IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

INDEPENDENT COMMUNITY BANKERS OF AMERICA
1615 L Street, N.W., Suite 900
Washington, D.C. 20036,

Plaintiff,

v.

NATIONAL CREDIT UNION ADMINISTRATION
1775 Duke Street
Alexandria, VA 22314-3428,

Defendant.

Civil Action No. 1:16-CV-1141
(JCC/TCB)

COMPLAINT

Plaintiff INDEPENDENT COMMUNITY BANKERS OF AMERICA ("ICBA") brings this complaint against defendant the NATIONAL CREDIT UNION ADMINISTRATION ("NCUA"), and in support thereof, by and through its attorneys, based on knowledge as to plaintiff and information and belief as to all other matters, ICBA alleges as follows:

INTRODUCTION AND OVERVIEW

1. This lawsuit is brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to challenge a final rule promulgated by NCUA, the federal agency charged with insuring and regulating credit unions. The final rule at issue—known as the "member business loan" rule (hereinafter "MBL Rule")—addresses the extent to which federally insured credit unions may engage in commercial lending in competition with banks, including the community banks that

are members of plaintiff ICBA. *See* Final Rule, Member Business Loans; Commercial Lending, 81 Fed. Reg. 13,530 (Mar. 14, 2016) ("MBL Rule Release").[1]

2. The MBL Rule adopted by NCUA purports to free credit unions from a core statutory restriction that Congress placed on their commercial lending activities by allowing all federal and state credit unions insured by NCUA to acquire, essentially without limit, (a) entire commercial loans extended by other lenders, including other credit unions, to borrowers who are not members of the credit union (what NCUA refers to as "non-member commercial loans"), and (b) portions of such commercial loans originated by other lenders (what NCUA refers to as "non-member participation interests in commercial loans"). *See* MBL Rule Release, 81 Fed. Reg. at 13,558 (adopting 12 CFR § 723.8(b)(2)) (excluding all such commercial loans and interests in commercial loans from the definition of "member business loan").[2]

3. This rule violates the plain terms of the Federal Credit Union Act, as amended, 12 U.S.C. § 1751 *et seq.* (the "FCU Act" or the "Act"), which strictly limits the amount of commercial loans and interests in such loans of any kind that an insured credit union may hold on its balance sheet. In section 1757a, the FCU Act states:

> On and after August 7, 1998, no insured credit union may make any member business loan that would result in a total amount of such loans outstanding at that credit union at any one time equal to more than the lesser of—(1) 1.75 times the actual net worth of the credit union; or (2) 1.75 times the minimum net worth required under section 1790d(c)(1)(A) of this title for a credit union to be well capitalized.

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[1] The MBL Rule becomes effective January 1, 2017, and will be codified in 12 CFR Parts 701, 723, and 741. 81 Fed. Reg. at 13,530. A copy of NCUA's MBL Rule Release is attached as an addendum to this complaint.

[2] Federally chartered credit unions may purchase "participation interests" in loans made by other lenders to credit union members. 12 U.S.C. § 1757(5)(E); 12 CFR § 701.22. The borrower need not be a member of the purchasing credit union, only a member of any participating credit union. 12 CFR § 701.22(d)(2).

12 U.S.C. § 1757a(a).[3] The phrase "such loans outstanding" in section 1757a clearly refers to all "member business loans" carried on the books of the credit union. Subject to certain narrow statutory exceptions, and contrary to the exclusions adopted by NCUA, the key term "member business loan" is expressly defined in the statute for purposes of this restriction to include "any loan" used for a "commercial" or other "business" purpose:

> As used in this section[,] the term "member business loan" . . . means ***any*** loan, line of credit, or letter of credit, the proceeds of which will be used for a commercial, corporate or other business investment property or venture, or agricultural purpose[.]

Id. § 1757a(c)(1) (emphasis added).[4] Under the plain wording of the Act, the commercial loans subject to the statutory restriction are *not* limited to loans made to members of the credit union and do *not* exclude loans or portions of loans the credit union acquires from other lenders. ***The Act does not give NCUA any authority to create its own regulatory exceptions to section 1757a's express limit on commercial lending.***

4. The plain language of the statutory cap on commercial lending is reinforced by the transitional provision in section 1757a, which required any insured credit union that had a total amount of outstanding commercial lending on its books as of August 7, 1998 in excess of the aggregate limit imposed in section 1757a(a) to reduce its interests in commercial loans to meet the limit within three years. *See id.* § 1757a(d). The transitional provision makes it clear

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[3] Section 1757a defines "net worth" to mean "the credit union's retained earnings balance, as determined under generally accepted accounting principles." *Id.* § 1757a(c)(2)(A). Section 1790d(c) sets forth minimum net worth and capitalization requirements for all insured credit unions to help avoid long-term loss to NCUA's insurance fund for credit union deposits. *See id.* § 1790d(a), (c)(1). The statute exempts from the commercial lending cap credit unions that serve predominantly low-income members and those that qualify as "community development financial institutions" within the meaning of 12 U.S.C. § 4702. *See id.* § 1757a(a)(2), (b).

[4] Section 1757a sets forth only five narrow exceptions to the broad definition of "member business loan." These express statutory exceptions cover only those "extensions of credit" that are: (i) fully secured by a lien on a family dwelling that is the primary residence of a member of the credit union; (ii) fully secured by shares in the credit union or deposits in a financial institution; (iii) made to a borrower or associated member whose aggregate lines of commercial credit are less than $50,000; (iv) fully insured or guaranteed by a state or federal agency or political subdivision of a State; or (v) granted by one corporate credit union to another credit union. 12 U.S.C. § 1757a(c)(B).

that Congress intended the aggregate loan limit in section 1757a to apply equally to all commercial loans or interests in such loans on the credit union's balance sheet without regard to the originator of the loans and whether they were acquired in whole or part from another lender.

5. There are two logical elements to the commercial lending restriction of section 1757a, and both are contravened by NCUA's MBL Rule. First, in determining whether the total amount of commercial loans held on the books of a credit union has reached or will reach the statutory limit, the Act requires NCUA and the credit union to count *all* extensions of commercial credit carried on the balance sheet of the credit union, whether or not the credit was extended to a member of the credit union and whether or not the credit union's interest in the extension of credit was acquired from another lender. The MBL Rule flouts this mandate. Second, subject only to the narrow statutory exceptions granted by Congress, the credit union may not "make" any new extension of commercial credit of any kind if the new loan will cause the statutory limit on commercial lending to be reached or exceeded. While not expressly defined in the statute, the word "make" in section 1757a is plainly meant to include any action that increases the amount of commercial loans or interests in such loans outstanding on the balance sheet of the credit union, whether the additional loan or portion of a loan is originated by the credit union itself or is acquired from another lender. Here again, the MBL Rule is inconsistent with the Act.

6. The restriction on commercial lending mandated by Congress in section 1757a is critical to the entire regulatory framework of the Act and to the goal of protecting the safety and soundness of federally insured credit unions. It is one of several important restrictions the Act places on the scope and reach of credit unions; other restrictions imposed by Congress include limitations on the breadth of membership of federal credit unions and limitations on the

geographic reach of their business activities. *See* 12 U.S.C. § 1759. In exchange for these well-established limitations, credit unions have long enjoyed an exemption from nearly all taxation, both federal and state.[5] This extraordinary tax privilege gives credit unions a significant cost advantage whenever they compete head-to-head against banks, including in making commercial loans.[6] Thus, enforcement of the strict limitations Congress intended to place on tax-exempt credit unions is also critical to the health and competitiveness of America's banks, especially the thousands of local community banks across the nation that represent the lifeblood of credit for most small businesses.

