NATIONAL CREDIT UNION ADMINISTRATION
1775 Duke Street, Alexandria, VA 22314

DATE: OCTOBER 28, 1996
LETTER NO.: 96-FCU-3

LETTER TO ALL FEDERAL CREDIT UNIONS

On Friday October 25, 1996, the U.S. District Court for the District of Columbia issued an injunction against NCUA and other defendants in two consolidated cases.

In the first case, *First National Bank and Trust Co., et al. v. NCUA, et al.,* the Court of Appeals for the D.C. Circuit ruled, in connection with select employee group expansions limited only to AT&T Family Federal Credit Union, that all members of an occupational federal credit union must share a single common bond. The Court of Appeals then returned that case to the trial court for implementation of its ruling.

The second case, *American Bankers Association v. NCUA, et al.,* which was brought after *First National Bank* challenged NCUA's multiple group policy, as applied nationwide, and sought immediate injunctive relief to prevent NCUA from allowing additions to federal credit unions pursuant to that policy. The trial court combined the two cases and granted an injunction against NCUA. A copy of the Court's Memorandum and Order ("Order") is enclosed.

The NCUA believes that the injunction was incorrectly decided. The NCUA and other co-defendants have met and agreed to continue to pursue all available legal means to seek reversal of the Court's decision in both cases. The NCUA is considering seeking legislative action and is reviewing its current regulations and policies to determine any possible avenue to lessen the detrimental impact of the Order.

NCUA believes that the Order as issued is subject to several possible interpretations. We are requesting immediate clarification from the Court. Pending such clarification, NCUA offers the following guidance:

1. The Order appears to allow federal credit unions to continue to serve all of their *existing* members.

2. The Order does not apply to federally chartered community credit unions, nor to federal credit unions that serve groups with a single common bond of occupation or association that have not utilized select group additions or other special rules that permit the combination of unlike groups as set forth in NCUA's Chartering Manual. However, federal credit unions that do not serve groups with a single common bond are affected by the Order.

3. Pending further clarification from the Court, we advise federal credit unions that they may no longer add groups to their field of membership whose members do not share their "core" common bond. "Core" common bond is defined as the employee or associational group that constituted the field of membership at the time of charter. In most cases, that group will comprise the largest portion of the existing field of membership.

4. Pending further clarification from the Court, we advise federal credit unions to continue to admit new members from the employee or associational group that comprises their "core" common bond. If the original group no longer exists, federal credit unions may designate an individual employee or associational group within the existing field of membership as their core group and continue to admit new members from that group. Federal credit unions which have a family member bylaw may continue to admit family members of individuals from their "core" group.

5. Pending further clarification from the Court, we advise federal credit unions that they should no longer admit *new* members from any existing groups that do not share their "core" common bond. This includes groups added as select group additions pursuant to Chapter 2, Section II.A.1 of the Chartering Manual, groups added pursuant to special situations addressed in Chapter 2, Section II.A.3 of the Chartering Manual, and groups added through non-emergency mergers.

6. Any federal credit union that has acquired another credit union pursuant to the emergency merger authority in Section 205(h) of the Federal Credit Union Act, 12 U.S.C. 1785(h), may continue to admit new members from the "core" common bonds of both the merging and continuing credit union. Not all mergers involving NCUA assistance are considered emergency mergers. If you are unsure about whether a merger involving your federal credit union was an emergency merger, contact your regional office.

7. In the case of multiple group federal credit unions serving low income members, the Order requires those credit unions *not* to admit *new* members who do not share the "core" common bond.

8. Pending further clarification from the Court, it appears that the Order does not affect "common bond additions" pursuant to Chapter 2, Section II.A.1 of NCUA's Chartering Manual, i.e., groups added on the basis that they share a common bond with the "core" group. This includes both new members from existing groups and the addition of new groups that share a common bond.

9. In accord with the Order, NCUA is suspending streamlined expansion procedure (SEP). Federal credit unions are no longer authorized to add groups pursuant to that policy.

10. Action on all pending occupational and associational field of membership expansions, including mergers, not sharing a "core" common bond will be deferred until further notice.

For further information contact your regional office.

SIGNED BY NCUA BOARD ON OCT. 28 AT 4:30 P.M.

Yolanda Wheat	Shirlee Bowné	Norman D'Amours
Board Member	Vice Chairman	Chairman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FIRST NATIONAL BANK AND TRUST COMPANY, et al.,

Plaintiffs,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.,

Defendants.

