

February 22, 2001

Ms. Becky Baker
Secretary to the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 2314-3428

Dear Ms. Baker:

The Credit Union National Association is pleased to provide its comments to the National Credit Union Administration Board on the Board's proposed amendments regarding the incidental powers of federal credit unions, which appeared in the Federal Register November 24, 2000. By way of background, CUNA represents more than 90% of the nation's more than 10,600 state and federal credit unions.

The incidental powers proposal represents one of the most important regulatory changes the agency has undertaken in recent history. It reflects the approach to regulation that CUNA President and CEO Dan Mica urged the agency to adopt in his speech at our annual symposium in October. He called upon NCUA to promote and provide "empowerment and flexibility (for credit unions), not mandates, dictates or punitive action." More specifically, he unveiled several recommendations to improve NCUA's functioning, including a supervisory framework that focuses on safety and soundness; targets risk, not detailed supervision; and facilitates innovation and does not erect roadblocks to progress. The incidental powers proposal is generally consistent with those principles; we will use every opportunity to encourage the agency to utilize this doctrine, which will benefit both credit unions and NCUA.

CUNA's letter was developed under the auspices of the Federal Credit Union Subcommittee, chaired by Edwin Collins, President and CEO of Lockheed Georgia Federal Credit Union.

SUMMARY OF CUNA'S COMMENTS

CUNA Commends NCUA for Its Efforts to Expand the Current Interpretation of Incidental Powers

- The proposed incidental powers rule is quite favorable, and CUNA commends the NCUA Board for its efforts to expand the interpretation of incidental powers.
- CUNA wholeheartedly supports the agency's proposed elimination of limits on income, which we recommended to the agency in our comment letter on incidental powers last year.

Expanded Powers for Federal Credit Unions are Essential

- Federal credit unions must have expanded powers if they are to grow and prosper in the evolving financial marketplace. This is particularly true in light of the increased powers and new activities banking entities may engage in under the Gramm-Leach-Bliley Act.
- Indeed, if federal credit unions do not obtain the authority necessary to engage in expanded activities, problems related to growth may translate into real safety and soundness concerns over time.
- A number of significant regulatory changes are necessary to help achieve the regulatory environment federal credit unions need to continue providing the level of services their members want as the marketplace evolves. Our recommendations regarding some of these changes are addressed further below in this letter.

NCUA Has Authority to Provide Federal Credit Unions with Wider Latitude under Incidental Powers Than the Proposal Calls For

- The history of the evolution of incidental powers for banks demonstrates that for decades, the bank regulators have been willing to expand incidental powers, and the courts have consistently agreed.
- Even so, the banks are today in hot pursuit of greater authority under the incidental powers clause. An illustration of this point is the recent proposal from the Federal Reserve to permit banks to offer real estate brokerage services through a subsidiary, a move that is vigorously contested by realtor groups.

- The Office of the Comptroller of the Currency has gone much farther in its interpretations for national banks than NCUA has proposed for federal credit unions in authorizing activities under the incidental powers clause. This was the case even before enactment of Gramm-Leach-Bliley.
- The NCUA Board should follow the bank regulators' approach to interpreting incidental powers and use the full extent of its authority to define such powers so that federal credit unions may utilize the full range of theirs, consistent with the Federal Credit Union Act.
- We agree with NCUA that the three-part test utilized by the Office of the Comptroller of the Currency for determining whether an activity is permissible as an incidental power is reasonable. However, the OCC has expanded this test through interpretations and in other documents. NCUA should incorporate similar language into its standard for determining what is permissible as an incidental power.

NCUA's Proposal Can Be Expanded In Several Key Ways

- The proposal states that while the agency is considering adopting criteria used by the Office of the Comptroller of the Currency, the NCUA Board may reach a different conclusion than OCC did as to what is an incidental power for credit unions. NCUA should delete this language, while making clear that credit union boards, not NCUA, are the primary decision makers regarding appropriate business activities.
- Recognizing that there is a need for safety and soundness firewalls, absent such a legitimate safety and soundness concern, NCUA should allow a federal credit union to undertake activities directly that are permitted for CUSOs.
- NCUA should consider allowing a federal credit union to engage generally in activities that are permissible for a state chartered credit union in the state in which the federal credit union is located. For example, federal credit unions in Georgia could engage in any activities permitted state chartered credit unions in Georgia. Some state-chartered credit unions have powers that are not permitted for federals; however, the burden should be on NCUA to establish an expedited process under which a nonconforming activity could be reviewed.

