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VIA E-MAIL TRANSMISSION
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January 27, 2011

Ms. Mary Rupp,
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

Re: Proposed Rulemaking for Part 704--Corporate Credit Unions

Dear Ms. Rupp:

The Illinois Credit Union League represents over 400 federal and Illinois chartered credit unions. We are pleased to respond to the NCUA Board's request for comment on its proposed rulemaking for corporate credit unions published November 29, 2010 (75 FR 73000).

The proposed rule would add new §704.21 which the NCUA believes will provide for equitable distribution of corporate credit union stabilization expenses. Federally insured credit unions are assessed an annual premium to repay the current and future corporate credit union losses sustained by the NCUSIF. This assessment is paid into the Temporary Corporate Credit Union Stabilization Fund ("TCCUSF").

The proposed rule would require members of corporate credit unions that are not federally insured credit unions ("non-FICUs") to make an annual "voluntary contribution" to the Corporate Stabilization Fund or be subject to an NCUA-mandated expulsion procedure. The contribution for a non-FICU would be calculated by applying the same percentage applied to the insured share amount of a FICU to a figure determined by multiplying the non-FICU's year-end assets by 81.5%. If the non-FICU does not pay the "voluntary contribution," the corporate credit union will be required to hold a membership meeting to vote on whether or not the non-FICU member should be expelled (if the non-FICU is a member of more than one corporate credit union, each must hold an expulsion meeting).

<u>We strongly oppose the proposed rulemaking.</u> It does the NCUA no good and may even be described as an embarrassment. While the proposed rule would apply to all non-FICUs, such as credit union leagues, service corporations, and CUSOs, its actual target

seems to be the approximately 150 privately insured credit unions. One commenter described the proposal as a "thinly disguised attempt to demonize privately insured credit unions." We believe the rule, if promulgated, will have that effect irrespective of the NCUA's stated intent.

It is particularly ironic that credit union leagues and league service corporations are also targeted, given that most corporate credit unions were founded by the leagues and their service corporations, which provided the original staff for many of the corporate credit unions and absorbed a substantial portion of the corporate credit union's operating expenses until the corporate credit unions could stand on their own. Leagues would also have to explain to their member FICUs that in addition to a FICU's substantial TCCUSF expense, a part of its League dues would be diverted to pay the League's "voluntary contribution" to the TCCUSF. We believe that most FICUs would feel they were paying twice.

It is also very ironic that the rulemaking comes during an extraordinarily difficult economic period. Rather than doing everything it can to support the credit union industry and the associations and service organizations that serve the industry, NCUA has launched an attack against non-FICUs in an apparent attempt to drive them to banking competitors for the payment and liquidity services they need. The American Bankers Association could not devise such a hostile campaign to pillory credit unions.

Fair and Equitable

NCUA states that non-FICUs have not assumed their "fair share" share of the expense of the corporate stabilization actions and that the proposed rule provides for equitable sharing among all members of corporate credit unions.

In fact, the TCCUSF assessment is borne by all federally insured credit unions, even if they have never been a member of a corporate credit union or used corporate credit union services. A substantial number of natural person FICUs (especially those credit unions that were not members of corporate credit unions), feel it is not fair that they should bear the cost to the NCUSIF resulting from the actions of corporate credit unions and would argue that their portion of the TCCUSF is not equitable.

Such credit unions might also feel that the amount contributed to the TCCUSF by the corporate credit unions is not equitable. The TCCUSF assessment is a percentage of each FICU's insured shares (the 2010 assessment was 0.134% of insured shares). NCUA states that for year end 2008 and year end 2009 the aggregate ratio of insured shares to assets for all FICUs for **81.5%.** A review of the corporate credit unions' 5310 call reports for March 31, 2010, indicates that the aggregate insured shares to assets ratio for all corporate other than US Central[1] is **2.74%--**and the aggregate ratio of corporate credit unions' 2010 TCCUSF premiums to assets is 1/29th of the aggregate ratio of average natural person credit unions' 2010 TCCUSF premium to assets.

The reason for this disparity is that insured shares are a small percentage of the total share deposits of a corporate credit union and NCUSIF premiums have always been based on the amount of insured shares and the assessment of TCCUSF premiums is also based on insured shares. We wonder why this disparity between natural person and corporate credit union contributions to the TCCUSF has not engendered the same concern in the NCUA, as the lack of contributions from the small number of corporate credit union members that are not FICUs.