7. By eviscerating section 1757a's restriction on the commercial lending activities of insured credit unions in violation of the Act, the MBL Rule exacerbates the unfair competitive harm that tax-exempt credit unions are able to inflict on community banks, which do not benefit from the tax advantages enjoyed by credit unions. This harm is real, and it is experienced by thousands of ICBA's members in communities from coast to coast.

8. In adopting the MBL Rule, NCUA also acted arbitrarily and capriciously and without reasoned decision making. In its MBL Rule Release, NCUA expressly recognized that any "commercial lending activities in which a credit union may engage" must be subject to the "safety and soundness" requirements of the Act. 81 Fed. Reg. at 13,538. Yet, irrationally, NCUA simultaneously decided to exclude the broad categories of commercial loans described above from section 1757a's aggregate cap, which is the Act's central means for protecting the

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[5] "Federal credit unions are exempt from *all* taxes imposed by the United States or by any state, territorial, or local taxing authority, except for local real or personal property tax." Michael J. McKenna, NCUA, Letter of Exemption (August 2011) (emphasis added), *available at* https://www.ncua.gov/Legal/GuidesEtc/GuidesManuals/TaxExemptLetter.pdf. *See* 12 U.S.C. § 1768. State-chartered credit unions are also exempt from federal income tax under section 501(c) of the Internal Revenue Code. *See* 26 U.S.C. § 501(c)(14)(A). Similarly, 37 States provide state-chartered credit unions with various levels of tax exemptions.

[6] *See* U.S. Dep't of Treasury, Report on Credit Union Member Business Lending (Jan. 2001) (recognizing that credit unions have an "inherent cost advantage" over banks), *available at* https://www.treasury.gov/about/organizational-structure/offices/Documents/Jan2001CreditUnionReport.pdf.

safety and soundness of credit unions from the effects of commercial lending. Because of this contradiction, NCUA felt constrained to adopt a new regulatory definition of "commercial loan" that encompasses the full universe of commercial loans subject to its safety-and-soundness rules, as distinct from the narrower subset of commercial loans that NCUA counts for purposes of the section 1757a restriction. *See id.* Tellingly, the agency's new definition of "commercial loan" includes "*any* loan" or other form of "credit" that a credit union extends to any borrower "for commercial, industrial, agricultural, or professional purposes," and specifically includes "any interest a credit union obtains in such loans made by another lender." *Id.* at 13,554-55 (emphasis added). Nowhere in the MBL Rule Release does NCUA ever adequately consider or explain how this artificial distinction between "member business loans" and other "commercial loans" could possibly advance the Act's goal of ensuring the safety and soundness of credit unions or preserve the traditional limitations Congress mandated on the scope and reach of credit unions.

9. This rulemaking is the latest example of NCUA's demonstrated tendency to stretch the bounds of the FCU Act to help tax-exempt credit unions expand their business activities and field of membership in ways Congress never intended, all at the expense of community banks. It is part of a concerted pattern of questionable regulatory actions by NCUA that appear designed to empower credit unions and discourage them from converting into banks and moving out from under the jurisdiction of NCUA. In this case, NCUA has clearly crossed the line and exceeded its authority under the Act.

10. Accordingly, by this complaint, plaintiff ICBA respectfully requests from this Court: (1) a declaratory judgment that NCUA acted contrary to law and arbitrarily and capriciously in violation of the FCU Act and the Administrative Procedure Act by adopting a rule that purports to exclude certain commercial loans and interests in commercial loans

purchased by credit unions from the aggregate limit on "member business loans" imposed in 12 U.S.C. § 1757a; (2) a declaratory judgment that NCUA acted contrary to law and arbitrarily and capriciously in violation of the FCU Act and the Administrative Procedure Act by adopting a rule that purports to treat a credit union's purchase of a commercial loan or interest in a commercial loan from another lender as anything other than the "mak[ing]" of a "member business loan" within the meaning of 12 U.S.C. § 1757a; (3) an order invalidating and setting aside NCUA's 2016 MBL Rule and related adopting release to the extent they purport to treat acquired commercial loans and interests in such loans that are not subject to a statutory exception as anything other than a "member business loan" for purposes of the lending restriction of 12 U.S.C. § 1757a; (4) an award to the plaintiff of its reasonable costs, including attorney's fees, incurred in bringing this action; and (5) any other relief this Court may deem just and proper.

PARTIES

11. Plaintiff ICBA is the principal trade association representing the interests and perspectives of the nation's community banks. Most of the nearly 6,000 community banks in the United States are members of ICBA. ICBA's members operate in nearly every State, and they include community banks of all sizes and charter types.

12. ICBA operates primarily out of its offices at 1615 L Street, N.W. in Washington, D.C.

13. ICBA member community banks operate 24,000 locations worldwide and employ 300,000 Americans who serve the financial and banking needs of their Main Street communities. ICBA members hold $1.4 trillion in assets, $1.2 trillion in deposits, and $950 billion in loans to consumers, small businesses, and farmers.

14. ICBA's members compete in the same markets and for the same loans and deposits as the state and federal credit unions insured by NCUA, and many of ICBA's members in communities across the nation are directly harmed by the competitive advantage that NCUA's unlawful MBL Rule confers on tax-exempt credit unions.

15. Defendant NCUA is an authority of the United States government and constitutes an agency of the United States for purposes of the Administrative Procedure Act. *See* 12 U.S.C. § 1757; 5 U.S.C. § 701(b)(1). NCUA is responsible for administering the FCU Act, 12 U.S.C. § 1751 *et seq.* NCUA's responsibilities include regulating and supervising federal credit unions and insuring the deposits of ***all*** insured credit unions, both state and federal.

16. NCUA is managed by the National Credit Union Administration Board (the "Board"), which consists of three members. 12 U.S.C. § 1752a. Currently, the Board members are Chairman Rick Metsger and Board Member J. Mark McWatters. The Board has one vacancy.

17. NCUA maintains its principal office in this judicial district at 1775 Duke Street, Alexandria, Virginia.

JURISDICTION AND VENUE

18. This case arises under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Accordingly, this Court has federal question jurisdiction over this action under 28 U.S.C. § 1331.

19. The MBL Rule is a final rule, and the MBL Rule Release of March 14, 2016 constitutes final agency action by NCUA for which there is no other adequate remedy in court within the meaning of 5 U.S.C. § 704. No other statute governs judicial review of the MBL Rule Release and the MBL Rule.

20. ICBA has standing as an association to bring this action on behalf of its members. In particular, many of ICBA's thousands of member community banks across the country have suffered and will suffer legal wrong and are and will be adversely harmed by NCUA's promulgation and enforcement of the MBL Rule for purposes of 5 U.S.C. § 702 and Article III of the Constitution, including in the following specific ways:

a. Federally insured credit unions, which include essentially all state and federal credit unions, offer deposit and lending products and services that local community banks also offer. Indeed, on its Web site, NCUA states, "Like banks, credit unions accept deposits, make loans and provide a wide array of other financial services."[7] As a result, credit unions vigorously compete with ICBA's members and other community banks to make loans, including commercial loans. Moreover, because of their tax advantages, credit unions operate with an unfair government subsidy and a substantial cost advantage over competing community banks.[8]

b. Tax-exempt credit unions recognize that they enjoy an advantage over banks, and they are perpetually looking for opportunities to exploit this advantage by expanding the range and degree of their competition with banks. Since 2003, when NCUA first began to liberalize its enforcement of section 1757a's restriction on commercial lending by purporting to grant "waivers" from the statutory lending cap, commercial lending by credit unions has increased rapidly. In 2008, NCUA reported that outstanding loan "participations" by federal

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[7] *Available at* http://www.mycreditunion.gov/about-credit-unions/Pages/How-is-a-Credit-Union-Different-than-a-Bank.aspx.