NCUA Can Streamline the Process for Approving Activities Under The Incidental Powers Rule

- The proposed process for approving incidental powers is cumbersome. Rather than a list of preapproved activities and requiring credit unions to apply to NCUA to conduct additional activities not on the list, NCUA should

establish broad parameters as to what constitutes incidental powers and allow credit unions to engage in such activities that fit those parameters.

- NCUA could provide examples of permissible incidental power activities in its regulation.
- NCUA should publish on its website the list of all current incidental powers activities it has approved through legal opinion letters.

Broader Incidental Powers Should be Combined with Reg-Flex and Wider CUSO Activities; Repeal of CAP; and an Intensive Reg-Relief Review

- NCUA should undertake a coordinated regulatory approach to create a favorable regulatory climate that will enhance the value of the federal credit union charter and strengthen the dual chartering system.
- The foundation of such an approach should be five key regulatory components:
 - a new broad incidental powers rule,
 - an expanded Reg-Flex regulation,
 - an updated Credit Union Service Organization rule;
 - repeal of the unnecessary CAP requirements for federal community credit unions;
 - expanded capabilities for federals to operate branches on foreign soil and
 - a rigorous review of all guidelines, Examiner's Manual and directives, agency letters to credit unions, legal opinion letters, and all other relevant agency documents, in addition to its review of regulations, to develop further meaningful regulatory relief and improvements for federal credit unions.

(A brief discussion of recommended changes to the Reg-Flex proposal, CUSO rule amendments, the need to repeal CAP, and other regulatory improvements is provided following our comments on the incidental powers proposal.)

CUNA'S COMMENTS

CUNA Commends NCUA for Its Expanded Interpretation of Incidental Powers

The National Credit Union Administration Board is proposing to revise the manner in which it interprets and regulates the use of the incidental powers clause of the Federal Credit Union Act (FCU Act). Under the FCU Act, a federal credit union is authorized to engage in express activities and "to exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated."¹

Under the proposal, NCUA would define what is an incidental powers activity by relying on a three-part test "substantially similar"² to the criteria employed by the Office of the Comptroller of the Currency. The proposal establishes eleven categories of preapproved, permissible activities from which a federal credit union may derive income without regulatory limitation. An approval process would also be established under which federal credit unions could seek review of activities to be added to the preapproved list.

In the comment letter we filed one year ago in response to the agency's request for comments on incidental powers, we urged NCUA to lift the limits completely on the amount of compensation a credit union could obtain from any activity, as long as the product or service could be defined as a direct or incidental power. Under the current proposal, the agency has removed the regulatory limits on income that may be derived from incidental powers activity. We continue to support this approach in the strongest manner possible.

CUNA commends NCUA for the superior legal work attendant to this proposal and for its efforts to interject flexibility into its interpretation of incidental powers for federal credit unions. We view NCUA's proposal as an excellent starting point. Nonetheless, it is a starting point, and we urge the agency to use the full capacity of its authority in interpreting incidental powers for federal credit unions. We offer a number of recommendations below to enhance the proposal in meaningful ways and further increase the value of a federal credit union charter.

Expanded Powers for Federal Credit Union Are Essential

"As we stand at the dawn of the twenty-first century, the possible configuration of products and services offered by financial institutions appear limitless. There can be little doubt that these evolving changes in the financial landscape are providing net benefits...."³ Federal Reserve Board Chairman Alan Greenspan observed during a speech last May. Undoubtedly one of the major changes to which he was alluding was the enactment of the Gramm-Leach-Bliley Act of 1999, still in the infancy stages of implementation. With the passage of that Act, broad new powers for banks and banking institutions were inserted into the provisions of the federal banking code. In fact, a list of permissible activities for

banks and their affiliates, compiled by the Federal Deposit Insurance Corporation, spans 30 pages.⁴ The disparity between bank and credit union powers is clearly represented in the Treasury Department's recent study on credit unions.^{5 6}

Now the issue of new powers for credit unions is under NCUA Board consideration and to no one's surprise, the bankers are demanding limits on credit union powers, even as they seek greater incidental powers for themselves.⁷ As the California-based citizens group, Consumer Action, stated even before passage of Gramm-Leach-Bliley, "Not only are they (the banks) seeking a larger advantage by attacking the credit union tax treatment, while defending their own subsidies, but also they are seeking to expand their own field of activities, while attempting to restrict that of the credit unions."^{8 9}

Despite bankers' hollow, self-serving protests, authority for credit unions to engage in a more complete range of services is essential to the future of federal credit unions. Credit unions must operate in the same markets as do banks and their affiliates. Indeed, if credit unions are not afforded the complete complement of activities which should be permissible under the FCU Act, real issues relating to growth as well as safety and soundness may arise over time.