<u>NCUA Lacks the Authority for such Rulemaking.</u>

The NCUA references two section of the Federal Credit Union Act ("FCUA") as its authority for proposed §701.21—12 U.S.C. §1772a and 12 U.S.C §1789. Section 1772a authorizes the NCUA to accept gifts for carrying out any of its functions under the FCUA. Given the strong arm tactics set forth in the proposed rule, we believe that the TCCUSF payment "requested" by NCUA could only be described as a "gift" if the definition of gift includes a payment made pursuant to a shakedown.

Presumably, the NCUA's reference to 12 U.S.C. §1789 is to the authority granted to the NCUA to "exercise all powers specifically granted by this Title [the share insurance provisions of the FCUA] and such incidental powers as shall be necessary to carry out the powers so granted. 12 U.S.C. §1789(a)(7). When a regulatory agency relies on "incidental powers" to validate a regulatory action, it is operating at the uncertain edge of its statutorily delegated authority.

Proposed §704.21 greatly exceeds any specific or incidental power granted by the FCUA. The authority to levy TCCUSF assessments is set forth in §217 of the FCUA. 12 U.S.C §1790e. Section 217 was added in 2009 to establish the TCCUSF (referred to in the Act as the "Stabilization Fund"), to provide for extended funding of the corporate credit union investments losses. The Stabilization Fund is authorized to borrow funds from the Secretary of the Treasury and if the Stabilization Fund might not have enough funds to make repayment to the Treasury, Section 217(d) authorizes the NCUA to "assess each <u>federally insured credit union</u> a special premium due and payable within 60 days in an aggregate amount calculated to ensure the Stabilization Fund is able to make the repayment" (emphasis supplied). 12 U.S.C. §1789e(d).

Section 217 has recently been amended by S.4036, signed by President Obama on January 4, 2011. S.4036, supported by the NCUA, clarifies the NCUA's authority to

[1] (US Central's insured shares to assets ratio was only 0.045%).

make stabilization fund expenditures without borrowing from the Treasury. The amendment allows the NCUA to levy a special TCCUSF premium to fund expenditures by the Stabilization Fund other than repayment of Treasury advances. The amendment to §217(d) contains substantially the same language regarding imposition of the special premium, authorizing the NCUA to "assess a special premium with respect to each insured credit union"[2] (emphasis supplied). 12 U.S.C. 1789e(d).

The language of §1790e(d) enacted in 2009 and the amendment enacted January 4, 2011 could not be more specific—the intent of Congress is that the assessment is to be paid only by FICUs.

We note that S.4036 was introduced by Senator Dodd on December 16, 2010, 28 days after the NCUA Board approved the issuance of proposed §704.21. Since NCUA felt the need for a bill to clarify additional actions that could trigger the TCCUSF assessment, perhaps the NCUA should have also addressed the additional non-insured entities that should, in the NCUA's view, be subject to the assessment. Perhaps the NCUA refrained because it realized that Congress would have been dumbfounded if the agency had requested the authority to impose payment of the special premium on certain account holders of a corporate credit union.

NCUA's Action is an Impermissible Exercise of Power Beyond the Scope of Any Congressionally Delegated Authority

NCUA's action under proposed §704.21 is a blatant affront to the Constitutional parameters under which it is charged with operating. Not only is the proposed rule a logically unpermitted exercise of authority, it is an unconstitutional one. Through its seminal decision in *Chevron v. Natural Resource Defense Council*, the United States Supreme Court has put forth the standard by which actions of an administrative agency are governed. [3] The constitutional validity of an agency action is determined by a two-pronged approach. First, "is the question whether Congress has directly spoken to the precise question at issue. 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."[4] Only after this threshold inquiry is determined in the negative, that Congress has not specified unambiguous intent as to the meaning of a statute, can an agency interject additional construction through rulemaking. Even then, an agency is not given unfettered discretion to promulgate any rules or regulations it sees fit under the guise of a chosen statute. If Congress explicitly left a gap for intentional rulemaking, such rules cannot be "arbitrary, capricious, or [be] manifestly contrary to the statute."[5]

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[2] The term "Insured credit union" is defined in 12 U.S.C. 1702 as a credit union insured in accordance with Title II of the Federal Credit Union Act, i.e., a federally insured credit union.
[3] *Chevron v. Natural Resource Defense Council.* 467 U.S. 837 (1984).
[4] *Id*. at 842-843.
[5] *Id*. at 844.