[8] *See* John A. Tatom, Ph.D., *Competitive Advantage: A Study of the Federal Tax Exemption for Credit Unions* 22 (2005), *available at* http://taxfoundation.org/sites/taxfoundation.org/files/docs/8ccda96dc9aa7b1b47ca2f9f2632c796.pdf ("With a tax rate of one-third and average rate of return on assets of one percent, the [return on assets] before taxes in the absence of the exemption would have to be 1.50 percentage points, or 50 basis points higher. This is the size of the subsidy (per dollar of assets) that accrues to the beneficiaries of the current tax exemption.").

credit unions had more than doubled.[9] And in the MBL Rule Release at issue in this case, NCUA stated:

> Once an ancillary product offered by a small number of credit unions, business lending is now becoming a core service offered by many credit unions as they strive to meet the expanding needs of their small business members. Today, credit unions represent an important source of credit for small businesses.

81 Fed. Reg. at 13,530. NCUA noted that "total business loans including unfunded commitments at federally insured credit unions grew from $13.4 billion in 2004 to $56 billion in September 2015, an annualized growth rate of 14 percent." *Id.* at 13,530 n.7.

c. As a result of NCUA's lax enforcement of the restriction on commercial lending by tax-exempt credit unions, many community banks that are members of ICBA have suffered and continue to suffer specific and concrete harm. For example, one ICBA member testified to the U.S. Senate Committee on Banking, Housing, and Urban Affairs that the harm from competition with tax-exempt credit unions is "not in the least abstract." This Minnesota community bank reported that "[o]n countless occasions, [it] lost business lending opportunities with established customers to credit unions who underpriced [the community bank's] competitive rates."[10] The testimony details a specific instance in 2011 in which the community bank's "longtime customer, with both personal and commercial lending relationships," reported that it was taking three loans to two different credit unions that undercut rates that the community bank was able to offer. Indeed, the bank testified that one of these loans was "priced about 400 basis points less than [the community bank's rate], which is competitive." Numerous members of ICBA from around the country have reported similar specific instances in which

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[9] NCUA, Supervisory Letter, Evaluating Loan Participation Programs (2008), *available at* https://www.ncua.gov/Resources/Documents/LCU2008-26Enc-2.pdf.

[10] This testimony is available at http://www.banking.senate.gov/public/_cache/files/e2033a8f-b08c-4784-b066-39b08cee1df1/33A699FF535D59925B69836A6E068FD0.wilcoxtestimony61611.pdf.

their banks are suffering harm from the commercial lending activities of tax-exempt credit unions.

d. The harm to ICBA's members is significantly exacerbated by the MBL Rule under challenge. In its MBL Rule Release, NCUA is now purporting to eliminate the commercial lending limit mandated by Congress entirely for broad categories of commercial credit. The MBL Rule dramatically increases the harm to community banks by purporting to grant tax-exempt credit unions a categorical exception by rule from the statutory lending cap for commercial loans and interests in such loans acquired from other lenders. As the NCUA Board Chairman put it, "With this final rule, we begin a new era."[11] This evisceration of the statutory limit has an immediate and significant adverse impact on ICBA's members, including on the present valuation of their businesses, because it heralds a "new era" in which tax-subsidized credit unions may now engage in significantly more commercial lending on an even greater scale essentially without restriction and with even less oversight by NCUA.

e. ICBA is well situated to represent the interests and experiences of its thousands of members, both individually and collectively, in this challenge to the lawfulness of the MBL Rule and its harmful effects on community banks. With ICBA as an effective representative of the many community banks in the United States that are aggrieved by the present rulemaking, there is no need for any particular individual community bank to participate as a plaintiff in this challenge.

f. A favorable ruling on plaintiff's claims in this case will confirm that NCUA must require credit unions to count "any loans . . . the proceeds of which will be used for a commercial purpose" when applying the aggregate limit of commercial lending permitted by

[11] NCUA, Board Action Bulletin, NCUA Board Modernizes Member-Business Lending Rule to Provide Flexibility (Feb. 18, 2016), *available at* https://www.ncua.gov/About/Pages/board-actions/bulletins/2016/february/BAB20160218.aspx.

section 1757a, as intended by Congress. 12 U.S.C. § 1757a(c)(1). The recognition and vindication of this requirement will result in credit unions' changing their currently underreported aggregate commercial loan balances, and, as a result, tax-exempt credit unions will not be able to evade the law to compete unfairly in making new commercial loans. The correct application of the FCU Act's commercial lending restriction will help to ensure that community banks, including ICBA's members, can compete effectively.

g. No purpose is served by delaying judicial review of the MBL Rule until it becomes fully effective on January 1, 2017. The rule is final and ripe for challenge. The prospective effectiveness of the rule is already causing particularized harm to community banks, and further harm to ICBA's members from the MBL Rule is imminent.

21. Venue is proper in this Court because NCUA's principal office is located in this judicial district. *See* 28 U.S.C. § 1391(e)(1).

BACKGROUND

22. Federal credit unions are cooperative, mutually owned financial associations chartered and regulated by NCUA pursuant to the FCU Act. State credit unions are chartered and supervised by state regulators. Insured credit unions include any federal or state credit union whose member accounts are insured by NCUA in accordance with the Act and are subject to the requirements and limitations imposed by the Act to protect the safety and soundness of the member accounts. *See* 12 U.S.C. § 1752. The MBL Rule at issue here applies to all state and federal credit unions insured by NCUA.

23. As originally conceived, credit unions were meant to remain small, local institutions dedicated to providing limited financial services to a discrete group of individuals, usually of modest means, who all shared a common bond or community of interest, such as the

employees of a single company or organization. The "members" of the credit union are those eligible persons who share the common bond and are permitted to have accounts with and use the services of the credit union.

24. Consistent with their narrow purposes and in order to promote the financial health and solvency of credit unions in furtherance of public policy, credit unions are accorded highly preferential tax treatment under federal and state tax laws, as described above. The Office of Management and Budget estimates that over the next ten years, the federal income tax exemption for credit unions alone will be worth an average of $2.54 billion per year to the credit union industry in the United States.[12]

25. The corollary to these enormous tax benefits is that Congress has decreed that all federal credit unions shall be strictly limited in their field of membership and geographic reach, and that all insured credit unions, whether federally chartered or state-chartered, shall be strictly limited in their business activities and operations, so as to protect the safety and soundness of their operations and to ensure that they will not cause unfair competitive disruptions in local markets for community banking services.

26. A central limitation Congress has placed on the business of state and federal credit unions is the section 1757a commercial lending restriction at issue in this case. Although insured credit unions are permitted to engage in a modest amount of commercial lending to address the borrowing needs of their members, and may participate to a limited extent in commercial loans extended to the members of other credit unions, section 1757a forbids an insured credit union from accumulating a total amount of commercial loans or interests in commercial loans on its books that exceed a specified level, as discussed above. *See* 12 U.S.C.

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[12] *Available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/ap_14_expenditures.pdf.

§ 1757a. This restriction is based on the recognition that extensive participation in commercial lending poses a greater risk to the solvency of credit unions, which typically have less experience and capacity to manage the risks of business lending than do commercial banks, whose business is built on commercial lending.

27. Notwithstanding the statutory limitations mandated by Congress, tax-exempt credit unions have continually sought to expand their commercial banking activities at every opportunity. And they have pushed to weaken or eliminate common-bond membership restrictions to enable federally chartered credit unions to increase their size and reach in direct competition with community banks. NCUA has increasingly assisted credit unions in that effort by stretching the FCU Act beyond its breaking point.

