GC/TPM:sg
3320

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

December 29, 1988

Office of General Counsel

Mr. Fred C. Dent
Commissioner of Financial Institutions
State of Louisiana
P.O. Box 94095
Baton Rouge, Louisiana 70804-9095

Re: Louisiana's Restriction on Out-of-State Credit Union Branching (Your August 1, 1988, Letter)

Dear Mr. Dent:

You have asked whether a Louisiana statute providing that "[n]o credit union domiciled outside of the state of Louisiana may operate a branch office within the state of Louisiana" is effective against Federal credit unions ("FCU's"). We believe: that the statute attempts to limit Congress' longstanding policy to permit an FCU to branch wherever necessary to meet credit union members' needs and is thus invalid under the Supremacy Clause of the U.S. Constitution; and that, given the freedom credit unions domiciled within Louisiana seem to have to branch, the statute seems discriminatory against out-of-state credit unions, and thus invalid under the Commerce Clause of the U.S. Constitution. Since the statute was, in our view, outside Louisiana's authority to enact, we do not believe Executive Order 12612 requires FCU's to abide by it.

Louisiana Statutory scheme

Louisiana gives credit unions chartered under its laws the authority [La. Rev. Stat. Ann. §6:644 (West)] to exercise;

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> such rights, privileges, and powers as may be incidental to or
>
> reasonably necessary or appropriate for the accomplishment of the objects and purposes of the credit union; to enter into such contracts, incur such obligations, and generally do anything necessary or appropriate to take advantage of all membership, loans, subscriptions, contracts, grants, rights, or privileges whatsoever which at any time may be available or inure to credit unions by virtue of any act or resolution of the Congress of the United States, particularly any act of congress creating a Federal credit union system, and regulations issued pursuant thereto.

On the other hand, Louisiana law gives these powers to FCU's and credit unions chartered by other states [La. Rev. Stat. Ann. §6:667.1 (West)]:

> A. Unless Federal laws or regulations provide otherwise, Federal credit unions and federally insured credit unions and the members thereof shall possess all of the rights, powers, privileges, benefits, immunities, and exemptions that are now provided or hereafter may be provided by the laws of this state for credit unions organized under the laws of this state and for the members thereof. This provision is additional and supplemental to any provision which by specific reference is applicable to federal credit unions and the members thereof.
>
> * * *
>
> C. Credit unions organized under the laws of another state and the members thereof, shall possess all of the rights, powers, privileges, benefits, and immunities and exemptions that are

> provided or hereafter may be provided by the laws of this state for credit unions organized under this Chapter and for the members thereof.

However, in 1986, the Louisiana legislature passed an amendment to its credit union law that: "[n]o credit union domiciled outside of the state of Louisiana may operate a branch office within the state of Louisiana." La. Rev. Stat. Ann. §6:641.2 (West) (Supp. 1988).

Federal Statutory Scheme

The FCU Act was enacted in 1934 to enable FCU's to serve "groups having a common bond of occupation or association, or . . . groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. §1759. From the beginning, FCU's have freely established branches wherever needed to satisfy the needs of the group they were chartered to serve without regard to state boundaries. Unlike federally-chartered banks and savings and loans, FCU's have never been restricted by statute or regulation as to where they might establish branches. Compare 12 U.S.C. §36(c).

In 1970, Congress added to the FCU Act [12 U.S.C. §1752(9)] a definition of "branch":

> The term "branch" includes any branch credit union, branch office, branch agency, additional office, or any branch place of business located in any State of the United States, the District of Columbia, the several territories, including the trust territories, and possessions of the United States, the Panama Canal Zone, or the Commonwealth of Puerto Rico, at which member accounts are established or money lent. The term "branch"also includes a suboffice, operated by a Federal credit union or by a credit union authorized by the Department of Defense, located on an American military installation in a foreign country or in the trust territories of the United States.

The term had been placed in the Act in 1946 without being defined; See 12 U.S.C. §1766(b)(4) (requiring publication of notice to creditors and members "in each county in which the Federal credit union in liquidation maintained an office or branch for the transaction of business . . . .").

Also in 1970, Congress rejected a proposal to add the following provision to the FCU Act [S. 3822, 91st Cong., 2d Sess. §205(c)(1970)]:

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

CUNA International had opposed the amendment [Hearing on S. 3822 Before the Subcommittee on Financial Institutions, 91st Cong., 2d Sess. 116 (1970)]:

> 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.

