NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

November 7, 1986

GC/HMU:sg
4690

Office of General Counsel

Mr. Paul C. Herring
President
Peoples Community Federal Credit Union
P.O. Box 1377
Cumberland, MD 21501-1377

Dear Mr. Herring:

This is in response to your letter of August 27 concerning the ability of your Federal credit union, with its main office in Maryland, to open a branch in West Virginia.

It has been our longstanding position that a Federal credit union (FCU) has the authority to branch. It is our opinion that any state law purporting to limit such authority is preempted. This position is supported by various sections of the FCU Act, its legislative history and case law. Enclosed is a copy of a memorandum prepared by this Office several years ago when the same question arose. Our position remains as is stated in the attached 1980 memorandum.

Although not directly on point, you may wish to call legal counsel's attention to a recent case involving a New Jersey national bank that relocated its main office in Pennsylvania. McEnteer v. Clarke, 55 LW 1061 (September 25, 1986).

I hope that the enclosed memorandum will prove helpful. Please contact me if you have further questions.

Sincerely,

STEVEN R. BISKER
Assistant General Counsel

HMU:sg

Enclosure

FOIA file: Vol III, C, 5 - Branch Office

NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

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GC STAFF COMMENTS: GC-4-10

The following comments have been prepared in response to the request of the General Counsel on the question of state regulation of Federal credit union branching activity. Our conclusion is based on the supremacy of Federal regulation, the structure of the Federal Credit Union Act, the clear intent of Congress, and the analogous experience of the Federal Home Loan Bank Board in the regulation of branching.

The recently decided case of Jones v. Rath Packing Co., 403 U.S. 519 (1977), sets out the determinants that the court will look to in deciding whether or not state law is preempted by Federal law. The court stated that the "first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., Art. 1, §8, has prohibited state regulation of the particular aspects of commerce involved." The states' police powers will not be disturbed unless Congress has ". . . 'unmistakenly so ordained' . . . that its enactments alone are to regulate a part of commerce." Further, the court held that Congress' intent may be obtained by way of review of what is explicitly contained in the statute's language or implicitly contained in its structure and purpose."

Congress has explicitly stated in 12 U.S.C. § 1756 that "Federal credit unions shall be under the supervision of the Board . . . ." Further, the Board, before approving any FCU's organization certificate (charter), is required by 12 U.S.C. § 1754 to make an appropriate investigation "for the purpose of determining (1) whether the organization certificate conforms to the provisions of this chapter; (2) the general character and fitness of the subscribers thereto; and (3) the economic advisability of establishing the proposed Federal credit union." In S. Rep. No. 555, 73D Congress 2d Sess. 4 (1934), the Committee on Banking and Currency, in discussing the necessity of a Federal law governing credit unions instead of state laws noted, among other reasons, that:

> (c) In order to have a uniform development, the State laws differ in essential particulars and many of them are very imperfect rendering normal development impossible. . . .
>
> (f) Because the problems with which the credit union is concerned are truly national problems which can only be met nationally by a Federal law.

With respect to the above, it is clear that Congress intended that Federal credit unions be governed by Federal law.

An examination of the Federal Credit Union Act reveals that Congress has expressly recognized that Federal Credit Unions possess the power to branch.

Congress amended the Federal Credit Union Act by its Act of July 31, 1946, Pub. L. 574, § 8, 60 Stat. 745, which read, in section 8(4):

> (4) Subject to the control and supervision of the Governor and under such rules and regulations as the Governor may prescribe, the liquidating agent of a Federal credit union in involuntary liquidation shall (i) cause notice to be given to creditors and members to present their claims and make legal proof thereof, which notice shall be published once a week in each of three successive weeks in a newspaper of general circulation in each county in which the Federal credit union in liquidation maintained an office or branch for the transaction of business on the date it ceased unrestricted operations; . . . .(Emphasis supplied)

This section, with minor changes, is presently codified as section 120(b)(4)8 the Federal Credit Union Act (12 U.S.C. § 1766(b)(4)). Legislative history indicates that the 1946 amendments merely codified the involuntary liquidation procedures employed by the Governor of the Federal Deposit Insurance Corporation, a predecessor of the National Credit Union Administration, as evidenced by the following colloquy:

