

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Bankers Association)
1120 Connecticut Avenue)
Washington, D.C. 20036)

Plaintiff,)

v.)

National Credit Union Administration)
1775 Duke Street)
Alexandria, VA 22314)

Defendant.)

Civil Action
File No:

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF AMERICAN
BANKERS ASSOCIATION'S APPLICATION FOR A PRELIMINARY INJUNCTION**

This lawsuit challenges a rule approved by defendant National Credit Union Administration ("NCUA") on December 17, 1998 that purports to implement the limitations on credit union membership established by the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751, *et seq.* Plaintiff American Bankers Association ("ABA") seeks a preliminary injunction preventing the NCUA from approving applications or taking other action based on that rule, on the grounds that the rule violates (rather than enforces) the membership limitations of the FCUA, and was made effective in violation of the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.^{1/}

^{1/} The ABA's complaint also challenges the provisions of the NCUA's rule that define the terms "immediate family or household member" and "local well-defined community credit union" and become effective on March 5, 1999. The ABA does not at this time seek a preliminary injunction as to those provisions of the NCUA's membership rule.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Credit Unions Generally

Federal credit unions are mutually owned financial institutions chartered and regulated by the NCUA pursuant to the Federal Credit Union Act. By statute and regulation, federal credit unions are allowed to provide a range of ordinary banking services, including issuing deposit accounts (technically, selling "shares") and consumer loans, and providing checking account services.

Federal credit unions have tax and regulatory advantages over the banks that compete with them for business. For example, credit unions are exempt from federal taxation, 12 U.S.C. § 1768, and the requirements of the Community Reinvestment Act, 12 U.S.C. § 2902, while banks are subject to both. Congress has tempered the regulatory advantages enjoyed by federal credit unions, and sought to limit their economic impact on banks, by restricting credit unions from competing with banks on an unlimited basis. Specifically, credit unions have generally been prohibited from serving persons who are not credit union members and credit union membership has always been subject to explicit statutory limitations. See, e.g., 12 U.S.C. 1759(b) (requiring that "the membership of any Federal credit union shall be limited"). The NCUA, as regulator under the Act, is supposed to enforce the FCUA's membership limitations.

2. Prior Litigation Between ABA and NCUA

In 1990, the ABA and certain of its members filed a lawsuit challenging the NCUA's policy of chartering credit unions comprised of an unlimited number of unrelated occupational and associational groups. The ABA challenged the NCUA's chartering policy on

the ground that it violated the then-existing requirement that membership in all federal credit unions be limited to "groups hav[ing] a common bond of occupation or association" The United States Supreme Court agreed with the ABA and on February 25, 1998 ruled that the NCUA's practice of chartering multiple common bond credit unions violated the membership limitations of the FCUA. National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S.Ct. 927 (1998).

3. The Credit Union Membership Access Act

About six months after the Supreme Court decision in First National Bank, Congress passed, and President Clinton signed into law, the Credit Union Membership Access Act ("CUMAA" or the "Act"), Public Law 105-219, 112 Stat. 913 (1988). The CUMAA was compromise legislation designed to mitigate the impact of the First National Bank decision. Congress wanted to "ensure the continued safety and soundness of credit unions by permitting multiple common bond formations while preserving the integrity of the common bond concept established by the Federal Credit Union Act . . . by imposing certain limitations on permissible new groups that can be added to an existing credit union." H.R. Rep. No. 105-472, at 10 (1998). The CUMAA mooted the litigation then pending between the ABA and the NCUA by allowing all federal credit unions to keep their then-existing members, and providing that others then eligible for membership under the NCUA's prior rules would "continue to be eligible" to join the credit union, notwithstanding the Supreme Court decision invalidating the membership rule by which they became members.

The CUMAA also changed the membership provision of the FCUA to provide for "single common bond credit unions" and "multiple common bond credit unions." Each has a

limited, identified membership. A "single common bond credit union" is limited to "one group that has a common bond of occupation or association." 12 U.S.C. § 1759(b)(1). A "multiple common bond credit union" is limited to persons belonging to different "common bond groups" each of which is generally comprised of "fewer than 3,000 members" at the time it is included in the credit union. *Id.* § 1759(b)(2).^{2/}

The statute provides a narrow exception to this 3,000 member limitation for a common bond group that could not "feasibly or reasonably" operate a separately chartered credit union for one of three reasons: (1) it lacks sufficient resources, (2) it has characteristics that might "affect the financial viability and stability of a credit union" or (3) it "would be unlikely to operate a safe and sound credit union." *Id.* at §1759(d)(2)(A)(i-iii). As the House and Senate Reports that accompanied the enactment of the CUMAA explain, in providing these "exceptions to the 3,000 member limitation," Congress did not "intend for these exceptions to provide the [NCUA] Board with broad discretion to permit larger groups to be incorporated within or merged with other credit unions," but instead intended that "[t]he exceptions" only "apply where the Board has sufficient evidence to support a finding that creation of a separately chartered credit union, or the continued operation of an existing credit union, present safety and soundness concerns." H.R. Rep. No. 105-472, at 19; S. Rep. No. 105-193, at 7 (1998).

^{2/} As amended by the CUMAA, the FCUA also limits the membership field of a "community credit union" to "[p]ersons or organizations within a well-defined local community, neighborhood, or rural district." 12 U.S.C. § 1759(b)(3). As noted above, the ABA's application for a preliminary injunction does not address the rule's implementation of the membership restrictions on community credit unions so this definition is not relevant to this motion.

The CUMAA places additional limitations on the formation of multiple group credit unions. *First*, the CUMAA discourages the formation of multiple common bond credit unions even where the particular common bond group has fewer than 3,000 members. Congress made clear that in adopting the 3,000 member demarcation line it did "not intend for this numerical limitation to be interpreted as permitting all groups with 3,000 or fewer members to be included within the field of membership of an existing credit union," H.R. Rep. No. 105-472, at 19, and the Act expressly requires that the NCUA in all cases "encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union wherever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). The House Committee on Banking and Financial Services noted that the "3000 member figure is not intended to indicate that groups below 3,000 are incapable of forming new, viable credit unions" because "over 3,300 credit unions have less than \$2 million in assets and average just 700 members." H.R. Rep. No. 105-472, at 21.

Second, the CUMAA places a geographic limitation on the addition of new common bond groups to already existing credit unions by requiring that the existing credit union be "within reasonable proximity" of the group being added. 12 U.S.C. § 1759(f)(1)(a). Congress did not expressly define the phrase "within reasonable proximity," but did indicate that by including this requirement it intended to provide a serious geographic restriction on the formation of multiple common bond credit unions. For example, Congressman John J. LaFalce, the drafter of this provision, said that "[t]his 'proximity' requirement is extremely important, and I insisted on its inclusion in the bill to ensure that we maintain, to the maximum extent

practicable, the closest feasible geographic common bond. It was my intent in offering this provision that the NCUA give a conservative interpretation to the term 'reasonable proximity,' allowing credit unions in larger cities to incorporate only common bond groups located within nearby sections of that city." 144 Cong. Rec. H7050 (daily ed. Aug. 4, 1998) (Statement of Rep. LaFalce). Both the Senate and House Reports indicate that a credit union's "service facility" -- one of the benchmarks for determining whether a credit union is "within reasonable proximity" of the group being absorbed -- should retain the narrow meaning it had under prior NCUA rules and should *not* include "an automatic teller machine or similar device." H.R. Rep. No. 105-472, at 19; S. Rep. No. 105-193, at 7.

