United States District Court
For the Eastern District of Virginia

COALITION FOR CREDIT UNION CHARTER OPTIONS
500-5301 Wisconsin Avenue, N.W.
Washington, D.C. 20015

1:07cv667
CMH/TRJ

Plaintiff

v.

NATIONAL CREDIT UNION ADMINISTRATION
1775 Duke Street
Alexandria, Virginia 22314

Defendant

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Coalition for Credit Union Charter Options brings this action against the National Credit Union Administration under 5 U.S.C. §§701-706 for declaratory and injunctive relief and to compel compliance with the Credit Union Membership Access Act of 1998. As grounds for such complaint, the plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA) and the Credit Union Membership Access Act of 1998, 12 U.S.C. §1785 (CUMAA).

2. Judicial review is sought pursuant to the APA, which authorizes review of agency actions. 5 U.S.C. §§701-706.

3. This Court has federal question jurisdiction over this action under 28 U.S.C. § 1331, and may grant declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202.

4. Venue is proper in this District pursuant to 28 U.S.C. §1391(e).

PARTIES

5. Plaintiff Coalition for Credit Union Charter Options is an educational and advocacy group organized under the laws of the District of Columbia. Its membership consists of federally-insured credit unions that seek to preserve charter choice for credit unions under reasonable rules and at a reasonable cost.

6. Defendant National Credit Union Administration (NCUA) is an agency of the United States government. It is the creation of the Federal Credit Union Act, 12 U.S.C. §§1751 *et seq.* (the Act). It is headquartered at 1775 Duke Street, Alexandria, Virginia. Its role is to administer the Act by chartering and supervising federal credit unions. In addition, the NCUA also administers the National Credit Union Share Insurance Fund

(NCUSIF), an insurance program for depositors at both federally-chartered and state-chartered credit unions.

STATEMENT OF FACTS

7. The Congress passed CUMAA on August 7, 1998 (Pub.L. 105-219) and the legislation was codified as part of the National Credit Union Act at 12 U.S.C. 1751 *et seq.* Section 202(2) of CUMAA, codified at 12 U.S.C. §1785(b)(2), addressed congressional concerns that NCUA policy and regulations were hindering the ability of credit unions to change their charters and thereby exit the jurisdiction of the NCUA for a banking charter with insurance of accounts by the Federal Deposit Insurance Corporation (FDIC).

8. Unlike other types of federally insured depository institutions, credit unions are required to maintain a "Capitalization Deposit" equal to one percent of the insured deposits on account with the NCUSIF. The interest earned on these funds is used to offset the operating costs of the NCUA. 12 U.S.C. §1783(a). When a credit union leaves the NCUA (and the NCUSIF), the Capitalization Deposit is returned to the credit union. 12 U.S.C. §1782. For a credit union with $1 billion in insured deposits, this amount would be approximately $10 million, which then becomes an interest earning asset for the bank formerly chartered as a credit union.

9. In 1998, the Congress specifically repealed authority previously delegated to the NCUA to approve charter conversions and provided that, on a going forward basis, such conversions were permissible "without the prior approval of the Board." 12 U.S.C. §1785(b)(2)(A). The 1998 Act further provided a specific voting process while limiting

the role of the NCUA to "administering and verifying" the vote of the credit union members. 12 U.S.C. §1785(b)(2)(G)(ii).

10. Most importantly, the 1998 Act also provided that the NCUA's rules for charter conversions by insured federal credit unions were to be "consistent with rules promulgated by other federal regulators, including the Office of Thrift Supervision and the Comptroller of the Currency" and are to be "no more or less restrictive than that applicable to charter conversions by other financial institutions." 12 U.S.C. §1785(b)(2)(G)(i).

11. The initial rules promulgated by the NCUA under the 1998 Act met the congressional requirement for "consistency" with the charter conversion regulations of the Office of Thrift Supervision (OTS) and the Office of the Comptroller of the Currency (OCC). Interim Rule, 63 Federal Register 65532 (November 28, 1998), Final Rule, 64 Federal Register 28733 (May 27, 1999). This regulation remained in effect from 1998 until 2004.

12. Gradually, however, as the number and asset size of credit unions seeking to convert began to increase, the NCUA adopted a series of additional regulations making it increasingly more difficult and expensive for credit unions to convert their charter. For example, in 2004, the NCUA began requiring statements with negative connotations to be included in voting materials such as "the conversion from a credit union to a mutual savings bank could lead to members losing their ownership interests" and that directors or management officials may receive an "increase in compensation." 69 Federal Register 8548 (Feb. 25, 2004). The OTS and the OCC have no comparable disclosure

requirements for institutions seeking to leave their jurisdiction for another type of depository institution charter.

13. In 2005, the NCUA further amended its conversion regulations to require the verbatim inclusion of the following boxed disclosure in each written communication sent to credit union members during the conversion process:

> The National Credit Union Administration, the federal government agency that supervises credit unions, requires [insert name of credit union] to provide the following disclosures.
> 1. **OWNERSHIP AND CONTROL.** In a credit union, every member has an equal vote in the election of directors and other matters concerning ownership and control. In a mutual savings bank, **ACCOUNT HOLDERS WITH LARGER BALANCES USUALLY HAVE MORE VOTES AND, THUS, GREATER CONTROL.**
> 2. **EXPENSES AND THEIR EFFECT ON RATES AND SERVICES.** Most credit union directors and committee members serve on a volunteer basis. Directors of a mutual savings bank are compensated. Credit unions are exempt from federal tax and most state taxes. Mutual savings banks pay taxes, including federal income tax. If [insert name of credit union] converts to a mutual savings bank, these **ADDITIONAL EXPENSES MAY CONTRIBUTE TO LOWER SAVINGS RATES, HIGHER LOAN RATES, OR ADDITIONAL FEES FOR SERVICES.**
> 3. **SUBSEQUENT CONVERSION TO STOCK INSTITUTION.** Conversion to a mutual savings bank is often the first step in a two-step process to convert to a stock-issuing bank or holding company. In a typical conversion to the stock form of ownership, the **EXECUTIVES OF THE INSTITUTION PROFIT BY OBTAINING STOCK FAR IN EXCESS OF THAT AVAILABLE TO THE INSTITUTION'S MEMBERS.**
> 4. **COSTS OF CONVERSION.** The costs of converting a credit union to a mutual savings bank are paid from the credit union's current and accumulated earnings. Because accumulated earnings are capital and represent members' ownership interests in a credit union, the conversion costs reduce members' ownership interests. As of [insert date], [insert name of credit union] estimates **THE CONVERSION WILL COST [INSERT DOLLAR AMOUNT] IN TOTAL.** That total amount is further broken down as follows: [itemize the costs of all expenses related to the conversion including printing fees, postage fees, advertising, consulting and professional fees, legal fees, staff time, the cost of holding a special meeting, conducting the vote, and any other expenses incurred].

70 Federal Register 4005 (Jan. 28, 2005). There is no boxed disclosure requirement in the charter conversion regulations of the other federal regulators, let alone mandated verbiage, to the point of setting rules on font size, capitalization and bolding for conversion related notices.

14. This boxed disclosure language, which the OTS has termed "potentially misleading,"[1] amounts to the re-imposition of a requirement contained in the NCUA conversion regulations prior to 1998 and which was properly removed by the NCUA for a period of five years after the enactment of CUMAA.

15. In 2006, the NCUA amended its conversion regulations for a third time to add the following features which, once again, have no counterpart in the comparable

[1] OTS Order 2005-23, June 29, 2005.

regulations of the OTS and OCC: (1) advance publication of the Board of Directors' intent to vote on a proposal to convert; (2) establishment of a means for member-to-member communication regarding the proposed conversion; (3) individually signed Board of Director certifications in support of the conversion; (4) balloting limitations and (5) prohibitions on certain statements and information not previously approved by the NCUA.

16. The 2006 regulations modified but continue the requirement of boxed disclosure language containing highly prejudicial and inaccurate information as follows:

> **IMPORTANT REGULATORY DISCLOSURE ABOUT YOUR VOTE**
>
> The National Credit Union Administration, the federal government agency that supervises credit unions, requires [insert name of credit union] to provide the following disclosures:
>
> 1. LOSS OF CREDIT UNION MEMBERSHIP. A vote "FOR" the proposed conversion means you want your credit union to become a mutual savings bank. A vote "AGAINST" the proposed conversion means you want your credit union to remain a credit union.
> 2. RATES ON LOANS AND SAVINGS. If your credit union converts to a bank, you may experience changes in your loan and savings rates. Available historic data indicates that, for most loan products, credit unions on average charge lower rates than banks. For most savings products, credit unions on average pay higher rates than banks.
> 3. POTENTIAL PROFITS BY OFFICERS AND DIRECTORS. Conversion to a mutual savings bank is often the first step in a two-step process to convert to a stock-issuing bank or holding company structure. In such a scenario, the officers and directors of the institution often profit by obtaining stock in excess of that available to other members.

71 Federal Register 77157, 12 CFR 708a.4. There is no mandatory boxed disclosure language requirements in the charter conversion regulations of the other federal financial regulators for conversion related notices.

FIRST CAUSE OF ACTION
(FACIAL CHALLENGE)

17. Plaintiff reasserts and incorporates herein the allegations set forth in paragraphs 1 through 16.

18. The adoption of charter conversion rules by the NCUA in 2004 (69 Federal Register 8548, February 25, 2004), in 2005 (70 Federal Register 4005, January 28, 2005) and in 2006 (71 Federal Register 77150, December 22, 2006) are all final agency actions.

19. As a result of the amendments set forth in the above paragraph, the NCUA charter conversion regulations are now 20 times longer, manifestly inconsistent with and indisputably more restrictive than the rules promulgated by other financial regulators, specifically including the OTS and OCC.

20. The regulations added in 2004, 2005 and 2006 are without legal basis and, in fact, represent a less than subtle effort by the NCUA to subvert the will of the Congress as expressed in CUMAA and to deprive Plaintiff's members of their statutory and constitutional rights.

21. Plaintiff's member credit unions and their depositors are and have been harmed by the illegal interference of the NCUA in the right of credit unions and their depositors to convert to a mutual savings bank or other type of depository institution charter as expressly authorized by statute. These illegal regulations have made charter conversions more expensive to undertake and more difficult to complete.

22. Such a result is contrary to the goal of the original National Credit Union Act of protecting the financial integrity and economic stability of institutions entrusted with the safekeeping of depositors' funds. The enforcement of such restrictive conversion regulations by NCUA imposes a significant burden on the ability of Plaintiff's members to compete in a continually changing and increasingly competitive financial marketplace.

SECOND CAUSE OF ACTION
(ARBITRARY AND CAPRICIOUS AGENCY ACTION)

23. Plaintiff reasserts and incorporates herein the allegations set forth in paragraphs 1 through 22.

24. The adoption of charter conversion rules by the NCUA in 2004 (69 Federal Register 8548, February 25, 2004), in 2005 (70 Federal Register 4005, January 28, 2005) and in 2006 (71 Federal Register 77150, December 22, 2006) are all final agency actions.

25. The rules promulgated in 2004, 2005 and 2006 lack any factual basis to justify a departure from the rules in effect from 1998 until 2004. For example, the stated basis for the 2004 changes, as proposed in 2003, was that "There are increasing indications that a high percentage of credit unions that convert to mutual savings banks have or will undertake a second conversion to become a stock institution." (68 Federal Register 56590, October 1, 2003). This statement is without factual support in the administrative record.

26. The 2005 changes were justified on the basis that "NCUA has become concerned that many credit union members do not appreciate the effect a conversion may have on their ownership interests in the credit union." (70 Federal Register 4005, January 28, 2005). The administrative record is similarly silent as to the factual basis for this alleged concern.

27. The proposal for the 2006 changes cites two research studies[2] as the evidentiary basis for the purported differences in the loan and savings rates between credit unions and banks as utilized to justify the boxed disclosure language, but in the one instance the study was commissioned by the NCUA itself while the other study was commissioned and paid for by a national trade association for the credit union industry. There is no independent data in the administrative record for the general proposition that

[2] J. Heinrich and R. Kashian, "Credit Unions to Mutual Conversions: Do Rates Diverge?" and Datatrac "Comparison of Historical Rates: Credit Unions, Savings Banks and other Banks.

credit unions pay higher rates for savings and charge lower rates for loans than their bank competitors.

28. The absence of a factual record, let alone any attempt by the NCUA to correlate changed circumstances to the regulatory policies adopted in 2004, 2005 and 2006, represent an arbitrary and capricious exercise of administrative power by the NCUA.

THIRD CAUSE OF ACTION
(UNAUTHORIZED EXPANSION OF REGULATORY AUTHORITY)

29. Plaintiff reasserts and incorporates herein the allegations set forth in paragraphs 1 through 28.

30. The adoption of charter conversion rules by the NCUA in 2004 (69 Federal Register 8548, February 25, 2004), in 2005 (70 Federal Register 4005, January 28, 2005) and in 2006 (71 Federal Register 77150, December 22, 2006) are all final agency actions.

31. The conversion of mutual savings banks, formerly organized as credit unions, to stock-issuing companies falls within the federal jurisdiction of another regulator, the Office of Thrift Supervision within the department of the Treasury. 12 U.S.C. §1464(p). The OTS has in place a comprehensive regulatory scheme for this type of transaction. 12 CFR 563b.5-563b.690.

32. Neither CUMAA nor any other provision of the Act empowers the NCUA to govern the conversion of mutual savings banks to stock savings banks. That is a field fully occupied by another regulator, the OTS. (*Community Credit Union v. Nat'l Credit*

Union Administration, et al., No. CV-285 (E.D. Tex., 2005); Report and Recommendation of U.S. Magistrate Judge, p.12).

