The Evolution of the Common Bond in Occupational Credit Unions: How Close Must the Tie That Binds Be

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I. INTRODUCTION

Roy Lane, a citizen of North Carolina, found himself in need of two loans, one to cover his mother-in-law's funeral expenses and the other to buy a used truck.¹ The bank where he had deposited his paychecks for the past twelve years rejected his loan applications.² Fortunately for Lane, his employer, Klaussner Furniture Industries Inc., was a member group of the AT&T Family Federal Credit Union (ATTF).³ The ATTF approved his loan, despite the fact that Lane admits to living from paycheck to paycheck.⁴ While Roy Lane and others in similar situations sing the praises of credit unions, the same is not true for those who have to compete with credit unions for customers.⁵

After watching many of his customers join the ATTF, James Culberson, Chairman of the First National Bank and Trust Company in Asheboro, North Carolina, began asking “how people that had absolutely no affiliation with AT&T could belong to their credit union.”⁶ What Culberson and other bankers discovered was that the credit unions’ regulator, the National Credit Union Administration (NCUA), said they could by authorizing the inclusion of multiple employer groups in federal credit unions.⁷ Consequently, Culberson and other bankers decided to sue the NCUA to prevent it from

². See id.
³. See id.
⁴. See id.
⁵. See id.
⁷. See Wahl, supra note 6, at I2; see also NCUA Interpretive Ruling and Policy Statement 82-1, 47 Fed. Reg. 16775 (1982) (authorizing the inclusion of multiple employer groups in federal credit unions).
continuing to allow unrelated employer groups from joining federal credit unions. Eight years after they filed suit, the Supreme Court agreed with the bankers and held that § 109 of the Federal Credit Union Act (FCUA) required all members of an occupational credit union to share a single common bond.

The bankers' victory, however, was short-lived. On August 7, 1998, President Clinton signed into law the Credit Union Membership Access Act (CUMAA) that allows federal credit unions to expand their fields of membership to include multiple employee groups. The legislation was initiated in direct response to the Supreme Court's decision in the National Credit Union Administration v. First National Bank & Trust case. The CUMAA provides that federal credit unions can now be chartered as either single or multiple occupational group institutions, essentially in an effort to promote the safety, soundness, and continued existence of federal credit unions in changing economic times.

Part II of this Note considers the definition of a credit union, the history and effect of the FCUA, and the NCUA's 1982 interpretation of the common bond requirement. Part III of this Note explores the facts and holding of First National Bank & Trust. Part IV analyzes the meaning and effect of the CUMAA. Part V considers the recent legislation and policy debates that the passage of the CUMAA has sparked. Finally, Part VI of this Note concludes
that although the credit unions have won a significant victory, all is
not necessarily lost for the banks in their battle to restrict the activities
of federal credit unions.\(^\text{20}\)

II. BACKGROUND

A. What is a Credit Union?

A credit union is a non-profit, member owned, and
democratically controlled institution, chartered with the purpose of
making loans available to people of small means.\(^\text{21}\) The basic rationale
behind a credit union is that a person’s reputation and character are as
valuable as his property.\(^\text{22}\) In theory, a credit union approves loans
based on the borrower’s reputation in the community, rather than
based on the person’s means or collateral.\(^\text{23}\) Its board of directors is
elected from the membership and board members are not compensated
for their services.\(^\text{24}\) Members purchase shares of the credit union
when they join and then each member has one vote, regardless of the
amount in their account.\(^\text{25}\) Members invest in the credit union, and the
credit union invests in its members through making loans available to
them at lower rates of interest than they would obtain elsewhere.\(^\text{26}\)
Credit unions are able to offer loans at lower interest rates, in part,
because of their non-profit status, but more importantly because they
are exempt from taxation.\(^\text{27}\) Unlike other financial institutions, federal

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\(^{20}\) See infra notes 167-178 and accompanying text.

\(^{21}\) See Credit Union Membership Rules: Before the Subcomm. on Fin. Inst. and
Consumer Credit of the Comm. on Banking and Fin. Serv., 105th Cong. 11 (1997)
[hereinafter Credit Union Membership Rules] (testimony of Norman E. D’Amours,
Chairman, NCUA); 78 CONG. REC. 12,223 (1934) (statement of Rep. Steagall) (House
discussion and passage of the FCUA); 78 CONG. REC. 7259 (1934) (statement of Sen.
Sheppard) (Senate discussion and passage of the FCUA).

\(^{22}\) See Credit Union Membership Rules, supra note 21, at 11 (testimony of Norman
E. D’Amours, Chairman, NCUA).

\(^{23}\) See id.

amended 1998).

\(^{25}\) See id. § 1760.

\(^{26}\) See Credit Union Membership Rules, supra note 21, at 11 (testimony of Norman
E. D’Amours, Chairman, NCUA).

credit unions, their property, franchises, capital, reserves, surpluses, other funds, and their income are completely tax exempt.\textsuperscript{28}

B. The Federal Credit Union Act

Federally chartered credit unions came into existence in 1934 after Congress passed the FCUA to mitigate the devastating effects of the Great Depression on low and middle income workers.\textsuperscript{29} The financial crisis of the Great Depression prevented many Americans from obtaining credit at reasonable rates because banks offering loans demanded security greater than many Americans could provide.\textsuperscript{30} To obtain credit, Americans turned to loan sharks that charged usurious rates exceeding the cap of 42% that was imposed in most states.\textsuperscript{31} Congress feared that this situation was reducing the overall purchasing power of American consumers, which was, in turn, preventing the recovery of the economy.\textsuperscript{32}

In an attempt to “establish credit facilities for proper purposes at normal rates for men and women who otherwise must have recourse, in time of need, to the usurer,” Congress created the federal credit union system.\textsuperscript{33} Congress modeled the federal credit union system after the state credit unions, which thrived during the Great Depression.\textsuperscript{34} Credit unions were perceived to be a happy medium between a loan shark and a bank for people of “small means,” and the FCUA was seen as a way to provide the same credit opportunities to Americans living in states that were not currently being served by credit unions due to a lack of enabling state legislation.\textsuperscript{35}

At the time the FCUA was passed, the majority of state credit unions served factories, associations, or other clearly defined units sharing a common bond.\textsuperscript{36} The common bond characteristic was

\textsuperscript{28} See id.