B. The NCUA's Promulgation of its New Membership Rule

1. The Rulemaking Proceeding

The CUMAA directed the NCUA to promulgate rules and regulations implementing its requirements. See, e.g. 12 U.S.C. § 1759(d)(3). On September 14, 1998, the NCUA issued, and made available for public comment, a proposed rule that revised its policies with respect to field of membership issues. See "Organization and Operations of Federal Credit Unions," 63 Fed. Reg. 49164 (1998). The agency allowed for a 60-day comment period.

On November 13, the ABA timely submitted a letter commenting on the NCUA's proposed rule and identifying instances where the rule, as proposed, violated the membership limitations contained in the FCUA. (Attached as Exhibit A to the Declaration of Jonathan Mastrangelo) (January 7, 1998) ("Mastrangelo Declaration").

During this comment period, the NCUA received other letters that were also critical of its proposed rule. Congressman John J. LaFalce, ranking minority member of the

House Banking Committee and one of the architects of the CUMAA, wrote that "there are at least four key provisions of the proposed regulations where NCUA staff has either misunderstood the purpose or intent of the legislative language, or has deliberately sought to provide the legislative language with an interpretation contradictory to what Congress intended." See November 12, 1998 Letter of Congressman LaFalce at 1 (attached as Exhibit B to the Mastrangelo Declaration). Congressman LaFalce specifically identified the NCUA's purported implementation of two of the FCUA's limitations on the formation of multiple group credit unions -- the 3,000 member limit on the groups being added to existing credit unions and the requirement that the existing credit union be within "reasonable proximity" of the group being added -- as being contrary to Congressional intent. *Id.* Congresswoman Marge Roukema, Chairman of the Financial Institutions Subcommittee of the House, also wrote to express her "concern[] that the NCUA's proposed rule does not reflect Congressional intent with respect to the limits on the expansion of multiple common bond credit unions and the formation of new credit unions." December 9, 1998 Letter of Congresswoman Roukema at 2 (attached as Exhibit C to the Mastrangelo Declaration).

On December 17, 1998 -- about 30 days after the close of the 60-day comment period -- the NCUA approved its final field of membership rule, which is formally referred to by the agency as "IRPS 99-1," by a 2 to 1 vote. The provisions of the final rule that govern the chartering of multiple common bond credit unions are materially identical to the provisions of the proposed rule that were criticized by Congressman LaFalce, Congresswoman Roukema and the ABA.

NCUA Chairman Norman D'Amours dissented from approval of the membership rule in part because he believed that the NCUA erred by creating a presumption against the chartering of federal credit unions with fewer than 3,000 members. Chairman D'Amours also expressed concern regarding the membership rule's purported implementation of the CUMAA's geographic limitation on the addition of new common bond groups to existing credit unions.^{3/}

2. The Effective Date of The New Rule

The NCUA purported to make the final effective on January 1, 1999, even though it was not published in the *Federal Register* until December 30, 1998, and the APA provides that a rule cannot be made effective less than 30 days after publication in the *Federal Register* unless the agency has "good cause" for doing so. 5 U.S.C. § 553(d).^{4/} Indeed, as approved on December 17, the rule and statement of basis and purpose did not contain anything about "good cause." See Rule as Approved on December 17 at 46 (attached as Exhibit E to the Mastrangelo Declaration. As published, the rule did purport to state "good cause" for becoming effective on January 1, 1999, apparently added by the NCUA based on the votes of two Board members on December 22, 1998 (attached as Exhibit F to the Mastrangelo Declaration).

^{3/} Counsel for the ABA has requested a copy of the administrative record by FOIA request and has requested a copy of Chairman D'Amours' dissent, by both FOIA request and letter to the NCUA's General Counsel; to date, the NCUA has not provided the ABA with copies of any of the requested documents. The details of Chairman D'Amours' dissent, outlined generally above, are from an article published in the credit union trade journal, *Credit Union Times*. See NCUA Board Acts on New Chartering Manual, *Credit Union Times*, Dec. 23, 1998 (attached as Exhibit D to the Mastrangelo Affidavit).

^{4/} The NCUA's definitions of "immediate family member" and "community credit unions" -- which the ABA does not address in this motion -- were designated "major rules" and are made effective on March 6, 1999.

The statement of cause belatedly added to the membership rule was not based on an existing "emergency." The justification for immediate effectiveness was simply the NCUA's "belie[f] that credit unions are continuing to be harmed by the inability to add new" common bonds to existing credit unions. 63 Fed. Reg. at 72017. The NCUA did not cite any facts in the administrative record supporting that "belief." The disability which the NCUA now alluded to and relied on -- existing credit unions' inability to add new common bond groups to their existing membership -- had been in place since *October 1996*, when this Court (Jackson, J.) entered an order enforcing a D.C. Circuit opinion that invalidated the NCUA's earlier policy of permitting credit unions to include in their fields of membership an unlimited number of unrelated common bond groups (attached as Exhibit G to the Mastrangelo Declaration).

3. **NCUA's Rapid and Aggressive Implementation of its New Multiple Group Credit Union Policy**

The NCUA moved instantly, based on the new rule, to permit existing credit unions to add new common bond groups. According to recent press reports, by January 4, 1999, two regions of the NCUA had already approved the addition of 61 "select employee groups" to already existing credit unions pursuant to the new membership rule. SEG Application Approvals Roll in Under Roukema' Watchful Eye, Credit Union Times Breaking News (Jan. 5, 1999) [http://www.cutimes.com/breaking_news/br010599-1.html] (attached as Exhibit H to the Mastrangelo Declaration).

C. **The NCUA's New Membership Rule**

IRPS 99-1 undermines the membership limitations of the CUMAA, particularly the membership limitations on multiple common bond credit unions. By unlawfully easing the

restrictions on the formation and expansion of multiple common bond credit unions, this new membership rule increases the size of credit unions. See Declaration of James Chesson at ¶ 9 (“Chesson Decl.”) (“Multiple-group credit unions tend to be larger than single group credit unions”). That increase, in turn, threatens ABA member institutions with serious competitive injury because as credit unions grow larger and amass more assets, their size, when combined with their regulatory and tax advantages, make it difficult for banks to compete with them for business. See *id.* at ¶¶ 12-13 (describing how credit unions “leverage” their tax and regulatory advantages to take customers from thrifts and banks). As we show below:

First, IRPS 99-1 unlawfully expands membership in a “single common bond credit union” to include multiple employer groups, even where the employer groups have little interaction and no meaningful alignment of interests.

Second, IRPS 99-1 unlawfully expands membership in multiple common credit bond unions by permitting exceptions to the statute’s 3,000 member limit on the basis of concerns *not* related to safety and soundness.

Third, IRPS 99-1 stands the CUMAA’s 3,000 member limit on its head by establishing a presumption *against* the chartering of separate credit unions having fewer than 3,000 potential members. *Id.* at 72001.

Fourth, IRPS 99-1 unlawfully lowers the size of the common bond group for purposes of the 3,000 member limitation by considering only a portion of the group’s membership rather than all of the potential members.

Fifth, IRPS 99-1 unlawfully permits unwarranted expansion of multiple common bond credit unions by allowing *successfully* operating credit unions with more than 3,000

aggregate members to merge so long as they "contain[] select employee groups of less than 3,000 primary potential members." *Id.* at 72003.

Sixth, IRPS 99-1 unlawfully eases the geographic restriction on the formation of multiple common bond credit unions by dramatically expanding the meaning of the terms "service facility" and "reasonable proximity."