33. The charter conversion rules of 2004, 2005 and 2006, not only exceed NCUA's statutory authority, they trespass into a regulatory area already fully occupied by the OTS.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court issue a Judgment declaring the following:

(1) The NCUA has violated 12 U.S.C. §1785(b)(2)(G)(i) by promulgating rules that are inconsistent with rules promulgated by other financial regulators including the OTS and OCC.

(2) The NCUA has violated 12 U.S.C. §1785(b)(2)(G)(i) by promulgating rules that are more restrictive than the rules promulgated by other federal regulators including the OTS and OCC.

(3) The actions of the NCUA in promulgating additional charter conversion regulations promulgated in 2004, 2005 and 2006 are null and void.

(4) The NCUA is to immediately cease enforcement of said regulations.

(5) The NCUA is barred from all references to mutual-to-stock conversions of savings institutions in its future regulatory initiatives.

(6) Plaintiff is awarded its costs, reasonable attorney's fees and other disbursements in this action, and

(7) Such other and further relief as may be just and proper.

DATED this 11th day of July, 2007

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By /s/ Dennis M. Hart (24655)

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

COALITION FOR CREDIT UNION CHARTER OPTIONS,	)	
Plaintiff,	)	CIVIL ACTION NO. 1:07-cv-667 (CMH/TRJ)
v.	)	
NATIONAL CREDIT UNION ADMINISTRATION,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

Defendant National Credit Union Administration moves this Honorable Court pursuant to Federal Rule of Civil Procedure 12(b)(1) for an Order dismissing plaintiff's complaint on the grounds that (1) plaintiff's challenge to the validity of the prior versions of the regulations is moot, and (2) plaintiff lacks standing to challenge any of the regulation, including the most recent version of the conversion regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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

COALITION FOR CREDIT UNION CHARTER OPTIONS,	)	
Plaintiff,	)	CIVIL ACTION NO. 1:07-cv-667 (CMH/TRJ)
v.	)	
NATIONAL CREDIT UNION ADMINISTRATION,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

The National Credit Union Administration ("NCUA") is charged with the authority to oversee and regulate federally-chartered and federally-insured, state-chartered credit unions. This authority includes the administration of the conversion process when a federally-insured credit union wishes to convert to a mutual savings bank. 12 U.S.C. § 1785(b)(2)(G)(ii). Pursuant to that authority, the NCUA has issued regulations designed to ensure that the members of a credit union have sufficient information prior to voting on whether to approve the proposed conversion. 12 C.F.R. Part 708a.

In this action, plaintiff Coalition for Credit Union Charter Options ("CCUCO") challenges the current regulations, which were issued in 2006, as well as the two prior versions of the regulations issued in 2004 and 2005. CCUCO claims that the regulations (1) violate 12 U.S.C. § 1785(b)(2)(G)(i), which requires that the rules be "consistent with rules promulgated by

other financial regulators" and are "no more or less restrictive than that applicable to charter conversions of other financial institutions;" (2) are arbitrary and capricious; and (3) infringe on the authority of another regulator, the Office of Thrift Supervision.

These claims should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction. First, CCUCO's challenge to the validity of the prior versions of the regulations is moot. The current regulations substantially amended and superseded the prior regulations. Accordingly, any claims that CCUCO has with respect to the prior versions of the regulations no longer present a live case or controversy. Second, CCUCO lacks standing to challenge any of the regulations, including the most recent version. While CCUCO alleges that "its membership consists of federally-insured credit unions that seek to preserve charter choice for credit unions under reasonable rules at a reasonable cost," Complaint, ¶ 5,[1] it has not alleged that any of its members have any immediate plans to convert to a mutual savings bank. Moreover, even if it could show that one of its members had an imminent plan to convert to a mutual savings bank, CCUCO still

[1] The above-quoted language is taken from plaintiff's Complaint dated July 11, 2007, which was filed with the Court. Curiously, the version of the Complaint that was served on the United States Attorney's Office is dated July 10, 2007 and contains different language in paragraph 5. The typed language of the served Complaint stated that CCUCO's "membership *is composed of* current *and former* federally-insured credit unions that seek to preserve charter choice for credit unions under reasonable rules and at a reasonable cost." Complaint dated 7/10/07, ¶ 5 (attached as Exhibit A) (emphasis added). Some of this typed language is crossed out by hand and is amended by hand to state CCUCO's "membership *includes current* federally-insured credit unions that seek to preserve charter choice for credit unions under reasonable rules and at a reasonable cost." Id. (emphasis added). The formulations of CCUCO's membership in the served Complaint appear to be more consistent with other public statements made by CCUCO than the formulation used in the Complaint filed with this Court. See Statement of Lee Bettis, Executive Director of CCUCO, Hearing before the House Committee on Financial Institutions and Consumer Credit (May 11, 2006) (attached as Exhibit B). For purposes of this motion, however, the Court need not resolve the factual question of who actually comprises CCUCO's membership.

has not made the prerequisite showing of injury. While CCUCO alleges that the challenged regulations "have made charter conversions more expensive to undertake and more difficult to complete" (Complaint, ¶ 21), it has not alleged any facts purporting to demonstrate this injury. Nor has it linked this alleged injury to any particular regulation. Thus, it has not made the prerequisite showing that any of its members will suffer any imminent injury as a result of the regulations.

Accordingly, this Court should dismiss CCUCO's complaint for lack of jurisdiction.

STATUTORY AND REGULATORY BACKGROUND

A. The Federal Credit Union Act

In 1934, Congress enacted the Federal Credit Union Act ("FCUA"), 12 U.S.C. §§ 1751, et seq., which authorized the chartering and incorporation of federal credit unions. NCUA v. First National Bank & Trust Co., 522 U.S. 479, 483 (1998). Credit unions – whether federally or state-chartered – are nonprofit cooperative associations or corporations organized for the purpose of promoting thrift among their members and providing a source of credit for productive purposes. 12 U.S.C. § 1752(1) & (6); American Bankers Association v. NCUA, 271 F.3d 262, 264 (D.C. Cir. 2001). Credit unions are member-owned with elected, volunteer Boards of Directors that are charged with managing the credit union. 12 U.S.C. § 1761.

The FCUA established the NCUA as an independent agency within the executive branch of the federal government. 12 U.S.C. § 1752a(a). The NCUA is under the management of the NCUA Board, which oversees the agency. Id. The agency operates on a decentralized basis through five regional offices located across the country. A Regional Director, who reports to the Board, manages each regional office. 12 C.F.R. § 790.2(a).

The NCUA may insure the accounts of state-chartered credit unions that apply and qualify for insurance coverage under the statute. 12 U.S.C. § 1781. The NCUA possesses broad authority to oversee the operations of these federally-insured, state chartered credit unions. See e.g., 12 U.S.C. §§ 1782, 1784-1787.

The FCUA provides that a federally-insured credit union may convert to a mutual savings bank,[2] as that term is defined by the Federal Deposit Insurance Act.[3] 12 U.S.C. § 1785(b)(2)(A). In order to facilitate such a conversion, a majority of the directors of the insured credit union must first approve the conversion and set a date for a vote by the members. 12 U.S.C. § 1785(b)(2)(B). The insured credit union that proposes to convert to a mutual savings bank must submit three notices at 30-day intervals to each of its members who is eligible to vote regarding the intent to convert. The notices must be sent 90 days, 60 days, and 30 days before the scheduled member vote on the conversion. 12 U.S.C. § 1785(b)(2)(c). No director or senior management official of the insured credit union may receive any economic benefit in connection with the conversion, other than director fees or other compensation or benefits paid in the ordinary course of business. 12 U.S.C. § 1785(b)(2)(F). Approval of a proposal for conversion requires an "affirmative vote of a majority of the members of the insured credit union who vote on the proposal." 12 U.S.C. § 1785(b)(2)(B).

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[2] The Credit Union Membership Access Act ("CUMAA"), enacted into law on August 7, 1998, amended the provisions of the FCUA concerning, *inter alia*, the conversion of insured credit unions to mutual savings banks. Pub. L. No. 105-21, § 202, 112 Stat. 913.

[3] The Federal Deposit Insurance Act defines a mutual savings bank as "a bank without capital stock transacting a savings bank business, the net earnings of which inure wholly to the benefit of its depositors after payment of obligations for any advances by its organizers." 12 U.S.C. § 1813(f).

The FCUA grants the NCUA significant authority over the conversion process for federally-insured credit unions. Specifically, while the FCUA provides that an insured credit union may convert to a mutual savings bank "without the prior approval of the [NCUA] Board, subject to the requirements and procedures set forth in the laws and regulations governing mutual savings banks," 12 U.S.C. § 1785(b)(2)(A), the FCUA charges the NCUA with the administration of the member vote of the charter conversion, which must then be verified by the federal or state regulatory agency that would have jurisdiction over the institution after the conversion. 12 U.S.C. § 1785(b)(2)(G)(ii). The FCUA also expressly provides the NCUA with the authority to disapprove the methods and procedures applicable to the member vote and to order a new vote. Id. As stated in the statute:

> [i]f either the [NCUA] or [the] regulatory agency [that would have jurisdiction over the institution after the conversion] disapproves of the methods by which the member vote was taken or procedures applicable to the member vote, the member vote shall be taken again, as directed by the [NCUA] or the agency.

Id.

The FCUA also grants the NCUA broad discretion to promulgate rules related to charter conversion. The statute states, in relevant part:

> [T]he [NCUA] shall promulgate final rules applicable to charter conversions described in this paragraph that are consistent with rules promulgated by other financial regulators, including the Office of Thrift Supervision and the Office of the Comptroller of the Currency. The rules required by this clause shall provide that charter conversion by an insured credit union shall be subject to regulation that is no more or less restrictive than that applicable to charter conversions by other financial institutions.

12 U.S.C. § 1785(b)(2)(G)(i).

B. NCUA's Regulatory Framework for Conversion of Insured Credit Unions to Mutual Savings Banks

Pursuant to the above authority, NCUA has promulgated regulations setting out the methods and procedures applicable to the member vote for such a conversion. See 12 C.F.R. Part 708a. In adopting these regulations, the NCUA has been guided by two concerns: (1) "that members are entitled to make an informed decision on the conversion proposal," and (2) "that they should be protected against the potential for self-dealing by credit union management and directors." 71 Fed. Reg. 36,946 (June 28, 2006). As the NCUA explained:

> the conversion from a credit union charter to a bank charter is a fundamental shift. The decision to convert belongs to the members. To make this decision, the members must be fully informed as to the reasons for the conversion and have time to consider the advantages and disadvantages of conversion.

71 Fed. Reg. 77,150 (December 22, 2006). This need for members to be "fully informed" is especially critical because under the FCUA, as amended by the CUMAA in 1998, approval of the conversion only requires an affirmative vote of the majority of the members which voted on the proposal, not a majority of all of its members. 12 U.S.C. § 1785(b)(2)(B). The NCUA has, therefore, continued to review its procedures. Based on this review and suggestions made by interested parties in its prior rulemakings, the NCUA has amended the regulations several times in order to improve the information available to credit union members and boards of directors. See 63 Fed. Reg. 65,532 (November 27, 1998); 64 Fed. Reg. 28,733 (May 27, 1999); 69 Fed. Reg. 8,548 (February 25, 2004); 70 Fed. Reg. 4,005 (January 28, 2005); 71 Fed. Reg. 77,150 (December 22, 2006).

The current regulatory scheme for a credit union that wishes to convert to a mutual

savings bank requires the credit union to take, *inter alia*, the following steps:

- Prior to voting on a proposal for conversion, the board of directors of a credit union must give advance notice to members of a conversion proposal and provide an opportunity for its members to share their views with directors before the board adopts the proposal. 12 C.F.R. § 708a.3.
- If the board of directors approves the conversion, the credit union must provide its members with written notice of its intent to convert, which has to adequately describe the purpose and subject matter of the conversion and include certain disclosures; the notice has to be submitted 90 days, 60 days, and 30 days before the date of the membership vote. Id. §§ 708a.4(a)-(c).
- It must include in each of these written communications specific "boxed disclosures" set forth in the regulations, although they may be modified with the prior consent of the Regional Director and the appropriate state regulatory agency; the boxed disclosures must be the only text on the front side of a single piece of paper and placed so that the member will see the text after reading the credit union's cover letter but before reading any other part of the member notice. Id. § 708a.4(d).
- The credit union must provide notice that a written ballot is included in the same envelope as the 30 day notice. Id. § 708a.4(b)(2). The regulations also provide for a format for the ballot to ensure that the member understands that a vote for the proposal means the credit union will become a bank while a vote against the proposal means that the credit union will remain a credit union. Id. § 709a.4(b)(4).
- Upon the request of a member, a credit union must disseminate information regarding the

proposal from the requester to other members at the requester's expense. Id. § 708a.4(f).

- A credit union must notify NCUA of its intent to convert during the 90-day period preceding the date of the membership vote on the conversion and include a copy of its member notice, ballot, and all other written materials the credit union provided or intended to provide to its members in connection with the conversion. Id. § 708a.5(a).
- *If it so chooses*, the credit union *may* submit these materials to NCUA prior to the 90-day period of the membership vote to allow NCUA to review the materials and make a preliminary determination regarding the methods and procedures applicable to the membership vote; if the NCUA disapproves of the procedures, it will notify the credit union within 30 days, but, in any event, the prior submission by the credit union does not relieve the credit union of its obligation to certify the results of the membership vote or affect the right of the NCUA to disapprove the actual methods and procedures. Id. § 708a.5(b).
- The credit union must allow its members to vote on the proposal to convert in person at a special meeting held on the date set for the vote or by written ballot filed by the members; the vote must be by secret ballot and conducted by an independent entity. Id. § 708a.6(c).
- The credit union must certify the results of the membership vote to NCUA within 10 days after the vote is taken and certify that the notice, ballot and other written materials provided to members were identical to those previously submitted during the 90-day conversion period or provide copies of any new or revised materials and an explanation of the reasons for the changes. Id. § 708a.7.