\textsuperscript{29} See id. \$ 1751; 78 CONG. REC. 12,223 (1934); 78 CONG. REC. 7259.

\textsuperscript{30} See 78 CONG. REC. 12,223; 78 CONG. REC. 7259.

\textsuperscript{31} See 78 CONG. REC. 12,224 (1934) (statement of Rep. Luce); 78 CONG. REC. 7259 (1934) (statement of Sen. Barkley).

\textsuperscript{32} See 78 CONG. REC. 12,223; 78 CONG. REC. 7259.

\textsuperscript{33} 78 CONG. REC. 7259.

\textsuperscript{34} See 78 CONG. REC. 12,224.

\textsuperscript{35} See 78 CONG. REC. 7259.

\textsuperscript{36} See Credit Union Membership Rules, supra note 21, at 11 (testimony of Norman E. D'Amours, Chairman, NCUA).
perceived as a factor contributing to the success of the state credit unions.\textsuperscript{37} The common bond promoted safety and soundness in two ways.\textsuperscript{38} First, people working or living together were thought to know each other well enough to make a judgment of one another's inclination and ability to repay a loan.\textsuperscript{39} Second, in a well-defined unit, no one would want to be regarded as irresponsible by his peers.\textsuperscript{40} Consequently, Congress imposed a common bond requirement in the FCUA, providing in section 109 that "federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."\textsuperscript{41}

To counteract a recent down swing in the economy that many feared foreshadowed another depression, Congress again acted by passing legislation to protect Americans with low incomes from becoming the prey of usurious loan sharks.\textsuperscript{42} In keeping with the original mission of the FCUA, to aid the people of small means, Congress amended the FCUA to give all federal credit unions tax exempt status.\textsuperscript{43} Congress believed that the taxation of the federal credit unions' so called "undistributed profits" placed too high a burden on the credit unions and unduly threatened their viability.\textsuperscript{44} As a result all federal credit unions have enjoyed an exemption from federal taxes since 1937.\textsuperscript{45}

\section*{C. The NCUA's Revision of Membership Policies}

For almost fifty years following the passage of the FCUA, the common bond provision was interpreted to require all members of a

\textsuperscript{37} See id.
\textsuperscript{38} See id.
\textsuperscript{39} See id.; 78 CONG. REC. 12,223; 78 CONG. REC. 7259.
\textsuperscript{40} See Credit Union Membership Rules, supra note 21, 11 (testimony of Norman E. D'Amours, Chairman, NCUA); 78 CONG. REC. 12,223; 78 CONG. REC. 7259.
\textsuperscript{42} See 82 CONG. REC. 358 (1937) (statement of Rep. Steagall) (House discussion and passage of tax exemption amendment of the FCUA).
\textsuperscript{43} See Federal Credit Union Act, 12 U.S.C. § 1768.
\textsuperscript{44} 82 CONG. REC. 358.
federal credit union to share the same bond. For example, the NCUA, the agency charged with administering the FCUA, refused to allow an United States Air Force base credit union to extend its membership to people in the military without a connection to the particular base. The Tenth Circuit affirmed the decision and held that service in the military was not a sufficient common bond. In a similar vein, the North Carolina Supreme Court refused to allow members of a state employees credit union to extend their membership to include employees of local and federal government. The court in that case stated that

All persons eligible for membership in a credit union must share one and the same common bond. If the requisite degree of commonality required for a "common bond" to exist could be met by showing similarity of occupation for sub-groups of the membership only, the scope of eligible membership would know no bounds and the Legislature's enactment of the common bond requirement would be rendered a nullity.

In 1982, the NCUA broke from its prior interpretation of section 109 and authorized federal credit unions to extend membership to include multiple employer groups. According to the NCUA's new

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47. See Forbes Fed. Credit Union v. National Credit Union Admin., 477 F.2d 777, 784 (10th Cir. 1973).
48. See id.
49. See In re Appeal of N.C. Sav. & Loan League, 276 S.E.2d 404, 414 (N.C. 1981) (involving the interpretation of N.C. GEN. STAT. § 54-109.26, the language of which is essentially identical to § 109 of the FCUA.)
50. Id. at 411.
51. See NCUA Interpretive Ruling and Policy Statement 82-1, 47 Fed. Reg. 16,775 (1982). Even before the NCUA's 1982 expansive interpretation of the common bond requirement, the American Banker's Association (ABA) complained that credit unions had stretched the common bond requirement to the "breaking point." AMERICAN BANKERS ASSOCIATION, THE CREDIT UNION'S CHANGING IMAGE: DISTURBING FACTS ABOUT CREDIT UNION TRENDS, 16-17 (1973). In 1973, the ABA noted that the average credit union had over a thousand members and many served persons dispersed all over the country. See id. For example, in 1965, the Credit Union National Association (CUNA) announced the formation of a Miscellaneous Trade Union that would serve members of thirty unions
interpretation of section 109 of the FCUA, each group within a credit union had to share a common bond, but each member of a credit union did not have to share the same bond. Employee groups, each with a distinct common bond, were permitted to be included in a federal credit union’s charter or added to its current field of membership provided the proposal was economically feasible and the employee groups were within a well-defined area accessible to the credit union’s offices.