AMERICAN BANKERS ASSOCIATION, et al.,

Civil Action No. 90-2948

F I L E D
OCT 25 1996

CLERK, U.S. DISTRICT COURT

Plaintiffs,	DISTRICT OF COLUMBIA
v.	
NATIONAL CREDIT UNION ADMINISTRATION,	Civil Action No. 96-2312
Defendant.	

MEMORANDUM AND ORDER

These two actions have a single common purpose, viz., to force the same federal regulatory agency to cease and desist from enlarging its constituency in alleged violation of its governing statute. The cases will accordingly be consolidated for all proceedings henceforth.

The National Credit Union Administration ("NCUA"), the agency administering the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751 et seq., is the principal defendant in both cases. At issue in both cases is a policy, purportedly followed by NCUA since 1982, to permit established federal credit unions to accept groups of new members who do not share a "common bond of occupation" with the existing membership if the members of each new group share such a bond with one another.

Plaintiffs in both cases are representatives of the private commercial banking industry. NCUA's private co-defendants are representative of the interests of the credit unions who are competitors of commercial banks for much personal and family banking business. Credit unions, it is said, possess certain competitive advantages by operation of law, and commercial banks are therefore concerned that credit union membership not proliferate.

Civil No. 90-2948 (hereinafter the "FNBT" case) is before the Court on a return of mandate from the U.S. Court of Appeals for the D.C. Circuit for entry of an appropriate permanent injunction against NCUA in accordance with an opinion of a panel of the D.C. Circuit dated July 30, 1996 and reported as First National Bank and Trust Co. v. National Credit Union Administration, 90 F.3d 525 (D.C. Cir. 1996).

Civil No. 96-2312 (hereinafter "ABA" case) is a recently filed "related" case in which a motion for a preliminary injunction to the same end is pending.

The subject matter of the FNBT case was a series of rulings by NCUA in 1989 and 1990 approving applications by a federal credit union of employees (and their families) of American Telephone & Telegraph Co. (the credit union being known as "ATTF") to admit to membership groups of employees of multiple unrelated business entities, e.g., a major tobacco company, an auto supply firm, and a television station. The plaintiffs in FNBT (which included the American Bankers Association) challenged the actions, alleging that Section 109 of the FCUA, 12 U.S.C. § 1759, required that all members of a federal credit union organize as an "occupational" (as opposed to, e.g., a geographic) unit such as ATTF must be employed by a single employer (or related employers) whose business afforded the "common bond" between all members. In its decision of

July 30th , a three-judge panel of the D.C. Circuit agreed in substance, and, ruling on the basis of its own construction of Section 109 of the FCUA, held that Congress had expressly foreclosed all other interpretations. The "common bond requirement" of Section 109, the Court of Appeals held, contemplated that all members of an occupationally organized federal credit union comprised of more than one "group" must share the same common occupational bond. "[I]t is not sufficient," the Court of Appeals said, "that the members of each different group have a bond common to that group only." 90 F.3d at 531. The decision

concluded with an order of remand to this Court to enter declaratory and injunctive relief "consistent with" its ruling, adding, however, the phrase" . . . concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF." Id.

NCUA believes the FNBT case to have been wrongly decided by the D.C. Circuit, although its petition for a rehearing or hearing en banc has been denied. The mandate having issued to this court in the meantime, however, the FNBT plaintiffs demand that the declaratory and injunctive relief "consistent with" the panel decision be entered without delay, and they insist that a general prospective injunction is the appropriate form of relief, not simply a judicial cancellation of the 1989 and 1990 ATTF applications that gave rise to the suit.

For its part NCUA points to the limiting language at the conclusion of the opinion, contending that any injunction entered cannot go beyond the 1989 and 1990 applications at issue in the FNBT case. When asked in open court as to the extent to which it will voluntarily comply with the ruling, NCUA asserts that it will refrain from processing further applications from ATTF to expand its membership by enrolling similar disparate "groups." Otherwise it intends to continue to do as it has been doing, unless enjoined, and will approve such applications from other federal credit unions across the country, notwithstanding the decision purports to hold the policy itself, not merely the ATTF application approvals, to be ultra vires.

The ABA case thus anticipates both the possibility that the maximum relief available to the prevailing parties in FNBT will reach only to the 1989 and 1990 ATTF applications, and the probability that NCUA will, notwithstanding the apparent universality of D.C. Circuit decision, persist in approving other similarly flawed applications. The prayer for final judgment in the ABA case is, thus, as general as the holding FNBT: a prospective injunction, and a retrospective divestiture of all disparate employee groups acquired by federal credit unions throughout the country pursuant to NCUA's misconceived policy.