The regulations further provide that NCUA will review the methods and procedures

applicable to the membership vote. Id. § 708a.8(a). This review includes determining that "the notice and other communications to members is accurate, not misleading, and timely" and that "the membership vote was conducted in a fair and legal manner." Id. If NCUA disapproves the vote, it may direct that a new vote be taken. Id. § 708a.7(b). In addition, the regulation provides that the federal or state regulatory agency that will have jurisdiction over the financial institution after conversion must verify the membership vote and may direct a new vote, if it disapproves of the methods and procedures relating to the vote. Id. § 708a.9.

ARGUMENT

I. PLAINTIFF'S CHALLENGES TO THE PRIOR VERSIONS OF THE REGULATIONS SHOULD BE DISMISSED ON MOOTNESS GROUNDS

Article III of the Constitution limits the federal courts to the resolution of live "cases" and "controversies." U.S. Const., art. III, § 2. This limitation prohibits the court from considering a claim "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). As the Supreme Court has recognized, where a defendant has amended its regulations, "the issue of the validity of the old regulations is moot." Princeton University v. Schmid, 455 U.S. 100, 103 (1982). Accord Gulf of Maine Fishermen's Alliance v. Daley, 292 F.3d 84, 88 (1st Cir. 2002); Disabled in Action of Baltimore v. Bridwell, 820 F.2d 1219 (4th Cir. 1987) (table), 1987 WL 36137; National Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm'n, 680 F.2d 810, 813-15 (D.C. Cir. 1982); Center for Auto Safety v. Dole, 595 F. Supp. 98, 99-100 (D.D.C. 1984). See also Phillips v. McLaughlin, 854 F.2d 673, 677 (4th Cir. 1988) (new regulation superseding prior agency interpretation moots challenge to that interpretation).

In this case, CCUCO challenges not only the current regulations but also the prior versions of the regulations. Plaintiff's challenges to the 2004 and 2005 versions of the regulations are moot because those regulations are no longer in effect. They have been superseded by the regulations issued by NCUA in 2006. The new regulations substantially amended the previous regulations. For example, while the 2005 regulations also had required "boxed disclosures," the 2006 rulemaking amended the 2005 provisions in several ways. First, the NCUA changed the disclosure language. Compare 12 C.F.R. § 708a.4(e) (2005) with 12 C.F.R. § 708a.4(d)(1) (2007). Second, the NCUA changed the requirements regarding when the boxed disclosures must be included in communications. While the 2005 regulations required that the boxed disclosures be contained "with each written communication [the credit union] sends to its members," 12 C.F.R. § 708a.4(e) (2005), the current regulations only require that the disclosures be delivered with the 90-, 60-, and 30-day member notices. 12 C.F.R. § 708a.4(d)(1) (2007). Third, the NCUA modified the requirements on the format and placement of the notices. Instead of requiring a particular font size and format for the disclosure, 12 C.F.R. § 708.4(e) (2005), the current regulations focus on placement of the boxed disclosure in the notice. 12 C.F.R. § 708a.4(d)(2) (2007). Thus, any claims raised by plaintiffs regarding the earlier version of "boxed disclosures" are moot because those provisions are superseded by the current regulations.

Similarly, the 2006 rulemaking changed the requirements for providing a written ballot. Under the prior regulations, a ballot was required to be provided not less than 30 days before the date of the vote. 12 C.F.R. § 708a.4(b) (2005). Under the new regulations, the ballot may be sent only with the 30-day notice. 12 C.F.R. § 708a.4(b)(2) (2007). The new regulations also

added provisions on the format of the ballot to ensure that the members understood the ballot. 12 C.F.R. § 708a.4(b)(4) (2007). The new regulations also added provisions (1) requiring a converting credit union to give advance notice to members that its board intends to vote on a conversion proposal, 12 C.F.R. § 708a.3(a) (2007); (2) establishing a method for credit union members to share information with other credit union members, id. § 708a.4(f); and (3) modifying the voting guidelines to include information on the use of voting incentives such as raffles, id. § 708a. 13(d).[4] CCUCO's challenge to the validity of the prior versions of the regulations are, therefore, moot because they have been superseded by the new regulations.

II. PLAINTIFF LACKS STANDING TO CHALLENGE THE REGULATIONS

Article III's requirement of a live "case or controversy" also prohibits a court from considering an issue that a party has no standing to raise. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992); Diamond v. Charles, 476 U.S. 54, 61-62 (1986); Allen v. Wright, 468 U.S. 737, 750 (1984). To meet this standing requirement when, as here, a plaintiff is an organization that is suing on behalf of its members, the plaintiff must show that (1) its members would otherwise have standing to sue individually; (2) the interests at stake are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation

[4] The notice of the proposed rulemaking for the amended regulations was not limited to particular provisions of 12 C.F.R. Part 708a. See 71 Fed. Reg. 36946 (June 28, 2006). Instead, it set forth all of the provisions in their entirety. Id. at 36961-36966. Even where the new regulations retained some of the language of the prior provisions, the provisions were reorganized and renumbered. For example, the provision requiring the vote to be held at a special meeting or by written ballot, which was formerly at 12 C.F.R. § 708a.4(a) (2005), is now at 12 C.F.R. § 708a.6(c) (2007). Similarly, the paragraphs dealing with certification of the vote on conversion proposal, NCUA oversight, other regulatory oversight, completion of the conversion, limits on compensation for officials and voting guidelines were renumbered from 12 C.F.R. §§ 708a.6 - 708a.11 (2005) to 12 C.F.R. §§ 708a.7 - 708a.11 and 708a.13 (2007).

of individual members in the suit. Friends for Ferrell Parkway LLC v. Stasko, 282 F.3d 325, 320 (4th Cir. 2002) (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000))

In order to show that its members would have standing to sue as individuals, a plaintiff must show that: (1) its members have suffered an injury in fact; (2) the asserted injury in fact is fairly traceable to, or caused by, the challenged action of the defendant; and (3) it is likely rather than merely conjectural that the asserted injury will be redressed by a decision in the plaintiff's favor. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Allen, 468 U.S. at 751; Taubman Realty Group Ltd. v. Mineta, 320 F.3d 475, 480 (4th Cir. 2003). The plaintiff bears the burden of establishing standing through allegations that are capable of withstanding careful judicial examination. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990); Allen, 468 U.S. at 752; Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d at 320.

To meet the injury in fact requirement, a plaintiff's injury must be "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotation marks omitted); see also Allen, 468 U.S. at 751 (requiring "distinct and palpable" injury). Accordingly, the Supreme Court has "repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen, 468 U.S. at 754; Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 483 (1982) ("[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."). Instead, "'[t]he party who invokes the power [of judicial review] must be able to

show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" Lujan, 504 U.S. at 574 (emphasis added) (quoting Melon, 262 U.S. 447, 488-89 (1923)).

In Lujan, the Supreme Court found that environmental groups lacked standing to challenge Department of Interior's regulations regarding endangered species. Two members of the plaintiff organization submitted declarations alleging that they had traveled to Sri Lanka and intended "some day" to return and hope to see endangered species such an elephant and leopard. 504 U.S. at 563-64. The Supreme Court held that "[s]uch 'some day' intentions – without any description of concrete plans, or indeed even specifications of *when* the some day will be – do not support a finding of 'actual or imminent' injury that our cases require." Id. at 564. As the Court explained, '[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes – that the injury is '*certainly* impending.'" Id. 564 n.2 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). The Court found that "imminence" had been "stretched beyond the breaking point" when as in that case, "the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." Id. The Supreme Court warned that in such circumstances, courts must insist "that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." Id. Accord Animal Legal Defense Fund, Inc. v. Espy, 23 F.3d 496, 500 (D.C. Cir. 1994) (claim by psychobiologist that she will be required to engage in further animal research "at some undefined future time"

lacks standing to challenge regulations dealing with animal research).

In this case, like the plaintiff in Lujan, CCUCO has not made the required showing that any of its members are immediately in danger of sustaining any direct injury as a result of the challenged regulations. While CCUCO alleges that challenged regulations "have made charter conversions more expensive to undertake and more difficult to complete" (Complaint, ¶ 21), it does not allege that any of its members have any immediate plans to convert to a mutual savings bank or that the regulations would prevent them from doing so. Instead, CCUCO simply alleges that "[i]ts membership consists of federally-insured credit unions that seek to preserve charter choice for credit unions under reasonable rules and at a reasonable cost." Id. at ¶ 5. In short, CCUCO's credit union members are similar to the members of the environmental groups in Lujan. Just as the plaintiffs in Lujan sought to preserve their "options" to someday travel to see endangered species, the credit union members of CCUCO seek, in some vague and undefined way, to preserve their charter options. In fact, CCUCO's allegations are even weaker than they were in Lujan because CCUCO does not even allege that any of its credit union members in fact have any "some day" plans to convert to a mutual savings bank.

Moreover, even if CCUCO could show that one of its members has an imminent plan to convert, it has still not made the requisite showing of injury.[5] While CCUCO makes a generalized allegation that the challenged regulations "have made charter conversions more expensive to undertake and more difficult to complete" (Complaint, ¶ 21), it has not alleged any

[5] Cf. Bell Atlantic Corp. v. Twombly, __ U.S. __, 127 S.Ct. 1955, 1974 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim of relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed").

facts purporting to demonstrate this injury or linking this alleged injury to any particular aspect of the regulations. Such alleged injury is not readily apparent from the regulations. For example, while 12 C.F.R. § 708a.4(b)(4) sets forth a format for the ballot, this requirement does not impose any additional cost on the credit union since there is no dispute that a member must be provided a ballot. It is also hard to understand how this requirement can make the conversion more difficult to complete since the provision is merely designed to ensure that the members understand the vote.

Similarly, while the new regulations set forth a procedure for members to communicate their views to other members, 12 C.F.R. § 708a.4(f), this requirement does not impose any substantial cost to the credit union itself. The regulation requires that the member requesting to send material to other members "to reimburse the credit union for the reasonable expenses, excluding overhead, of mailing or e-mailing the materials and also provides the credit union with an appropriate advance payment." 12 C.F.R. § 708a.4(f)(1)(iv). It is also not clear how this provision makes conversion more difficult because this provision for member-to-member communication is a neutral requirement: a member can send a communication favoring or opposing the conversion.

Likewise, while CCUCO alleges that the "boxed disclosures" contain "highly prejudicial and inaccurate information" (Complaint, ¶ 16), it does not identify, in terms of specific facts, what statements in the boxed disclosure are inaccurate or prejudicial.[6] Furthermore, the "boxed

[6] The allegation that the disclosures are "inaccurate" and "prejudicial" are plaintiff's conclusions, not "facts." While courts must accept all precisely worded factual allegations as true, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236,

disclosures" do not impose any additional cost on the credit union because the regulations require that the disclosure be made in the 30-, 60- and 90-day communications which the credit union is already required by statute to send to its members, 12 U.S.C. § 1785(b)(2)(c). 12 C.F.R. § 708a.4(d). In short, CCUCO has simply made a generalized claim that the regulations make conversion more expensive and difficult without alleging any facts to support that generalized allegation or show how the regulations harm one of its members. Cf. Bell Atlantic Corp. v. Twombly, 127 S.Ct. at 1974.

Accordingly, because CCUCO has not made the necessary showing for this fundamental criterion for standing – an immediate and direct injury to itself or one of its members -- CCUCO's complaint should be dismissed for lack of jurisdiction.

CONCLUSION

For the above stated reasons, this Court should dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction.

Respectfully submitted,

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240 (2d Cir. 2002). Accord Young v. City of Mount Ranier, 236 F.3d 567, 577 (4th Cir. 2001).

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

COALITION FOR CREDIT UNION CHARTER OPTIONS Plaintiff v. NATIONAL CREDIT UNION ADMINISTRATION Defendant	)	Civil Action No. 1:07-cv-667 (CMH/TRJ)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Coalition for Credit Union Charter Options (CCUCO), by and through its counsel, submits this Memorandum of Law in opposition to Defendants' Motion to Dismiss.

Preliminary Statement

This lawsuit challenges the National Credit Union Administration's ("NCUA") regulations governing the conversion of federal credit unions to mutual savings banks. Plaintiff contends that the NCUA's conversion regulations are so onerous – they are 17 times as lengthy as those adopted by the other federal financial regulatory agencies – as to be facially inconsistent with the organic legislation's plain language mandating that the NCUA charter conversion regulations be consistent with other financial regulatory agencies. In essence, the NCUA is seeking to prevent further erosion of its membership base by adopting unduly burdensome and unlawful regulations.

In 1998, the Congress of the United States terminated the requirement that federally-insured credit unions applying to other federal financial regulators to become an FDIC-insured bank obtain the prior approval of the NCUA Board.[1] The 1998 legislation was in keeping with a core component of the U.S. banking system which places a premium on the ability of individual institutions to move freely among types of depository institution charters. The former Chairman of the Federal Reserve Board, Alan Greenspan, has noted, for example, that a bank's freedom to choose its regulator serves "as a constraint on arbitrary and capricious policies" in regulatory behavior.[2]

Concern over the NCUA's failure to abide by this principle of charter choice, the Congress went even further in 1998 to preclude the NCUA from reasserting itself as an obstacle to the conversion process by inserting additional statutory language requiring the NCUA's conversion regulations to track the comparable rules of the other federal financial regulators.[3]

Plaintiff brings this facial challenge to the current conversion rules, as cumulatively amended and expanded in 2004, 2005 and 2006, as now being in excess of the Agency's statutory authority. As a "purely legal" challenge by a coalition of credit unions subject to and currently operating under these unlawful rules, the Plaintiff has both standing and a reviewable claim which suffice to defeat the pending Motion to Dismiss.

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[1] Pub. L. No.105-21, §202(1), 112 Stat. 913 repealing the words "Except with the prior approval of the Board."

