Frequently Asked Questions: ICBA Lawsuit Against the National Credit Union Administration

Why is ICBA suing the NCUA?
ICBA is suing the agency for an unlawful March 2016 rulemaking allowing tax-exempt credit unions to exceed limits on commercial lending established by Congress.

What is the rule in question?
An NCUA final rule would dramatically expand business-lending loopholes for tax-exempt credit unions in violation of limitations established by Congress. The rule excludes purchased nonmember commercial loans and participations (i.e., commercial loans or participations originated by another credit union to a borrower who is not a member of the purchasing credit union) from the purchasing credit union's cap on business loans. This significantly alters the NCUA's approach to credit union commercial lending, allowing credit unions to circumvent the member business lending cap by purchasing commercial loans and participations from other credit unions.

Why is the NCUA's rule unlawful?
The NCUA action is contrary to the plain language of the Federal Credit Union Act as amended by the Credit Union Membership Access Act, which expressly limits the amount of member business loans that a credit union can both make and hold. It also defines a "member business loan" (MBL) as *any* commercial loan on the credit union's balance sheet, without regard to whether it was originated by the credit union or purchased from another credit union.

What do these laws say?
These laws say that no insured credit union may make any member business loan that would result in a total amount of such loans outstanding at that credit union at any one time equal to more than the lesser of (1) 1.75 times the actual net worth of the credit union; or (2) 1.75 times the minimum net worth required for a credit union to be well-capitalized. The FCU Act defines "member business loan" as "*any* loan, line of credit, or letter of credit, the proceeds of which will be used for a commercial, corporate or other business investment property or venture, or agricultural purpose."

Why do the laws contain restrictions on credit union member business loans?
All commercial loans affect credit union safety and soundness. Congress itself noted that these restrictions are intended to prevent a level of credit union commercial lending that may present safety and soundness concerns and to ensure that credit unions continue to fulfill their specified mission of meeting the needs of consumers by emphasizing consumer, not business, lending.

What is the NCUA's explanation for its rule?
The NCUA has not offered any rational explanation for its radical policy change. In fact, the agency has acknowledged that it "does not have authority to amend the MBL definition through regulation." This underscores the agency's lack of a legal basis for this action.

Who has the authority to set credit union laws?
Only Congress. The NCUA's rule completely and intentionally sidesteps the legislative branch, which has considered the MBL cap for more than a decade and chosen not to expand it.

Why is the NCUA action objectionable?
The NCUA has chosen to sidestep Congress to satisfy the demands of large, growth-oriented credit unions that are subsidized by the American taxpayer. This is an example of the agency's continued practice of serving as the industry's regulatory "rubber stamp."

So the NCUA is beholden to the industry it is supposed to regulate?
Yes, the NCUA has increasingly assisted credit unions by stretching the FCU Act beyond its breaking point. As credit union assets have ballooned, the NCUA's role has transformed from a federal financial regulator to an industry cheerleader.

Are there other recent examples of this transformation?
Yes. The NCUA proposed a separate field-of-membership rule in December 2015 that would significantly expand the definition of "well-defined local community," which by law limits the territory a community-based credit union can serve, to include any congressional district. The proposed rule would allow community credit unions in seven states—Montana, Alaska, Delaware, North Dakota, South Dakota, Vermont and Wyoming—to serve the entire state, making a mockery of the term "local." In the case of Alaska, the NCUA would treat towns located more than 1,000 miles apart as part of the same "local" community. The NCUA would also quadruple its rural district population definition—to 1 million people—and allow multiple-common-bond credit unions to expand "virtually," ignoring the requirement that the credit union be within a reasonable proximity to the location of the group as long as members have access to the Internet.

Why doesn't the ICBA lawsuit include the field-of-membership rule?
Until the NCUA adopts a final rule, ICBA is precluded from filing a lawsuit.

What is the harm of the NCUA's rule?
Ultimately, the rule puts consumers, taxpayers and the financial system at risk by jeopardizing the safety and soundness of federally insured credit unions. It also inappropriately expands the federally funded competitive advantages these tax-exempt institutions enjoy over community banks.

Wait, credit unions don't pay taxes?
Correct. Unlike community banks, credit unions are exempt from nearly all taxation—federal and state—a privileged position endowed because these institutions were created by Congress to serve a limited set of consumers. As a result, they receive a taxpayer-subsidized marketplace advantage.

How much does that exemption cost taxpayers?
The nonpartisan Tax Foundation has estimated the federal income tax subsidy at $31.3 billion over 10 years, and the Obama administration projected it to cost taxpayers $9.5 billion every four years.

What is ICBA seeking in its lawsuit?
ICBA simply wants the NCUA to adhere to the law when writing its rules. The association has asked the District Court for the Eastern Division of Virginia to declare that the NCUA acted contrary to law and acted arbitrarily and capriciously in concluding that:

- credit unions do not need to count purchased nonmember commercial loans and participations toward the MBL limit, and
- a credit union's purchase of a nonmember commercial loan or participation does not constitute making an MBL under the FCU Act.