The recession in the early 1980s and the number of business failures accompanying it prompted the NCUA’s expansion of its membership policy. Credit unions, 80% of which were occupationally based, suffered declining membership in the wake of the numerous business failures. Many sponsor businesses were faced with either shutting down, relocating, filing for bankruptcy, or laying off workers, which forced credit unions either to alter their charter, merge with another credit union with the same sponsor, or liquidate. By revising its interpretation of section 109, the NCUA attempted to provide credit unions with another option – greater flexibility – to insure their safety and soundness in a struggling economy. The NCUA noted that a majority of businesses had one hundred or fewer employees, falling far short of the 500 member minimum requirement for chartering a credit union. Consequently, many people were denied access to credit union services. By allowing credit unions to include multiple employee groups, the NCUA sought to further the

“comprising hotel and restaurant employees, stationary engineers, office workers, bartenders, building service employees, and others.” Id. at 18-19. In 1965, CUNA’s Planning Committee conceded that “new looks are being given to the concept of ‘common bond’ as the basis for credit union organization. At one time a common bond was the reason for the formation of a credit union; now it is an excuse.” Id. The CUNA committee suggested that “the movement must look upon need for credit union services as being just as good a common bond as the traditional ones . . . .” Id. at 21.

53. See id.
54. See id.
55. See Credit Union Membership Rules, supra note 21, at 11 (testimony of Norman E. D’Amours, Chairman, NCUA).
56. See id.
57. See id.
58. See id.
59. See id.
original mission of the FCUA of promoting the safety and soundness of the credit unions in difficult economic times, and providing more individuals access to reasonably priced financial services.  

III. FIRST NATIONAL BANK AND TRUST CO. v. NATIONAL CREDIT UNION ADMINISTRATION

As a practical matter, the new NCUA interpretation increased the number of people eligible to join credit unions.  

Pursuant to this interpretation, the NCUA approved a series of amendments to the charter of the ATTF that allowed it to considerably expand its membership to include non-AT&T employees.  

At one point, only 35% of the ATTF's members were employees of AT&T and its affiliates. In response, First National Bank & Trust Company of Asheboro, North Carolina joined with the American Bankers Association and four other North Carolina banks and sued the NCUA.  

The lawsuit was filed in the District Court for the District of Columbia in 1990, eight years after the publication of the NCUA's liberal interpretation of section 109. The banks challenged the NCUA's interpretation of section 109 and its approval of the amendments to the ATTF's charter, arguing that they were contrary to law because the extended membership violated the common bond statutory requirement. The banks argued that by allowing groups lacking the requisite common bond to join federal credit unions, the

60. See id.
61. See id.
63. Id. The ATTF had “112,000 members in more than 150 disparate occupational groups spread across all 50 states.” First Nat'l Bank & Trust Co. v. National Credit Union Admin., 90 F.3d 525, 527 (D.C. Cir. 1996). The NCUA approved amendments to ATTF's charter to allow the addition of other employer groups including Lee Apparel Company, the Coca-Cola Bottling Company, the Duke Power Company, and the American Tobacco Company. See First Nat'l Bank & Trust, 118 S. Ct. at 931.
64. See First Nat'l Bank & Trust Co. v. National Credit Union Admin., 772 F. Supp. 609 (D.C. Cir. 1991). The North Carolina banks joining First National Bank & Trust in bringing suit were Piedmont State Bank, Lexington State Bank, Randolph Bank and Trust Company, and Bankers Trust of North Carolina. See id. ATTF and the CUNA intervened as defendants after the suit had been filed. See id.
65. See id.
66. See id.
ATTF had expanded beyond the original congressional mandate. According to the banks, "by allowing ATTF to accept members from among the employees of any number of employers, the NCUA has in effect opened the membership to anyone with a job." The District Court entered summary judgment on the merits in favor of the credit union, basing its decision on the analytical framework set forth in Chevron U.S.A. v. Natural Resources Defense Council. The District Court held that the language of the FCUA lacked a "clear, unambiguous intent" and held unreasonable the NCUA's interpretation of section 109 to allow multiple employer groups. On appeal, the Court of Appeals for the District of Columbia Circuit reversed the District Court and held that the lower court's application of Chevron was erroneous. The Court of Appeals held that, following the first prong of Chevron, Congress had in fact clearly spoken on the issue in question and had unambiguously set out the requirement that a single common bond must be shared by all members of a federal credit union.