The entry of a preliminary injunction in the ABA case will render the scope of any permanent injunction entered pursuant to mandate in the FNBT case, and vice versa, a matter of purely academic interest. As a practical matter, a "permanent" injunction in the FNBT case would remain so only so long as the D.C. Circuit decision stands unreversed and the statute unrepealed or amended. Conversely, a "preliminary" injunction in the ABA case would be made permanent as a matter of course upon plaintiffs' motion for summary judgment. No stay having been entered

by the Court of Appeals, the mandate having issued despite NCUA's request for its recall, the appeals process having been exhausted in the D.C. Circuit, and NCUA having declared its refusal to acknowledge the decision as the law of the land, the issuance of a permanent injunction by this Court is but a ministerial formality. The prospective injunction, at least, should be entered forthwith.

To the extent plaintiffs may nevertheless be required to satisfy the four elements of a meritorious application for pendite lite relief as prayed in the ABA case, plaintiffs have clearly done so. First, they are not only "likely" to prevail on the merits, it is a virtual certainty unless the law changes. Second, their members sustain irreparable injury with each new addition to the membership rolls of competing financial institutions, because the amount of financial business they will lose in consequence is impossible to ascertain for purposes of an award of damages, if indeed anyone were liable. Third, NCUS has shown no prospect of an injury to its interests (other than discomfiture) if it is restrained from approving any more suspect applications, other than a speculative apprehension that the vitality of credit unions will dissipate over time if they are unable to replenish their memberships with sufficient new recruits. Moreover, unlike plaintiffs, NCUA has an alternative remedy available: it can apply to Congress for a change in the law. Finally, and perhaps of greatest importance, it is indisputably in the public interest that the law, once authoritatively declared, be as authoritatively enforced.

NCUA and the intervening co-defendants interpose the defense of laches, citing the case of Independent Bankers Association of America v. Heimann, 627 F.2d 486 (D.C. Cir. 1980), as "indistinguishable" precedent. They say the commercial bankers have waited 14 years to object to NCUA's multiple group policy, and that NCUA's reliance upon the plaintiffs' apparent resignation to the policy to allow it to create a nationwide system of credit unions comprised of disparate employee groups should estop plaintiffs from complaining now.

The defense is spurious. Whenever NCUA may have first embraced its "policy," it was only manifested over time in a series or progressively more expansive rulings upon specific applications that plaintiffs at first believed themselves without standing to oppose. The FNBT case, commenced in 1990 as a challenge to ruling then less than a year old, was dismissed on standing grounds in 1991, 772 F.Supp. 609, 612-13 (D.D.C. 1991), and was not allowed to proceed on the merits until April, 1993, 998 F.2d 1272 (D.C. Cir. 1993). In September, 1994, this Court held that NCUA had made a reasonable interpretation of its legislative mandate and gave judgment for NCUA, 863 F.Supp. 9 (D.D.C.1994), a judgment that was not reversed until the D.C. Circuit decision of last July. The FNBT case has been diligently and persistently pursued. NCUA was never deluded into a belief that plaintiffs were content to live with its multiple group policy.

The ABA case was filed by plaintiffs only when they were alerted in August to NCUA's unwillingness to accept the D.C. Circuit decision as to the meaning of Section 109, and its startling assertion upon the return of mandate that it would not voluntarily obey it except as it pertained to the ATTF rulings of 1989 and 1990. NCUA has shown neither the unreasonable delay nor the reasonable reliance necessary to a meritorious defense of laches.

For the foregoing reasons, it is, this 25th day of October, 1996,

ORDERED, that the plaintiffs' applications for declaratory and injunctive relief in both the FNBT and ABA cases are granted; and it is

FURTHER ORDERED, ADJUDGED and DECREED, that membership in a federal credit union by individuals or groups of individuals who do not share a single common bond of occupation with all other members thereof is declared to be unlawful; and it is

FURTHER ORDERED, that National Credit Union Administration, its officers, attorneys, agents, employers, and all others in active concert or participation with it, including the intervenor-defendants, are hereby restrained and enjoined preliminarily and permanently from henceforth authorizing occupational federal credit unions to admit members who do not share a single common bond of occupation; and it is

FURTHER ORDERED, that these cases are scheduled for a status conference to determine the course of subsequent proceedings herein on December 4, 1996 at 9:30 a.m.

/s/

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Thomas Penfield Jackson
U.S. District Judge