28. As the amount of loan assets held by credit unions has ballooned and their business activities have morphed into the markets traditionally served by banks, NCUA's role has transformed from less of a regulator to more of a "cheerleader" for the credit union industry. *See, e.g., Am. Bankers Ass'n v. NCUA*, 347 F. Supp. 2d 1061, 1070 (D. Utah 2004) (chastising NCUA for failing to observe a statutory requirement and for acting as "a rubber stamp or cheerleader for any application brought before it" by credit unions).

29. Indeed, in a 2001 report to Congress, the U.S. Department of the Treasury noted the lax approach that NCUA takes to regulatory enforcement. The report explained that the Treasury Department "found it difficult to determine whether credit unions were in full, partial, or non-compliance with Part 723 [the "member business loan" regulations] because the information contained in the examination reports did not consistently show whether the examiners tested for compliance."[13]

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[13] U.S. Dep't of Treasury, *supra* note 6, at 5.

30. At the same time, NCUA regulates federal credit unions and federally insured credit unions with an eye to protecting its own jurisdictional powers and regulatory interests: It seeks to expand the competitive potency of credit unions to discourage them from converting to commercial banks or thrift institutions. While the law provides an avenue for credit unions to convert to banks, NCUA has actively resisted the process and discouraged conversions. *See, e.g.*, *Community Credit Union v. NCUA*, No. 4:05-CV-285 (E.D. Tex. Aug. 24, 2005) (finding that NCUA's refusal to validate election results regarding conversion from a credit union charter was arbitrary and capricious where NCUA had focused on the manner in which paper was folded in envelopes that were mailed to credit union members), *withdrawn per settlement terms* (E.D. Tex. Sept. 2, 2005).

Field of Membership Proposal

31. NCUA's recent field of membership rule proposals exemplify this expansive and impermissible approach. On December 10, 2015, NCUA issued a notice of proposed rulemaking seeking comment on a proposal to expand the terms for chartering federal credit unions and the range of members who may be served by a single federal credit union. *See* Proposed Rule, Chartering and Field of Membership Manual, 80 Fed. Reg. 76,748 (Dec. 10, 2015).

32. Since Congress amended the FCU Act in 1998, the statute recognizes three types of federal credit union charters: single common bond; multiple common bond; and community. The December 2015 field of membership release contains a number of proposals that would significantly loosen the conditions and limits for chartering each type of federal credit union.

33. For example, while the FCU Act limits community credit unions to "persons or organizations within a well-defined *local* community," 12 U.S.C. § 1759 (emphasis added), the proposed rule would extend the term "local" to include the entirety of any congressional district.

This extension means that the entire territory of seven different States, including Alaska, would in each case qualify as "local." In Alaska, NCUA would treat towns located more than 1,000 miles apart as within the same local community. In so doing, NCUA's proposed rule would effectively read the critical limiting term "local" out of the statute.

34. Similarly, with respect to "multiple common bond" credit unions, the Act permits NCUA to add a new group of members to an existing credit union charter only where, among other requirements, the "credit union is within reasonable proximity to the location of the [new] group[.]" *Id.* § 1759(f)(1)(A). In 1998, NCUA interpreted this requirement to mean that the new group must be located within the "reasonable proximity" of one of the credit union's bricks-and-mortar "service facitilit[ies]." 80 Fed. Reg. at 76,752. In 2015, however, NCUA proposed to amend its definition of a credit union "service facility" to include "an online internet channel such as a transactional Web site." *Id.* If a Web site can satisfy the statutory proximity requirement, anyone with a smart phone or a local library Internet connection could qualify to join any credit union with a fully featured Web site, no matter how geographically distant. Yet again, NCUA's proposal would erase a meaningful limitation from the Act.

35. As ICBA observed in its February 2016 comment on NCUA's proposed field of membership rules, these proposals represent "another example of . . . NCUA['s] attempting . . . inappropriately and illegally [to] extend the [credit union] industry's government-subsidized competitive advantage," and they "show[] how captive the agency really is to the industry it regulates."[14]

[14] ICBA, Comment on Chartering and Field of Membership Manual Proposal (Feb. 8, 2016), *available at* http://www.icba.org/files/ICBASites/PDFs/cl020816.pdf.

Member Business Loan Restrictions

36. NCUA's application of the statutory limit on commercial lending by insured credit unions has taken the same end-around approach, and it too is untethered from the terms of the Act. NCUA's heavy-handed redefinition of "member business loans" to gut the lending limit mandated in section 1757a wholly disregards the will of Congress and betrays the agency's determination to be the "rubber stamp" for the credit union industry.

37. Since the amendments of 1998, the Act has strictly limited the extent of commercial lending by insured credit unions, both state and federal, according to the aggregate cap set forth in section 1757a. As explained above, section 1757a plainly restricts the total amount of all types of commercial loans and participating interests in commercial loans that a credit union may have outstanding on its balance sheet at any time, regardless of whether those loans and loan interests originated with the credit union itself or with another lender and regardless of whether the borrower is one of the credit union's own members. 12 U.S.C. § 1757a(a). The term "member business loan" is defined to include "*any*" extension of commercial credit, without regard for the borrower or the original lender, subject to certain specified exceptions. *Id.* § 1757a(c)(1)(A); *see id.* § 1757a(c)(1)(B). The purpose of this statutory definition is clearly to capture all commercial loan interests held by the credit union on its balance sheet from whatever source and regardless of the identity of the borrower (other than those expressly excluded by Congress), because all commercial loan interests held by a credit union affect its safety and soundness and may increase the risk for all credit union members.

38. The section-by-section analysis of the 1998 amendments to the Act prepared by the U.S. Senate Committee on Banking, Housing, and Urban Affairs makes clear that Congress established the commercial lending limit to "prevent significant . . . credit union resources from

being allocated in the future to large commercial loans that may present . . . safety and soundness concerns" and that could "potentially increase the risk of taxpayer losses through the National Credit Union Share Insurance Fund." S. Rep. No. 105-193 (1998).

39. Congress also struck a careful balance in the 1998 amendments. Representative Jim Leach, Chairman of the House Committee on Banking and Financial Services, noted his view that "the competitive regulatory playing field between banks and credit unions is pretty well evened under this legislation." 144 Cong. Rec. H7043 (daily ed. Aug. 4, 1998) (statement of Rep. Leach). The Senate committee report also confirms that the commercial lending "restrictions are intended to ensure that credit unions continue to fulfill their specified mission of meeting the credit and savings needs of consumers . . . *through an emphasis on consumer rather than business loans*." S. Rep. No. 105-193, at 9-10 (1998) (emphasis added).

NCUA's 1999 Rulemaking

40. Shortly after Congress enacted section 1757a's express limitation on commercial lending, NCUA adopted its first set of implementing rules. In releasing the initial rules, NCUA provided "guidance on how loan participations are treated for purpose of the aggregate loan limit": As it correctly explained, "Unless otherwise exempt, loan participations that are made without recourse . . . *are to be counted against the aggregate loan limit for the participating credit union* . . . ." 64 Fed. Reg. 28,721, 28,725 (May 27, 1999) (emphasis added).

41. NCUA also noted that "[s]ix commenters stated that loan participations should be excluded from the calculation of a credit union's aggregate member business loan limit, except for the originating credit union." *Id.* at 28,727. These commenters took the position that because "the Act refers to loans 'made' by . . . credit unions [and only the] originating credit union 'makes' the loan, purchasing credit unions would not be 'making' the loan, and [thus], it should

not count toward [the purchasing credit unions'] statutory limits." *Id.* NCUA rejected this reading of the statute on the grounds that it "*would promote form over substance and result in a large block of member business loans suddenly vanishing from the books of credit unions for purposes of calculating the aggregate loan limit.*" *Id.* (emphasis added).