Seventh, IRPS 99-1 unlawfully expands membership eligibility in existing common bond credit unions by reading the CUMAA's provision that grandfathers the membership eligibility of persons who, on the date of enactment, were members of a group comprising a portion of a multiple common bond credit union as applying to persons who were *not* members of such groups on that date. *Id.* at 72015.

ARGUMENT

The ABA is entitled to a preliminary injunction preventing implementation of IRPS 99-1 because, as shown below, (1) it has a substantial likelihood of success on the merits, (2) it will suffer irreparable harm in the absence of the requested relief, (3) the NCUA will not suffer substantial harm if relief is granted, and (4) the public interest is furthered by the injunctive remedy. Under the law of this Circuit, a preliminary injunction should issue if the ABA shows "either a high probability of success and some injury, or *vice versa*." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam); accord Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Woerner v. Small Bus. Admin., 739 F. Supp. 641, 650 (D.D.C. 1990).

A. The ABA Is Likely to Succeed on the Merits

1. IRPS 99-1 Violates the Membership Limitations of the FCUA

The ABA is likely to succeed on the merits of its substantive claim that IRPS 99-1 is invalid because it violates the limitations on credit union membership Congress added when enacting the CUMAA. It is settled law that an agency's interpretation of a statute must conform to congressional intent and that where it does not, it must be found invalid. See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). Here, the NCUA's interpretation of the CUMAA violates the express intent of Congress, as reflected in the language, structure and legislative history of the statute. See id. at 843 n.9 (court determines the intent of Congress by employing the "traditional tools of statutory construction"); see also Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (relying on the plain language, structure, and legislative history of statute in determining Congressional intent); NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987) (same).

First, the rule as written violates the statutory restriction on the formation of multiple common bond credit unions by:

- (1) permitting exceptions to the statutorily mandated "3,000 member" limit where it has not been demonstrated that concerns regarding safety and soundness prevent the common bond group from forming a separately chartered credit union;

- (2) creating a presumption against the chartering of separately operating credit unions with fewer than 3,000 "primary potential" members;
- (3) excluding "family" and "household" members when determining whether a common bond group has more than 3,000 potential members;
- (4) allowing mergers of financially strong credit unions having dissimilar common bonds;
- (5) permitting the addition of a new common bond group to an existing credit union that is not "within reasonable proximity" of that credit union for purposes of the Act.

Second, the rule violates the CUMAA's limitation on membership in "single common bond credit unions" by allowing such credit unions to be comprised of multiple employer groups that have little or no meaningful interaction. *Third*, the rule violates the CUMAA by applying too broadly the exception that "grandfathers" the membership eligibility of certain persons.

First: Violations of The CUMAA's Limitations On Multiple Common Bond Credit Unions

- a. **IRPS 99-1 Violates the CUMAA By Permitting Exceptions to the 3,000 Member Limit On Multiple Common Bond Groups Where There Are No Safety and Soundness Concerns.**

IRPS 99-1, as approved, violates the CUMAA by granting exceptions to the 3,000 member limit on the formation of, and addition of new groups to, multiple common bond credit unions on the basis of sponsor group preference. In so doing, IRPS 99-1 jeopardizes the competitive interests of ABA member institutions by severely undermining the 3,000 member

limit and thus promoting an unintended growth in both the number and size of multiple common bond credit unions.

A central feature of the compromise embedded in the CUMAA is its strict limitation on the formation of, and addition of new groups to, multiple common bond credit unions. As now amended, the FCUA provides that subject to narrow exceptions "only a group with fewer than 3,000 members shall be eligible to be included in the field of membership" of a multiple common bond credit union. 12 U.S.C. § 1759(d)(1).

The FCUA allows exceptions to the 3,000 member limit for common bond groups that would likely not succeed if chartered separately because they (1) lack sufficient resources to operate a credit union, (2) possess demographic or other characteristics "that may affect the financial viability and stability of a credit union," or (3) are found to be "unlikely to operate a safe and sound credit union." 12 U.S.C. § 1759(d)(2).

The legislative history makes clear that Congress intended for these to be narrow exceptions that would only be invoked by the NCUA where there are serious concerns regarding the particular group's ability to operate safely and soundly as a separately chartered credit union. Both the House and Senate Reports expressly state that "[t]he Committee does not intend for these exceptions to provide broad discretion to the [NCUA] Board to permit larger groups to be incorporated within or merged with other credit unions." H.R. Rep. No 105-472, at 19; S. Rep. No. 105-193, at 7. Instead, "[t]he exceptions are intended to apply where the Board has sufficient evidence to support a finding that creation of a separately chartered credit union, or the continued operation of an existing credit union, *present safety and soundness concerns.*" *Id.* (emphasis added). The term "safety and soundness," while not defined by the FCUA, is

generally understood in banking law to address concerns related to "action or lack of action, [1] which is contrary to generally accepted standards of prudent operation, [2] the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution . . ." Johnson v. Office of Thrift Supervision, 81 F.3d 195, 201 n.8 (D.C. Cir. 1996) (quoting the Office of Thrift Supervision's definition of "unsafe or unsound practice").

The NCUA's new rule does not restrict the statute's exceptions to cases where operation of a "separately chartered credit union . . . present[s] safety and soundness concerns." Instead, the NCUA's determination turns essentially on whether the new group *wants* to form a separately chartered entity. As the IRPS 99-1 explains, the NCUA considers the most important factors "the desire and intent of the group and the sponsor support." 63 Fed. Reg. at 72002. By the simple expedient of procuring and submitting to the NCUA "a letter from the CEO of the [the employer group] stating that it does not wish to form a new credit union," the common bond group will have produced "substantial evidence," in the NCUA's eyes, justifying an exception to the statute's 3,000 member limit. *Id.* at 72010-11.

But the preference of the sponsor group does not amount to concerns regarding the group's ability to operate safely and soundly; nor, for that matter, is it tangible, objective evidence that the group lacks the resources or demographics necessary to operate as a separately chartered entity. To the contrary, by relying primarily on the "desire" of the common bond group, the NCUA reinstates in substance the policy it had before the Supreme Court's decision in First National Bank, which allowed common bond groups to join existing credit unions (rather than be chartered as separate credit unions) when both they and the relevant existing credit union so desired. That is the very policy that Congress rejected when it adopted the 3,000 member

limit, and by reverting to it, the NCUA's rule is contrary to the clear intent of Congress as reflected in both the language, see 12 U.S.C. § 1759(d)(2), and legislative history of the CUMAA. See H.R. Rep. 105-472, at 19; S. Rep. No 105-193, at 7; see also H.R. Rep. No. 105-472, at 10 (identifying preservation of the common bond concept as a primary objective of the CUMAA). This provision of the NCUA's membership rule is therefore invalid. Chevron, 467 U.S. at 842-43.

b. **IRPS 99-1 Violates the CUMAA By Encouraging Common Bond Groups Having Fewer Than 3,000 "Potential Primary Members" to Join Existing Credit Unions.**

IRPS 99-1 violates the express intent of Congress by creating a presumption *against* the chartering of separately operating credit unions with fewer than 3,000 "primary potential" members. That presumption discourages the formation of separately chartered credit unions having fewer than 3,000 "primary potential" members and has the effect of making inclusion in a multiple common bond credit union automatic for any common bond group having fewer than 3,000 "primary potential" members. By discouraging groups having fewer than 3,000 members from forming separately chartered credit unions, and in fact making such additions automatic, IRPS 99-1 threatens the business interests of ABA member institutions by expanding both the number and size of conglomerate credit unions.

