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Re: Permissibility of Lease Arrangement - MBU Employees Federal Credit Union (Your February 12, 1991 Letter)

Dear Mr. Johnson:

You requested our opinion as to whether MBU Employees Federal Credit Union ("MBU") may lease out an unfinished building which stands on the same parcel of real estate as the office building that MBU recently purchased to house its operations. The facts provided in your letter are insufficient for us to determine whether the proposed lease arrangement is permissible. We have referred this matter to NCUA's Region III Office in Atlanta (the "Region"), which will investigate and attempt to work out an acceptable plan with MBU. The Region will contact you shortly. However, following is a brief review of the applicable law and regulations, which we hope will assist you in advising MBU and working with the Region.

#### Background

MBU recently purchased an office building and moved its operations from a rented space to the newly purchased property. In addition to the office building, there is on the same parcel of real estate an unfinished building which apparently is unusable in its present condition. MBU has been approached by local unions, some of whose members are also members of MBU, about the possibility of leasing the unfinished building.

The unions propose to "lease" the unfinished building for fifteen years, during which time they will complete the building and convert it into useable space. The unions wish to treat the work they perform as payment for their use of the building, rather than making actual lease payments. Although you do not say so specifically, it appears that all improvements made to the building by the unions would become the property of MBU at the end of the lease. MBU would also have access to the building during the term of the lease, in order to hold MBU functions. In a telephone conversation with Staff Attorney Margaret Suuberg of this Office, you indicated that MBU would probably retain the building at the end of the lease and use it for credit union functions.

#### Analysis

As a preliminary matter, we note that you do not ask whether MBU had the authority to purchase the unfinished building. A federal credit union ("FCU") is empowered by Section 107(4) of the Federal Credit Union Act (the "Act") (12 U.S.C. ~1757(4)) "to purchase, hold, and dispose of property necessary or incidental to its operations." While that authority allows an FCU to buy real property that it plans to use for FCU business, it does not permit an FCU to purchase real estate for speculative investment purposes. Your letter does not state the reason for MBU's purchase of the real property in question. For purposes of this letter, we shall assume that MBU purchased the unfinished building intending to use it for FCU business in the future, and the purchase was therefore allowable. We also assume that MBU obtained NCUA approval prior to purchasing both buildings, if required to do so by Section 701.36(c) of the Regulations (12 C.F.R. ~701.36(c)).

Section 701.36 of the Regulations governs FCU ownership of fixed assets. While this letter discusses only

limited provisions of that regulation, we caution you that MBU's purchase, use and any eventual disposition of the real property must comply in all respects with Section 701.36.

Among the investments in fixed assets allowed under Section 701.36 is "any investment in real property (improved or unimproved) which is being used or is intended to be used as premises." Section 701.36(b)(4)(i). "Premises" is defined in Section 701.36(b)(1) as, "any office, branch office, suboffice, service center, parking lot, other facility, or real estate where the credit union transacts or will transact business." Assuming, again, that MBU purchased the unfinished building intending to use it for FCU business, and that the purchase otherwise met the requirements of Section 701.36, the purchase was a permissible investment in fixed assets.

Where an FCU purchases real estate for future expansion, Section 701.36(d)(1) applies. That section provides:

[A]t least partial utilization should be accomplished within a reasonable period, which shall not exceed 3 years unless otherwise approved in writing by the Administration. After real property acquired for future expansion has been held for 1 year, a board resolution with definitive plans for utilization must be available for inspection by an NCUA examiner. 12 C.F.R. ~701.36(d)(1).

You do not indicate how long MBU has owned the real property, when the proposed lease would begin, or how soon thereafter MBU will have access to the building to hold meetings. All of these issues will be taken into account by the Region in determining whether MBU is currently in compliance with Section 701.36(d)(1), and whether it will be in compliance if it enters into the proposed lease arrangement.

Section 701.36(d)(2) of the Regulations (12 C.F.R. ~701.36(d)(2)) prescribes rules for treatment of "abandoned premises." That term is defined in Section 701.36(b)(5) to include, "property originally acquired for future expansion for which such use is no longer contemplated." 12 C.F.R. ~701.36(b)(5). Again, we do not have sufficient information to determine whether the property in question falls under Section 701.36(d)(2). Assuming that it does, MBU's ownership of the property is subject to the limitations imposed by the regulation.

Section 701.36(d)(2) states:

A Federal credit union shall endeavor to dispose of "abandoned premises" at a price sufficient to reimburse the Federal credit union for its investment and costs of acquisition. Current documents must be maintained reflecting the Federal credit union's continuing and diligent efforts to dispose of "abandoned premises." After "abandoned premises" have been on the Federal credit union's books for 4 years, the property must be publicly advertised for sale. Disposition must occur through public or private sale within 5 years of abandonment, unless otherwise approved in writing by the Administration.

The Region will determine whether the property in question is within the ambit of Section 701.36 and, if necessary, will advise MBU on achieving compliance with the regulation. In the event that the Region has legal questions regarding application of Section 701.36 (or other provisions of the Act and/or Regulations) to MBU's particular fact situation, this Office will provide legal guidance. If you have specific legal questions after conferring with the Region, please feel free to contact Margaret Suuberg.

I hope that we have been of assistance.

Sincerely,

Hattie M. Ulan  
Associate General Counsel

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cc: H. Allen Carver, Director, Region III  
SE Christa O'Harrow, Region III