42. To reinforce the point, the agency observed that both NCUA and credit unions "historically have classified loan participations as loans and not as investments." *Id.* In addition, NCUA explained that adopting the recommended interpretation "could lead to ***absurd results*** [since] a credit union could have half of its assets in member business loan participations without falling within the aggregate loan limit and without receiving an exception." *Id.* (emphasis added). The agency properly concluded that "***such a result was not intended by Congress and does not make sense within the statutory scheme.***" *Id.* (emphasis added).

NCUA's 2003 Rulemaking

43. NCUA's approach to acquired commercial loans changed radically only five years later. NCUA issued a notice of proposed rulemaking in 2003 explaining that the agency "ha[d] reconsidered its position regarding the treatment of loan participations by purchasing credit unions and propose[d] to *exclude* participation interests from the calculation of the aggregate MBL limit." 68 Fed. Reg. 16,450, 16,451 (Apr. 4, 2003) (emphasis added). In this sudden shift, NCUA explained that it now "believe[d]" that the legislative history of the 1998 amendments supported this exclusion. *Id.*

44. This radical change generated a number of comments, including from the U.S. Department of the Treasury. The Treasury Department's comment correctly recognized that "[a]llowing both the seller and purchaser of a participation interest to exclude the participation balance from counting toward the MBL cap would create a loophole for credit union business

loans to escape the aggregate limit set by Congress."[15] The comment highlighted that NCUA's own analysis from its 1999 rulemaking had rejected the same approach NCUA was proposing in 2003. The comment concluded that NCUA's earlier assessment was correct and that "[Treasury could] find no explanation by the agency as to why [NCUA's 1999] assessment is no longer valid." *Id.* The comment emphasized that NCUA's proposed liberalization of the commercial lending limit departed not only from the agency's own interpretation a few years earlier, but also from what NCUA's releases had previously identified as being historically consistent with the broader industry's treatment of loan participations.

45. Commenters from the banking industry urged that the proposal was inconsistent with congressional intent and that expanding the business loan activities of insured credit unions, particularly with the advantages of their tax-exempt status, would create unfair competition for banks. 68 Fed. Reg. 56,537, 56,539 (Oct. 1, 2003).

46. Notably, even some credit unions questioned the basis for distinguishing between commercial loans originated by the credit union and commercial loan interests acquired from other lenders. *See id.* at 56,544.

47. In its final 2003 adopting release, NCUA backed off from the proposed "exclusion" but persisted with its determination to treat loan participations differently from other commercial loans. The agency's 2003 adopting release generally acknowledged the concerns raised by the Treasury Department, but it failed to address, let alone adequately grapple with and respond to, the obvious logic and undeniable force of Treasury's criticism. NCUA never offered any explanation for its departure from a previous, reasoned treatment of acquired interests in commercial loans under section 1757a. This omission underscores NCUA's lack of any

[15] Wayne A. Abernathy, Asst. Sec. for Financial Institutions, Dep't of Treasury, *Comment Letter to Secretary of the Board, National Credit Union Administration* (June 2, 2003), *available at* http://www.aba.com/Issues/CUdocs/TreasCommentNCUA99993.pdf.

reasoned basis for the change in its interpretation and only highlights the inconsistency between NCUA's approach and the plain requirements of the statute.

48. In response to public comments, and in lieu of the proposed exclusion, NCUA added two provisions to its 2003 rule qualifying the approach to acquired commercial loans, or "loan participations." First, the adopting release created a distinction between "member loan participations" and "non-member loan participations": If a credit union held an interest in a "business purpose loan" of its member, the interest would be treated the same under the statutory limit regardless of whether the credit union originated the loan or purchased it from another lender, *see* 12 CFR § 723.1(d); whereas, with respect to "non-member participation interests," the 2003 final rule provided that they would be treated the same as other commercial loans for all purposes *except the aggregate lending limit* of section 1757a. Second, the 2003 rule introduced a waiver process for acquired commercial loans: While acquired loans would still count against the aggregate limit in section 1757a, the credit union could seek a special administrative "waiver" from NCUA for permission to proceed with an acquisition of such loans notwithstanding the statutory cap. "The total of such nonmember loans, when added to member loans, *may exceed the aggregate limit on member loans only if approved by the NCUA Regional Director pursuant to an application and review process*." 68 Fed. Reg. at 56,539 (emphasis added). This change in treatment was codified at 12 CFR § 723.1(e), and the procedures for waiver applications were added to the rules at 12 CFR § 723.16.

49. To facilitate this new distinction, NCUA compromised its responsibility to regulate the safety and soundness of the industry and resorted to inventing a new term, "net member business loan balance." 12 CFR § 723.21. Under this definition, "neither the originating credit union nor a participating credit union [would] count participations against their

MBL aggregate cap provided [that] the loan participation is not in a loan made to a member of the participating credit union and the participating credit union has obtained a waiver, if required [by NCUA's new rule] under the circumstances." *Id.* at 56,545.

50. The 2003 adopting release suggests that NCUA abandoned the political compromise Congress enacted in the 1998 amendments and instead embarked on its own agenda to create a more attractive business environment for credit unions. Indeed, the release confirms that NCUA's initiative was motivated by the desire "to avoid unnecessary interference with the ability of credit unions to place their excess funds in the manner that best serves the credit union, its members, and the credit union system." *Id.* at 56,544.

51. NCUA's only attempt at anchoring this initiative in the statute was to assert (for the first time) that "[t]he statutory [commercial loan limit] lends itself to several possible interpretations."[16] *Id.* at 56,543. The agency outlined three "possible" interpretations and, without explanation, chose to focus on "[t]he narrowest interpretation [which] appl[ies] the limit only to loans made by a credit union to its members and not to loans and loan interests purchased from another lender." *Id.*

52. In the absence of any persuasive statutory support for the new waiver approach adopted in 2003, NCUA could rely only on its own policy preferences. In conclusory fashion, NCUA simply declared that it "continue[d] to believe that these purchases will be made only as a productive method of placing excess funds after member loan demands are met, and that they need not count against the purchasing credit union's aggregate MBL limit." *Id.* at 56,544. Given the intent of the "member business loan" restriction on commercial lending by credit unions

[16] "A second interpretation would [have] appl[ied] the limit to all business loans to a credit union's members, whether made by the credit union or purchased from another lender, but not to purchases of loans or loan interests where the borrower is not a member." *Id.* Only the third "possible alternative" tracked the statute. Indeed, the third alternative represented the "most inclusive interpretation [and] would apply the limit to all business loans, whether made or purchased, and irrespective of whether the borrower is a member." *Id.*

imposed by Congress, this interpretation was and is unsustainable—indeed, "absurd," as NCUA itself concluded in 1999.

53. In sum, in its 2003 rulemaking, NCUA sought to ease concerns about the continued enforcement of the statutory MBL limit with its own policy compromise. The 2003 rule introduced a new requirement not contained in the statute for a special "waiver" from the NCUA Regional Director for "any transaction [by a federal or state credit union] that would cause the total of purchased nonmember business loans and nonmember participation interests, when added to the credit union's MBLs, to result in an amount in excess of the credit union's aggregate limit on MBLs." *Id.* at 56,544. But, significantly, because it acknowledged that "a purchased . . . participation interest of a nonmember *is a business loan asset* with all of the attendant risks," NCUA recognized that it had to subject such acquired loan interests to the same safety and soundness requirements as all other "member business loans."