> Mr. Rhodes . . . Then the new section to be added would change section 16 and give the proper procedure in the event it was necessary to liquidate a credit union. The act at present permits a charter to be suspended or revoked, but it does not say what might be done toward clearing out its affairs and closing them up, and we are favorable to having it. Perhaps a representative of the Federal Deposit Insurance Corporation might add a word to that, if there are any questions about it.
>
> Senator Millikin. When a charter is suspended does the FDIC step in and take charge in any way of the liquidation, or is that left in the hands of the directors or those who are managing the local concern?
>
> Mr. Orchard. Wherever possible we ask the local group to close it up, but there are sometimes when the local officers abandon it and there we must step in.
>
> Senator Millikin. When the local officers do close up, how closely does the FDIC follow it?
>
> Mr. Orchard. We check it very carefully and account for every cent.
>
> Senator Millikin. Do you exercise any discretion in the manner of dissolution or do you just simply watch it?
>
> Mr. Orchard. We have set up a standard procedure which we give them immediately they attempt to liquidate.
>
> Senator Millikin. You require them to follow that procedure?
>
> Mr. Orchard. We require them to follow that procedure. If they don't follow it then we take them over and put them in what we call an involuntary liquidation, which is provided for here.

> We have had less than 50 cases of that kind, but when they do occur we need some way of actually closing them up so that claims can be barred after a reasonable time and the thing can be done in an orderly fashion. This is provided for in this proposed amendment. Hearing before the Committee on Banking and Currency United States Senate, Seventy-Ninth Congress, Second Session, on H.R. 6372, an Act to Amend the Federal Credit Union [Act], July 2, 1946, at pages 16, 17.

A more recent expression of Congressional will occurred in 1970, during deliberations concerning the creation of the National Credit Union Administration as an independent agency of the Federal government. Section 205(c) of S. 3822, a bill introduced in the second session of the 91st Congress (May 1970), provided that:

> Except with the prior written consent of the Administrator no insured credit union shall establish and operate any new branch or move its main office or any branch from one location to another.

During hearings on this bill, Mr. R.C. Robertson, President, CUNA International, Inc., commented on the bill and stated the following in regard to § 205(c):

> . . . It is our opinion that this is more properly a matter which falls within the prerogative and decision making of the Credit Union concerned rather than the Administrator of the National Credit Union Administration. Hearing on S. 3822 Before the Subcommittee on Financial Institutions, 91st Congress, 2d Session (June 1970) at 116.

In subsequent testimony, Mr. Mal Nestlerode, Treasurer of the National Association of Federal Credit Unions, expressed wholehearted concurrence with CUNA's position on § 205(c). 14 at p. 30.

The Committee on Banking and Currency deleted 205(c). In Senate Report Number 91-1128, 91st Congress, Second Session 1970) at page 7, it noted its reasons:

> The Committee also deleted a prohibition against establishing branches or moving an office or branch without approval from the Administrator. Since credit unions are noncompetitive with each other, authority over branching or movement of the main office is not necessary for proper operation of the insurance program. If branching were to affect costs of operation adversely, the Administrator could deal with the problem under other authority in the bill.

Thus, in its discussion (and rejection) of proposed limitations on the power of credit unions to establish branches, Congress expressly acknowledged that power and the fact that credit unions have historically engaged in branching activity.

Additionally, we are of the opinion that the Federal Credit Union Act is a comprehensive statute which comprises an exclusive Federal regulatory scheme to govern the powers and operations of Federal credit unions. Such a regulatory scheme was recognized for Federal savings and loan associations in People of the State of California v. Coast Federal Savings and Loan Association, 98 F.Supp. 311 (S.D.Cal. 1951). Federal regulation was summarized there as controlling a Federal savings and loan "from its cradle to its corporate grave" 98 F.Supp. at 316. The court also discussed distinctions between national banks and Federal savings and loan associations. With respect to the latter institutions, the court noted that:

> . . . Congress made plenary preemptive delegation to the [Federal Home Loan Bank] Board to organize, incorporate, supervise and regulate, leaving no field for state supervision. (Emphasis added.) Id.

See also, Elwert v. Pacific First Federal Savings and Loan Association, 138 F. Supp. 395 at 400 (D.Ore. 1956).