The CUMAA requires the NCUA in every instance to "encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever practicable and consistent with reasonable standards for safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). The CUMAA does not provide an exception to this mandate for credit unions

or common bond groups with fewer than 3,000 members. To the contrary, its legislative history makes clear both that Congress did not intend for groups under the 3,000 member threshold to automatically qualify for membership in a multiple common bond credit union, H.R. Rep. No. 105-472, at 19 (it was not "intend[ed] for this numerical limitation to be interpreted as permitting all groups with 3,000 or fewer members to be included within the field of membership of an existing credit union"), and did not, in adopting the 3,000 member limit, mean to indicate that groups with fewer than 3,000 members are incapable of forming separately chartered credit unions. *Id.* at 20 ("the 3,000 member figure is *not* intended to indicate that groups below 3,000 are incapable of forming new, viable credit unions").

IRPS 99-1, however, establishes a regulatory presumption *against* the formation of a separately chartered credit unions having fewer than 3,000 primary potential members. Specifically, IRPS 99-1 provides that "groups above the threshold of 3,000 primary members must be able to demonstrate why they cannot satisfactorily form a separate credit union," but requires that "[g]roups below the 3,000 threshold . . . be able to demonstrate why they can successfully operate a credit union." 63 Fed. Reg. at 72001. Consequently, "a charter applicant with a proposed field of membership of fewer than 3,000 primary potential members may have to provide more support than a proposed credit union with a larger field of membership in order to demonstrate that it is economically advisable and that it will have a reasonable chance to succeed." *Id.* at 72000.

By creating a presumption against the formation of separately chartered credit unions having fewer than 3,000 "primary potential members," and subjecting such common bond groups to a potentially more stringent charter approval process, the NCUA, contrary to the

express requirements of the CUMAA, discourages (rather than encourages) the formation of separately chartered credit unions having fewer than 3,000 "primary potential members." The NCUA's presumption is therefore contrary to the intent of Congress, as expressed by and through the unambiguous language of 12 U.S.C. § 1759(f)(1)(A), and the House Committee Report, which specifically provides that "the 3,000 member figure is *not* intended to indicate that groups below 3,000 are incapable of forming new, viable credit unions." H.R. Rep. No. 105-472, at 20 (emphasis added).⁵¹

In addition, the NCUA's presumption violates Congress' intent in enacting the CUMAA by having the effect of making common bond groups having fewer than 3,000 "primary potential" members *automatically* eligible for inclusion in already existing credit unions. Unless common bond groups having fewer than 3,000 "primary potential" members choose to, and are capable of, affirmatively rebutting the NCUA's presumption, they are automatically treated as having the trait necessary for being added to an already existing credit

⁵¹ Previously, the NCUA had presumed that common bond groups having less than 500 -- not 3,000 -- members would be unable to form separately chartered entities, see 59 Fed. Reg. at 29079 (1994) ("While NCUA has not set a minimum size field of membership for chartering a federal credit union, experience has shown that a credit union with a proposed field of membership of under 500 generally is unlikely to succeed"); IRPS 99-1 tacitly acknowledges the effectiveness of that policy. 63 *Federal Register* at 72001 (justifying the NCUA's policy change by contending that "[i]t would be remiss simply to say that, *since a lower threshold number worked in the past*, there is no need to change the economic advisability requirement today") (emphasis added). The NCUA's Chairman made similar representations to Congress, testifying that 500 -- not 3,000 -- was the minimum potential membership needed to form a safe and sound credit union. Cong. Hearing to Review the Supreme Court's Decision Regarding the Credit Union Common Bond Requirement and the Appropriate Congressional Response to the Ruling, Testimony of Norman D'Amours at 1 (March 11, 1998) [<http://www.house.gov/banking/31198wit.htm>] (stating that of the groups presently in multiple common bond credit unions "94.2 percent of them . . . have fewer than the 500 potential members needed, as an absolute minimum, to organize and maintain a viable credit union").

union -- i.e., as being unable to operate as a separately chartered entity. Should the group choose not to challenge the NCUA's presumption, it will, by force of that presumption, be permitted to be included in the field of membership of an existing credit union. That effect is contrary to congressional intent, as reflected in the CUMAA's legislative history, which unambiguously provides that it was not "intend[ed] for this numerical limitation to be interpreted as permitting all groups with 3,000 or fewer members to be included within the field of membership of an existing credit union." H.R. Rep. No. 105-472, at 19.

c. **IRPS 99-1 Violates the CUMAA By Excluding Certain Members When Calculating the Size of a Common Bond Group For Purposes of the 3,000 Member Limit.**

IRPS 99-1 violates the CUMAA by excluding "family" and "household" members when determining whether a common bond group or existing credit union falls below the 3,000 member threshold that limits eligibility for membership in multiple common bond credit unions. By counting only part of a group's membership when making that determination, IRPS 99-1 expands the number of groups and credit unions that qualify for membership in multiple common bond credit unions and thus damages the competitive interests of ABA member institutions.

The CUMAA provides that, subject to narrow exceptions, "only a group with fewer than 3,000 members shall be eligible to be included in the field of membership" of a multiple common bond credit union. 12 U.S.C. § 1759(d)(1). The statute does not provide that any members of the common bond group should be excluded when determining whether the group falls above or below 3,000 member limit.

IRPS 99-1 is contrary to the plain language of this membership limitation because it excludes certain persons who are members of the common bond group when determining the group's size for purposes of the 3,000 member threshold. IRPS 99-1 considers only "primary potential members" when determining the size of common bond groups that are already part of either a single or multiple common bond credit union (in the merger context), 63 Fed. Reg. at 72003 (allowing mergers of healthy credit unions that "contain[] select employee groups of less than 3,000 primary potential members"), and considers only "primary potential members" when determining the size of the charter applicants' common bond(s). *Id.* In both instances, the NCUA excludes from its calculation persons who are credit union members (or eligible for credit union membership) "on the basis of the[ir] relationship . . . to another person who is eligible for membership in a credit union." 12 U.S.C. § 1759 (e)(1) (granting membership eligibility to "family or household members" "on the basis of the[ir] relationship . . . to another person who is eligible for membership in the credit union").

These excluded "family" and "household" members are members of the common bond and potential members of any subsequent common bond credit union. They have full membership rights identical to those of so-called primary members, by both statute and regulation, and *they are expressly considered members of the common bond group by NCUA rule.* 63 Fed. Reg. at 72027 (listing among the "other persons sharing [the] common bond" of a given group "member[s] of the immediate family or household" of persons who are "primary" members of the group). The NCUA's decision to exclude these members when determining whether the group has fewer than 3,000 members is arbitrary, capricious and an abuse of discretion and violates the unambiguous language of the CUMAA.

d. IRPS 99-1 Violates the CUMAA By Allowing the Merger of Financially Healthy Credit Unions Having Dissimilar Common Bonds.

The CUMAA requires the NCUA to encourage the formation of separately chartered credit unions and generally does not permit the formation of multiple common bond credit unions having groups of more than 3,000 members. IRPS 99-1 disregards these statutory requirements by allowing the merger of financially sound credit unions having dissimilar common bonds even where the separate merging entities are comprised either entirely or in part of common bond groups with more than 3,000 members. By exempting these mergers from the membership restrictions of the CUMAA, IRPS 99-1 damages the interests of ABA member institutions by allowing for an expansion in the number and size of multiple common bond credit union not intended by Congress.