In 1998, CUNA retained the highly respected survey research firm of Luntz Research Company to question consumers about their knowledge of credit unions. Sixty-nine percent of respondents indicated they totally agreed that credit unions cannot survive if they cannot grow. "Limiting the growth of credit unions could kill them," respondents indicated.¹⁰ Without new powers, credit union growth will be substantially curtailed.

A study currently underway by the Filene Research Institute indicates that, while there is a point of diminishing returns, credit union growth often leads to significant economies of scale that are beneficial to the operation of the credit union and ultimately positive for the credit union's members.¹¹

CUNA has commended NCUA for its proposal, which reflects an improved understanding of the nature of incidental powers and the position of credit unions in the financial marketplace. Yet, as we discuss below, NCUA may go farther in delineating incidental powers.

Indeed, NCUA must go farther -- up to but not exceeding, the limits permitted under the FCU Act. Maintaining arbitrary impediments to the exercise of the full range of lawful powers under the Federal Credit Union Act represents an arcane view of regulation that has been abandoned by every other federal depository institution regulator. Credit unions and their members will be severely disadvantaged, particularly as banks and their subsidiaries exercise more fully their panoply of new powers, if unnecessary constraints from NCUA remain in place.

NCUA Has Authority to Provide Federal Credit Unions with Wider Latitude under Incidental Powers

We are convinced that NCUA has even greater authority to expand its interpretation of what constitutes a permissible exercise of federal credit unions' authority under the incidental powers clause. A brief review of the evolution of the expansion of bank powers indicates how bank regulators have used the incidental powers clause, legitimately, as a tool to support and facilitate bank expansion and growth.

The incidental powers clause for banks was adopted as part of the National Currency Act of 1863, which later became the National Bank Act.¹² One year later, the provision was moved to the beginning of the Act, but no substantive changes have been made to the clause.¹³

Despite the fact that Congress has not expanded the incidental powers clause for banks, the bank regulatory agencies have consistently used their authority under the National Bank Act to stretch the clause to accommodate a variety of new products and services to meet consumer demand.¹⁴

In ten of eleven significant court cases since 1870 and ending with the landmark incidental powers case in 1995¹⁵ (discussed further below), bank activities as incidental powers have been repeatedly affirmed. This remarkable record of success suggests that agencies like NCUA do enjoy broad discretion to recognize marketplace realities faced by the institutions they regulate.

Even the one key case that OCC lost, Arnold Tours, ultimately led to the development of a broader test for what constitutes a permissible activity under the incidental powers clause.¹⁶ (Tours holds that an incidental power is permissible if convenient and useful in connection with the performance of an express power.¹⁷)

The Comptroller was again challenged in 1988 for approving a subsidiary for Citibank, the American Municipal Bond Assurance Corporation, to offer municipal bond insurance to buyers of municipal bonds through a standby letter of credit from Citibank. Though perhaps impermissible under the Tours rationale, the subsidiary was sanctioned by the court, which ruled in favor of the bank and the Comptroller.¹⁸ The court in this case supported the evolution of the incidental powers authority the Comptroller was seeking and developed a broader test than was articulated in Tours. This court said an incidental power does not have to be convenient or useful regarding expressly authorized activities.

Of course, an even more expansive view of incidental powers was displayed by the Comptroller when it permitted the sale of annuities by national banks. The activity was upheld by the Supreme Court in the seminal and oft-cited case of

VALIC.¹⁹ In VALIC, the Supreme Court expressly held that the business of banking is not limited to the enumerated powers in the banking act but includes more broadly activities that are part of the business of banking. It also reaffirmed that banks may engage in activities that are incidental to the enumerated powers found in the banking act.²⁰

The OCC has relied upon VALIC to expand the powers of banks and has been almost routinely upheld by the courts, despite persistent challenges, in permitting activities as diverse as the authority to act as an exclusive agent during acquisition negotiations for a customer and in allowing a bank to offer a market index investment.^{21 22}

It is an inescapable conclusion that for decades, the Comptroller of the Currency has been willing, if not eager, to listen to the operational concerns of the banks it regulates and remove regulatory barriers from the development of new products through favorable interpretations of the incidental powers clause. It is equally clear that the courts have consistently deferred to the Comptroller's interpretations on a range of new activities.²³