Fearing the effects of this ruling, the NCUA and the ATTF

67. See id. at 612.
68. First Nat'l Bank & Trust Co. v. National Credit Union Admin., 90 F.3d 525, 527 (D.C. Cir. 1996). ATTF was chartered originally as the Radio Shops Federal Credit Union. See id. The members shared the common bond of being "employees of the Radio Shops of Western Electric Company, Inc. who work in Winston-Salem, Greensboro, and Burlington, North Carolina; employees of this credit union; members of their immediate families; and organizations of such persons." Id.
69. See First Nat'l Bank & Trust Co v. National Credit Union Admin., 863 F. Supp. 9 (D.C. Cir. 1994). The banks initially filed suit in the U.S. District Court for the District of Columbia, but their complaint was dismissed for lack of standing. See First Nat'l Bank & Trust Co., 772 F. Supp. at 609. The banks appealed the dismissal and the D.C. Circuit Court of Appeals held that the banks did in fact have standing and remanded the case to the District Court for a decision on the merits. See id.
70. 467 U.S. 837 (1984). Chevron delineated a two-step test that is used to determine if an agency's interpretation of a statute is permissible. See id. at 842. The first step of the Chevron analysis, applied in First Nat'l Bank & Trust, requires a determination of whether Congress has spoken directly to the issue at hand, making its intended interpretation clear. See id. If there is a "clear, unambiguous intent" on the part of Congress, the agency has no choice but to adhere to the intent of Congress. Id. If the intent of Congress is not clear, however, the second step of the Chevron test must be applied. See id. at 843. The second step requires the court to determine whether the agency's interpretation is based on a permissible construction of the statute at issue. See id.
71. Id. at 842; First Nat'l Bank & Trust Co., 863 F. Supp. at 13.
73. See id.
appealed to the Supreme Court.\textsuperscript{74} Regardless of the fact that the circuit courts that had addressed the issue were essentially in agreement, the Supreme Court granted certiorari in February of 1997, based on “the importance of the issues presented.”\textsuperscript{75} One of the two issues addressed by the Supreme Court in \textit{First National Bank & Trust} was whether the NCUA’s interpretation of the section 109 common bond requirement of the FCUA was permissible.\textsuperscript{76} Justice Thomas delivered the majority opinion of the Court, holding that the NCUA’s interpretation of § 109 was impermissible because the FCUA clearly required members of occupational credit unions to share a single common bond.\textsuperscript{77}

Applying the first step of the \textit{Chevron} analysis, the Court determined that Congress had in fact spoken on the issue at hand, and held that the NCUA’s interpretation of section 109 was impermissible because it was “contrary to the unambiguously expressed intent of Congress” that the common bond uniting all occupational credit union members be that of employment with the same employer.\textsuperscript{78} The banks argued that “because section 109 uses the article ‘a’ – i.e., ‘one – in conjunction with the noun ‘common bond,’ the ‘natural reading’ of § 109 is that all members in an occupationally defined federal credit

\textsuperscript{74} See National Credit Union Admin. v. First Nat'l. Bank & Trust Co., 118 S. Ct. 927 (1998).

\textsuperscript{75} Id. at 933. The Court of Appeals for the Sixth Circuit reached a conclusion similar to the Court of Appeals for the D.C. Circuit, holding that the NCUA should not have allowed the AEDC Federal Credit Union to expand its charter to include over three hundred different employee groups. See First City Bank v. National Credit Union Admin., 111 F.3d 433 (6th Cir. 1997). In doing so, the Sixth Circuit found that accepting the NCUA’s interpretation would make the common bond requirement meaningless. See id. Also, according to the NCUA, thousands of federal credit unions have relied on its interpretation of section 109 to allow unrelated occupational groups membership. See \textit{First Nat'l Bank & Trust}, 118 S. Ct. at 933.

\textsuperscript{76} See \textit{First Nat'l Bank & Trust} 118 S. Ct. at 938. The second issue addressed by the Court was whether banks, as competitors of credit unions, had standing to challenge the NCUA’s interpretation. See id. The Court held that the banks did in fact have standing because their interests were arguably within the “zone of interests” that the statute was enacted to protect. See id.; see also Benn G. Gurton, \textit{Bank/Credit Union Turf War Spills Over to the Supreme Court: Will the High Court Have the Final Say in this Heated Debate?}, 17 ANN. REV. BANKING L. 527 (1998) (discussing the standing issue).

\textsuperscript{77} See \textit{First Nat'l Bank & Trust}, 118 S. Ct. at 930.

\textsuperscript{78} Id. at 937. Interestingly, in her dissenting opinion, Justice O’Connor focused solely on the respondents’ lack of standing and failed to mention the clarity of congressional intent in section 109 or the NCUA’s interpretation of section 109. Her analysis leaves a question as to how she and the other dissenting Justices would rule on these additional aspects of the case. See id. at 940 (O’Connor, J., dissenting).
union must be united by one common bond.” 79 The NCUA replied that “because section 109 uses the plural noun ‘groups,’ it permits multiple groups, each with its own common bond, to constitute a federal credit union.” 80

Finding neither of these arguments particularly compelling, the Court explored three additional considerations in reaching its conclusion that the NCUA’s interpretation was impermissible. 81 First, the Court held that the NCUA’s interpretation makes the statutory phrase “common bond” merely surplus when applied to a federal credit union consisting of multiple employer groups because each group already has a common bond, namely employment with a particular employer. 82

Second, the Court held that the NCUA’s interpretation violated the established maxim of statutory construction that similar language within the same section of a statute must be given a consistent meaning. 83 Section 109 contains two parallel clauses that set up two potential types of credit union membership: “groups having a common bond of occupation or association” or “groups within a well-defined neighborhood, community or rural district.” 84 The Court held that the two parallel clauses must be read in the same way and concluded that “just as all members of a geographically defined federal credit union must be drawn from the same ‘neighborhood, community or rural district,’” to give the geographic limitation meaning, “members of an occupationally defined federal credit union must be united by the same ‘common bond of occupation.’” 85

The final reason given by the Court for finding the NCUA’s interpretation impermissible was that section 109, by its terms, requires that credit union membership “shall be limited.” 86 The Court

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79. Id. at 939 (quoting brief of respondents).
80. Id.
81. See id.
82. Id.; see Karl H. Llewellyn, Remarks of the Theory of Appellate Decisions and the Rules or Cannons about How Statutes are to be Construed, 3 VAND. L. REV. 395 (1950) (explaining general rules of statutory construction).
83. See First Nat’l Bank & Trust, 118 S. Ct. at 938; Llewellyn, supra note 82, at 395.
84. First Nat’l Bank & Trust, 118 S. Ct. at 938-39. The Court noted that the NCUA had never attempted to assert that a credit union could be composed of groups from various places. See id.
85. Id. at 940
86. Id.
noted that the NCUA’s current interpretation would allow for the
creation of a credit union with groups of employees from every
company in the country.\textsuperscript{87} The Court stated that if section 109 were
interpreted to permit such a “limitless” result, it was not in any form
acting as a limitation.\textsuperscript{88}