The CUMAA provides that the NCUA is to "encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union," 12 U.S.C. § 1759(f)(1)(A), and generally does not allow the formation of multiple common bond credit unions consisting in whole or in part of common bond groups having more than 3,000 members. *Id.* § 1759(b)(2). The statute's membership restrictions apply equally to both the formation of new multiple common bond credit union charters through the merger of existing credit unions, and formation of new multiple common bond credit unions through the incorporation of common bond groups that did not previously belong to any federal credit union.

See, e.g., H.R. Rep. No 105-472, at 19 (noting that the statutory exceptions to the 3,000 member limit "apply where the Board has sufficient evidence to support a finding that creation of a separately chartered credit union, or the continued operation of an existing credit union, present safety and soundness concerns"). Id. (emphasis added); S. Rep. No. 105-193, at 7 (same).

IRPS 99-1 permits two financially sound credit unions to merge and form a new multiple common bond credit union consisting either in whole or in part of common bond groups having fewer than 3,000 "primary potential" members. See 63 Fed. Reg. at 72003 (allowing mergers of healthy credit unions that "contain[] select employee groups of less than 3,000 potential primary members"). The NCUA allows such mergers even though, by definition, they involve credit unions that can -- and in fact do -- operate safely and soundly as separately chartered entities; and the NCUA permits such combinations even where the two credit unions consist in whole or in part of common bond group(s) having more than 3,000 (but less than 3,000 "potential primary") members. Id.

The NCUA's treatment of mergers of financially sound credit unions violates the plain and unambiguous requirement that the NCUA must "encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). Here, the NCUA does not encourage the chartering of separate credit unions but instead permits credit unions that are operating separately on a safe and sound basis to combine

and create new multiple common bond credit unions.⁹ The NCUA's rule is, in this respect, both contrary to the requirements of the CUMAA and arbitrary, capricious and an abuse of agency discretion.

e. **IRPS 99-1 Violates the FCUA By Not Requiring That Existing Credit Unions Be Located "Within The Reasonable Proximity" of the Common Bond Groups They Are Absorbing.**

IRPS 99-1 violates the CUMAA's geographic limitation on the formation of multiple common bond credit unions by permitting an existing credit union that is not "within reasonable proximity" of a common bond group to add that common bond group to its field of membership. IRPS 99-1 damages the competitive interests of ABA member institutions by easing the geographic limitation placed by the CUMAA on the formation and growth of multiple common bond credit unions.

The CUMAA provides that an existing credit union must where practicable be located "within reasonable proximity" of any common bond group being added to its field of membership. 12 U.S.C. § 1759(f)(1)(B). The CUMAA does not expressly define the phrase "reasonable proximity," but its legislative history makes clear that by including the "reasonable proximity" requirement, Congress intended to provide a strict geographic limitation on the formation and growth of multiple common bond credit unions. As the Report of the House

⁹ This violation is made worse when coupled with the NCUA's policy of counting only "potential primary members" when determining the size of the merging credit union's common bond group(s). Taken together, these rules disregard one of the CUMAA's most fundamental principles by permitting a financially successful "group with [more] than 3,000 members . . . [to] be eligible to be included in the field of membership" in a multiple common bond credit union. 12 U.S.C. § 1759(d)(1).

Banking and Financial Services Committee explains, the CUMAA "articulates a strong policy towards placing groups which cannot form their own credit unions with a local credit union" because "the Committee believes that credit union members who live, work and interact in the same geographic area are likely to have more of a meaningful affinity and common bond than those who do not." H.R. Rep. No. 105-472, at 20. Congressman LaFalce, who drafted this provision, likewise stressed that the "reasonable proximity requirement" was "extremely important" and should be "give[n] a conservative interpretation, allowing credit unions in larger cities to incorporate only common bond groups located within nearby sections of that city." 144 Cong. Rec. H7050 (daily ed. Aug. 4, 1998) (statement of Rep. LaFalce). Equally as important, the House and Senate Reports also make clear that a credit union "facility" -- which the IRPS 99-1 uses as the touchstone of its "reasonable proximity" test -- is "meant to be defined in the *same way that the [NCUA] has defined "service facility," that is, an automatic teller machine or similar device would not qualify.*" H.R. Rep. No. 105-472, at 19 (emphasis added); see also S. Rep. No. 105-193, at 7.

The NCUA does not give either "service facility" or "reasonable proximity" the meaning intended by Congress. IRPS 99-1 provides that a group is within "reasonable proximity" of the existing credit union where it is within the service area of one of the credit union's "service facilities." 63 Fed. Reg. at 72002. IRPS 99-1 then goes on to alter -- and significantly broaden -- its previous definition of "service facility" by allowing it to include not only a "credit union owned branch" but also "a credit union owned electronic facility." Id. Under its prior field of membership rule, the NCUA had only considered as "service facilities" actual branches where a credit union member could "deal directly with a credit union

representative." See 59 Fed. Reg. at 29078 ("A credit union's service facility is a place where . . .

(1) Shares are accepted for members' accounts; (2) loan applications are accepted or loans are disbursed; (3) a member can deal directly with a credit union representative; and (4) the service provided is clearly associated with that particular credit union").

IRPS 99-1 violates the clear intent of Congress, as reflected in the CUMAA's legislative history. Congress plainly did not intend for the NCUA to broaden its definition of "service facility"; in fact, it specifically stated that it intended for the NCUA to retain its earlier definition of "service facility." See H.R. Rep. No. 105-472, at 19. Just as plainly, Congress did not intend for the NCUA's definition to include electronic devices "similar" to automated teller machines. Id. IRPS 99-1 violates the FCUA by doing both. By these actions, the NCUA undermined Congress' intent that members of multiple common bond credit unions have the affinity that comes from members "liv[ing], work[ing] and interact[ing]" with one another. See H.R. Rep. No. 105-472, at 20.

Second: Violations of the CUMAA's Limitations on "Single" Common Bond Credit Unions

IRPS 99-1 as written violates the CUMAA by allowing a "single" common bond credit union to be comprised of multiple employer groups having little or no meaningful affinity. By unlawfully expanding the membership limits on "single" common bond credit unions, IRPS 99-1 allows some employer groups to circumvent the membership limits on multiple common bond credit unions set forth in the CUMAA. That circumvention harms the competitive interests of ABA member institutions by facilitating the creation and growth of *de facto* multiple common bond credit unions.

The FCUA, as amended, retains the common bond concept originally adopted when the statute was first enacted in 1934 specifically limiting the membership field for single common bond credit unions. It does so by limiting "single common bond credit unions" to "one group that has a common bond of occupation or association." 12 U.S.C. § 1759(b)(1). The legislative history of the original FCUA makes clear that Congress intended for an "occupational common bond" to encompass only persons belonging to a single employer group. For example, Roy Bergengren, an early advocate of credit unions who was instrumental in Congress' drafting of the FCUA, testified that an occupational common bond would be "limited to a single employer":

Senator Bankhead: Take clerks in the stores. Who [among the clerks] is eligible in the [common bond] group if you organize [a credit union] in Baltimore?

Mr. Bergengren: Take, for instance, the Tennessee Coal, Iron & Railroad Co. in Birmingham, Ala. There we have the T.C.I. Credit Union.

Senator Bankhead: *And is it limited to a single employer?*

Mr. Bergengren: *Yes.*

Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency, 73d Cong., 1st 13 at 24 (1933) (emphasis added) ("1933 Committee Testimony").

In retaining the common bond concept for single common bond credit unions, Congress intended to preserve to the fullest extent possible a meaningful affinity between credit union members.

See, e.g., H.R. Rep. No. 105-472 at 10 (providing that one of the purposes of the CUMAA was to "preserv[e] the integrity of the common bond concept established by the Federal Credit Union Act . . .").

