines set forth, that they could engage in correspondent activities without obtaining NCUA Board approval.

On July 15, 1982, NCUA repealed IRPS 80-6 because it had served its limited purpose of notifying FCUs that NCUA no longer required prior approval of correspondent credit union programs and because the guidelines had been incorporated into the Accounting Manual for FCUs. Repeal of IRPS 80-5 and 80-6, "Shared and Proprietary Remote Service Units Programs and Correspondent Credit Unioning Programs," (July 15, 1982). Although the reference in the Accounting Manual for FCUs was deleted in the 1989 edition, the requirements for correspondent credit union services have remained unaltered.

Basically, correspondent credit union programs are cooperative arrangements between credit unions in which one or all agree to service the members of the others. Participation in a correspondent credit union program is authorized for FCUs pursuant to the incidental powers clause of the FCU Act, 12 U.S.C. §1757(17). As a party to a correspondent credit union agreement, an FCU that offers a correspondent credit union service is acting in an agency capacity for the other credit unions that are parties to the agreement.

FCUs may participate in correspondent credit union programs with one or more other federal or state chartered credit unions. The arrangements may be bilateral or unilateral, i.e., a credit union may agree to service the members of another credit union without reciprocation from the serviced credit union. While such programs generally are implemented when distance prevents members' ready access to their own credit union's place of business, they may be utilized in a

situation such as you describe, where larger credit unions can facilitate smaller credit unions in providing services to their members.

To implement a correspondent credit union program, the board of directors of each participating credit union should determine if the activity will be in its best interests and provide a service to its members. In reaching the decision, which should be documented in the minutes, the board should consider, among other things, the likely degree of participation by members and the capability of credit union personnel to handle the additional activity.

The types of services provided should be determined by written agreement and should fall within the policies and limitations established by the board of directors of each credit union involved. Services may include, but not necessarily be limited to, receiving share and loan payments, disbursing share withdrawals and loan proceeds, cashing share drafts, cashing and selling checks and money orders, and offering and servicing credit card programs. Each credit union is responsible and accountable to its own individual members regarding correspondent transactions reflected in their accounts. The responsibilities of the board of directors and credit committee must not be delegated to or assumed by the correspondent credit union. In addition, all share disbursements and loan advances between a member and a correspondent credit union should be authorized by the proper authority in the member's own credit union. The failure to provide such authorization may be an unsafe and unsound practice.

The methods of settlement between correspondent credit unions will be determined by agreement of the parties involved. Settlement can be made through a variety of methods including the establishing of permissible share accounts in each other, use of a draft instrument drawn on the other credit union or on a designated clearing credit union, direct payment by check and/or draft between correspondents for transacted activity, or by use of Due To/Due From clearing accounts. Any settlement account should be cleared at least monthly and be supported by a detailed listing of the transactions occurring on behalf of the correspondent. Arrangements should be made between correspondents for the timely communication of daily transactions in order that the members' subsidiary ledgers can be maintained currently and so that members' statements will properly reflect all correspondent transactions.

Each credit union should obtain written assurances from its surety company that coverage extends to the correspondent activity. These assurances are necessary to comply with Sec-

tion 701.20 of NCUA's Rules and Regulations, 12 C.F.R. §701.20.

It is recommended that an Operations Manual and/or other type of Statement of Operating Specifications be maintained in the credit union's files describing the specific services and transactions covered under the program and such other information as is necessary to provide management and operating staff with an overview of the scope of the activity, as well as the day-to-day details. The Operations Manual/Statement of Operating Specifications may be incorporated as part of the agreement between the parties involved in the program. An unsafe or unsound practice may exist if an FCU enters into a correspondent credit union program without a written agreement being established which addresses the following: 1) the type of business to be transacted; 2) the method and frequency of settlement; 3) the method of communication between correspondents concerning individual transactions; 4) service fees, if applicable; 5) provisions for notifying credit unions of the addition or removal of participants; and (6) procedures for arbitrating disputes and terminating the contract.

Trade Names

The NCUA has prohibited federally-insured credit unions from using trade names, rather than their approved corporate names, in conducting their individual business activities for safety and soundness reasons and as a violation of Section 740.2 of the NCUA Rules and Regulations regarding inaccurate representations. 12 C.F.R. §740.2. We have not changed our position on that matter. However, we have decided that the use of a trade name by two or more federally-insured credit unions in conducting joint operations may be permissible provided certain conditions are met. (State law may still preclude state-chartered credit unions from using a trade name.) Of utmost importance is disclosure to individual members that services are being provided by and through their individual credit union. The details of the service and underlying arrangements and relationships must also be fully and conspicuously disclosed. All pertinent legal documents must use the full legal name of the credit union providing the service, in this case, extending consumer credit, and not the trade name. Similarly, Truth-in-Lending disclosures must be in the full legal name of the creditor and not the trade name. 12 C.F.R. §226.5(a). Next, all trade name related loans must be reflected in the credit union's records in accordance with all applicable laws and regulations. See, e.g., 12 C.F.R. §§701.21, 701.22 and 749.2. Finally, the trade name, if it is to be used in interstate commerce,

should be registered with the Patent and Trademark Office, or, if it is to be used solely in intrastate commerce, registered with the appropriate state authority. Registration makes actionable the deceptive and misleading use of a trade name, protects the trade name from interference, and prevents fraud and deception. See, 15 U.S.C. §§1051 et seq. (Federal trademark law), 74 Am.Jur.2d Trademarks and Tradenames §§69-83 and 87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition §§123-170.

As you noted in your letter, credit card and debit card services are preapproved permissible activities for credit union service organizations ("CUSOs"). 12 C.F.R. §701.27(c)(5)(i). CUSOs should also comply with the same three requirements applicable to federally-insured credit unions when using trade names.

Sincerely,

James J. Engel
Deputy General Counsel

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