An excerpt from the Comptroller's Guide to the National Banking System²⁴ leaves no doubt that the Comptroller takes a vigorously proactive role in facilitating the development of new products and services. In discussing bank powers, including incidental powers, the Guide states:

So that national banks may continue providing effective service to their customers and communities, the OCC supports initiatives by national banks to engage in new activities as markets and customer needs change, to the extent the law permits and consistent with safety and soundness. ***One of our four key goals that support the OCC's mission is 'to foster competition by allowing banks to offer new products and services'*** (emphasis added).²⁵

We urge the NCUA now and into the future to follow the example the Comptroller has set and use the fullest extent of its authority to enable federal credit unions to utilize the fullest range of theirs. We recommend that NCUA adopt language for credit unions as part of the incidental powers rule similar to that in the OCC Guide.

The NCUA proposal states that it would incorporate a three-part test that is substantially similar to the one developed by the Comptroller of the Currency, which parallels court opinions on incidental powers.

Under the proposal, NCUA will determine whether an activity is permissible if it:

- is convenient or useful in carrying out the mission or business of credit unions consistent with the FCU Act;

- is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and
- involves risks similar in nature to those already assumed as part of the business of credit unions.

We believe this test is not as permissive as the one utilized by the OCC. We call to the agency's attention the OCC's discussion of incidental powers in its publication on the national banking system cited above. The parameters set by the OCC regarding incidental powers are broader than NCUA's test would seem to indicate:

One important legal principle permits banks to engage in activities that are incidental to authorized banking activities. We have found permissible 'incidental activities' to include those that are **incidental to operating a bank as a business enterprise**, that **optimize the use and value of a bank's facilities and competencies**, that **enable banks to avoid economic waste**, or that **enhance the quality and efficiency** of the content or delivery of banking products or services (emphasis added).²⁶

We also call to the agency's attention recent interpretive letters from the OCC that provide the agency's analysis of how an activity may be permissible. One such letter addresses whether a national bank may offer crop and fire insurance in connection with loans to farmers.²⁷ The letter approves such activities and discusses at length the OCC's standards for authorizing products and services as part of the "business of banking." The test it articulates during that discussion is very similar to NCUA's proposed standard. However, the letter indicates that there is more to OCC's consideration of whether an activity is "incidental to banking," going beyond the business of banking standard.

Even if the ...proposal were not viewed as part of the business of banking, the proposal is incidental to the business of banking. The ...proposal is incidental to a bank's authority to make loans ... because selling crop insurance **enhances a bank's ability** to receive repayment for its loans; **promotes a bank's lending business** by making available a credit related product sought by borrowers, and **enables a bank to avoid economic waste** in connection with its lending activities" (emphasis added).²⁸

As NCUA is well aware, under the standard articulated in Chevron, when confronted with a challenge to an agency's determination, the courts will first ask whether the "intent of Congress is clear" on the issue at hand.²⁹ If it is, "that is the end of the matter."³⁰ However, if the statute is silent or ambiguous with respect to the issue, the court will give the agency's view "controlling weight" when it is based on a permissible construction of the statute.³¹

We see no reason to conclude that Congress has given NCUA latitude that is any less broad in setting the standards for incidental powers for federal credit unions than it has given to the OCC to set such standards for banks. As the case law clearly demonstrates, the courts have repeatedly upheld the OCC's interpretation of what is an incidental power and have sanctioned the OCC's efforts to promote bank growth through the offering of new products and services. Based on our legal review of the relevant cases,³² we believe that if challenged, courts would weigh carefully the treatment they have afforded the OCC and defer to NCUA in a similar manner, consistent with Chrevron.

We urge NCUA to amend the three-part test for incidental powers to incorporate more flexibility into the standard, as the OCC has done through its interpretations and in other agency documents. Expanding the criteria in this manner will, we believe, allow NCUA to accommodate more readily new products and services as incidental powers, while still adhering to a reasonable interpretation of what is encompassed under the rubric of "incidental powers."

In the request for comments, NCUA states, "In reviewing whether an activity is within an FCU's incidental powers, the Board is adopting criteria that are substantially similar to those used by the OCC, but notes that those criteria will be applied in the unique context of credit unions and the business for which they are incorporated. Thus, while the Board may look to other laws and precedents in the financial industry for guidance in this area, the results of the Board's analysis may be different."³³

This language causes concern for several reasons, but most fundamentally, because its meaning is unclear.