2 Alan Greenspan. Annual Meeting and Conference of State Bank Supervisors, Nashville, Tennessee (May 2, 1998)(http://www/federalreserve.gov/boarddocs/speeches/1998/19980502.htm).

[3] 12 USC 1785(G)(1).

Overview of Plaintiff's Opposition

This memorandum replies first to the Defendant's characterization of the Federal Credit Union Act (FCUA), 12 U.S.C. §§ 1751, *et seq.*, as amended by Section 202 of the Credit Union Membership Access Act of 1998 (CUMAA), Pub. L. No.105-21, §202, 112 Stat. 913. We next refute the contention that Plaintiff's objections to the 2004 and 2005 amendments to the NCUA regulations governing conversions from a credit union charter to a bank charter are moot by virtue of the adoption of supplemental amendments to the conversion regulations in 2006. The memorandum concludes by demonstrating that the Plaintiff has standing to sue.

Argument

I. Statutory Framework

Defendant's Memorandum in Support of the Motion to Dismiss (Def. Mem.) asserts that "[t]he Federal Credit Union Act grants the NCUA *significant authority* over the conversion process for federally insured credit unions." (Def. Mem., p.5, *emphasis added*). This assertion ignores both the plain language and the legislative context of Section 202 of the CUMAA which specifically repealed the NCUA's prior delegation of authority to approve conversions for reasons expressly related to the perceived abuse of such authority. In the words of Senator Richard Shelby, who on April 30, 1998, offered the amendment adding Section 202 to CUMAA:

> "This amendment would provide a more democratic process to the National Credit Union Administration, who currently, a lot of people think, hinders the consumer's right to choose the structure of his or her financial institution.[4]

[4] Senate Comm. on Banking, Housing & Urban Affairs, Transcript of H.R. 1151, The Credit Union Membership Access Act (April 30, 1998), p.6. (Exhibit A).

Defendant takes even greater liberty in stating that "[t]he FCUA also grants the NCUA *broad discretion* to promulgate rules related to charter conversion." (Def. Mem., p.5, *emphasis added*). In addition to abrogating the NCUA's authority to approve conversions, the Agency's limited remaining authority to administer and verify the voting process was significantly circumscribed by additional statutory language providing that:

> (G) Consistent rules – (i) In general. - Not later than 6 months after August 7, 1998, the Administration shall promulgate final rules applicable to charter conversions described in this paragraph that are *consistent* with rules promulgated by other financial regulators, including the Office of Thrift Supervision and the Office of the Comptroller of the Currency. The rules required by this clause shall provide that charter conversion by an insured credit union shall be subject to regulation that is *no more or less restrictive* than that applicable to charter conversions by other financial institutions. (*Emphasis added*)[5]

Thus, on a post-1998 basis, the NCUA has only limited, rather than significant, authority over charter conversions and such authority as it does possess is quite narrow because the NCUA is specifically prohibited by law from adopting additional regulations under Section 202 of CUMAA which go beyond the rules established by other federal financial regulators for institutions departing their regulatory jurisdiction. Exhibit B to this Memorandum, which sets forth the comparable charter conversion regulations of the Office of Thrift Supervision (OTS) and the Office of the Comptroller of the Currency (OCC), shows that the NCUA charter conversion rules are *17 times longer* than those the federal regulators demand of other types of converting depository institutions. The most important point to observe is that nowhere do the OTS and OCC conversion regulations seek to regulate the content of any shareholder or accountholder approval requirements

[5] 12 U.S.C. 1785(G).

and no such authority exits in the FCUA for the NCUA to do so.

II. Mootness

Defendant's argument that the Complaint's challenge to the 2004 and 2005 conversion rules are moot "because those regulations are no longer in effect" (Def. Mem., p.10) proceeds from the incorrect premise that the rulemaking issued on December 22, 2006 superseded the prior NCUA conversion regulations when in fact it was primarily supplemental thereto. For example, the Definitions Section of the 2006 regulation (§708a.1) contains six defined terms of which two are new and four are carried over identically from the 2004 and 2005 versions of the regulation. (69 FR 8548; 70 FR 4005; 71 FR 77149). By way of further example, the disclosure requirements set forth in Section 708a.4(c) were revised simply by adding the words "clear and conspicuous" to the prior rules:

> §708a.4(c)(1) A **clear and conspicuous** disclosure that the conversion from a credit union to a mutual savings bank could lead to members losing their ownership interests in the credit union if the mutual savings bank subsequently converts to a stock institution and the members do not become stockholders. [Language added in 2006 **bolded;** language carried over from 2004 and 2005 in regular type][6]

NCUA's own preamble to the *Federal Register* notice adopting the 2006 rules refers to the changes as "revisions" to its rules, which includes "revised disclosures" and "revised voting procedures" (71 FR 77150). In ordinary parlance, "revise" means to "alter something already written or printed, in order to make corrections, improve, or update" (*Dictionary.com* Unabridged (v.1.1)). Essentially, the 2006 revision retained the 1,500 words of the 2004 conversion regulations while adding a host of new requirements

[6] 69 FR 8548; 70 FR 4005; 71 FR 77149.

resulting in a current regulation consisting of 5,671 words.

The cases relied upon in Defendant's Memorandum (p.9) are factually distinct from the present lawsuit. In *Powell v. McCormack,* 395 U.S. 486 (1969), the complaint centered on the 90th Congress refusing to seat a duly elected member of Congress. By the time the case was heard, the 91st Congress was sitting and the Member in question had been reelected and seated. Thus, with an entirely new Congress, there was no controversy for the seating issue at the time of the lawsuit. Significantly, however, the Supreme Court did permit the plaintiff to proceed with his claim for back pay and concluded that the pay issue was not moot. In *Princeton University v. Schmid*, 455 U.S.100 (1982), the Supreme Court declined to hear an appeal case involving the constitutionality of a university regulation governing political activity on campus where the regulation had subsequently been revised and, importantly, the lower court had already overturned the arrest and conviction based on the prior regulation which initially gave rise to the case. Since the new regulations were not the subject of the court challenge, the Court ruled that the University *amicus* did not have standing.

The 4th Circuit case, *Disabled in Action of Baltimore v. Birdwell*, (1987 WL 36137) cited by the Defendant is likewise inapt since the regulations in that case were mooted by new regulations which the court describes as a "set of superseding regulations" which "fully replaced the 1981 regulations." (Id. WL *3) As noted, the NCUA regulations being challenged here were described by the NCUA as "revising" not "superseding" prior regulations.

Moreover, since the challenge here is facial to the authority of the Defendant to promulgate and enforce the charter conversion regulations, there is no

requirement for the Court to review facts unique for each of the years in question--a situation which the other cases cited by the Defendant rely upon to justify dismissal for mootness. Finally, the fact that there are multiple versions that may overlap or amend each other does not automatically preclude judicial review. *See, Allen, Allen, Allen & Allen v. Williams,* 254 F.Supp.2d 614 (E.D.Va. 2003)(rejecting mootness challenge even when Bar rules on advertising revised during litigation).

Even if we were to grant Defendant's largely semantic point, Plaintiff's Complaint still survives the mootness point since the Complaint clearly challenges the 2006 regulations (Count III) as well. In order to grant appropriate relief to Plaintiff on the merits, it is necessary for the Court to have all three sets of regulations fall within the review of the Court, since the mere voiding of the new requirements added in 2006, would leave the 2004 and 2005 regulations intact even though they are similarly *ultra vires* on the grounds that they exceed the NCUA's limited authority to oversee charter conversions.

III. Standing

A. Facial Challenge Standing

Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of a claim over which the court lacks subject matter jurisdiction. In reviewing a Rule 12(b)(1) motion based on lack of subject matter jurisdiction, the court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *White Tail Park. Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005)(*quoting Richmond, F. & P. R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). In its review, however, the court should grant the motion only if there is no genuine issue of material fact

relevant to jurisdiction, and if the moving party is entitled to prevail as a matter of law. *Richmond*, 945 F.2d at 768. The facts alleged in the complaint are assumed to be true for purposes of this particular Rule12(b)(1) challenge and the Plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

There are three requirements to meet the "irreducible constitutional minimum of standing." *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83,102 (1998). A plaintiff must show: "(1) he has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends for Ferrell Parkway v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002)(*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81(2000)). An organizational plaintiff, such as Plaintiff CCUCO "has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit.'" *Taubman Realty Group Ltd. P'ship v. Mineta*, 320 F.3d 475, 480 (4th Cir. 2003)(*quoting Friends for Ferrell Parkway*, 282 F.3d at 320).

Defendant argues that in the absence of an "imminent plan to convert" the credit unions subject to the NCUA conversion regulations can not make "the requisite showing of injury." (Def. Mem., p.14). However, to prove the requisite "injury in fact," a plaintiff need only show it (or one of its members) suffers "an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent."

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 154 (4th Cir. 2000) (*en banc*); *see also White Tail Park*, 413 F.3d at 458; *Dixon v. Edwards*, 290 F.3d 699, 711-12 (4th Cir. 2002). We agree that the injury cannot be "conjectural or hypothetical." *Friends for Ferrell Parkway*, 282 F.3d at 320; *Dixon v. Edwards,* 290 F.3d at 711 (*citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). Nevertheless, and most notably, the injury "required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

When, as here, the regulations are inherently illegal, i.e., a violation of an express congressional directive, there is no need to demonstrate or to consider the manner in which the NCUA has or may implement the regulations. This position was described in a recent D.C. Circuit decision, *Nat'l Ass'n. of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459 (DC Cir. 2006):

> All agree that the issues raised are "purely legal." "A purely legal claim in the context of a facial challenge, such as [Industry's] claim is presumptively reviewable."
>
> * * * * *
>
> The legality *vel non* of the two challenged features will not change from case to case or become clearer in a concrete setting.... Industry's objection is to the "*faithful* application" of the regulation, which Industry claims facially exceeds the agencies' statutory authority.... (464-465, citations omitted.)

Similarly, in *National Women, Infants, & Children Grocers Ass'n. v. Food & Nutrition Service,* 416 F.Supp. 2d 92, 101 n.2 (D.D.C. Feb.23, 2006), the Court held:

> Plaintiffs are challenging the legality of the interim rule by alleging that the rule falls short of the statutory mandate. Given the purely legal nature of the plaintiffs' challenge to the interim rule ... the issue is fit for judicial resolution and [the] claim is ripe for review.

Along the same lines, there are: *American Federation of Government Employees v. Rumsfeld*, 422 F. Supp. 2d. 16, 35 (D.D.C. Feb 27, 2006) (finding that because plaintiff labor organizations challenged Department of Defense regulations as exceeding the Department's statutory authority, the "purely legal nature of plaintiffs' facial challenge to the regulations" meant that the claims were ripe for review) and *Shays v. Federal Election Commission*, 424 F. Supp. 2d 100, 112 (D.D.C. Mar. 29, 2006) (finding that the plaintiffs' claim that an agency's failure to issue a certain campaign finance rule was arbitrary and capricious and was "legal" in nature).

In these situations, courts will also look to the question of hardship from a delay in judicial review. In general:

> The Court has found substantial hardship . . . [when] . . . the enforcement of a statute or regulation is certain and the only impediment to ripeness is simply a delay before the proceedings commence. Where the application of a law is inevitable and consequences attach to it, the Court will find the matter ripe before the actual proceedings occur. Erwin Chemerinsky, *Federal Jurisdiction* § 2.4, at 121 (3d ed. 1999).

With respect to regulatory challenges, the Supreme Court has held that such a challenge is not ripe for judicial review if "the impact of the regulation 'could not be said to be felt immediately by those subject to it in conducting their day-to-day affairs' and 'no irremediabl[y] adverse consequences flow[ed] from requiring a later challenge.' " *Nat'l Park Hospitality Assoc. v. Department of the Interior,* 538 U.S. 803, 810 (quoting *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 158, 164 (1967)). However, this standard has been applied to find that, where a regulation will impact an entity that seeks to engage in a particular activity governed by the regulation, and "there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the

balance against judicial review." *Nat'l Ass'n of Home Builders,* 440 F.3d at 465 (internal quotation marks and citations omitted).

B. *Economic Harm Standing*

In further opposition to the government's Motion to Dismiss, Plaintiff submits the attached Declaration of Lee Bettis, Executive Director of the Plaintiff Coalition. (Exhibit C) Plaintiff would note that this is the same individual who authored the statement utilized by the government as an attachment in its Motion to Dismiss. Mr. Bettis' Declaration shows that Plaintiff and its members face a real and continuing threat of injuries. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, (1983) (Prospective relief is available if plaintiffs are suffering a continuing injury or are under a real and immediate threat of being injured in the future.)

The Complaint sets forth a well-founded interest on behalf of its current members who wish to convert from credit unions to mutual savings banks, as explained at Paragraphs 14-21 of the Complaint. Mr. Bettis' Declaration specifically demonstrates how members of the Plaintiff coalition must balance the NCUA's unreasonable, illegal and costly conversion regulations against opportunities for growth and expansion in their ongoing management deliberations. (Para 2).

Mr. Bettis' Declaration further demonstrates the damage such unlawfully restrictive regulations have on management decisions by indicating that members of the Plaintiff coalition are actively considering conversion under the NCUA rules. (Para. 5) He attests that the development of NCUA's restrictive rules and the additional costs involved in compliance with these rules has delayed and discouraged credit union managers from exercising the option to convert to a mutual savings bank charter. (Para.

6).