The Supreme Court determined the intent of Congress in § 109
to be that the members of each occupational federal credit union must
be united under a single common occupational bond.\textsuperscript{89} In reading over
section 109, the Court’s conclusion that Congress was clear in its
intent is not remarkable.\textsuperscript{90} Perhaps Justice Scalia said it best during
oral argument in this case when he stated that “any banker or, indeed,
any beer salesman, who read this language would come to the
conclusion that each member of the group had to have a common bond
with the others.”\textsuperscript{91} According to the NCUA, thousands of credit
unions relied on its interpretation of section 109 to allow federal credit
unions to be composed of multiple occupational groups since it was
first announced in 1982.\textsuperscript{92} To comply with the First National Bank &
Trust decision, federal credit unions composed of multiple
occupational groups would be forced to restructure their membership
or convert to thrift institutions.\textsuperscript{93}

IV. THE NEW LEGISLATION

The Supreme Court’s decision in First National Bank & Trust
was not the end of the line for federal credit unions with a field of
membership consisting of multiple employee groups.\textsuperscript{94} Just as

\begin{itemize}
\item \textsuperscript{87} See id. at 940.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} See id.
\item \textsuperscript{91} Oral Argument, First Nat’l Bank & Trust Co. v. National Credit Union Admin.
   (transcript), available in 1997 WL 611828; Kanjorski: Sign CU Legislation ASAP, AM.
\item \textsuperscript{92} See Organization and Operation of Federal Credit Unions 63 Fed. Reg. 71,998,
   72,000 (1998) (to be codified at 12 C.F.R. pt. 701). According to the NCUA, the ruling
   affected almost 4,000 multiple common bond credit unions serving approximately 160,000
   member groups. See id.
\item \textsuperscript{93} See id.
\item \textsuperscript{94} See Bill Introduced to Amend FCU Act, supra note 14, at 1. Concerned by the
   implications of this ruling on the future viability of occupational based federal credit
Congress passed the original FCUA in 1934, it has the power to amend the Act to define those eligible for credit union membership in any manner that it chooses.\textsuperscript{95} House Bill 1151, the Credit Union Membership Access Act, was initially introduced after the Court of Appeals for the District of Columbia Circuit held that the NCUA's interpretation of section 109 was impermissible.\textsuperscript{96} Congress quickly responded and passed the CUMAA on August 4, 1998, less than six months after the First National Bank & Trust decision.\textsuperscript{97} The bill passed with an overwhelming majority, 411 votes in the House, and 92 votes in the Senate.\textsuperscript{98} President Clinton signed the CUMAA into law on August 7, 1998, praising the bill for "ensur[ing] that customers continue to have a broad array of choices in financial services."\textsuperscript{99}

In essence, the CUMAA codified the NCUA's 1982 interpretation of section 109 by allowing federal credit unions to be composed of multiple employer groups.\textsuperscript{100} The original FCUA permitted federal credit union membership to consist only of "groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district."\textsuperscript{101} The CUMAA redefined the membership field of credit unions to include three possible categories: a group sharing a single common bond of association or occupation; multiple groups of persons sharing a common bond of association or occupation; or a group sharing a geographic or community bond.\textsuperscript{102}


\textsuperscript{99.} McElroy, supra note 10.


\textsuperscript{102.} See Credit Union Membership Access Act § 101, 112 Stat. at 913.
The Congressional Record in both the House and the Senate reflects the fact that providing customers with a choice in financial services was a major selling point of the bill.\textsuperscript{103} Those who spoke in favor of the CUMAA argued that it not only provides choice in financial services but it also enables access to financial services for low income earners who would otherwise be unable to obtain financial services.\textsuperscript{104} The Office of Management and Budget (OMB) report, confirming that the legislation would have no net budget effect, also proved influential.\textsuperscript{105} The report indicated that Congress would be able to provide expanded choice in financial services to Americans without additional cost.\textsuperscript{106}

By providing for multiple common bond credit unions, Congress attempted to make credit union access available to groups too small in number or without the necessary resources to organize their own credit union.\textsuperscript{107} Consistent with this objective, Congress limited multiple common bond credit union membership to employee groups having less than three thousand employees.\textsuperscript{108} This limit, however, is not absolute. Congress empowered the NCUA to exempt certain groups from this numerical limitation if the NCUA determines that the group "could not feasibly or reasonably establish a new single

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\textsuperscript{104} See S. REP. No. 105-193; H.R. REP. No. 105-472. Many of those opposed to the CUMAA marvel at the fact that the credit union lobbyists were able to keep the debate over taxation of credit unions off the agenda. See Elizabeth R. Schlitz, Credit Union Lobbyists' Show Kept Big Issues Offscreen, AM. BANKER, August 19, 1998, at 3.
\textsuperscript{105} See 144 CONG. REC. E1333-02 (Statement of Rep. Kanjorski). Bankers argue, however, that the government's revenue will be affected by the CUMAA because customers of the tax-paying banks will move to credit unions, which can offer lower rates because they are tax exempt. See Pamela Atkins & Alex D. McElroy, CBO Budget Scoring of Credit Union Bill Estimates Revenue Loss of $217 Million, BNA BANKING DAILY, June 4, 1998, at 5, available in LEXIS, BNA Library, Bnabd File. The OMB does not consider such indirect results as customer shifting when determining the budget effects of legislation, so it appears unclear whether this legislation will impact the budget. See 144 CONG. REC. E1333 (Statement of Rep. Kanjorski including OMB report).
\textsuperscript{106} See 144 CONG. REC. E1333 (Statement of Rep. Kanjorski).
\textsuperscript{107} See S. REP. No. 105-193; H.R. REP. No. 105-472; 114 CONG. REC. H1868, 1877 (daily ed. July 28, 1998) (House discussion and passage of the CUMAA); 114 CONG. REC. S9089, 9095 (daily ed. April 1, 1998) (Senate discussion and passage of the CUMAA).
\textsuperscript{108} S. REP. No. 105-193 at 6; H.R. REP. No. 105-472 at 20. The Senate Report indicates that the 3,000-member limitation applies only at the time of initial inclusion in the credit union. See id. It is not to be read to preclude the inclusion of additional employees as the member business grows after joining the credit union. See id.
\end{flushleft}
common-bond credit union" for one of three reasons. The three reasons include a lack of sufficient volunteers and resources to support efficient and effective operation, a failure to meet criteria necessary for success in establishing and managing a credit union (such as geographic location of members, diversity of age and income, etc.), or a determination that the group would be unlikely to operate a safe and sound credit union.