The Home Owners' Loan Act of 1933, specifically 12 U.S.C. §1464(a), authorizes the FHLBB ". . . to provide for the organization, incorporation, examination, operation and regulation of . . . 'Federal Savings and Loan Association[s]', and to issue charters therefor. . . ." Likewise, the Federal Credit Union Act authorizes the Administrator to perform such functions with respect to Federal credit unions. 12 U.S.C. §§ 1754, 1756, and 1766. Thus, the Federal scheme for credit unions parallels that recognized for Federal savings and loan associations by the Coast court.

During our review of the authority of other financial institutions (Federal Savings and Loan Associations and National banks) in the area of branching, two cases of particular note were discovered. The case of North Arlington National Bank v. Kearny Federal Savings & Loan Association, 187 F.2d 564 (3rd Cir. 1951) cert. denied, 342 U.S. 816, and United States v. First Federal Savings & Loan Association, 151 F.Supp. 690 (E.D. Wis. 1957), aff'd, 248 F.2d 804 (7th Cir. 1957), cert. denied, 355 U.S. 957, hold that Federal savings and loan associations do have the authority to branch although such authority is not explicitly stated in their statute. These holdings are relevant in that a strong analogy may be made between the branching authority of savings and loan associations and that of Federal credit unions.

North Arlington was an action brought by a national bank against a Federal savings and loan association which opened a branch office near the bank. The bank argued that the association was without authority to branch. The Home Owners' Loan Act (12 U.S.C. §§ 1461-1468), the statute involved, did not give explicit authority to the Federal Home Loan Bank Board to permit branch offices for associations. The court noted that the "statute is one of the type which states a policy, provides for the project under consideration, lays down some general rules and prohibitions and leaves details to the Board. . . ." The Board, under its general authority, issued regulations for the granting of permission for the operation of branch offices. Both parties referred to words and phrases contained in the statute which they argued impliedly supported their

position.

The court held, at 565, that the "microscopic examination of statutory words alone does not bring one to any conclusion not open to reasonable differences or opinion." The court went on to state that "[s]trong argument for the existence of the power of the part of the Board to establish a branch office for an association we think comes from other words of the statute." The statute authorizes the board to issue charters "giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." 12 U.S.C. § 1464(a). The court held that it was that section which gave the Board the duty and authority to make policy. The Board did not exceed its authority in promulgating a regulation governing branching. Further, the court held, at 565, that a weighty factor in support of the Agency's interpretation of its authority is subsequent legislative history. In this instance, the court was presented with testimony about two congressional bills that were never passed, which proposed to limit the power of the Board with respect to the establishment of branch offices. The court emphasized that "it would have been wholly unnecessary to provide for limitations on the power of the Board to provide for branch offices if it had no such power at all." It also stated that, "[w]e think that the bills and report thus impliedly averting to the existence of the power is stronger argument for its existence than the mere failure of Congress to do anything about an administrative body's interpretation of its authority when the matter is not directly called to its attention." The court held for the defendant association.

Our situation is somewhat analogous to the facts of North Arlington. First, like the Home Owners' Act, the Federal Credit Union Act does not provide explicit authority for FCU's to branch, although there are words and phrases which by strong implication permit such activity. Second, Congress proposed to amend the FCU Act (previously noted) by requiring prior approval by the Administrator before an FCU could branch. This amendment did not pass. The clear intent of Congress was to reaffirm the branching authority of Federal credit unions by declining to impose a requirement that branching decisions be subject to prior regulatory approval. Third, NCUA has interpreted the Act as permitting branching, as a result of which a number of FCU's have established branch offices. Finally, the Act contains similar broad statutory language that would authorize the Board to regulate branching.

The case of First Federal affirmed the court's holding in North Arlington, thereby establishing favorable precedent in the 7th Circuit.

As a result of this initial research, it is our opinion that Federal credit unions have the power to establish branches under the authority of the Federal Credit Union Act, which statute, by virtue of the supremacy of Federal legislation, preempts conflicting state legislation. A recent decision of the United States Supreme Court prompts the further observation that state authority to regulate or impede branching decisions of Federal credit unions is further circumscribed by the implicit limitations imposed by the Commerce Clause of the United States Constitution, which grants to Congress the power to regulate commerce among the states and limits the power of the states to erect barriers

against interstate trade. For a recent discussion of the Commerce Clause and the limits which it imposes on state regulatory authority, see Lewis v. BT Investment Managers, Inc. _____U.S._____, 48 U.S.L.W. 4638 (U.S. June 9, 1980).