Mr. Bettis also explains the substantial additional financial burden imposed by the regulations enacted in 2004, 2005 and 2006. Mr. Bettis outlines the historical development of these changes, which he describes as a dramatic change in the credit union conversion landscape beginning in 2004. (Para. 7). He compares this conclusion with some examples taken from data collected by the Plaintiff in paragraph 8 of his Declaration, citing two examples: a conversion before 2004 which involved a conversion cost of $325,000 for a credit union with $260 million in assets versus a conversion under the 2007 regulations for a credit union with less than one half the amount of assets as the first example which cost approximately $531,000. In addition, Mr. Bettis states that litigation costs have also increased because of obstructionism and the complexity of the NCUA conversion regulations. (para. 8).[7]

Thus, the Coalition has shown that its membership includes individual credit union members who are directly aggrieved by being forced to submit to cumbersome, extraordinarily expensive, and ultimately unauthorized requirements that are imposed by NCUA on any institution that wishes to convert. See, e.g., *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 186-87 (4th Cir. 2007)(finding standing); *White Tail Park*, 413 F.3d at 461-62 (reversing district court). *Cf., Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421 (4th Cir. 2007)(error in denying standing).

Plaintiff's members fall directly within the zone of interests sought to be protected

[7] For example, in a case specifically involving charter conversions, the NCUA sought to withhold certification of two overwhelming membership votes in favor of becoming a savings bank on the grounds that a single piece of paper included with the ballot solicitation materials was improperly folded. Reversing that ruling and ordering the NCUA to withdraw its disapproval, a Federal Magistrate termed the agency's action "simply erroneous and silly." (*Community Credit Union v. Nat'l Credit Union Administration, et al.*, No. CV-285 (E.D. Tex., 2005).

under Section 202 of CUMAA because they are the intended beneficiaries of that 1998 legislation, and their interests align with those protected by the statute, to such a degree that one can readily ascribe to Congress an intent that they be permitted to enforce their right to protection under the statute. *Mgmt. Ass'n for Private Photogrammetric Surveyors v. United States*, 467 F. Supp. 2d 596, 605-06 (E.D.Va. 2006).

Conclusion

Plaintiff has demonstrated that its members have been adversely affected and aggrieved by agency action to represent an "injury in fact." They do not have a "mere interest in the proceeding," but rather a direct stake in the outcome of the litigation. Such a demonstration is all that is required when standing for lack of injury is raised. *United States v. SCRAP*, 412 U.S. 669, 689, n. 14 (1973).

Coalition members must factor into their financial plans the increased burden, complexity, financial and litigation costs of a potential conversion and, as such, have a real stake in this challenge. Courts have also left no doubt that threatened injury is by itself "injury in fact." The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements. *See, e.g., Valley Forge*, 454 U.S. 564, 472 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, (1979). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979).

By Declaration, Plaintiff has demonstrated that its members are incurring current and ongoing injury by virtue of the imposition of unlawful and onerous conversion regulations. As this Circuit has explained, threats or increased risk occasioned by

arbitrary government action constitute cognizable harm. *Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp*, 204 F.3d 149 (4th Cir. 2002).[8] The standard is "one of kind and not of degree." *Id.*, at 156.

Gaston Copper's commonsense approach is consistent with numerous other courts which have agreed that the injurious nature of risk itself can demonstrate standing . For example, in *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993), the Seventh Circuit found standing because "the Village is in the path of a potential flood" and "even a small probability of injury is sufficient to create a case or controversy." Similarly, the District of Columbia Circuit in *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1234 (D.C.Cir. 1996), held that an increased risk of wildfire from certain logging practices constitutes injury in fact. And the Fifth Circuit in *Sierra Club v. Cedar Point Oil Co.,* 73 F.3d 546, 556 (5th Cir. 1996), did not require evidence of actual harm to a waterway, noting: "[t]hat this injury is couched in terms of future impairment rather than past impairment is of no moment."

The Plaintiff in this case has satisfied the requirements for Article III standing.

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[8] For various applications by trial courts of these principles, see, e.g. *Saunders v. General Services Administration,* 659 F.Supp. 1042 (E.D.Va. 1987)(fair housing challenge); *Doe v. Duling*, 603 F.Supp. 960 (E.D.Va. 1985)(standing question in cohabitation statute challenge); *Cline v. Robb,* 548 F.Supp. 128 (E.D.Va. 1982)(reapportionment challenge); *Health Systems Agency v. Virginia State Board of Medicine,* 424 F.Supp. 267 (E.D.Va. 1976)(First Amendment case).

Dated: September 18, 2007

Respectfully submitted,
BUTERA & ANDREWS

By: /s/

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing Plaintiff's Memorandum in Opposition was served, by mail, with first class postage upon the following this 18th day of September 2007:

Marcia K. Sowles
United States Department of Justice
Civil Division Federal Programs Branch
P.O. Box 883
Washington, D.C. 20530

And upon the following by electronic service by using the Clerk of Court's CM/ECF filing system which will send notification of such filing (NEF) to the following:

AUSA Lauren A. Wetzler
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Alexandria, Virginia 22314

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

COALITION FOR CREDIT UNION CHARTER OPTIONS Plaintiff v. NATIONAL CREDIT UNION ADMINISTRATION Defendant	)	Civil Action No. 1:07-cv-667 (CMH/TRJ)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Exhibit A

Senate Committee on Banking Housing & Urban Affairs
Selected transcript on H.R. 1151, The Credit Union Membership Act
(April 30, 1998)

Transcript of Hearings

Before The

United States Senate

COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

Markup on

H.R. 1151

THE CREDIT UNION MEMBERSHIP ACCESS ACT

Washington, D. C.

THURSDAY, APRIL 30, 1998

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NATIONWIDE COVERAGE

Mark up

on

H.R.1151

The Credit Union Membership Access Act

- - -

Thursday, April 30, 1998

United States Senate,

Committee on Banking, Housing, and Urban Affairs,

Washington, D.C.

The Committee met at 2:00 a.m., in Room SD-538 of the Dirksen Senate Office Building, the Honorable Alfonse D'Amato, Chairman of the Committee, presiding.

(No response)

There being no objection, I want to announce for the record that we have a quorum established.

The text is now open to amendment.

Senator Shelby. Mr. Chairman?

The Chairman. Senator Shelby?

Senator Shelby. Mr. Chairman, I have an amendment. I believe everybody has it.

I want to offer this amendment on behalf of myself, Senator Bennett, you, Mr. Chairman, Senator Gramm, Senator Mack, Senator Faircloth, Senator Grams, Senator Allard, Senator Enzi, and Senator Hagel.

The amendment would amend the bill, the mark-up vehicle that you've just brought up, with respect to the conversion of insured credit unions to mutual savings bank, if that were the case.

This amendment would provide a more democratic process to the National Credit Union Administration, who currently, a lot of people think, hinders the consumer's right to choose the structure of his or her financial institution.

This amendment would require a democratic vote of a proposal to convert, if that were the case, to a mutual savings bank.

This amendment is pro-choice, pro-consumer, and pro-democracy.

In addition, we've included several safeguards with regard to the proper notification of credit union members, as well as the prohibition on sweetheart deals for senior management.

Mr. Chairman, there's broad support among a lot of us here to preserve consumer choice with regard to this matter. We do not believe a federal agency should limit the choices of consumers, especially when it comes to their financial accounts.

At this point, I'd like to yield to Senator Bennett, who has been working with me on this.

The Chairman. Senator Bennett?

Senator Bennett. Thank you, Mr. Chairman. I don't have much to add to Senator Shelby's comments.

I will make this personal observation.

During this entire experience of educating myself on credit unions and banks and the similarities thereof, and the differences between, one of the things that the credit union representatives and advocates have told me over and over and over again has been that credit unions are different from banks because they are controlled by their members, and that the members serve voluntarily on boards of directors, that it is a participatory relationship very, very different from a provider-customer relationship.

In that spirit, I think we ought to make sure that the

participants in that participatory relationship have the opportunity, if they want, to change their status. And the present circumstance makes that extremely difficult.

The present circumstance says that you must have a majority of all members, whether they choose to vote or not. Now if we had that standard in the United States without compulsory voting, none of us would be elected to the Senate because we don't have to get a majority of all of the people of voting age in our state. We just have to get a majority of those who are interested enough and, presumably, informed enough, that they come to the polls.

Therefore, this makes it possible for the interested people in a credit union who want to make a conversion -- and I have no idea how many do, and I have no idea what would motivate them. I'm just saying those who want to have that option will now have the opportunity after full disclosure and full circulation to every member of the credit union to have it happen on the majority vote of those who vote.

And I think that is in context and in keeping with the things that credit union representatives have told me about the way that credit unions are run.

Therefore, I don't understand that there is any opposition to this. But I think it's a procedural fix that will increase the number of choices and increase the

UNITED STATES DISTRICT COURT
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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Exhibit B

Comparison of Regulations
OTS (12 C.F.R. 522)
OCC (12 C.F.R. 5.24)
NCUA (12 C.F.R. 708)

OTS	OCC	NCUA
12 C.F.R. § 552.2–7 Conversion to National banking association or State bank. A Federal stock association may convert to a National banking association or a State bank after filing a notification or application, as appropriate, with the Office in accordance with the applicable provisions of § 563.22(b) of this chapter. **§ 563.22 Merger, consolidation, purchase, or sale of assets, or assumption of liabilities** (b)(1) No savings association may without notifying the Office, as provided in paragraph (h)(1) of this Section… (h) Special requirements and procedures for transactions under paragraphs (b) and (c) of this section— (1) Certain transactions with no surviving savings association. The Office must be notified of any transaction under paragraph (b)(1) of this section. Such notification must be submitted to the OTS at least 30 days prior to the effective date of the transaction, but not later than the date on which an application relating to the proposed transaction is filed with the primary regulator of the resulting institution; the Office may, upon request or on its own initiative, shorten the 30-day prior notification requirement. Notifications under this paragraph must demonstrate compliance with applicable stockholder or accountholder approval requirements. Where the savings association submitting the notification maintains a liquidation account established pursuant to part 563b of this chapter, the notification must state that the resulting institution will assume such liquidation account. The notification may be in the form of either a letter describing the material features of the transaction or a copy of a filing made with another Federal or state regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute. If the action contemplated by the notification is not completed within one year after the Office's receipt of the notification, a new notification must be submitted to the Office.	**12 C.F.R. 5.24 Conversion.** (e) ***Conversion of a national bank to a state bank***—(1) ***Procedure.*** A national bank may convert to a state bank, in accordance with 12 U.S.C. 214c, without prior OCC approval. Termination of the national bank's status as a national bank occurs upon the bank's completion of the requirements of 12 U.S.C. 214a, and upon the appropriate district office's receipt of the bank's national bank charter (or copy) in connection with the consummation of the transaction. **(2) *Notice of intent.*** A national bank that desires to convert to a state bank shall submit to the appropriate district office a notice of its intent to convert. The national bank shall file this notice when it first submits a request to convert to the appropriate state authorities. The appropriate district office then provides instructions to the national bank for terminating its status as a national bank. **(f) *Conversion of a national bank to a Federal savings association.*** A national bank may convert to a Federal savings association without prior OCC approval. The requirements and procedures set forth in paragraph (e) of this section and 12 U.S.C. 214a and 12 U.S.C. 214c apply to a conversion to a Federal savings association, except as follows: (1) In paragraph (e) of this section references to "appropriate state authorities" mean "appropriate Federal authorities"; and (2) References in 12 U.S.C. 214c to the "law of the State in which the national banking association is located" and "any State authority" mean "laws and regulations governing Federal savings associations" and "Office of Thrift Supervision," respectively.	**12 C.F.R. § 708a.1 Definitions.** As used in this part: Clear and conspicuous means text in bold type in a font size at least one size larger than any other text used in the document (exclusive of headings), but in no event smaller than 12 point. Credit union has the same meaning as insured credit union in section 101 of the Federal Credit Union Act. Federal banking agencies have the same meaning as in section 3 of the Federal Deposit Insurance Act. Mutual savings bank and savings association have the same meaning as in section 3 of the Federal Deposit Insurance Act. Regional director means the director of the NCUA regional office for the region where a natural person credit union's main office is located. For corporate credit unions, regional director means the director of NCUA's Office of Corporate Credit Unions. Senior management official means a chief executive officer, an assistant chief executive officer, a chief financial officer, and any other senior executive officer as defined by the appropriate federal banking agencies pursuant to section 32(f) of the Federal Deposit Insurance Act. **§ 708a.2 Authority to convert.** A credit union, with the approval of its members, may convert to a mutual savings bank or a savings association that is in mutual form without the prior approval of the NCUA, subject to applicable law governing mutual savings banks and savings associations and the other requirements of this part. **§ 708a.3 Board of directors' approval and members' opportunity to comment.** (a) A credit union's board of directors must comply with the following notice requirements before voting on a proposal to convert. (1) No later than 30 days before a board of directors votes on a proposal to convert, it must publish a notice in a general circulation newspaper, or in multiple newspapers if necessary, serving all areas where the credit union has an office, branch, or service center. It must also post the notice in a clear

		and conspicuous fashion in the lobby of the credit union's home office and branch offices and on the credit union's Web site, if it has one. If the notice is not on the home page of the Web site, the home page must have a clear and conspicuous link, visible on a standard monitor without scrolling, to the notice. (2) The public notice must include the following: (i) The name and address of the credit union; (ii) The type of institution to which the credit union's board is considering a proposal to convert; (iii) A brief statement of why the board is considering the conversion and the major positive and negative effects of the proposed conversion; (iv) A statement that directs members to submit any comments on the proposal to the credit union's board of directors by regular mail, electronic mail, or facsimile; (v) The date on which the board plans to vote on the proposal and the date by which members must submit their comments for consideration, which may not be more than 5 days before the board vote; (vi) The street address, electronic mail address, and facsimile number of the credit union where members may submit comments; and (vii) A statement that, in the event the board approves the proposal to convert, the proposal will be submitted to the membership of the credit union for a vote following a notice period that is no shorter than 90 days. (3) The board of directors must approve publication of the notice. (b) The credit union must collect member comments and retain copies at the credit union's main office until the conversion process is completed. (c) The board of directors may vote on the conversion proposal only after reviewing and considering all member comments. The conversion proposal may only be approved by an affirmative vote of a majority of board members who have determined the conversion is in the best interests of the members. If approved, the board of directors must set a date for a vote on the proposal by the members of the credit union. **§ 708a.4 Disclosures and communications to members.**