The new legislation appears to give the NCUA a certain degree of latitude in deciding whether to approve a charter for a multiple group federal credit union or an application to add an additional employee group to an occupational credit union charter. Congress, however, made it clear that the NCUA is to “encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union.” It is only when the chartering of a separate federal credit union is not practical or consistent with standards of safety and soundness that an additional group should be allowed to join the membership of an existing credit union.

The CUMAA requires all multiple common bond credit unions to apply to the NCUA each time they want to add an additional group. Before an additional group can join a credit union, the NCUA is required to determine that the credit union has not engaged in any material unsafe or unsound practice in the year preceding the application, that it is adequately capitalized, that it has the administrative capacity and resources to adequately serve the new members, that any potential harm to another existing credit union is “clearly outweighed” by the benefit of providing for the additional group, and that the group meets any additional NCUA requirements.

110. See id. An exception was also created for groups transferred to another credit union for supervisory reasons. See id. Yet another exception exists for those groups approved for transfer by the NCUA prior to October 1996. See id.
111. See Credit Union Membership Access Act § 102, 112 Stat. at 917.
112. Id.; S. REP. No. 105-193.
113. See Credit Union Membership Access Act § 102, 112 Stat. at 917.
114. See id.
115. Id.
There is also a requirement that the existing credit union be within a "reasonable proximity to the location of the group." 116

In addition to redefining the potential membership fields of federal credit unions, the CUMAA grandfathers all members and groups of federal credit unions that were permitted to join a federal credit union by the NCUA prior to October 1996. 117 This means that anyone who was a member of a federal credit union as of the date of enactment of the CUMAA can remain a member, regardless of whether the member would be eligible to join the credit union under the new CUMAA requirements. 118 It also means that any person who is a member of one of the groups belonging to a federal credit union as of the date of enactment is eligible to become a member of that credit union. 119 This seems to indicate that in the case of the ATTF, anyone who was originally a member may continue to be such, and any employees of the groups making up the credit union as of the enactment of the Credit Union Membership Access Act are eligible for membership. 120

The CUMAA also specifically provides for the tax-exempt status that credit unions have enjoyed since their formation. 121 The tax exemption provided for in the original FCUA was intended to be a way to subsidy to people who had no other reasonable opportunities to obtain credit. 122 Under section 2(4) of the CUMAA, credit unions are allowed to retain their tax exempt status based upon the rationale that "they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means." 123 Today, however, a large number of credit unions do not seem to serve the people of "small mean" they were chartered to provide for. 124 For

116. Id.
117. See id. § 101, 112 Stat. at 915.
118. See id.
119. See id.
120. See id.
121. See id. § 403, 112 Stat. at 935.
122. See 78 CONG. REC. 12,218 (1934); 78 CONG. REC. 7259 (1934); Credit Union Membership Rules, supra note 21, at 43 (testimony of R. Scott Jones, American Bankers Association).
123. Credit Union Membership Access Act, 112 Stat. at 913.
124. Credit Union Membership Rules, supra note 21, at 43 (testimony of R. Scott
example, the Harlem Globetrotters, the California Angels baseball club, and Playboy Enterprises, Inc. are all members of the First Entertainment Federal Credit Union that enjoys tax exempt status.\textsuperscript{125} Serving such people seems to conflict with the congressional intent to provided for people of "small means."\textsuperscript{126} The banks have argued all along that credit unions should not be given preferential treatment and should be restricted to serving people of "small means," subsidizing those who really need it, in keeping with the original goal of the FCUA; or in the alternative that they should be taxed like any other financial institution.\textsuperscript{127}

For the present, the CUMAA allows the credit unions to retain their tax-exempt status.\textsuperscript{128} As part of the Act, however, Congress has ordered the Treasury to conduct a study on the differences between credit unions and other financial institutions as well as the potential effects of applying the same federal laws that govern other financial institutions to the credit unions.\textsuperscript{129} The Secretary of the Treasury’s report, which must be presented to Congress within a year of the enactment of the CUMAA, could significantly impact Congressional treatment of the credit unions’ tax status.\textsuperscript{130}

After the CUMAA passed, the NCUA issued a proposed rule that would revise its policies to be consistent with the Act.\textsuperscript{131} The proposed rule was published in the Federal Register on September 14,
The NCUA received three hundred and sixty-nine comments on its proposed rule during the sixty-day comment period. After consideration of the comments, the NCUA issued its final rule that went into effect January 1, 1999 with the exception of certain portions that require additional approval of Congress.