One meaning is that NCUA will be predisposed to construe credit unions' incidental powers even more broadly than the OCC has interpreted those of banks. This would be the most logical approach for several reasons. Credit unions have far less direct authority and incentive to take excessive financial risks than banks, and all other things being equal, should need less regulatory supervision. Credit union management does not benefit from stock option appreciation when income spikes and does not gain personal net worth when gambles pay off. In addition, credit unions start from a deficit position when their powers are compared with those of banks. Thus, NCUA could reasonably be signaling its intent to provide an especially generous interpretation of the incidental powers clause for credit unions.

However, the language may be intended to indicate NCUA's plans to continue its historic approach of being less generous to credit unions in its interpretation of incidental powers than the OCC has been for banks. This is a double cause for concern. First, there is no legal or economic justification for perpetuating the disparity in treatment. Second, the language suggests that NCUA believes that it should impose on credit unions its own vision of what constitutes the business of a credit union. We are not aware of any language in the FCU Act that conveys

this authority or responsibility to NCUA or of any objective basis under the Act for making such a determination.

Had the FCU Act clearly defined the business of credit unions beginning in 1934, credit unions would probably have ceased to exist by now because they could not have responded to changing market conditions. For instance, no one in 1934 could have predicted that issuing credit cards would someday be considered part of credit unions' business. No one today, however, could seriously question that such activity is not only legitimate, but also essential for many credit unions. In the absence of standards in the FCU Act, and in light of the practical necessity of keeping credit unions viable in the marketplace, NCUA must defer to the marketplace, as experienced by credit unions and their members, as to what constitutes the business of credit unions in our evolving era—so long as all express prohibitions on credit union powers in the FCU Act are preserved and safety and soundness issues are minimized.

Restricting credit unions' incidental powers on the basis of some other NCUA theory of what constitutes the business of credit unions would represent a dangerous foray away from safety and soundness regulation and into mission regulation, which is not supported by the language, intent, or history of the FCU Act.

We urge the Board to abandon this negative language and approach. It predetermines an outcome that is not in the best interests of federal credit unions, their members or even the agency. Rather, the supplementary information as well as the rule itself should make it clear that **credit union boards, not NCUA, are the primary decision makers regarding appropriate business activities.**

CUNA has consistently supported interpretations from NCUA that are unique to credit unions, but we do not believe that NCUA has the authority to limit a credit union's activities, simply because it is a credit union.

Rather than focusing on how credit unions should be curtailed, we believe NCUA should adopt OCC's approach and standards. NCUA should routinely consider appropriate for credit unions activities that the OCC approves through its legal opinion letter process, unless there is a pressing safety and soundness concern or an activity is contrary to the FCU Act.

NCUA's Proposal Can Be Expanded in Other Ways

In addition to taking the OCC's encouraging approach, incorporating more permissive concepts into the NCUA's standard for determining incidental powers, clarifying that the credit union's board is the primary decision maker regarding appropriate activities, and routinely considering new activities the OCC approves,

NCUA may reasonably take other steps to expand the use of incidental powers, consistent with the FCU Act.

Parallel CUSO Rule

Currently, NCUA is considering whether changes should be made to the Credit Union Service Organization rule, to enhance the utility of these organizations. CUNA strongly supports this review and will be filing detailed comments on CUSOs.

There is a strong link between what is permissible for a CUSO and what a credit union should be allowed to engage in directly through the authority of incidental powers. That is because, under the FCU Act, a credit union organization in which a federal credit union may participate:

Is established primarily to serve the needs of its member credit unions, and whose business relates to the daily operations of the credit unions they serve.³⁴

Thus, what is allowed for a CUSO should be readily permitted for federal credit unions directly in most cases because CUSO activities must relate to credit union operations, as do incidental powers. In fact, many activities that CUSOs are now permitted to conduct NCUA has included for federal credit unions under this proposal.

We think this approach should be continued. As NCUA approves new activities for CUSOs through whatever mechanism, those new activities and services should be regularly considered as direct services credit unions may offer under the incidental power authority.

Parity Approach

Federal credit unions exist side-by-side with state credit unions in most areas. Even though both types of institutions are federally insured, so that NCUSIF ultimately bears risk for their activities, in some states the state-chartered institutions have broader powers than their federal counterparts. In some cases, these broader powers contravene no express prohibitions in the FCU Act.

If an activity under state law is being carried on by some federally insured credit unions without undue risk and in a manner that provides value to members, then almost by definition it must be *at least* incidental to the business of a federal credit union, unless specifically prohibited under the FCU Act, because other credit unions (state chartered) are in fact, carrying on the activity as part of their business.