		(a) After the board of directors has complied with § 708a.3 and approves a conversion proposal, the credit union must provide written notice of its intent to convert to each member who is eligible to vote on the conversion. The notice to members must be submitted 90 calendar days, 60 calendar days, and 30 calendar days before the date of the membership vote on the conversion. A ballot must be included in the same envelope as the 30-day notice and only in the 30-day notice. A converting credit union may not distribute ballots with either the 90-day or 60-day notice, in any other written communications, or in person before the 30-day notice is sent. (b)(1) The notice to members must adequately describe the purpose and subject matter of the vote to be taken at the special meeting or by submission of the written ballot. The notice must clearly inform members that they may vote at the special meeting or by submitting the written ballot. The notice must state the date, time, and place of the meeting. (2) The notices that are submitted 90 and 60 days before the membership vote on the conversion must state in a clear and conspicuous fashion that a written ballot will be mailed together with another notice 30 days before the date of the membership vote on conversion. The notice submitted 30 days before the membership vote on the conversion must state in a clear and conspicuous fashion that a written ballot is included in the same envelope as the 30-day notice materials. (3) For purposes of facilitating the member-to-member contact described in paragraph (f) of this section, the 90-day notice must indicate the number of credit union members eligible to vote on the conversion proposal and state how many members have agreed to accept communications from the credit union in electronic form. The 90-day notice must also include the information listed in paragraph (f)(9) of this section. (4) The member ballot must include: (i) A brief description of the proposal (e.g., "Proposal: Approval of the Plan Charter Conversion by which (insert name of credit union) will convert its charter to that of a federal mutual savings bank."); (ii) Two blocks marked respectively as "FOR" and "AGAINST;" and

		(ii) The following language: "A vote FOR the proposal means that you want your credit union to become a mutual savings bank. A vote AGAINST the proposal means that you want your credit union to remain a credit union." This language must be displayed in a clear and conspicuous fashion immediately beneath the FOR and AGAINST blocks. (5) The ballot may also include voting instructions and the recommendation of the board of directors (i.e., "Your Board of Directors recommends a vote FOR the Plan of Conversion") but may not include any further information without the prior written approval of the Regional Director. (c) An adequate description of the purpose and subject matter of the member vote on conversion, as required by paragraph (b) of this section, must include: (1) A clear and conspicuous disclosure that the conversion from a credit union to a mutual savings bank could lead to members losing their ownership interests in the credit union if the mutual savings bank subsequently converts to a stock institution and the members do not become stockholders; (2) A clear and conspicuous disclosure of how a conversion from a credit union to a mutual savings bank will affect members' voting rights and if the mutual savings bank intends to base voting rights on account balances; (3) A clear and conspicuous disclosure of any conversion-related economic benefit a director or senior management official will or may receive including receipt of or an increase in compensation and an explanation of any foreseeable stock-related benefits associated with a subsequent conversion to a stock institution or mutual holding company structure. The explanation of stock-related benefits must include a comparison of the opportunities to acquire stock available to officials and employees with those opportunities available to the general membership; (4) A clear and conspicuous disclosure of how the conversion from a credit union to a mutual savings bank will affect the institution's ability to make non-housing-related consumer loans because of a mutual savings bank's obligations to satisfy certain lending

		requirements as a mutual savings bank. This disclosure should specify possible reductions in some kinds of loans to members; and (5) An affirmative statement that, at the time of conversion to a mutual savings bank, the credit union does or does not intend to convert to a stock institution or a mutual holding company structure. (d)(1) A converting credit union must provide the following disclosures in a clear and conspicuous fashion with the 90-, 60-, and 30-day notices it sends to its members regarding the conversion: IMPORTANT REGULATORY DISCLOSURE ABOUT YOUR VOTE The National Credit Union Administration, the federal government agency that supervises credit unions, requires [insert name of credit union] to provide the following disclosures: 1. LOSS OF CREDIT UNION MEMBERSHIP. A vote "FOR" the proposed conversion means you want your credit union to become a mutual savings bank. A vote "AGAINST" the proposed conversion means you want your credit union to remain a credit union. 2. RATES ON LOANS AND SAVINGS. If your credit union converts to a bank, you may experience changes in your loan and savings rates. Available historic data indicates that, for most loan products, credit unions on average charge lower rates than banks. For most savings products, credit unions on average pay higher rates than banks. 3. POTENTIAL PROFITS BY OFFICERS AND DIRECTORS. Conversion to a mutual savings bank is often the first step in a two-step process to convert to a stock-issuing bank or holding company structure. In such a scenario, the officers and directors of the institution often profit by obtaining stock in excess of that available to other members. (2) This text must be placed in a box, must be the only text on the front side of a single piece of paper, and must be placed so that the member will see the

		text after reading the credit union's cover letter but before reading any other part of the member notice. The back side of the paper must be blank. A converting credit union may modify this text only with the prior written consent of the Regional Director and, in the case of a state-chartered credit union, the appropriate state regulatory agency. (e) All written communications from a converting credit union to its members regarding the conversion must be written in a manner that is simple and easy to understand. Simple and easy to understand means the communications are written in plain language designed to be understood by ordinary consumers and use clear and concise sentences, paragraphs, and sections. For purposes of this part, examples of factors to be considered in determining whether a communication is in plain language and uses clear and concise sentences, paragraphs and sections include the use of short explanatory sentences; use of definite, concrete, everyday words; use of active voice; avoidance of multiple negatives; avoidance of legal and technical business terminology; avoidance of explanations that are imprecise and reasonably subject to different interpretations; and use of language that is not misleading. (f)(1) A converting credit union must mail or e-mail a requesting member's proper conversion-related materials to other members eligible to vote if: (i) A credit union's board of directors has adopted a proposal to convert; (ii) A member makes a written request that the credit union mail or e-mail materials for the member; (iii) The request is received by the credit union no later than 35 days after it sends out the 90-day member notice; and (iv) The requesting member agrees to reimburse the credit union for the reasonable expenses, excluding overhead, of mailing or e-mailing the materials and also provides the credit union with an appropriate advance payment. (2) A member's request must indicate if the member wants the materials mailed or e-mailed. If a member requests that the materials be mailed, the credit union will mail the materials to all eligible voters. If a member requests the

		materials be e-mailed, the credit union will e-mail the materials to all members who have agreed to accept communications electronically from the credit union. The subject line of the credit union's e-mail will be "Proposed Credit Union Conversion--Views of Member (insert member name)." (3) (i) A converting credit union may, at its option, include the following statement with a member's material: On (date), the board of directors of (name of converting credit union) adopted a proposal to convert from a credit union to a mutual savings bank. Credit union members who wish to express their opinions about the proposed conversion to other members may provide those opinions to (name of credit union). By law, the credit union, at the requesting members' expense, must then send those opinions to the other members. The attached document represents the opinion of a member of this credit union. This opinion is a personal opinion and does not necessarily reflect the views of the management or directors of the credit union. (ii) A converting credit union may not add anything other than this statement to a member's material without the prior approval of the Regional Director. (4) The term "proper conversion-related materials" does not include materials that: (i) Due to size or similar reasons are impracticable to mail or e-mail; (ii) Are false or misleading with respect to any material fact; (iii) Omit a material fact necessary to make the statements in the material not false or misleading; (iv) Relate to a personal claim or a personal grievance, or solicit personal gain or business advantage by or on behalf of any party; (v) Relate to any matter, including a general economic, political, racial, religious, social, or similar cause, that is not significantly related to the proposed conversion; (vi) Directly or indirectly and without expressed factual foundation impugn a person's character, integrity, or reputation; (vii) Directly or indirectly and without expressed factual foundation make charges concerning improper, illegal, or immoral conduct; or (viii) Directly or indirectly and without expressed factual foundation make

		statements impugning the stability and soundness of the credit union. (5) If a converting credit union believes some or all of a member's request is not proper it must submit the member materials to the Regional Director within seven days of receipt. The credit union must include with its transmittal letter a specific statement of why the materials are not proper and a specific recommendation for how the materials should be modified, if possible, to make them proper. The Regional Director will review the communication, communicate with the requesting member, and respond to the credit union within seven days with a determination on the propriety of the materials. The credit union must then immediately mail or e-mail the material to the members if so directed by NCUA. (6) A credit union must ensure that its members receive all materials that meet the requirements of § 708a.4(f) on or before the date the members receive the 30-day notice and associated ballot. If a credit union cannot meet this delivery requirement, it must postpone mailing the 30-day notice until it can deliver the member materials. If a credit union postpones the mailing of the 30-day notice, it must also postpone the special meeting by the same number of days. When the credit union has completed the delivery, it must inform the requesting member that the delivery was completed and provide the number of recipients. (7) The term "appropriate advance payment" means: (i) For requests to mail materials to all eligible voters, a payment in the amount of 150% of the first class postage rate times the number of mailings, and (ii) For requests to e-mail materials only to members that have agreed to accept electronic communications, a payment in the amount of 200 dollars. (8) If a credit union posts conversion-related information or material on its Web site, then it must simultaneously make a portion of its Web site available free of charge to its members to post and share their opinions on the conversion. A link to the portion of the Web site available to members to post their views on the conversion must be marked "Members: Share your views on the proposed conversion and see other members views" and the link must also be visible on all pages on which the credit union posts its own conversion-

		related information or material, as well as on the credit union's homepage. If a credit union believes a particular member submission is not proper for posting, it will provide that submission to the Regional Director for review as described in paragraph (f)(5) of this section. The credit union may also post a content-neutral disclaimer using language similar to the language in paragraph (f)(3)(i) of this section. (9) A converting credit union must inform members with the 90-day notice that if they wish to provide their opinions about the proposed conversion to other members they can submit their opinions in writing to the credit union no later than 35 days from the date of the notice and the credit union will forward those opinions to other members. The 90-day notice will provide a contact at the credit union for delivery of communications, will explain that members must agree to reimburse the credit union's costs of transmitting the communication including providing an advance payment, and will refer members to this section of NCUA's rules for further information about the communication process. The credit union, at its option, may include additional factual information about the communication process with its 90-day notice. (10) A group of members may make a joint request that the credit union send its materials to other members. For purposes of paragraphs (f)(2) and (f)(3) of this section, the credit union will use the group name provided by the group. **§ 708a.5 Notice to NCUA.** (a) If a converting credit union's board of directors approves a proposal to convert, it must provide the Regional Director with notice of its intent to convert during the 90 calendar day period preceding the date of the membership vote on the conversion. (1) A credit union must give notice to the Regional Director of its intent to convert by providing a letter describing the material features of the conversion or a copy of the filing the credit union has made or intends to make with another federal or state regulatory agency in which the credit union seeks that agency's approval of the conversion. A credit union must include with the notice to the Regional Director copies of the notices the credit union has provided or intends to provide to

		members under §§ 708a.3 and 708a.4. The credit union must also include a copy of the ballot form and all written materials the credit union has distributed or intends to distribute to members. The term "written materials" includes written documentation or information of any sort, including electronic communications posted on a Web site or transmitted by electronic mail. (2) As part of its notice to NCUA of intent to convert, the credit union's board of directors must provide the Regional Director with a certification of its support for the conversion proposal and plan. Each director who voted in favor of the conversion proposal must sign the certification. The certification must contain the following: (i) A statement that each director signing the certification supports the proposed conversion and believes the proposed conversion is in the best interests of the members of the credit union; (ii) A description of all materials submitted to the Regional Director with the notice and certification; (iii) A statement that each board member signing the certification has examined all these materials carefully and these materials are true, correct, current, and complete as of the date of submission; and (iv) An acknowledgement that federal law (18 U.S.C. 1001) prohibits any misrepresentations or omissions of material facts, or false, fictitious or fraudulent statements or representations made with respect to the certification or the materials provided to the Regional Director or any other documents or information provided to the members of the credit union or NCUA in connection with the conversion. (3) A state-chartered credit union must state as part of the notice required by § 708a.5(a) if its state chartering law permits it to convert to a mutual savings bank and provide the specific legal citation. A state-chartered credit union will remain subject to any state law requirements for conversion that are more stringent than those this part imposes, including any internal governance requirements, such as the requisite membership vote for conversion and the determination of a member's eligibility to vote. If a state-chartered credit union relies for its

		authority to convert to a mutual savings bank on a state law parity provision, meaning a provision in state law permitting a state-chartered credit union to operate with the same or similar authority as a federal credit union, it must: (i) Include in its notice a statement that its state regulatory authority agrees that it may rely on the state law parity provision as authority to convert; and (ii) Indicate its state regulatory authority's position as to whether federal law and regulations or state law will control internal governance issues in the conversion such as the requisite membership vote for conversion and the determination of a member's eligibility to vote. (b) If it chooses, a credit union may seek a preliminary determination from the Regional Director regarding any of the notices required under this part and its proposed methods and procedures applicable to the membership conversion vote. The Regional Director will make a preliminary determination regarding the notices and methods and procedures applicable to the membership vote within 30 calendar days of receipt of a credit union's request for review unless the Regional Director extends the period as necessary to request additional information or review a credit union's submission. A credit union's prior submission of any notice or proposed voting procedures does not relieve the credit union of its obligation to certify the results of the membership vote required by § 708a.6 or eliminate the right of the Regional Director to disapprove the actual methods and procedures applicable to the membership vote if the credit union fails to conduct the membership vote in a fair and legal manner consistent with the Federal Credit Union Act and these rules. (c) After receiving the notice described in paragraph (a)(3) of this section, the Regional Director will contact and consult with the appropriate State Supervisory Authority. **§ 708a.6 Membership approval of a proposal to convert.** (a) A proposal for conversion approved by a board of directors requires