The final rule does not differ substantially from either the proposed rule or the CUMAA either in its language or its provisions concerning multiple common bond membership fields. The rule offers a slightly more precise definition of a multiple common bond credit as one “chartered to serve a combination of distinct, definable, occupational and/or associational common bonds.” It also clarifies the CUMAA’s geographic location of prospective members requirement. Before being eligible to join a federal credit union, the CUMAA requires all prospective member groups to be within a reasonable proximity of a service facility of the credit union. The NCUA’s rule delineates what constitutes a service facility as those that disburse funds, accept shares, make deposits, and accept loan applications. The rule specifically excludes ATM machines from the definition of a service facility.

The rule lists the five criteria set forth in the CUMAA as the requirements a credit union must satisfy before being allowed to add additional groups of less than three thousand to its membership. Under the provisions of the NCUA’s final rule, a potential membership of three thousand or greater will require the formation of

132. See id.
133. See Organization and Operation of Federal Credit Unions, 63 Fed. Reg. at 71,998. Among those commenting were federal credit unions, state credit unions, state credit union leagues, national credit union trade associations, congressional representatives, banks, bank trade associations, credit union members, law firms, and several others. See id.
134. See id. Under section 205 of the CUMAA, the definitions of “local community, neighborhood or rural district” and “immediate family member or household” must be approved by Congress under the major rule provisions. Id. These definitions, if approved, would take effect on March 5, 1999. See id.
135. See id.
136. Id. at § IV.A.1.
137. See id.
138. See id.
140. See id.
a new credit union unless the NCUA finds extenuating circumstances that would make it impractical or unfeasible to do so.\textsuperscript{142} To be eligible to join an already existing credit union, the group must satisfy the NCUA's interpretation of five statutory criteria.\textsuperscript{143}

To meet the first criterion, a credit union seeking to add another group to its membership must prove that it did not engage in any materially unsafe practice within the last year preceding the application.\textsuperscript{144} Materially unsafe practice is defined as any action or lack thereof which would result in abnormal risk or loss to the credit union or its members.\textsuperscript{145} The second criterion requires that the credit union be "adequately capitalized," defined as 6% of net worth for credit unions chartered for more than ten years, and case-by-case consideration for those chartered for less than ten years.\textsuperscript{146} Third, the credit union must demonstrate that it has the administrative ability and financial resources to serve the group.\textsuperscript{147} To satisfy the fourth criterion, the credit union must prove "that any potential harm the expansion may have on other credit unions is clearly outweighed by the probable beneficial effect of the expansion."\textsuperscript{148} The NCUA indicated that based on a study it recently conducted, overlaps generally do not adversely affect the credit unions involved, and as such, in most cases the NCUA would find that the convenience of the members clearly outweighed the potential harm.\textsuperscript{149} Finally, before permitting a credit union to add a group to its membership, the NCUA has to determine whether the formation of a separate credit union is practical and economically feasible.\textsuperscript{150}

The CUMAA requires the NCUA to encourage the formation of separate credit unions whenever possible.\textsuperscript{151} The provisions of the final rule seem to indicate that for groups of less than three thousand,

\begin{footnotesize}
\begin{enumerate}
\item \textit{See} Organization and Operation of Federal Credit Unions 63 Fed. Reg. at 72,000.
\item \textit{See} id. at 72,009.
\item \textit{See} id.
\item \textit{See} id
\item \textit{Id.}
\item \textit{Id. at} 72,010.
\item \textit{Id.}
\item \textit{See} id
\item \textit{See} id.
\item \textit{See} id.
\item \textit{See Credit Union Membership Access Act \S 102(f)(1)(A), 112 Stat. 913 (1998).}
\end{enumerate}
\end{footnotesize}
formation of a new group will rarely be possible. Under the CUMAA, groups with greater than three thousand members are generally not eligible to join multiple common bond credit unions. While the NCUA has discretion under the CUMAA to permit a group over three thousand to join an existing credit union, the final rule makes it clear that it prefers the formation of a separate credit union, unless it is simply not practical or economically feasible.

V. THE AFTERMATH OF THE FINAL RULE

A. The ABA Files a New Lawsuit

After the publication of the final rule, the ABA filed suit against the NCUA in the District Court for the District of Columbia challenging the new rule and asking for an injunction that would prohibit the NCUA from approving any membership expansions until there is a ruling in the case. The ABA argues that the rule is too favorable toward large credit unions and that it violates several limitations imposed by the FCUA. According to the ABA, by being forced to compete with credit unions that are unlawfully expanding their membership and subject to relaxed regulations, banks are being unjustly harmed. The credit unions responded to the filing of the

152. See Organization and Operation of Federal Credit Unions 63 Fed. Reg. at 72,000. NCUA Chairman Norman D'Amours cited this requirement as the reason for dissenting from the adoption of the final rule. See Eileen Canning, Credit Union Regulator Approves Final Rule on Chartering, Field of Membership Manual, 72 Banking Rep. (BNA) 26 (Jan. 4, 1999). He believes that the practical and economically feasible requirement that groups of less than three thousand must meet to create a new credit union discriminates against smaller credit unions while encouraging already existing credit unions to grow larger. See id.


154. See Organization and Operation of Federal Credit Unions 63 Fed. Reg. at 72,000.

155. See Complaint for Declaratory and Injunctive Relief, (D.D.C. 1999) (case number unavailable at press time) (on file with the University of North Carolina School of Law Banking Institute); see also Ali Sartipzadeh, Bankers To Sue Credit Unions Over NCUA's Field of Membership Rules, 72 Banking Rep. (BNA) 73 (Jan. 11 1999).

156. See id. The ABA alleges that the final rule violates several of the FCUA's limitations, including those on the formation of multiple common bond credit unions, on single common bond credit unions, on mergers of credit unions with different common bonds, and on eligibility for membership. See id.