IRPS 99-1 does not limit a "single" occupational common bond credit union to single employer groups. Specifically, IRPS 99-1 allows employees of two companies to be bonded together in a "single" occupational group where either (1) one of the companies has at least a 10 percent ownership interest in the other company or (2) the companies are "related to another," "such as a company under contract and possessing a strong dependency relationship with another company." 63 *Federal Register* at 72007.

These exceptions to a one-employer group policy allow a single common bond credit union to be comprised of multiple employer groups that have no meaningful interaction with one another or an alignment of interests. The exception made for a company holding a 10 percent ownership interest in another company would apply even where the 10 percent interest is a non-voting one held by a silent partner or a large institutional investor and would allow a single common bond credit union to include diverse, unrelated employer groups. For example, persons employed by the "Tiger" funds would be in the same "single" common bond as employees of Tricon Global Restaurants, the parent company of Kentucky Fried Chicken, Pizza Hut and Taco Bell, because the "Tiger" funds hold a 10.8% interest in Tricon. See Tiger Partnerships Acquire 10.8% Stake in Tricon Global Restaurants, *The Orange County Register*, Jan. 10, 1998, at C02 (attached as Exhibit I to the Mastrangelo Affidavit). Similarly, the "dependency relationship" exception would allow large suppliers to be bonded with almost a limitless number of customers and service providers. For example, Microsoft could presumably be in the same "single"

common bond as nearly all makers of computer software and hardware, including those that have an adversarial relationship with Microsoft, and its outside law firms.²⁷

IRPS 99-1 violates the CUMAA by expanding membership in "single common bond credit unions" beyond the limits intended by Congress. The original drafters of the FCUA intended for occupational common bond credit unions to be confined to a single employer, see 1933 Committee Testimony at 24, and the Congress that amended that statute and carried over the "common bond" concept did so in part because it intended for credit unions to retain the cohesive membership and loyalty that comes with interaction and an aligning of interests. See, e.g., H.R. Rep. No. 105-472, at 20. IRPS 99-1 violates the intent of Congress by expanding membership in a single common bond credit union to include multiple employer groups that in many instances will have no meaningful interaction or even an alignment of interests.

Third: Violations of the CUMAA's "Grandfathering" Provision

IRPS 99-1 violates the requirements of the CUMAA by expanding the "grandfather" rights provided by the CUMAA beyond their statutory bounds. In so doing, IRPS 99-1 damages the interests of ABA member institutions by expanding the size of multiple common bond credit unions.

²⁷ The NCUA's prior chartering policy expressly (and sensibly) disallowed companies having adversarial relationship from being part of the same common bond. See e.g., 59 Fed. Reg. at 29076 ("[p]ersons working in the entertainment industry in California" are not part of a single common bond "since [their] firms compete with one another"). With limitations now placed on the formation of multiple common bond credit unions, however, that limitation on the formation of single common bond credit unions has been removed. See 63 Fed. Reg. at 72023 (excluding from the examples of impermissible single occupational "common bond" arrangements those that include competing firms).

The CUMAA allows persons who are "member[s] of any group whose members constituted a portion of the membership any Federal credit union . . . [to] *continue* to be eligible to become a member of that credit union, by virtue of membership in that group after [the date of enactment]," 12 U.S.C. § 1759(c)(1)(A)(ii) (emphasis added), regardless of their ability to otherwise meet the requirements for membership in that credit union. This exception, by its plain and unambiguous terms, applies only to persons who were members of the group on the date of enactment of the CUMAA and who can therefore "continue" to be eligible for membership in the group's credit union.

IRPS 99-1 does not limit this grandfathering exception to persons who were members of the group on the date of enactment of the CUMAA. Instead, as the NCUA most clearly explained when proposing its new membership rule, the agency will allow "a member, or *subsequent new member*, of any group, whose membership constituted a portion of the membership of any federal credit union at the date of enactment, to continue to be eligible for membership in the credit union." 63 Fed. Reg. at 49169 (emphasis added).

The NCUA's membership rule violates the unambiguous requirements of the FCUA's grandfathering provision. It allows persons who were not members of "a group whose membership constituted a portion of the membership any federal credit union at the date of enactment" of the CUMAA -- and who therefore cannot "continue" to be eligible for membership in that credit union -- to nevertheless be eligible for membership in that credit union solely on the basis of their subsequent membership in the group. This approach dramatically expands the impact of the CUMAA's grandfathering provision, giving it a meaning never intended by Congress. For example, all *future* employees of the more than 150 occupational

groups that comprise the membership of AT&T Family Federal Credit Union -- whose membership policies were specifically declared unlawfully in the First National Bank case -- would, under the NCUA's approach, have membership eligibility "grandfathered," even persons who became employees of these businesses decades after the enactment of the CUMAA.

2. **The NCUA Promulgated and Approved IRPS 99-1 in Violation of the Requirements of the Administrative Procedure Act.**

The ABA is likely to succeed on the merits of its claim that the NCUA violated the requirements of the Administrative Procedure Act by purporting make its new field of membership rule effective less than 30 days after its publication in the *Federal Register*. The agency's reliance on the "good cause" exception to the APA's notice-and-comment requirements is unwarranted. That exception applies only where the agency can point to a demonstrable emergency, see e.g., Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm'n, 969 F.2d 1141, 1144 (D.C. Cir. 1992); Analysas Corp. v. Bowles, 827 F. Supp. 20, 23 (D.D.C. 1993), which the NCUA has not done, and cannot do, here.

The Administrative Procedure Act provides generally that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date" 5 U.S.C. § 553(d). The NCUA belatedly recognized, when it approved the December 22 version of the rule, that it had bypassed this aspect of the APA's notice-and-comment requirements. It then attempted to justify its decision by relying on the "good cause" exception to the APA.

The Courts of this Circuit have explained time and again that "exceptions to the provisions of section 553 'will be narrowly construed and reluctantly countenanced,'" American Fed. of Gov't Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting New Jersey v. Environmental Protection Agency, 626 F.2d 1038, 1045 (D.C. Cir. 1980)), and have repeatedly stated that the good cause exceptions can only be legitimately invoked in "emergency situations." Id. at 1158; see also Georgetown University Hosp. v. Bowen, 821 F.2d 750, 757 n. 11 (D.C. Cir. 1987) (noting that "§ 553(d) appears to only contemplate a narrow exception to the 30 day requirement for rules that, for good cause shown, must be given effect either immediately or upon promulgation, or in less than 30 days"), aff'd, 488 U.S. 204 (1988).

The NCUA cannot rely on the "good cause" exception here because it cannot demonstrate on this record that there is an "emergency" that justifies its decision to bypass the requirements of the APA.

First, the record makes clear that this rule is the product of ordinary, not emergency, rulemaking. This is not a case where the agency promulgated a rule under a congressionally imposed deadline, see Asiana Airlines v. Federal Aviation Admin., 134 F.3d 393, 397 (D.C. Cir. 1998) ("Statutory language imposing strict deadlines, standing alone, does not constitute good cause under § 553"), or under exigent circumstances. Rather, this is a case where the NCUA promulgated a rule deliberately, permitted the public for 60 days to submit comments, and approved its final version more than a month later. Cf. Ngou v. Schweiker, 535 F. Supp. 1214, 1216-17 (D.D.C. 1982) (refusing to apply the "good cause" exception to § 553(d) where the Secretary proposed a rule for comment on December 11, 1981, approved the rule February 8, 1992, published the rule on March 12, 1982, and made the rule

effective April 1, 1982, because the Secretary "had ample time" to meet the thirty day notification requirement and could not "bootstrap himself to a position of emergency based on his own dilatory conduct"). The NCUA was fully aware, during this entire period, of the circumstances that it now identifies as emergent; but the NCUA never, prior to issuing the December 22 revision to the new rule, suggested that this was an emergency rule or that its final version had any legal justification to be made effective less than thirty days after publication in the *Federal Register*.