		approval by a majority of the members who vote on the proposal. (b) The board of directors must set a voting record date to determine member voting eligibility that is at least one day before the publication of notice required in § 708a.3. (c) A member may vote on a proposal to convert in person at a special meeting held on the date set for the vote or by written ballot filed by the member. The vote on the conversion proposal must be by secret ballot and conducted by an independent entity. The independent entity must be a company with experience in conducting corporate elections. No official or senior management official of the credit union or the immediate family members of any official or senior management official may have any ownership interest in or be employed by the independent entity. **§ 708a.7 Certification of vote on conversion proposal.** (a) The board of directors of the converting credit union must certify the results of the membership vote to the Regional Director within 10 calendar days after the vote is taken. (b) The certification must also include a statement that the notice, ballot and other written materials provided to members were identical to those submitted to NCUA pursuant to § 708a.5. If the board cannot certify this, the board must provide copies of any new or revised materials and an explanation of the reasons for any changes. **§ 708a.8 NCUA oversight of methods and procedures of membership vote.** (a) The Regional Director will review the methods by which the membership vote was taken and the procedures applicable to the membership vote. The Regional Director will determine: if the notices and other communications to members were accurate, not misleading, and timely; the membership vote was conducted in a fair and legal manner; and the credit union has otherwise complied with part 708a. (b) After completion of this review, the Regional Director will issue a

		determination that the methods and procedures applicable to the membership vote are approved or disapproved. The Regional Director will issue this determination within 30 calendar days of receipt from the credit union of the certification of the result of the membership vote required under § 708a.7 unless the Regional Director extends the period as necessary to request additional information or review the credit union's submission. Approval of the methods and procedures under this paragraph remains subject to a credit union fulfilling the requirements in § 708a.10 for timely completion of the conversion. (c) If the Regional Director disapproves the methods by which the membership vote was taken or the procedures applicable to the membership vote, the Regional Director may direct that a new vote be taken. (d) A converting credit union may appeal the Regional Director's determination to the NCUA Board. The credit union must file the appeal within 30 days after receipt of the Regional Director's determination. The NCUA Board will act on the appeal within 90 days of receipt. **§ 708a.9 Other regulatory oversight of methods and procedures of membership vote.** The federal or state regulatory agency that will have jurisdiction over the financial institution after conversion must verify the membership vote and may direct that a new vote be taken, if it disapproves of the methods by which the membership vote was taken or the procedures applicable to the membership vote. **§ 708a.10 Completion of conversion.** (a) After receipt of the approvals under § 708a.8 and § 708a.9 the credit union may complete the conversion. (b) The credit union must complete the conversion within one year of the date of receipt of NCUA approval under § 708a.8. If a credit union fails to complete the conversion within one year the Regional Director will disapprove of the methods and procedures. The credit union's board of

		directors must then adopt a new conversion proposal and solicit another member vote if it still desires to convert. (c) The Regional Director may, upon timely request and for good cause, extend the one year completion period for an additional six months. (d) After notification by the board of directors of the mutual savings bank or mutual savings association that the conversion has been completed, the NCUA will cancel the insurance certificate of the credit union and, if applicable, the charter of a federal credit union. **§ 708a.11 Limit on compensation of officials.** No director or senior management official of an insured credit union may receive any economic benefit in connection with the conversion of a credit union other than compensation and other benefits paid to directors or senior management officials of the converted institution in the ordinary course of business. **§ 708a.12 Voting incentives.** If a converting credit union offers an incentive to encourage members to participate in the vote, including a prize raffle, every reference to such incentive made by the credit union in a written communication to its members must also state that members are eligible for the incentive regardless of whether they vote for or against the proposed conversion. **§ 708a.13 Voting guidelines.** A converting credit union must conduct its member vote on conversion in a fair and legal manner. NCUA provides the following guidelines as suggestions to help a credit union obtain a fair and legal vote and otherwise fulfill its regulatory obligations. These guidelines are not an exhaustive checklist and do not by themselves guarantee a fair and legal vote. (a) Applicability of state law. While NCUA's conversion rule applies to all conversions of federally insured credit unions, federally insured state-chartered credit unions (FISCUs) are

		also subject to state law on conversions. NCUA's position is that a state legislature or state supervisory authority may impose conversion requirements more stringent or restrictive than NCUA's. States that permit this kind of conversion may have substantive and procedural requirements that vary from federal law. For example, there may be different voting standards for approving a vote. While the Federal Credit Union Act requires a simple majority of those who vote to approve a conversion, some states have higher voting standards requiring two-thirds or more of those who vote. A FISCU should be careful to understand both federal and state law to navigate the conversion process and conduct a proper vote. (b) Eligibility to vote. (1) Determining who is eligible to cast a ballot is fundamental to any vote. No conversion vote can be fair and legal if some members are improperly excluded. A converting credit union should be cautious to identify all eligible members and make certain they are included on its voting list. NCUA recommends that a converting credit union establish internal procedures to manage this task. (2) A converting credit union should be careful to make certain its member list is accurate and complete. For example, when a credit union converts from paper recordkeeping to computer recordkeeping, some member names may not transfer unless the credit union is careful in this regard. This same problem can arise when a credit union converts from one computer system to another where the software is not completely compatible. (3) Problems with keeping track of who is eligible to vote can also arise when a credit union converts from a federal charter to a state charter or vice versa. NCUA is aware of an instance where a federal credit union used membership materials allowing two or more individuals to open a joint account and also allowed each to become a member. The federal credit union later converted to a state-chartered credit union that, like most other state-chartered credit unions in its state, used membership materials allowing two or more individuals to open a joint account but only allowed the first person listed on the account to become a member.

		The other individuals did not become members as a result of their joint account, but were required to open another account where they were the first or only person listed on the account. Over time, some individuals who became members of the federal credit union as the second person listed on a joint account were treated like those individuals who were listed as the second person on a joint account opened directly with the state-chartered credit union. Specifically, both of those groups were treated as non-members not entitled to vote. This example makes the point that a credit union must be diligent in maintaining a reliable membership list. (c) Scheduling the special meeting. NCUA's conversion rule requires a converting credit union to permit members to vote by written mail ballot or in person at a special meeting held for the purpose of voting on the conversion. Although most members may choose to vote by mail, a significant number may choose to vote in person. As a result, a converting credit union should be careful to conduct its special meeting in a manner conducive to accommodating all members wishing to attend, including selecting a meeting location that can accommodate the anticipated number of attendees and is conveniently located. The meeting should also be held on a day and time suitable to most members' schedules. A credit union should conduct its meeting in accordance with applicable federal and state law, its bylaws, Robert's Rules of Order or other appropriate parliamentary procedures, and determine before the meeting the nature and scope of any discussion to be permitted. (d) Voting incentives. Some credit unions may wish to offer incentives to members, such as entry to a prize raffle, to encourage participation in the conversion vote. The credit union must exercise care in the design and execution of such incentives. (1) The credit union should ensure that the incentive complies with all applicable state, federal, and local laws. (2) The incentive should not be unreasonable in size. The cost of the incentive should have a negligible impact on the credit union's net worth

		ratio and the incentive should not be so large that it distracts the member from the purpose of the vote. If the board desires to use such incentives, the cost of the incentive should be included in the directors' deliberation and determination that the conversion is in the best interests of the credit union's members. (3) The credit union should ensure that the incentive is available to every member that votes regardless of how or when he or she votes. All of the credit union's written materials promoting the incentive to the membership must disclose to the members, as required by § 708a.12 of this part, that they have an equal opportunity to participate in the incentive program regardless of whether they vote for or against the conversion. The credit union should also design its incentives so that they are available equally to all members who vote, regardless of whether they vote by mail or in person at the special meeting.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

COALITION FOR CREDIT UNION CHARTER OPTIONS Plaintiff v. NATIONAL CREDIT UNION ADMINISTRATION Defendant	)	Civil Action No. 1:07-cv-667 (CMH/TRJ)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Exhibit C

Declaration of Lee Bettis

United States District Court
For the Eastern District of Virginia

COALITION FOR CREDIT UNION CHARTER OPTIONS

Plaintiff

v. 1:07cv667
(CNH/TRJ)

NATIONAL CREDIT UNION ADMINISTRATION

Defendant

DECLARATION OF LEE BETTIS

Lee Bettis makes the following declaration under oath:

1. I am an adult citizen of the State of Florida and fully competent to make this declaration.

2. I am Executive Director of the Coalition for Credit Union Charter Options, the plaintiff in the present action. I have been in this position since 2004. Prior to that position, I spent 17 years in the banking industry, including senior vice president of C&S Bank of Georgia, which later became part of NationsBank (now Bank of America). In addition, I was chief executive officer and president of AGE Federal Credit Union, located in Albany, Georgia and managed that institution's charter conversion to an FDIC-insured savings bank now doing business as Heritage Bank of the South. I have

submitted testimony and commentary on behalf of the plaintiff Coalition to the Congress and Federal administrative agencies.

3. The Coalition for Credit Union Chart Options was formed in 2004. It currently has federally-insured credit union members doing business in 12 states and ranging in asset size from $50 million to $1 billion. As such, these institutions are subject to NCUA regulations including its charter conversion regulations. The goal of the Coalition is to educate and advocate on the process of credit union conversion procedures. As the name of the Coalition reflects, it is the intention of the members to maintain as many options available for the growth of their financial institutions.

4. Modern credit unions operate in a similar manner to other financial services companies in that they must compete in a common financial environment. Modern credit unions retain the services of professional managers who are charged with the maximization of membership assets and the safeguarding of member deposits. This requires that those managers evaluate on a regular basis the constantly shifting opportunities for growth, expansion and security in the financial services marketplace. The evaluation depends in large measure on a balancing between growth and expansion of services versus the NCUA regulations that restrict such activity. The NCUA conversion regulations are an integral part of these ongoing management deliberations.

5. Some of the present members of the Coalition are actively considering converting from federally insured credit unions to mutual savings banks under the regulations promulgated by the NCUA.

6. The NCUA has actively discouraged the credit union conversion process by imposing increasingly restrictive conversion regulations since 2004. The existence of

these unreasonably restrictive rules and the compliance costs associated therewith have had the effect of delaying and discouraging credit union managers from opting for a mutual savings bank charter.

7. While each conversion is an individual event, whose complexity and costs are often determined by the factors involved in each case, data collected by the Coalition allows some generalizations to be made about the cost of regulatory compliance. Beginning in 1998 with the passage of the Credit Union Membership Access Act and continuing until approximately 2004, NCUA regulations imposed a reasonable cost upon credit unions wishing to convert to mutual savings banks. Beginning in 2004, new conversion regulations were imposed by the NCUA. These dramatically changed the landscape for credit union conversions for two reasons: the imposition of significantly additional costs and the attempt to insert into the voting process the institutional bias of the NCUA that favors retention of the status of credit unions.

8. Insofar as compliance costs are concerned, data collected by the Coalition indicated, for example, that the cost for a credit union with approximately $260 million in assets to convert just before the NCUA regulations were changed in 2004 were $325,000. In 2007, under the current rules, the cost for a credit union with only $113 million in assets is $531,000. When the costs of litigating against the NCUA are included, there have been recent cases where total conversion related costs have been approximately $1 million.

DATED this 14 day of September, 2007

Lee Bettis
Executive Director
Coalition for Credit Union Charter Options
500-5301 Wisconsin Avenue N.W.
Washington, D.C. 20015

Subscribed and sworn before me this 14 day of September, 2007

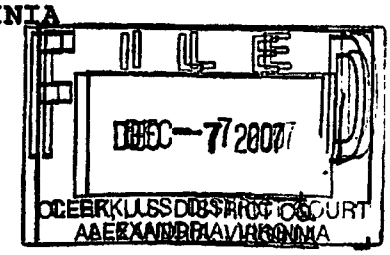
Notary Public: C L Pike

C. L. PIKE
MY COMMISSION # DD 444296
EXPIRES: June 21, 2008
Bonded Thru Notary Public Underwriters

State of Florida
County of Walton

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

Alexandria Division



COALITION FOR CREDIT UNION CHARTER OPTIONS, Plaintiff, v. NATIONAL CREDIT UNION ADMINISTRATION, Defendant.	Civil Action No. 07-0667

ORDER

This matter comes before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction.

Plaintiff is an "educational and advocacy group" consisting of federally insured credit unions that seeks "to preserve charter choice for credit unions under reasonable rules and at reasonable cost." Defendant National Credit Union Administration ("NCUA") is an agency of the United States government, created by the Federal Credit Union Act, 12 U.S.C. § 1751 et seq. The NCUA is charged with the authority to oversee and regulate federally-chartered and federally-insured state chartered credit unions. This authority includes the administration of the conversion process when a federally-insured credit union wishes to convert to a mutual savings bank. 12 U.S.C. § 1785(b)(2)(G)(ii).

Pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § § 701-706, Plaintiff seeks to obtain declaratory and injunctive relief concerning regulations Defendant has made concerning the process by which a credit union converts to a mutual savings bank. Prior to 1998, a credit union wishing to convert to a mutual savings bank had to seek approval from the NCUA. In 1998, Congress repealed this authority and credit unions no longer have to seek NCUA approval in order to convert. 12 U.S.C. § 1785(b)(2)(A). However, Congress did vest the NCUA with the authority to regulate the conversion process. 12 U.S.C. § 1785(b)(2)(G)(ii).

Plaintiff complains that the NCUA "adopted a series of regulations making it increasingly more difficult and expensive for credit unions to convert their charter." Plaintiff specifically identifies three regulations. First, in 2004, the NCUA required that, prior to voting on whether to change to a mutual savings bank, credit unions must mail to their members a statement that "the conversion from a credit union to a mutual savings bank could lead to members losing their ownership interests" and that directors or management officials may receive an "increase in compensation." 69 Fed. Reg. 8,548 (Feb. 25, 2004).