The incidental powers rule provides NCUA with a creative, but fully lawful, opportunity to enhance the value of the federal charter, and we urge NCUA to provide parity for federal credit unions regarding incidental powers. More specifically, what we are recommending is that NCUA allow all federals in a

particular state to engage in the range of activities allowed for state chartered credit unions in that state.

We believe that a streamlined process could be developed by NCUA for the appropriate NCUA office to review such nonconforming activities on an expedited basis. The rules governing this process would need to address such issues as how to handle situations in which federal credit unions do business in more than one state, or whether a power granted to state credit unions in a state should be available to all federal credit unions, whether or not they operate in that state. Credit unions that want to challenge a denial should be able to appeal to the Board, again under an expeditious review procedure.

For the record, CUNA has consistently supported the adoption of wild card provisions in the states under which state chartered credit unions can benefit if federal powers exceed state powers. Maintaining a healthy dual chartering system requires that there be reciprocity in this regard.

Specific Activities NCUA Should Incorporate

Below, we offer a framework for what we believe would be the optimal system for regulating incidental powers. Regardless of whether NCUA adopts these recommendations or retains the proposed categories of preapproved activities and the proposed process for approval of additional products, we urge NCUA to make clear in the supplementary information, the rule, or in an appendix, that the following activities (and others that additional commenters may be suggesting that fit the incidental powers criteria) are permissible under the incidental powers clause:

- All activities identified by NCUA in the Supplementary Information or in the proposal;
- Aggregation or screen scraping;
- Limited trust powers;
- The authority to offer a package of services to small businesses who are MBL borrowers;
- International monetary transfer services for members and nonmembers; and
- Real estate-related services.

Regarding aggregation, these “screen scraping services” allow a member to access information on all accounts, even those held elsewhere at other institutions or through other entities. Financial institutions often contract with a third party vendor to provide the service, which the institution then makes available to subscribers through its website. Alternatively, institutions partner with software programs such as Quicken or Microsoft Money to let subscribers have secure, online access to all or most of their assets and liabilities in one place. Bank regulators have indicated through Regulation E proposals and other documents that screen scraping is a permissible, financial-related and thus,

incidental activity for banks. Screen scraping should be allowed as an electronic financial service and an operational program.

Regarding trust powers, a federal credit union should be allowed to act as an agent for a member's trust account, in addition to the trustee activities described in the proposal. This means that a credit union could execute investments within and outside of the credit union on behalf of the trust, but only as the trust owner's agent and not acting on its own accord. Expanded trust powers would fit under the category already established for trustee or custodial services.

We also urge NCUA to consider expanding its interpretation of incidental powers to encompass a wide range of activities to support a small business to which a credit union is lending. This would include providing assistance in preparing payroll, including tax withholdings, offering life and disability insurance to the small business's employees, providing financial counseling to the employees of the small business, engaging in electronic fund transfers on behalf of the employees of the business and other related financial activities. Expanded services for small business borrowers could be included under several categories, including financial counseling, finder activities, marketing, and operational programs.

A number of credit unions would like to be able to send wire transfers on behalf of immigrants in this country to relatives and other individuals in foreign countries. For example seven billion dollars a year flow into Mexico alone from the United States through wire transfers, and over 60% of the Mexican immigrants in the U.S. routinely send money to their homeland. More often than not, these transfers are not through credit unions or other traditional institutions, but are through international wire transfer services that charge unconscionable amounts to send the transfer.

International transfers, such as through the International Remittance Network (IRnet), established by the World Council of Credit Unions, in partnership with leagues, are squarely within a federal credit union's incidental powers to offer electronic fund transfers and monetary instruments, finder activities and marketing. Such transfers should be permissible whether the individual is a member of the credit union or not.

Another permissible incidental power is the ability of a federal credit union to act as a finder between its members seeking a home mortgage loan and a real estate broker or agent. This activity, we believe, should be permissible as a finder activity, as well as an authorized marketing service and operational program.

NCUA Can Streamline the Incidental Powers Approval Process

We believe that NCUA can substantially improve the process for determining whether an activity is permissible as an incidental power. We urge NCUA to eliminate the preapproved category list and the need to amend the regulation to include new categories. While the categories are broad, no one can predict with certainty what new services and products will be developed and to what extent new categories will be required. The proposed process we believe will delay the implementation of new services because it will require the rule to be changed every time a new product or service is proposed that does not fit under a preapproved category.