THE CHALLENGED ACTION

The 2016 MBL Rule Release

54. Beginning in 2015, NCUA proposed yet again to reconsider its entire regulatory treatment of commercial loans. The result is the present rulemaking, in which NCUA has now rewritten the statutory definition of "member business loan" to facilitate and support the unlawful expansion of credit unions' commercial lending activities.

55. In its notice of proposed rulemaking for the present MBL Rule, NCUA revisited its regulation of purchased "non-member participation interests" and proposed a rule that "would significantly alter NCUA's overall approach to regulating and supervising credit union commercial lending activities." Proposed Rule, Member Business Loans; Commercial Lending, 80 Fed. Reg. 37,898, 37,899 (July 1, 2015). The agency made clear that this rulemaking is a

comprehensive reset of its existing MBL regulations designed to "provide federally insured credit unions with greater flexibility and individual autonomy" in commercial lending. *Id.* at 37,900. NCUA proposed "to add a new definition" to its MBL rules "to distinguish between the commercial lending activities in which a credit union may engage, and the statutorily defined MBLs, which are subject to the aggregate MBL cap contained in the FCU Act." *Id.* at 37,901. While NCUA still recognized "that there are safety and soundness risks inherent in the making of commercial loans" of any kind, nevertheless, NCUA proposed a rule that categorically excludes from the definition of "member business loan" "for purposes of the statutory MBL limit" "[n]on-member commercial loans or non-member participation interests in a commercial loan made by another lender." *Id.* at 37,909 (discussing proposed new rule 723.8). NCUA invited public comment on "any" aspects of the proposed new regulatory approach to commercial lending and all considerations relating to "MBL issues" for purposes of the agency's reconsideration of its Part 723 rules. *See id.* at 37,912 ("[C]ommenters are encouraged to discuss any other relevant MBL issues they believe NCUA should consider that are consistent with and permissible under the existing statute.").

56. In its March 14, 2016 MBL Rule Release, NCUA has now adopted the proposed exclusion as part of a wholesale promulgation of new MBL rules. The MBL Rule Release takes the agency's 2003 application of the section 1757a commercial lending limit to new heights of administrative arrogance and disregard for the law. The current rule eliminates the waiver application and review process for credit unions to seek permission to exceed the statutory limit when acquiring a commercial loan from another lender and for other waivers of NCUA's commercial-loan regulatory requirements. NCUA concluded that the waiver process has "hampered credit unions' ability to meet the commercial credit needs of their members," since it

"requires significant time and resources from both credit unions and NCUA, and has at times prevented credit unions from timely acting on borrowers' applications." *Id.* at 13,531; *see id.* at 13,531 n.10 (noting that as of March 14, 2016, NCUA was managing "over 1,000 active MBL-related waivers").

57. Under the approach now adopted in the MBL Rule Release, NCUA permits credit unions to purchase commercial loan interests ***without regard for the statutory limit and without any regulatory review or restriction***. With the stroke of a pen, NCUA has completed its plan to erase the plain language of the FCU Act. The only remaining hint of a limit to a credit union's participation in commercial loans originated by other lenders is the mere admonishment that the purchase of such loans must not be done collusively with other credit unions to circumvent what is left of the aggregate limit. *See id.* at 13,558.

58. Commenters, especially representatives of the banking industry, pointed out that the exclusion of commercial loan "participations" from the statutory lending limit on credit unions was plainly contrary to law. As NCUA noted, "A significant number of bank commenters suggested that the proposal disregards Congressional intent to limit credit union business lending." *Id.* at 13,531. For example, one commenter underscored that the statute defines "member business loans" to include "*any* loan . . . the proceeds of which will be used for commercial . . . purpose[s]."[17] The commenter noted that NCUA's approach redefines the meaning of "member business loan" so that the very same commercial loans would be recognized as commercial loans under some of NCUA's regulations, but not for purposes of the

[17] Colorado Bankers Association, Comments on Proposed Rulemaking for Part 723, at 4 (Aug. 28, 2015) (quoting 12 U.S.C. § 1757a), *available at* https://www.ncua.gov/Legal/CommentLetters/CLMBL20150830DChildears.pdf.

statutory cap. As the commenter reminded the agency, "If it walks like a duck and quacks like a duck then it is a duck."[18]

59. ICBA raised the same concerns. It warned that the proposed approach "would greatly expand [the existing] loophole by removing the requirement that credit unions seek a waiver [and] would allow large credit unions to engage in hundreds of millions and possibly billions of dollars of loans outside of the cap." ICBA, Comments on Proposed Rulemaking for Part 723 (Aug. 31, 2015).[19] As ICBA explained, "Congress intentionally placed limits on the ability of federally insured credit unions to engage in anything but the most insignificant amounts of commercial lending to ensure that the National Credit Union Share Insurance Fund is protected from large losses that place direct burdens on the taxpayers of the United States and to keep credit unions focused on their mission." *Id.* at 3. And ICBA emphasized that "NCUA should not be permitted to end-run Congress with a proposal to significantly expand member business lending." *Id.*

60. Nevertheless, NCUA's adopting release provides that "[a]fter careful consideration of the public comments on this issue," NCUA "has determined to adopt the proposed approach without change." MBL Rule Release, 81 Fed. Reg. at 13,549. The agency has now entirely displaced the will of Congress with its own policy preferences by pronouncing that the "approach of excluding non-member . . . participation[s] *from the statutory limit* provides for an important balance sheet management tool and is essential for certain credit unions to meet member demand for business loans while adhering to the statutory cap." *Id.* at 13,549 (emphasis added).

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[18] *Id.* at 3.

[19] *Available at* https://www.icba.org/files/ICBASites/PDFs/cl083115a.pdf.

NCUA Has Adopted a Legally Defective Approach to Enforcing the Aggregate MBL Limit in Section 1757a

61. Section 1757a of the statute mandates that "no insured credit union *may make any member business loan that would result in* a total amount of such loans outstanding at that credit union at any one time equal to more than . . . 1.75 times [the net worth of the credit union]." 12 U.S.C. § 1757a(a) (emphasis added).

62. The agency reads this provision to mean that it may exclude purchased "non-member participations" (*i.e.*, portions of commercial loans acquired from another lender) entirely from the statutory cap on commercial loans—in other words, that such interests simply do not count against the aggregate limit established by Congress. *See* 81 Fed. Reg. at 13,548-49. This reading contradicts the plain and unambiguous language of the FCU Act and finds no support in the structure and purposes of the Act or in the common customs and practices of the lending industry. Indeed, there is no doubt that Congress has mandated that those commercial loans NCUA calls "non-member participation interests" must be counted against the aggregate lending limit of an insured credit union under section 1757a.

63. In setting forth the aggregate cap on commercial loans, section 1757a refers to the "total amount of such loans," and "*such loans*" plainly refers to the antecedent phrase "any member business loan." 12 U.S.C. § 1757a (emphasis added). Section 1757a specifically defines the term "member business loan" for purposes of applying the cap to mean "*any* loan . . . the proceeds of which will be used for commercial . . . purpose[s]." *Id.* § 1757a(c)(1)(A) (emphasis added). Accordingly, if "non-member participations" are loans and commercial in nature, they must count toward the cap, provided only that none of the narrow exceptions applies. *See id.* § 1757a(c)(1)(B).

64. To be sure, NCUA has never contended that "participations" are not loans. NCUA's own regulation provides that "***[l]oan participation means a loan*** where one or more eligible organizations participate pursuant to a written agreement with the originating lender, and the written agreement requires the originating lender's continuing participation throughout the life of the *loan*." 12 CFR § 701.22(a) (emphases added).

