

January 27, 1999

David C. Woodburn, CUSO Director
Endicott/Owego Member Services Corp.
24 McKinley Avenue
Endicott, New York 13760

Re: CUSO Marketing Services Under 12 C.F.R. §712.5(b)(8).

Dear Mr. Woodburn:

You have asked whether providing marketing services for a real estate broker is a permissible activity for a credit union service organization (CUSO). As explained below, the answer is no.

We have reviewed the agreement you provided between a federal credit union's (FCU's) wholly owned CUSO and a real estate brokerage company (broker) to market and promote the broker to the FCU's members. In exchange for promoting and endorsing the broker, the CUSO receives 3% of all net commissions earned by the broker if an FCU member uses the broker. The FCU member will receive an unspecified discount. For the CUSO to receive a commission, and the member a discount, members must identify themselves as FCU members and request the discount. The agreement does not require the CUSO to undertake any particular activity to promote the broker. It provides that the CUSO "may prepare and provide at its expense and option" advertising material to credit union members. The broker will also pay a monthly fee for use of office space at the FCU and for certain administrative services. The agreement states that the CUSO must have a state real estate broker's license. Our understanding is that this is to enable the CUSO to receive a portion of the commission. The agreement provides that the CUSO will maintain a real estate broker's license by having the individual who is the licensed broker for the brokerage company also serve as an officer of the CUSO.

Our view is that, under this arrangement, the CUSO is, in effect, engaging in real estate brokerage activity. The agreement does not require the CUSO to do any advertising or marketing and the CUSO's income is a percentage of brokerage commissions, requiring that a licensed real estate broker be an employee of the CUSO. Real estate brokerage services previously were a permissible CUSO activity, but the amendment of the CUSO rule early last year removed it from the list of preapproved activities. 63 Fed.Reg. 10743, 10752 (March 5, 1998). The new CUSO regulation, however, provides a three-year period for FCUs to come into compliance. 12 C.F.R. §712.9. Credit unions may continue

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investments and loans in CUSOs existing before April 1, 1998, until April 1, 2001.

You contend that the activity described in the agreement between the CUSO and the broker should be characterized as providing "marketing services," which is a permitted CUSO activity. 12 C.F.R. §712.5(b)(8). In support of your view, you contend that the permissibility of this activity as "marketing" is analogous to auto buying services. You are correct that, in prior legal opinions, we determined that an auto buying service is a permissible marketing activity for CUSOs. Letter from Hattie M. Ulan to Guy A. Messick, dated January 5, 1993; Letter from Richard S. Schulman to C.O. Padgett, dated July 11, 1994. We disagree that the activity you propose is analogous.

Our prior opinions regarding auto buying services are specific about the activities CUSO employees may perform in facilitating the purchase of an automobile by a member who will be obtaining a loan from the FCU. Without reiterating here the description of the various steps involved in an auto buying service, we concluded that marketing services, in that context, "are limited to such activities as distributing advertisements, promoting the sale of a product, and arranging with dealers to negotiate prices and to encourage sales." Messick letter. It is important to keep in mind that the main issue in that earlier opinion was whether the CUSO could take delivery of automobiles from dealers. Our conclusion was that, while our regulation permits CUSOs to sell repossessed collateral, which may include used cars, the regulation does not permit CUSOs to operate as a used car dealer or to buy and sell new automobiles.

To be a permissible CUSO activity, marketing services must involve the promotion of credit union operations, products or services. Auto buying services facilitate the issuance of loans by the credit union and the income from that marketing service is related to the issuance of a loan. In your proposal -- the marketing of real estate brokerage services -- the income to the CUSO comes from the commission paid by the seller of the real estate. There is no connection between the selection of the broker, which is the goal of the proposed marketing service, and the issuance of a loan by an FCU to a buyer. There is no connection between the marketing service and a buyer's selection of a lender. For that reason, even if this arrangement were viewed as "marketing," it does not involve promoting the operations of the credit union and, therefore, is not a permissible CUSO activity.

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Finally, we note that our office has reviewed the letter, dated August 31, 1998, from Mr. Charles J. Bender of Visions FCU, which owns your CUSO, to the

NCUA Board on this subject. In that letter, he comments that the proposed regulation did not note a prohibition of the "marketing arrangement" your CUSO has had with a real estate brokerage agency. The proposed CUSO regulation specifically called for comment on the removal of real estate brokerage services as a permissible CUSO activity because the "NCUA has been troubled by cases involving conflicts and the appearance of conflicts between real estate brokerage CUSOs and the credit unions such CUSOs serve." 62 Fed.Reg. 11779, 11785 (March 13, 1997). As discussed above, our view is that your CUSO's activity is, in fact, real estate brokerage services, not marketing. Further, as noted above, even if your CUSO's activity is arguably a marketing arrangement, it would not have been a permissible CUSO "marketing service" under previous regulations because it does not relate to marketing the credit union's services; it markets the third party broker's service.

In Mr. Bender's letter to the Board, he also requested that the Board grant an approval, as provided in 12 C.F.R. §712.9, so that the credit union can continue its investment in this activity. The CUSO regulation provides that investments in CUSOs in existence prior to April 1, 1998, must conform with the regulation by April 1, 2001 "unless the Board grants prior approval to continue such investment for a stated period." 12 C.F.R. §712.9(a). The regulation contemplates that the Board may grant an approval to continue the investment for a stated period, but it is not a mechanism for approving an activity that is no longer permissible under the regulation for an indefinite period.

If you have any questions or believe it would be helpful to discuss this matter, please feel free to call me at (703) 518-6540.

Sincerely,

Sheila A. Albin
Associate General Counsel

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