Instead of the proposed preapproved categories, NCUA should amend the standard for determining what is an incidental power activity as we recommend above and provide that a federal credit union may determine for itself whether a new activity fits into that regulatory standard. Examiners would certainly be entitled to review such decisions through the examination process. Credit unions should be encouraged to seek a legal opinion from a private attorney or from NCUA regarding the legality of a new activity. Further, CUNA would work with NCUA to help ensure that credit unions would be fully aware that if they are embark on a new activity without a legal opinion, future problems could be in store if the activity is challenged.

NCUA may want to provide examples of permissible activities in the regulation, which we believe would be useful. In any event, we encourage NCUA to maintain a list on its website of all activities that it has determined through legal opinion letters are permissible under incidental powers. Currently, the FDIC maintains such a list for banks.

Broader Incidental Powers Should be Combined with Reg-Flex and Wider CUSO Activities; Repeal of CAP; and an Intensive Reg-Relief Review

CUNA enthusiastically supports the agency's efforts over the last several months to provide more flexibility for federal credit unions and to relieve their regulatory burden, including the incidental powers proposal.

However, we believe that the most favorable outcome for federal credit unions regarding incidental powers is still but one supporting block in a much larger foundation federal credit unions need to grow and prosper. We urge the agency to take a coordinated approach in developing an optimal regulatory climate that will enhance the value of the federal credit union charter and strengthen the dual chartering system.

Such an approach should encompass several key regulatory components, in addition to the broadest possible incidental powers regulation. Those components should include: an expanded Reg-Flex regulation; an updated Credit

Union Service Organization rule; repeal of the unnecessary CAP requirements for federal community credit unions; expanded capabilities for federals to operate branches on foreign soil; and a rigorous review of all regulations and all other relevant agency documents to develop further meaningful regulatory relief and improvements for federal credit unions.

Regarding Reg-Flex, Chairman Dollar took a very bold step when he announced at CUNA's Governmental Affairs Conference last February that he was proposing a new initiative to exempt healthy federal credit unions from needless regulatory burdens. We roundly applauded this move then and continue to do so now. We urge the Board to move forward with Reg-Flex and expand its scope and availability to make a good proposal even more meaningful for federal credit unions.

Concerning the CUSO regulation, the Board is now seeking comments on changes to improve the regulation. We will be filing a separate letter on the CUSO proposal. As we will state in that letter, we urge the agency to make the regulation as permissible as possible and in the process review bank holding company and financial holding company activities to allow credit unions parallel authority, consistent with the FCU Act.

We remain adamantly opposed to the unnecessary community action plan (CAP) requirements for federal community credit unions and urge the Board to repeal these provisions as expeditiously as appropriate and well before the December effective date.

We also believe that NCUA has authority to provide expanded capabilities for federals to operate branches on foreign soil and encourage the agency to incorporate this issue into its efforts to address the proper role of NCUA in supervising the foreign branches of state chartered credit unions.

Finally, we recognize that through the development of the Reg-Flex proposal and NCUA's routine regulatory reviews, the agency has identified and taken steps to relieve credit unions' regulatory burdens. However, we believe the agency can broaden this process to make it even more effective.

We request that the agency undertake in very short order a rigorous review of all regulations, guidelines, the Examiner's Manual and directives, agency letters to credit unions, legal opinion letters, interpretative rulings, and all other relevant agency documents to ensure they enhance credit unions' capabilities to serve their members, consistent with the message contained in the Board's joint letter in January.

Conclusion

We believe that the year 2001 can be a very productive one for credit unions and for NCUA, particularly if the agency will follow through on its commitment to enhance the value of the federal charter through such pivotal changes as expanded incidental powers authority. The incidental powers proposal certainly sends a strong, positive signal to credit unions that the agency wants to facilitate their operations and remove needless impediments that hamper their ability to serve their members.

Nonetheless, NCUA has greater authority to define and authorize incidental powers activities than it purports to use in this proposal. Unless NCUA is willing to assume the full mantle of its authority to expand incidental powers, federal credit unions will never be able to use the complete range of their powers, as the banks are allowed to do.

Again, we appreciate the opportunity to comment on this extremely important proposal for federal credit unions. Please feel free to us at 202-682-4200 if you have any questions or comments about the views expressed in this letter.