65. There is no clearer statement of congressional intent regarding the meaning of the statutory limit than the transitional provision in section 1757a(d):

> An insured credit union that has, on August 7, 1998, a total amount of outstanding member business loans that exceeds the amount permitted under subsection (a) shall, not later than 3 years after August 7, 1998, reduce the total amount of outstanding member business loans to an amount that is not greater than the amount permitted under subsection (a).

Id. § 1757a(d). This provision makes it plain that over the three-year transition period, the credit union must reduce, without differentiation, the "total amount" of ***all*** commercial loans held on its books, regardless of the source of the loans and the identity of the borrower or originating lender.

66. NCUA tries to justify the view that it may exclude acquired commercial loans from section 1757a's aggregate limit by asserting that "[p]urchases of nonmember . . . participation interests . . . do not involve the provision of member loan services, and the acquired loan assets are not MBLs." MBL Rule Release, 81 Fed. Reg. at 13,549 (quoting 68 Fed. Reg. at 56,543); *see id.* (emphasizing that acquired commercial loans "are not 'member' business loans"). This ipso facto reasoning is arbitrary and capricious and completely at odds with the language of the Act. The agency's assertion is a tautology, deriving the conclusion from the premise, and its rationale is the very absence of reasoned decision making.

67. NCUA's apparent reliance on the word "member" to exclude some commercial loans from the statutory cap is meritless. The substantive text of section 1757a's definition of

"member business loan," as distinct from the term itself, sweeps in "any" commercial loan, not just loans made to the credit union's own members or commercial loans originated by the credit union itself, as opposed to loans acquired from others. 12 U.S.C. § 1757a(c)(1)(A). Congress undoubtedly meant "any" to mean "any" in this definition. If it had intended otherwise, Congress would have expressly qualified the definition with a phrase like "of a member" or "to a member." To confirm as much, we need only look a few sections earlier in the statute to the FCU Act's definition of "member account," which Congress defined to mean "a share, share certificate, or share draft account *of a member of a credit union*." *Id.* § 1752(5) (emphasis added). Thus, Congress has "directly spoken to the precise question at issue [and] the intent of Congress is clear."[20]

68. Similarly, there is no statutory support for NCUA's contention that it may exclude purchased commercial loan interests from the definition of "member business loans" and therefore the statutory cap because they are not "loans [the credit union] makes." 81 Fed. Reg. at 13,549. The terms and structure of the FCU Act make plain that the commercial lending limit is a balance sheet test: It counts all extensions of commercial credit, partial or whole, that are "outstanding" on the books of the credit union, and the limit imposed by the statute is measured against the "net worth" of the credit union, as calculated using generally accepted accounting standards. Again, the transitional provision reinforces the conclusion that the cap applies to the "total amount of outstanding member business loans" of any kind. 12 U.S.C. § 1757a(d).

69. Congress included no statutory exception in section 1757a for commercial loans acquired from another lender where the borrower is not a member of the participating credit union. *See id.* § 1757a(c)(1)(B) (enumerating the few, narrow exceptions to the definition of

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[20] *NCUA v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 499-500 (1998) (quoting *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).

"member business loan"). And nothing in section 1757a or anywhere else in the Act grants NCUA the authority to conjure such an exception of its own. NCUA's purported exception makes no sense, moreover, because it contradicts the whole reason for the commercial lending cap. Congress sought to minimize the amount of commercial loan balances carried on the books of insured credit unions because commercial loans (of any type) are generally riskier than noncommercial, personal loans. *See* S. Rep. No. 105-193 (explaining that the commercial lending restrictions "are intended to . . . prevent significant amounts of credit union resources from being allocated in the future to large commercial loans that may present additional safety and soundness concerns for credit unions"); *see also id.* (stating that the MBL restrictions are meant to "ensure that credit unions continue to fulfill their specified mission of meeting the credit and savings needs of consumers . . . through an emphasis on consumer rather than business loans"). Elsewhere in the MBL Rule Release, NCUA recognizes that it "does not have authority to amend the MBL definition through regulation." 81 Fed. Reg. at 13,548. Yet that is just what the agency presumes to do in section 723.8 of its MBL Rule.

70. The arbitrariness of NCUA's effort to exclude acquired "participation interests" in commercial loans from the statutory cap is further exposed by NCUA's own concession that "any" "commercial loan," not just the subset of loans it wants to count in applying the cap, raise safety-and-soundness concerns for credit unions. *See id.* at 13,538. For that reason, NCUA felt the need to adopt a new definition of "commercial loan" for safety-and-soundness purposes that includes "any loan" or other "credit" extended to any borrower "for commercial, industrial, agricultural, or professional purposes" and "*any interest a credit union obtains in such loans made by another lender.*"[21] *Id.* at 13,554-55 (emphasis added). NCUA fails to acknowledge or

[21] The MBL Rule as amended by MBL Rule Release requires that in order to engage in commercial lending a federally insured credit union must adopt and implement a comprehensive written commercial loan policy

even consider the inherent irrational contradiction between its own recognition, on the one hand, that all commercial loans, including those acquired from other lenders, involve risk to the safety and soundness of a credit union, and its simultaneous decision, on the other hand, to adopt a rule that excludes such commercial loan interests from the very commercial lending limit that Congress also enacted to protect the safety and soundness of insured credit unions.

71. Notwithstanding all of these inconsistencies and contradictions, NCUA found a way in the MBL Rule Release to conclude that the Act "expressly requires a credit union to include *only MBLs it makes to its members* in calculating its statutory aggregate MBL limit." 81 Fed. Reg. at 13,548 (emphasis added) (quoting 68 Fed. Reg. at 16,451). Based on this erroneous reading of the statute, NCUA determined that it could categorically exclude other commercial loans when calculating the aggregate limit of outstanding commercial loans, and it adopted this new regulatory exclusion from the definition of "member business loan" in approving the rule to be codified in 12 CFR § 723.8. *See id.* at 13,549 ("maintain[ing] that a plain reading of the FCU Act requires a credit union to include only loans it makes to its members in calculating its aggregate MBL limit"); *id.* ("[N]onmember commercial loan participations are not included in calculating the participating credit union's aggregate MBL limit under the final rule.").

NCUA Acted Unlawfully in Treating Participating Interests in Commercial Loans as Anything Other than the "Making" of a Member Business Loan under Section 1757a

72. In addition to its unlawful and arbitrary decision to exclude acquired commercial loans from the aggregate limit in section 1757a, NCUA took the similarly flawed position that "[p]articipation interests purchased by a credit union . . . are not loans *made by* the participating credit union." 81 Fed. Reg. at 13,548 (quoting 68 Fed. Reg. at 16,451) (emphasis added). This

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that addresses certain specified matters, and must also, among other things, meet certain requirements regarding collateral for commercial loans and the handling of construction and development loans. 12 CFR §§ 723.4–6.

position equates the word "make" with the word "originate," which is inconsistent with the plain terms and structure of the FCU Act. NCUA provides no basis for its assertion to the contrary.

73. While the Act contains no special definition of the term "make" as used in section 1757a, the structure and purpose of the Act compel the conclusion that the term must be read more broadly than "originate." Indeed, section 1757, which establishes the powers of a federal credit union, provides that they "shall have power . . . to *make* loans [and to] *participate with other credit unions . . . in making* loans [provided they comply with a number of statutory requirements]." 12 U.S.C. § 1757(5) (emphases added). As a subset of this broad category of "making" loans, the Act includes specific requirements for participating in loans *originated* by other lenders. *Id.* § 1757(5)(E). Moreover, within these provisions governing the "making" of loans by federal credit unions, the Act includes specific requirements for "the credit union which *originates* a loan." *Id.* (emphases added). Any reasonable reading of the word "make" in the lending industry's vernacular would encompass both loans *originated* and loans *purchased* from other lenders. Both are "made" because both involve the financial institution's investing money and taking onto its balance sheet an asset reflecting the amount of the loan it has originated or acquired. Had Congress intended to exclude purchased commercial loans from the "member business loan" cap, it would have used the narrower term "*originator*," just as it did in section 1757.