Second, the NCUA's cited "harm," like the rulemaking process generally, is also ordinary. The NCUA states that the rule should be made effective on an expedited basis because existing credit unions, under the present regime, are denied the benefit of being able to add to their membership new groups having dissimilar common bonds.⁴⁷ But the fact that some regulated entities will benefit from, or be harmed by, the adoption of a regulation is rather typical -- indeed, even inevitable. Courts have consistently rejected the notion that this kind of "harm" provides an agency with "good cause" for making a rule effective immediately. *See, e.g., Tennessee Gas Pipeline Co.*, 969 F.2d 1141 (regulator's concern that industry will circumvent new regulatory requirements and inflict environmental damage was not "good cause" for purposes of the APA); *Ngou*, 535 F. Supp. 1214 (regulator's concern that regulated persons

⁴⁷ While the amended FCUA does permit existing credit unions to add to their membership dissimilar common bond groups, the statute intends to make such additions the exception (not the rule) in part by commanding the NCUA to always "encourage the formation of separately charter credit unions." NCUA's reliance on this limited exception in arguing that an emergency exists that warrants dispensing with the requirements of the APA is curious.

would lose certain benefits if the rule was made effective after expiration of 553(d)'s thirty day period was not "good cause" for purposes of the APA).

B. The ABA Will Suffer Irreparable Injury If the Requested Relief Is Not Granted.

Unless the Court grants preliminary injunctive relief, members of the ABA will suffer irreparable damage.

First, the NCUA's membership rule unlawfully expands credit union membership and therefore creates unlawful competition for ABA member institutions that threatens their ability to do business with both existing and potential customers. *See* Chessen Decl. ¶¶ 12-13, 16-17.^{2/} It is elementary that interference with "the opportunity to maintain and develop relationships with existing and potential customers" constitutes irreparable harm and supports the issuance of a preliminary injunction. *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509-10 (7th Cir. 1994); *JAK Prods., Inc. v. Wiza*, 986 F.2d 1080, 1084 (7th Cir. 1993) (unlawful competition resulting from violation of covenant not to compete results in irreparable injury); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985) (affirming injunction where plaintiff "faced irreparable, noncompensable harm in the loss of its customers"); *see also Sears Roebuck & Co. v. Sears Fin. Network, Inc.*, 576 F. Supp. 857, 864 (D.C. Cir. 1983) ("Trademark infringement and unfair competition are, by their nature, activities that cause irreparable harm"). Damage suffered from business lost to unfair competition cannot

^{2/} Recognizing that this type of injury results in irreparable harm, Judge Jackson, in analogous circumstances, entered an order enjoining the implementation of an earlier NCUA membership rule.

be completely remedied. See New York Pathological & X-Ray Labs., Inc. v. Immigration & Naturalization Serv., 523 F.2d 79, 81 (2d Cir. 1975) (irreparable results in cases involving loss of customers because "the Court would have no way to remedy the loss of business [plaintiffs] are now suffering"); see also Chessen Decl. at ¶16. That fundamental difficulty would be complicated here by the fact that complete relief would require the Court to "undo" field of membership expansions. See Unscrambling the Egg? Sun FCU Asks For Delay of De-Merger Plans with Defense Supply, Credit Union Times, July 15, 1998, (describing the problems associated with unraveling an illegal credit union merger) (attached as Exhibit J to the Mastrangelo Affidavit).

Second, with respect to its claim under the Administrative Procedure Act, ABA member institutions will suffer irreparable harm to their procedural rights unless a preliminary injunction is granted. Under the APA, the ABA and its member institutions are entitled to 30 days notice to prepare for, or challenge, regulatory action. That 30 day period will be irretrievably lost if the IRPS 99-1 is permitted to take effect on January 1.

The harm to the ABA members is also imminent. The 30 day period provided for by the APA is already running so the harm caused by the NCUA's violation of the APA's procedural requirements is now occurring. The harm caused by the NCUA's substantive violations of the FCUA is also imminent as the NCUA is, according to recent press reports, rapidly and aggressively approving expansions to multiple common bond credit unions. See SEG Application Approvals Roll in Under Roukema's Watchful Eye, Credit Union Times Breaking News (Jan. 1, 1999) [http://www.cutimes.com/breaking_news/br010599_1.html] (Web Page) ("As of January 4, 67 [select employee group] applications, filed under the new Chartering

Manual (IRPS 99-1), have been approved by two NCUA regions, according to agency spokesperson Lesia Bullock") (attached as Exhibit H to the Mastrangelo Declaration). That is not surprising. The NCUA has in the past moved quickly and aggressively in implementing new membership rules. For example, the NCUA approved over a dozen charter conversions under IRPS 96-2, a membership rule that the ABA immediately challenged (and this Court shortly thereafter invalidated), on the very day that the rule became effective. The NCUA's attempt to make this membership rule effective almost immediately on publication -- as it attempted to do with IRPS 96-2 -- sent a clear signal that it would move quickly here.¹⁰

C. The NCUA Will Not Be Significantly Harmed If Relief Is Granted

The NCUA will not be significantly harmed by the granting of relief. A preliminary injunction will simply return the agency to its prior membership rule. Under that regime, the NCUA can continue to charter single common bond and community credit unions and credit unions are permitted to maintain their current members and enroll new members from existing common bond groups. The NCUA will only be prohibited from approving charter applications and amendments on the basis of those portions of its membership rule that are unlawful.

¹⁰ The litigation regarding IRPS 96-2 is similar to this one in that there, like here, the ABA's challenge was based in part on an allegation that the rule had been adopted in violation of the requirements of the Administrative Procedure Act. In that case, Judge Jackson granted the ABA's motion from the bench and expressed concern that the NCUA, in violating the requirements of the APA, behaved as though it were a "rogue" agency.

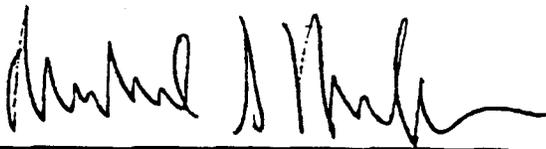
D. The Public Interest Is Advanced by Granting Injunctive Relief

The public interest would plainly be served by the grant of preliminary injunctive relief that the ABA now seeks. As this Court has explained: "[T]he public interest is best served by having federal agencies comply with the requirements of federal law, particularly the requirements of the APA" Patriot Inc. v. Department of Housing and Urban Development, 963 F. Supp. 1, 6 (D.D.C. 1997).

CONCLUSION

For the foregoing reasons, ABA respectfully requests that the Court enter a preliminary injunction preventing the NCUA from implementing IRPS 99-1.

Respectfully submitted,



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Date: January 8, 1999

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action
)	File No. 99-_____
NATIONAL CREDIT UNION ADMINISTRATION,)	
)	
Defendant.)	