Sincerely,

Eric L. Richard
General Counsel

Mary Mitchell Dunn
Associate General Counsel

Cc: CUNA Governmental Affairs Committee
CUNA Federal Credit Union Subcommittee
AACUL Legislative/Regulatory Task Force

Endnotes

¹ The Federal Credit Union Act, 12 USC 1757(17)

² NCUA incidental powers proposal, 65 FR 70526 (November 24, 2000)

³ Greenspan, Alan, "Banking Evolution," Remarks at the 36th Annual Conference on Bank Structure and Competition of the Federal Reserve Bank of Chicago, Chicago, IL May 2000.

⁴ Federal Deposit Insurance Corporation, "Activities Permissible for National Banks and Their Subsidiaries," Washington, DC, January 2000.

⁵ U.S. Department of Treasury, "Comparing Credit Unions With Other Depository Institutions," Washington, DC, January 2001.

⁶ In contrast to the approach taken by banking groups regarding credit union powers, credit union groups have generally not opposed new activities for banks on the grounds that consumers benefit from a wide array of choices for financial services.

⁷ "Realtors Want Hill To Post 'Keep Out' Signs for Bankers," CQ Daily Monitor, February 13, 2001, Bankers want their regulators to define real estate brokerage as an incidental power, and the Federal Reserve Board has issued such a proposal. "The new rule is going to completely benefit consumers because it provides greater choice and more competition. Any time you have greater choice and more competition, it means usually lower prices, better services," the ABA said. Our point exactly.

⁸ Cooper, Mark and James Likens, "Banks and Credit Unions: Keeping the Playing Field Level," Consumer Action, San Francisco, CA, March 1999.

⁹ Another example of the banks' contradictory propaganda about credit union activities is their charge that because credit unions have the same powers they do, we should be taxed. On the one hand, they want to accuse credit unions of having the same powers as banks and on the other, they want to deny credit unions the use of those same powers.

¹⁰ Luntz, Frank, "Credit Union Survey," Luntz Research Company, March 1999.

¹¹ Fried, Hal, Filene Research Institute, Madison, WI (study anticipated 2001).

¹² 12 Stat. 655,668.

¹³ 12 USC 24.

¹⁴ *Ibid.*

¹⁵ Merchants' Bank v. State Bank, 77 US 604 (1870); First National Bank v. National Exchange Bank, 92 US 122 (1875); Wyman v. Wallace, 201 US 230 (1906); Miller v. King, 223 US 505 (1912); Clement National Bank v. Stage of Vermont, 231 US 120 (1913); Colorado National Bank v. Bedford, 310 US 41 (1940); Franklin National Bank v. New York, 347 US 373 (1954); Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972); M&M Leasing Corp. v. Seattle First National Bank, 563 F. 2d 1377 (9th Cir. 1977); American Insurance v. Clarke, 865 F. 2d 278 (DC Cir. 1988); and NationsBank v. Variable Annuity Life Ins. Co., 513 US 251 (1995).

¹⁶ Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972).

¹⁷ *Id.* at 431, 432.

¹⁸ American Insurance Ass'n. v. Clarke, 865 F. 2d 278 (DC Cir, 1988).

¹⁹ NationsBank v. Variable Annuity Life Ins. Co. 513 US 251 (1995).

²⁰ *Id.* at 258.

²¹ Norwest Bank Minnesota v. Sween Corporation, 118 F3d 1255 (8th Cir. 1977); Investment Company Institute v. Ludwig, 884 F. Supp. 4,5 (D.D.C. 1995).

²² One exception is American Deposit Corporation v. Schacht, in which a district court, relied on VALIC, in a narrow issue involving whether a particular retirement certificate of deposit is the equivalent of a deposit; the court said it is not and is subject to insurance regulations, 887 F. Supp. 1066 (N.C. Ill. 1995).

²³ In this context, the banking industry's characterization of NCUA as a "cheerleader agency for credit unions is ironic. At least in the area of incidental powers, the OCC has been far more amenable to new activities for banks than NCUA has been for credit unions. As the record clearly shows, NCUA is decades behind OCC in developing incidental powers for credit unions.

²⁴ Federal Deposit Insurance Corporation, "A Guide to the National Banking System," Washington, DC, May 1999.

²⁵ *Id.* at p. 14.

²⁶ *Ibid.*

²⁷ OCC Interpretive Letter #812, Washington, DC, January 1998.

²⁸ Id at 6,7.

²⁹ Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 US 837 (1984).

³⁰ Id, at 843.

³¹ Id at 844.

³² See end note no. 14.

³³ NCUA incidental powers proposal, 65 FR 70527, 70529 (November 24, 2000).

³⁴ 12 USC 1757(5)(D).