Second, in 2005, the NCUA required that for all written communications sent to credit union members during the conversion

process, the credit union include a "boxed disclosure" stating the potential consequences associated with conversion. These include the various voting, cost, loan rate, and tax consequences that flow from conversion. 70 Fed. Reg. 4,005 (Jan. 28, 2005).

Third, in 2006, the NCUA again amended the various conversion procedures to require and prohibit disclosure of certain conversion-related information. 12 C.F.R. 708a.4, 71 Fed. Reg. 7,7150 (Dec. 22, 2006).

The crux of Plaintiff's Complaint is that the 1998 Amendment to the Federal Credit Union Act requires that regulations promulgated by the NCUA be "consistent with the rules promulgated by other federal regulators, including the Office of Thrift Supervision and the Office of the Comptroller of the Currency" and are to be "no more or less restrictive than that applicable to charter conversions by other financial institutions." 12 U.S.C. § 1785(b)(2)(G)(i). Plaintiff argues that the 2004, 2005, and 2006 regulations are facially invalid, arbitrary and capricious, and unauthorized expansions of regulatory authority because the Office of Thrift Supervision and the Comptroller of the Currency have not adopted such restrictive regulations for conversions from other types of financial institutions.

Defendant moves to dismiss the Complaint on the ground that this Court lacks subject matter jurisdiction because Plaintiff

lacks standing to challenge the regulations.[1]

Article III of the Unites States Constitution limits the federal courts to the resolution of live cases or controversies. U.S. Const., Art. III, § 2. The case or controversy requirement prohibits a federal court from considering an issue that a party has no standing to raise. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992); Diamond v. Charles, 476 U.S. 54, 61-62 (1986); Allen v. Wright, 468 U.S. 737, 750 (1984). In order for a group, rather than an individual, to have standing to sue on behalf of its members, the group must show that: (1) its members would otherwise have standing to sue individually; (2) the interests at state are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit. Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4th Cir. 2002)(citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)).

For a group to meet the first requirement – that its members would otherwise have standing to sue individually – a group plaintiff must show that: (1) its members have suffered an injury

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[1] Defendant also argues that Plaintiff's challenges to the 2004 and 2005 regulations are moot because the 2006 regulations substantially amended and superseded the prior regulations. Because the Court finds that Plaintiff lacks standing to challenge any of the regulations, the Court need not consider this argument.

in fact; (2) the asserted injury is fairly traceable to, or caused by, the challenged action of the defendant; and (3) it is likely, rather than merely conjectural, that the asserted injury will be redressed by a decision in the plaintiff's favor. See, e.g., Lujan, 504 U.S. at 560; Allen, 468 U.S. at 751. To meet the injury in fact requirement, a plaintiff's injury must be "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotations omitted). Moreover, "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer standing on a federal court." Allen, 468 U.S. at 754.

To show an injury in fact, a plaintiff must show that "he has sustained or is immediately in danger of sustaining some direct injury" as a result of the enforcement of the regulations or statute complained of by the plaintiff. Lujan, 504 U.S. at 574 (internal quotations omitted). In Lujan, the Supreme Court held that a plaintiff environmental organization did not have standing to challenge the Department of Interior's regulations concerning endangered species. Id. at 564. To support its claim, the plaintiff stated that two of its members intended to return to Sri Lanka with the hope of seeing particular endangered species, whose existence Plaintiff felt would not be insured by the Department's regulations. Id. at 563-64. The Court reasoned

that "[s]uch 'some day' intentions – without any description of concrete plans, or indeed even the specifications of when the some day will be – do not support a finding of 'actual or imminent' injury that our cases require." Id. at 564. The Court further reasoned that the imminence requirement is not satisfied when "the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." Id. at 564 n.2.

Plaintiff has made no showing that any of its members are immediately in danger of sustaining any direct injury as a result of the challenged regulations. While Plaintiff has alleged that the challenged regulations have made charter conversions more expensive to undertake, it does not allege that any of its members have any immediate plans to convert to a mutual savings bank or that the regulations would prevent them from doing so. Because Plaintiff has failed to establish that it has or will likely suffer an injury in fact that is actual or imminent, it lacks standing to assert this Action and this Court lacks subject matter jurisdiction.

For the foregoing reasons, it is hereby

ORDERED that Defendant's Motion to Dismiss is GRANTED and this case is hereby DISMISSED.

/s/
Claude M. Hilton
United States District Judge

Alexandria, Virginia
December 7, 2007

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

COALITION FOR CREDIT UNION CHARTER OPTIONS Plaintiff v. NATIONAL CREDIT UNION ADMINISTRATION Defendant	)	Civil Action No. 1:07-cv-667 (CMH/TRJ)

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Coalition for Credit Union Charter Options hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order entered in this action on seventh day of December, 2007.

Respectfully submitted,
BUTERA & ANDREWS

By: __/s/_____
Dennis M. Hart
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Dated: January 7, 2008

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing notice of appeal was served by the Court's electronic filing system this 7th day of January, 2008, upon the following:

AUSA Lauren A. Wetzler
Office of the United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314

_____/s_____
Dennis M. Hart

Filed: February 15, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEFING ORDER-CIVIL

No. 08-1115, Coalition for Credit Union v. National Credit Union Admin
1:07-cv-00667-CMH-TRJ

The Briefs and Appendix shall be served and filed within the time provided in the following schedule:

Appendix due: March 26, 2008

Opening Brief due: March 26, 2008

Response Brief due: April 28, 2008

Reply Brief permitted within 14 days of service of Response Brief

The Briefs and Appendix must conform to the **Rule Requirements for Preparation of Briefs and Appendices** and the **Fourth Circuit Checklist for Briefs and Appendices**, which set forth the applicable **Federal and Local Rules**. These documents are available as links from this order and at the Court's web site, **www.ca4.uscourts.gov**.

All parties to a side must join in a single brief, even in consolidated cases, unless the Court has granted a motion for leave to file separate briefs pursuant to Local Rules 28(a) and 28(d). Each side must notify the Court of the attorney who has been designated as lead counsel within 10 days of the date of this order. A governmental and a non-governmental party are not, however, required to join in one brief.

If a case has not been scheduled for a mediation conference, but counsel believes such a conference would be beneficial, counsel should contact the Office of the Circuit Mediator directly at 843-521-4022, and a mediation conference will be scheduled. In

such a case, the reason for scheduling the conference will be kept confidential.

Failure to file an Opening Brief within the scheduled time will lead to dismissal of the case pursuant to Local Rule 45 for failure to prosecute; failure to file a Response Brief will result in loss of the right to be heard at oral argument and may lead to imposition of sanctions if counsel has failed to comply with the Court's directives. The Court discourages motions for extension of time and grants extensions of the briefing schedule only in extraordinary circumstances upon a showing of good cause. Local Rule 31(c). If a brief is filed after its due date, the time for filing briefs in the schedule will be extended by the number of days the brief was late.

Failure to file an adequate Appendix containing all portions of the record necessary for review of the issues will result in the return of the Appendix for correction; deficiencies generally will not be remedied by reference to the record. The party at fault will be required to bear the cost of filing a Corrected Appendix regardless of the outcome of the case.

Pursuant to Local Rule 34(a), the Court may, on its own initiative and without prior notice, screen an appeal for decision on the parties' briefs without oral argument. If a case is selected for the oral argument calendar, counsel will receive notice that the case has been tentatively calendared for a specific court session approximately 45 days in advance of the session. Counsel will be afforded 10 days to file any motions that would affect the argument of the case. All parties to a side must share the time allotted for oral argument pursuant to Local Rules 28(d) and 34(d).

PATRICIA S. CONNOR
CLERK
By: Cathi Eubanks
Deputy Clerk

OFFICE OF THE CIRCUIT MEDIATOR
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM T. HOWELL	**THOMAS F. BALL** III	**DONNA S. KUNIHOLM**	**FRANK C. LANEY**
CHIEF CIRCUIT MEDIATOR	SENIOR CIRCUIT MEDIATOR	SENIOR RESIDENT CIRCUIT MEDIATOR	CIRCUIT MEDIATOR
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February 20, 2008

Re: 08-1115, Coalition for Credit Union Cha v. National Credit Union Administ

NOTICE OF SCHEDULED MEDIATION

Dear Counsel:

Pursuant to Local Rule 33, a mediation conference has been scheduled in this case. For everyone's convenience, it will be conducted by **TELEPHONE on March 6, 2008, at 9:00 am EASTERN TIME**. The Circuit Mediator will initiate the call. It is the policy of this office that cell phones may not be used in this conference.

There are several purposes for this conference: to prevent unnecessary motions or delay by attempting to resolve any procedural problems in the case, to identify and clarify the main issues being raised in the appeal, and to explore any possibilities there may be for settlement. All counsel are expected to discuss settlement with their clients and then attend the conference with authority to initiate and respond to settlement proposals.

Counsel addressed below are understood to be the lawyers with primary responsibility for this case and are required to participate. If: (1) any counsel listed below do not need to participate; or (2) additional or different counsel are necessary or beneficial for this conference; or (3) if this date presents an unavoidable conflict with a previously scheduled court appearance, please contact the undersigned Circuit Mediator immediately by telephone.

If this is an appeal from an administrative agency determination requiring an administrative record to be filed,

and if any party would like its due date extended, please contact the undersigned Circuit Mediator.

Sincerely,

Frank C. Laney
Circuit Mediator
Frank_Laney@ca4.uscourts.gov

Copies: Dennis M. Hart
Mark Bernard Stern

United States Court of Appeals for the Fourth Circuit
About Pre-Argument Mediations

Pre-argument mediations are scheduled by the Court with counsel for all parties in many civil appeals. They are conducted by experienced and specially trained Circuit Mediators. Although significant attention may be given to procedural questions and problems raised by counsel in a case, the primary purpose of the mediation is to offer participants a confidential, risk free opportunity to candidly evaluate their case with an informed neutral and to explore possibilities for voluntary disposition of the appeal.

Case Selection

Cases are selected for pre-argument mediations in several ways. Most are selected by the mediation program from the pool of all fully counseled civil appeals. Excepted from the screening process are prisoner, habeas corpus and some agency cases. Cases may be scheduled for a mediated conference at the request of one or more of the parties. Such requests are kept confidential by the Court but need not be by the requesting party. Requests for a mediation are usually allowed in any fully counseled civil appeal. Cases occasionally are referred by hearing panels for mediation just before or after oral argument.

Mediation Scheduling & Format

Nearly all pre-argument mediations are scheduled before submission of briefs and calendaring for oral argument. Written notice from the Court is mailed to each party’s representative in advance of the mediation date. Most mediations are by telephone with the Court initiating the calls. However, if convenient and beneficial, mediations may be in person.

Most mediations begin with the mediator briefly explaining the mediation process. The focus of discussion usually moves fairly quickly to explication of the issues on appeal. The purpose of this discussion is not to decide the case or reach conclusions about the issues, but to understand what the issues are and to evaluate the risks on appeal. The mediator will also inquire as to any procedural questions or problems counsel might have that could be resolved by agreement. These might include questions about the joint appendix or the need for a specially tailored briefing schedule.

Initial mediations typically last an hour and sometimes longer. In many cases, the discussions go no further. Often, proposals

are generated that require further review so follow-up discussions may continue for days or weeks or longer. If negotiations continue productively and all parties and the Circuit Mediator agree, briefing may be postponed for a reasonable time until negotiations are completed. Follow-up telephone or in-person mediations may be scheduled, with or without clients, as necessary, to fully pursue all chances for negotiated settlements.

What Participants Can Expect

Generally, participants can expect the Circuit Mediator to facilitate or lead a thoughtful and sometimes detailed exploration of the case. The extent of the mediator’s preparation will vary with the amount of information available at the time of the mediation. Usually the Circuit Mediator will have read the district court's opinion as well as the docketing statement. The Circuit Mediator will inquire about settlement and will probe for each party's interests if they are not immediately evident, often in private caucuses with each party. Every effort will be made to generate offers and counter-offers until the parties either settle or know the case cannot be settled and by how much it cannot be settled. Mediations are relatively informal. They are, however, official proceedings of the Court.

What the Court Expects

The Court attempts to identify lead counsel for all parties when scheduling mediations. This is not always possible so those notified of the mediation conference are asked to advise the Court in advance of the mediation if other counsel will be attending. Considerable time and effort is expended in preparing for and participating in these mediations , and attitudes and perceptions of participants frequently change in the process. Experience shows that this time and effort may be wasted and opportunities for settlement lost when the lawyers attending the mediation are not the lawyers on whose judgment the client will primarily rely when making decisions. The perceived tactical advantage of sending to the mediation an attorney with limited knowledge or authority is more than offset by the lost opportunity to influence or be influenced by this informed evaluation and settlement discussion. Thus, lead counsel are asked to come prepared to articulate their view of the merits of the case as well as their clients' interests and needs.

While counsel are to have authority to make and respond to offers, the Circuit Mediators do not necessarily expect counsel to have absolute settlement authority. Our experience is that in most cases there is more movement from prior settlement positions than anyone expected, requiring further consultation

with clients. Thus, counsel may wish to have clients present, or available by phone, at the time of the mediation. Clients are not required to be present at most initial mediations.

Mandatory Participation - Voluntary Settlement

Fourth Circuit Rule 33 requires the participation of all parties in scheduled mediations, usually through their counsel. Sometimes the purposes of the mediation cannot be achieved without the involvement of individuals or groups who are not parties to the appeal; such parties may be invited to participate. No actions affecting the interests of any party or the case on its merits, however, will be taken without the consent of all parties.

Confidentiality

By rule, nothing said in any mediation by the participants, including the Circuit Mediator, may be disclosed to anyone in the Fourth Circuit Court or any other court that might ever deal with the case. Disclosure is also prohibited to any person outside those participating directly or indirectly in the mediation process. This applies in all cases, including ones referred for mediation by the Court. This court rule does not apply to any settlement agreements. However, this in no way prohibits the parties from separately contracting that the terms of their agreement shall remain confidential.