Should no explicit "gap" exist and delegation to an agency to promulgate appropriate rules is implied, those rules must be executed under a reasonableness standard. NCUA's proposed §704.21, regardless of analysis under either of NCUA's stated statutory authorities (12 U.S.C. §1772a or 12 U.S.C. §1789), fails to survive *Chevron* analysis.

Reviewing proposed §704.21 under the statutory authority of §1772a, which gives NCUA the authority to accept gifts for carrying out any of its functions, leads to the conclusion that it fails to meet the initial prong of *Chevron*. The explicit term used by Congress was "gift", which has a clear and unambiguous meaning of a transfer made voluntarily and not predicated on an underlying duty or threat. By specifically using the term "gift," Congress expressly asserted its intent that this statute not be used as a method for forcing payments be made to NCUA that are not otherwise set forth in statute. By force placing an expulsion procedure for non-FICUs that do not "voluntarily contribute", NCUA is not only in contradiction of the statutory intent of §1772a, it is blatantly in violation of the statute's expressed terms. Labeling the proposed payment as a "voluntary" contribution is nothing more than a thinly veiled attempt to bootstrap an egregiously contradictory requirement into §1772a by use of a term that could not be farther from the truth.

As a direct contradiction of specified Congressional intent, NCUA's proposed §704.21 should not reach the second prong of *Chevron* analysis. However, the promulgation of a rule mandating monetary contributions from a class of entities based on a statutory authority to accept gifts is undeniably arbitrary, capricious, manifestly contrary to statute; and in every sense of the term, unreasonable.

Similarly, NCUA's attempt to promulgate proposed §704.21 in reliance on its statutory authority under §1789 fails under *Chevron*. Again, the proposed rule falls short of the step one *Chevron* analysis, as it is in direct contradiction to Congressional intent explicitly stated in statute. Specifically, §1789(a)(7) allows NCUA to "exercise all powers specifically granted by provisions of this subchapter [share insurance] and such incidental powers as shall be necessary to carry out the power so granted". Through this provision, Congress explicitly expressed its intent to allow NCUA to promulgate rules related to the topic of the "subsection," which is share insurance. Likewise, Congress explicitly expressed through the subsection that its scope pertains only to federally insured credit unions.[6] Promulgation of a rule mandating a class of entities (non-FICUs) pay into a fund based upon a statute, or collection of statutes, that expressly eliminates such entities from its scope is patently contradictory to expressed Congressional intent and therefore fails the first prong of *Chevron*.

For the sake of complete analysis, step two of *Chevron* would look to determine if NCUA's proposed rule was "arbitrary, capricious or manifestly contrary to the statute"

[6] See FN.2

since §1789(a)(7) designates a "gap" in which administrative rules may be inserted to "elucidate a specific provision of the statute by regulation."[7] Pursuant to Supreme Court precedent, regulations will fail this step if they "cannot be reconciled with the statute they purport to implement."[8] §1789 gives the NCUA authority to take necessary steps to maintain federal share insurance, which by statutory definitional standards excludes non-FICUs. Under no circumstances can a statute, let alone an entire subsection of statutes, which definitionally excludes a certain class of entities (non-FICUs), and only set forth duties and responsibilities of an entirely separate class (federally insured credit unions), be used as a basis of authority to enact a valid regulation that places a monetary burden on the excluded class. In other words, it is impossible to validate an agency rule based upon a statute that wholly excludes the group the rule will affect.

Under certain conditions, *Chevron* operates as a deferential standard, reducing judicial interference in agency actions.[9] It is imperative to note, however, that the Supreme Court has unequivocally stated that deference does not give an agency carte blanche when it comes to rulemaking and it will not tolerate expanding the authority of a certain statute to "virtually any [agency] interpretation."[10] NCUA's attempt to promulgate proposed §704.21 is a clear, unambiguous and unpermitted over-reaching of any authority delegated to it by Congress. Such an offensive "power-grab" is nothing more than NCUA's attempt to insult, degrade and circumvent the proper delegation of administrative agency authority under the legislative process.