157. See id.
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suit, which they claim has no merit and borders on harassment, by announcing to plans to fight the bankers “in the courts, in Congress, and in the general public arena.”

B. Policy debates arising from the new rule and pending litigation.

In the aftermath of the publication of the NCUA’s final rule, much of the criticism by both bank supporters and small credit unions has focused on the claim that the rule favors the large credit unions getting bigger at the expense of the smaller credit unions, and enjoying a tax subsidy in the process. The NCUA’s own chairman cited discrimination against smaller credit unions as his reason for dissenting from the final rule, and it is has been suggested that a more appropriate name for the CUMAA might be “the Credit Union Conglomerate Expansion Act of 1998.”

No longer are bankers the only ones upset with the NCUA’s activities, indeed, members of Congress have suggested that the NCUA’s final rule, which seems to favor expansion of larger credit unions contrary to Congressional intent, may cause the NCUA to come under much stricter scrutiny in the future.

The largest cause of disagreement, however, between the banks and the credit unions remains the tax exemption allowed all federal credit unions. The original legislative intent of the tax exemption was to provide credit opportunities for the people of small means, who prior to the passage of the FCUA, were forced to turn to loan sharks. Bankers argue that because credit unions’ membership

159. See Canning, Credit Union Regulator Approves Final Rule on Chartering, Field of Membership Manual, supra note 152, at 24; Eileen Canning, Senior House Banking Officials Speak Out Against Approval of New Credit Union Rule, 72 Banking Rep. (BNA) 25 (Jan. 4, 1999); Sartipzadeh, supra note 155, at d6.
160. See Canning, Credit Union Regulator Approves Final Rule on Chartering, Field of Membership Manual, supra note 152, at 24; Canning, Senior House Banking Officials Speak Out Against Approval of New Credit Union Rule, supra note 159, at d2.
161. See Canning, Senior House Banking Officials Speak Out Against Approval of New Credit Union Rule, supra note 159, at d2.
162. See id.
163. See 82 Cong. Rec. 358 (1937) (House discussion and passage of tax exemption amendment of the FCUA).
base is no longer limited to people of small means, they should not be allowed to retain their tax-exempt status, which they perceive as giving the credit unions an unfair competitive advantage. Credit unions counter by arguing that they do in fact provide for people of small means, and in addition, their non-profit status entitles them to the tax exemption.

VI. CONCLUSION

Within six months of the Supreme Court decision in First National Bank & Trust requiring a single common bond in occupational federal credit unions, Congress enacted the Credit Union Membership Access Act. The CUMAA essentially negates the Supreme Court’s decision. It does not, however, necessarily tarnish its validity concerning the NCUA’s interpretation of § 109. The NCUA seemed to have, indeed, overstepped its bounds in issuing its 1982 interpretation. The NCUA’s interpretation, however, was a positive step toward insuring the safety and soundness of credit unions, which are an important institution for many people of “small means.” Recognizing the validity of the NCUA’s position,

164. According to the ABA, the average household income for credit union members is $43,480 as opposed to the $31,660 average for non-members. See Credit Union Membership Rules, supra note 21, at 43 (testimony of R. Scott Jones, First Vice President, ABA).

165. See id; NCUA Field of Membership Proposal Misinterprets Congress’ Intent, Bankers Say, BNA BANKING DAILY, Nov. 18, 1998, at d2, available in LEXIS, BNA Library, Bnabd File. The banks also protest the credit unions exemption from CRA requirements; however, the credit unions counter that the new rule imposes CRA-like burdens on community credit unions. See Credit Union Membership Rules, supra note 21, at 43 (testimony of R. Scott Jones, First Vice President, ABA); Credit Union Groups Want More Flexibility; Bankers Say, Law Allows More Than Enough, BNA BANKING DAILY, Nov. 6, 1998, at d5, available in LEXIS, BNA Library, Bnabd File.

166. See Credit Union Membership Rules, supra note 21 (testimony of Norman E. D’Amours, Chairman, NCUA); see also DONALD J. MELVIN, THE FEDERAL INCOME TAX EXEMPTION OF CREDIT UNIONS (1981) (comparing credit unions to other non-profit organizations).


168. See Bill Introduced to Amend FCU Act, supra note 14, at 1.


170. See id.

171. Credit Union Membership Rules, supra note 21, at 11 (testimony of Norman E. D’Amours, Chairman, NCUA).
Congress chose to revise the original § 109 to provide for multiple employee groups in federal credit unions. The speed at which the bill flew through Congress, the bipartisan effort, the number of votes it received, as well as President Clinton's support seem to indicate that the banks are facing an uphill battle to try to restrict credit union membership.

While the banks have lost the common bond battle, they have not necessarily lost the war. Despite the fact that credit unions provide services identical to banks and are now able to extend services to a much larger population, they are able to enjoy a tax exempt status which enables them to pass savings on to their members through loans at lower rates and checking and savings accounts paying higher interest, while banks are forced to pay large amounts of federal income tax. As part of the CUMAA, Congress ordered a study of the differences between credit unions and banks as well as what the effect of taxation on credit unions would be. If the study proves what the bankers have said all along, namely that the credit unions provide the same services as banks to a population that no can no longer be described as "people of small means," it could spell the end


174. See Bill to Equalize Credit Unions Coming, supra note 127, at 1.

175. See Federal Credit Union Act, 12 U.S.C. § 1768 (1934) (exempting federal credit unions from taxation); Credit Union Membership Rules, supra note 21 (testimony of R. Scott Jones, American Bankers Association).

It seems logical that if credit unions want to operate in essentially the same fashion and serve the same population as banks, they should follow the same rules, or as James Culberson put it, "if it walks like a bank, and talks like a bank, it should pay taxes like a bank." 178

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177. See id.