74. Even standing alone, the structure of section 1757a shows that Congress intended the term "make" to be read broadly and to include the purchase of a participation interest. Indeed, the definition of "member business loan" turns on the proceeds of the loan. 12 U.S.C. § 1757a(C)(1). Like originators, loan participators provide the funds that go toward the loan's proceeds. Because a credit union that participates in a commercial loan contributes funds that

cover a portion of the principal of the loan, the participating lender is functionally indistinguishable from the originating lender.

75. The legislative history and purpose of the commercial loan limit support this conclusion. The limit was established because commercial loans, or interests in such loans, carry significantly more risk than other loans made by a credit union and require the kind of underwriting expertise found at commercial banks. It stands to reason that Congress intended for commercial loan participations to count towards the same safety-and-soundness limitation.

76. Rather than seriously considering the statutory structure, the context in which the term "make" actually appears, or the true congressional intent in limiting commercial lending by insured credit unions, NCUA's decision substituted conclusion for analysis. Principles of well-established administrative law require more. They require a reasoned explanation for the agency's action and a reasonable interpretation of the statutory text and structure. The requirement of reasoned decision making is especially important in rulemakings like this one, where the agency has opted for a position that it rejected as indefensible and "absurd" when it first implemented the statutory scheme at issue. *See* 64 Fed. Reg. at 28,727.

The Harmful Effects of NCUA's Legal Errors and the Need for Judicial Intervention to Address this Unlawful Action

77. NCUA's erroneous treatment of acquired commercial loans in the MBL Rule Release and the MBL Rule (Part 723 of its regulations) enables tax-exempt credit unions to make unlimited commercial loans, provided they do so by purchasing such loans from other credit unions rather than originating the loans themselves. If this action stands, NCUA's rule will effectively erase any meaning from the commercial lending limit that Congress enacted in section 1757a. Moreover, if left unchecked, NCUA's interpretation of the word "make" will

permit the agency to manipulate and evade the statutory cap to further its own policy objectives for the expansion of commercial lending activities by credit unions.

78. Together with the extraordinary tax exemptions enjoyed by credit unions, and the substantial cost advantages those exemptions confer, NCUA's adoption of the MBL Rule will produce significant competitive harm to community banks. The arbitrary and unlawful nature of NCUA's treatment of purchased commercial loans and the lack of a reasoned basis for NCUA's conclusions make it quite obvious that the MBL Rule is an improper, policy-oriented attempt to boost the business potential of credit unions and discourage them from converting into commercial banks.

79. The intervention of this Court is needed to halt NCUA's recurring conduct as a "cheerleader" for the credit union industry at the expense of community banks and in contravention of the laws of the United States.

COUNT ONE

VIOLATION OF THE FEDERAL CREDIT UNION ACT AND THE ADMINISTRATIVE PROCEDURE ACT

80. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

81. Section 1757a of title 12 of the United States Code plainly requires NCUA and insured credit unions to determine compliance with the aggregate limit on "member business loans" based on the total amount of "all loans . . . [with a] commercial . . . purpose" carried on the balance sheet of the credit union, regardless of whether the borrower is a member of the credit union or the loan was acquired in whole or in part from another lender. NCUA's determination in the MBL Rule Release and the MBL Rule that federally insured credit unions may exclude such acquired loan interests from the statutory lending cap is therefore unauthorized

by statute and contrary to law in violation of 12 U.S.C. § 1757a and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C).

82. Accordingly, plaintiff ICBA is entitled to relief under 5 U.S.C. §§ 702, 706(2)(A) & (C).

COUNT TWO

VIOLATION OF THE FEDERAL CREDIT UNION ACT AND THE ADMINISTRATIVE PROCEDURE ACT

83. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

84. Section 1757a of title 12 of the United States Code prohibits an insured credit union from "mak[ing]" any new commercial loan that would cause the total amount of commercial loans held on the balance sheet of the credit union to reach or exceed the aggregate statutory limit. In the context of an acquired commercial loan, the term "make" in section 1757a plainly includes the purchase of a loan or loan interest from another lender. NCUA's determination to the contrary is unauthorized by statute and violates 12 U.S.C. § 1757a and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C).

85. Accordingly, plaintiff ICBA is entitled to relief under 5 U.S.C. §§ 702, 706(2)(A) & (C).

COUNT THREE

ARBITRARY AND CAPRICIOUS RULEMAKING IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

86. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

87. Arbitrary and capricious agency actions and actions lacking in reasoned decision making are condemned as unlawful under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). NCUA acted arbitrarily and capriciously and without reasoned decision making

when it decided to exclude purchased commercial loans from the aggregate cap for "member business loans" based on faulty reasoning that is self-contradictory and finds no support in the Act. In the context of a commercial loan cap created to protect against excessive risk from commercial lending, there is no meaningful distinction between commercial loans originated by the credit union itself versus commercial loans acquired from another lender. To suggest otherwise "promote[s] form over substance." 64 Fed. Reg. at 27,727. NCUA's failure to consider and address the inherent contradiction between its own recognition of the safety-and-soundness implications of acquired interests in commercial loans and its refusal to count such loans in applying the statutory cap on commercial lending, which was enacted by Congress to protect the safety and soundness of insured credit unions, was the height of arbitrary and capricious rulemaking.

88. Further, NCUA's determination that purchasing a commercial loan interest is not "making" the loan within the meaning of 12 U.S.C. § 1757a was arbitrary and capricious because it ignored the plainly broad meaning of the term "make" in the Act and instead substituted NCUA's own preferred meaning that seeks to create a preferential business environment for credit unions. NCUA's MBL Rule Release provided no reasoned basis for its treatment of acquired commercial loans, and as a result violates the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

89. Accordingly, plaintiff ICBA is entitled to relief under 5 U.S.C. §§ 702, 706(2)(A).

PRAYER FOR RELIEF

90. WHEREFORE, plaintiff ICBA prays for an order and judgment:

a. Declaring that the National Credit Union Administration acted contrary to law and without statutory authority in violation of 12 U.S.C. § 1757a and 5 U.S.C. § 706(2)(A)

& (C) and arbitrarily and capriciously in violation of 5 U.S.C. § 706(2)(A) by concluding in the MBL Rule Release that insured credit unions may exclude purchased commercial loans or participations in such loans from the aggregate cap on "member business loans" under 12 U.S.C. § 1757a(a), (c);

b. Declaring that the National Credit Union Administration acted contrary to law and without statutory authority in violation of 12 U.S.C. § 1757a and 5 U.S.C. § 706(2)(A) & (C) and arbitrarily and capriciously in violation of 5 U.S.C. § 706(2)(A) by concluding in the MBL Rule Release that to purchase a commercial loan or an interest in a commercial loan from another lender is not to "make" a commercial loan within the meaning of 12 U.S.C. § 1757a(a);

c. Invalidating and setting aside NCUA's MBL Rule and Rule Release to the extent they purport to treat any acquired commercial loans or interests in such loans as anything other than a "member business loan" for purposes of the lending restriction of 12 U.S.C. § 1757a;

d. Awarding plaintiff its reasonable costs, including attorney's fees, incurred in bringing this action; and

e. Granting such other relief as this Court may deem just and proper.

September 7, 2016

Respectfully submitted,

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* *Pro hac vice* to be requested