<u>The TCCUSF is a temporary division of the NCUSIF. The NCUA may not extend TCCUSF assessments to entities that are not subject to NCUSIF premiums.</u>

Section 217 of the FCUA established the TCCUSF as a temporary segment of the NCUSIF to provide a separate accounting for the losses to the NCUSIF caused by corporate credit unions. Other than administrative payments all payments by the TCCUSF "shall be connected to the conservatorship, liquidation, or threatened conservatorship or liquidation, of a corporate credit union." Prior to authorizing each payment the NCUA Board must certify that, absent the existence of the TCCUSF, the Board would have made the identical payment out of the NCUSIF. 12 U.S.C. §1790e(b).

The statutes are clear that the credit unions insured by the NCUA are responsible for the repayment, through assessment of premiums, of losses suffered by the NCUSIF. The losses sustained by the TCCUSF would otherwise be sustained by the NCUSIF.

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[7] *Chevron* at 844.
[8] *Sullivan v. Zebley*. 493 U.S. 521 (1990).
[9] *Chevron* at 844.
[10] *Cuomo v. Clearing House Ass'n, L.L.C.* 129 S.Ct. 2710, 2715 (U.S. 2009).

The NCUA would not presume to argue that losses the NCUSIF incurs from natural person credit unions are the responsibility of consumer account holders of those credit unions (or suggest that such consumers make "voluntary" contributions to the NCUSIF or be subject to expulsion). Since the losses sustained by the TCCUSF would otherwise be sustained by the NCUSIF, an attempt to pressure non-FICUs to make such contributions to the TCCUSF is equally nonsensical.

Non-FICUs will not be eligible for partial reimbursement via NCUSIF dividends.

FICUs are eligible for dividends paid by the NCUSIF and therefore may recover a portion of the TCCUSF premium expense paid over the next several years. The FCUA does not allow payment of dividends to non-FICUs. Therefore, non-FICUs would never be able to recover any of their "voluntary contributions." Compelling a corporate credit union membership vote to expel a non-FICU under these circumstances is unfair and discriminatory.

Non-FICUs are not backed by the faith and credit of the U.S. and should not be required to pay for losses sustained by an agency whose only support to non-FICUs is insurance of the non-FICU's account at a federally insured depository institution.

Corporate credit unions and other federally-insured credit unions are backed by the full faith and credit of the U. S. Government. The TCCUSF was created to assist the NCUSIF in its support of federally insured corporate credit unions. Privately insured credit unions are required to fully and prominently disclose to members and perspective members that their deposits are not federally insured and are not backed by the full faith and credit of the U.S. government. Privately insured credit unions in danger of conservatorship or liquidation would not receive assistance from the NCUSIF or other branches of the federal government. It is the FICUs, not the entities who maintain share accounts a FICUs, that are backed by the full faith and credit of the U.S. government. Since a non-FICU derives no support, service or benefit from NCUSIF or TCCUSF other than the insurance of its account in a FICU, a non-FICU and should not be subject to expulsion if it fails to make a "voluntary contribution" to the fund.

Expelling a non-FICU that has complied with the bylaws and policies of the corporate credit union could violate state law and expose the corporate credit union and its officers to costly litigation.

We believe many courts would look askance at the expulsion of an account holder from a corporate credit union for failure to make a "voluntary contribution" to a federal government agency. We believe the expelled non-FICU's case would be strengthened if, in addition to complying with all the requirements of the corporate credit union, the non-FICU had suffered substantial losses from a partial or complete write-down of it previous corporate capital contribution by the corporate credit union seeking to expel the non-FICU.

The NCUA should also consider the possibility of personal financial risk to the individual board members of corporate credit unions, if the expulsion is later found to violate state or federal law. In addition, the NCUA should consider the unpleasant issues that might arise if the corporate credit union's members were to vote to retain certain classes of non-FICUs (e.g., a credit union trade association), but expel other non-FICUs.

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We appreciate the opportunity to respond to NCUA's request for comment regarding the proposed amendment to Section 704 regarding expulsion of non-FICUs. We will be happy to respond to any questions regarding these comments.

Very truly yours,

ILLINOIS CREDIT UNION LEAGUE

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