DECLARATION OF JAMES CHESSEN
IN SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

I, James Chessen, declare and say:

1. I am the Chief Economist of the American Bankers Association ("ABA"). I have a Ph.D. and Masters in Economics from Virginia Polytechnic Institute and State University and a B.A. in Economics from the University of Puget Sound. I have studied the banking industry and its competitors – including credit unions – for approximately 20 years as an academic, as a financial economist with a federal bank regulatory agency (the Federal Deposit Insurance Corporation), and as Chief Economist for the ABA. I am often called upon by the media to provide professional opinions on the banking industry, financial services competition and economic trends and developments. I submit this declaration in support of the Plaintiff's Motion for a Preliminary Injunction in the above-captioned case.

2. The American Bankers Association is the largest national trade association of the banking industry in the United States. ABA members include banks of all sizes and types, ranging from small community banks through regional and super-regional banks to money-center banks. The association represents national and state chartered banks, independent and holding company-owned banks, savings banks and savings and loan associations with both state and national charters. ABA members are located in each of the fifty states and the District of Columbia.

3. In my role as the ABA's Chief Economist, I am personally aware of the competitive nature of the markets in which ABA members operate, and of how the policies of the National Credit Union Administration impact those markets.

4. Banks, thrift institutions, and credit unions compete vigorously with one another. As credit unions have grown in size, they have also broadened their product lines to the point that they mirror those of banks and thrifts. Credit unions have federally insured deposits, offer a full line of savings, investment and loan products (including personal loans, student loans, credit cards, car loans, home equity and other mortgage loans) and many – particularly larger credit unions – offer trust services, safe deposit box facilities, ATMs, financial planning, securities and insurance products. Many credit unions are on the cutting edge of technology, offering Internet banking and other electronic products.

5. Credit unions, using their tax-subsidy, have taken retail customers away from banks and thrifts. Moreover, credit unions, particularly larger ones, are aggressively expanding business lending in an attempt to attract customers from banks. The competition from credit unions for both retail and commercial customers has and will

continue to create irreparable harm to banks and thrift institutions.

6. Even the credit union industry acknowledged that there is little difference between banks and large credit unions. According to Jerry Karbon, former spokesperson for the Credit Union National Association (the largest credit union trade association), "In terms of product offerings, there is little difference between a large credit union and a bank."

7. In fact, there are many examples of community banks that compete directly with credit unions that are significantly larger than the bank. One such example is John Deere Community Credit Union, a \$460 million institution in Iowa. It competes for the same customers as banks in Iowa and is nearly as big as all ten banks that serve Bremer County where the credit union is located. In fact, John Deere Community Credit Union is bigger than 88 percent of all banks and thrifts in this country. While banks are often portrayed as large institutions, the vast majority are small institutions. Of the over 10,700 banks and thrifts, over 40 percent have less than 25 employees and over 1,200 have fewer than 10 employees. While John Deere Community Credit Union has used its tax subsidy to grow at a 9 percent annualized rate since 1991, the 10 competing taxpaying banks in the county grew less than 4 percent. Most significantly, over these seven years, the ten banks have paid in excess of \$11 million in income taxes while John Deere Community Credit Union did not pay a dime, even though it made nearly \$26 million in undistributed profits.

8. Just as many consumers may obtain some financial services (such as a deposit account) from one bank, and others (a car loan, credit cards, or a mortgage) from another, consumers may also divide their patronage between banks (or thrifts) and credit unions.

Accordingly, the fact that some credit union members may also be bank customers does not mean that credit unions and other financial institutions do not compete in the same markets. ABA institutions do not have to lose a customer entirely in order for them to be harmed by credit union competition; they are harmed whenever an employee-group member looks to a credit union for any particular service.

9. Multiple-group credit unions tend to be larger than single group credit unions. In fact, the addition of multiple-groups within a single credit union explains much of why the credit union industry has quadrupled in size since 1982, when the NCUA began the policy of multiple common bonds.

10. Larger credit unions with multiple common bonds often have hundreds of multiple groups. For example, multiple-group credit unions with total assets over \$200 million have, on average, over 250 separate groups within a single institution. The Alaska USA Federal Credit Union provides a striking example of this. It has \$1.7 billion in assets, making it the second largest financial institution in Alaska. It takes 135 pages to describe Alaska USA's 3,000 multiple groups.

11. A lot of the multiple common bonds have been formed by large credit unions taking over smaller ones. The result is fewer, but larger credit unions. In 1982, there were 16,400 insured credit unions; today there are approximately 11,200. Over 77 percent of federal credit unions' assets are held by credit unions with multiple common bonds. What this consolidation means is that the credit union industry is becoming increasingly dominated by larger institutions.

12. The competitive playing field between ABA, IBAA and ACB institutions on the one hand, and credit unions on the other, is not a level one. While banks and thrift

institutions must typically pay very substantial income and other taxes (including a 34 percent marginal federal income tax rate), federal credit unions pay no such taxes. Credit unions also need not comply with the Community Reinvestment Act, and other regulatory requirements, as banks and thrifts must do. Accordingly, credit unions can often provide products and services at rates that other institutions cannot competitively match. Large credit unions in particular are able to leverage the considerable tax-subsidy to build sophisticated computer systems and networks to deliver state-of-the-art financial services to their members at a much lower cost than is possible from taxpaying banks and thrifts. Examples would include home banking, Internet services, and ATM networks. Having a subsidized infrastructure also allows large credit unions to deploy newly developed electronic services faster and cheaper as they become available. This ability to build up capital and infrastructure for large credit union poses a serious and irreparable harm to banks' and thrifts' ability to compete in the future.

13. Moreover, with more assets, large credit unions can leverage the tax-subsidy in many different ways to take customers away from banks and thrifts, including offering lower rates on all financial products, provide greater advertising, and establish large and dominant auto-financing programs. Basic economics tells us what will happen when a tax-exempt firm and a taxpaying firm offer the same products: the tax-exempt firm will grow rapidly at the expense of the taxpaying firm. The larger the credit union, the greater the subsidy and the greater the potential leverage it has to grow and compete with taxpaying banks and thrifts.

14. The customers for whom banks and thrift institutions compete with credit unions are highly desirable customers. It is commonly believed that credit union

memberships principally consist of lower income individuals, but this is not true. The credit unions' own numbers show clearly that credit union members have higher average incomes, more years of education, are more likely to have full-time employment, and are more likely to own their own home than non-members.

15. For example, according to CUNA's 1998 National Member Survey, 64 percent of credit union members had annual incomes between \$30,000 and \$75,000. According to that same study, the average household income of credit union members is about 50 percent higher than that of non-members. In addition, 60 percent of credit union members attended college, as compared to only 50 percent of non-members; and 72 percent of credit union members are homeowners, as compared to only 58 percent of non-members.

16. Each expansion of the field of membership allows credit unions to solicit customers away from ABA member institutions, or other financial institutions, to become credit union customers, for some or all of their financial needs. Whenever a customer of an ABA member institution takes his or her business to a credit union, that ABA member institution is irreparably harmed. Even if the customer eventually returns, the ABA member institution will have irretrievably lost the revenues it otherwise would have received during the interim period. A customer who borrows from a credit union today may pay the interest and principal on that loan to the credit union for the life of the loan, possibly fifteen years or more, even after he has returned to a bank or thrift institution for other financial services.

17. ABA member institutions invest substantial resources in physical plant facilities, personnel, data processing systems, equipment, and other resources to serve

their existing customers. If the institution loses such customers to a credit union, it must then spread these fixed costs over fewer customers, and the under-utilization of resources injures the financial performance and condition of the institution. The costs associated with under-utilization of resources is often passed on to customers through (among other things) higher interest on loans and lower interest on savings accounts.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.



James Chessen

Executed on the 8th day of January, 1999.