The Senate Committee explained its rejection this way:

> The Committee also deleted a prohibition against establishing branches or moving an office or branch without approval from [NCUA]. 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 [NCUA Board] could deal with the problem under other authority in the bill.

NCUA has uniformly interpreted the FCU Act to permit FCU branching without regard to state law restrictions. Copies of some of our opinions are enclosed.

Preemption

The Supremacy Clause of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The standards for determining whether a state enactment must give way to a Federal determination (the "preemption doctrine") are fairly well defined:

> The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const, art VI, cl 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by Federal law and the character of obligations imposed by it may

> reveal the same purpose." Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947).
>
> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with Federal law. Such a conflict arises when "compliance with both Federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941). See also Jones v. Rath Packing Co., 430 U.S., at 526, 51 L. Ed. 2d 604, 97 S. Ct. 1305; Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767, 773, 91 L. Ed. 1234, 67 S. Ct. 1026 (1947).

Fidelity Federal S & L Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982).

We believe that, at the least, Louisiana's Section 6:641.2 prohibiting FCU branching within the state "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." Congress established FCU's to serve the group they were chartered to serve wherever those persons may be located. Since 1934, FCU's, unlike banks and S&L's, have freely branched without restrictions of Federal or state law; Congress has been fully aware of this fact. In 1970, Congress rejected a proposal to require prior NCUA approval of FCU branches. Congress thereby implicitly also rejected state prohibition of FCU branching.

Discrimination Against Credit Unions Other Than Those Chartered By Louisiana

As we read Louisiana's statutory scheme, it creates this discriminatory situation:

a) Louisiana-chartered credit unions are allowed to branch freely within the state, either under the expansive "incidental powers" or "most favored nation" clauses of Section 644; and

b) Federal and other charters are prohibited from branching within the state.

The U.S. Supreme Court outlined the limits of state commercial discrimination in Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 402-03(1984):

> [T]he foundation of our analysis is the basic principle that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977), quoting McLeod v. J. E. Dilworth Co, 322 U.S. 327, 330, 88 L. Ed. 1304, 64 S. Ct. 1023 (1944); accord, Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 47 L. Ed. 2d 55, 96 S. Ct. 923 (1976). The undisputed corollary of that principle is that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States," including the States' power to tax. Boston Stock Exchange, 429 U.S., at 328, 50 L. Ed. 2d 514, 97 S. Ct. 599, quoting Freeman v. Hewit, 329 U.S. 249, 252, 91 L. Ed. 265, 67 S. Ct. 274 (1946). For that reason, "[n]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce. . . by providing a direct commercial advantage to local

> business." Boston Stock Exchange, 429 U.S., at 329, 50 L. Ed. 2d 514, 97 S. Ct. 599, quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458, 3 L. Ed. 2d 421, 79 S. Ct. 357, 67 A.L.R. 2d 1292 (1959). See also Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 10 L. Ed. 2d 202, 83 S. Ct. 1201 (1963); Nippert v. Richmond, 327 U.S. 416, 90 L. Ed. 760, 66 S. Ct. 586, 162 A.L.R. 844 (1946); i. M. Darnell & Son Co. v. Memphis, 208 U.S. 113, 52 L. Ed. 413, 28 S. Ct. 247 (1908); Guy v. Baltimore, 100 U.S. 434, 25 L. Ed. 743 (1880); Welton v. Missouri, 91 U.S. 275, 23 L. Ed. 347 (1876).

States are similarly restricted in their use of regulatory power. Lewis v. BT Investment Managers, 447 U.S. 27, 44 (1980); McEnteer v. Clarke, 644 F. Supp. 290, 294 (E.D. Pa. 1986).

Under these standards, Section 641.2 of the Louisiana statutes, as we read it, is unconstitutionally discriminatory.

Executive Order 12612

Section 4 of Executive Order 12612 states:

> (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt state law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

Because we believe the FCU Act can only be constructed so as to require preemption, Executive Order 12612 does

not alter our longstanding position that states cannot prohibit FCU branching in their states.

Sincerely,

Hattie M. Ulan

for JAMES J. ENGEL
Deputy General Counsel

TPM:sg

Attachments

NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

LS/YG:cch
3000
February 15, 1985

Jerry Chamberlain, Esq.
Wolf, Block, Schorr, Solis-Cohen
15 & Chestnut Streets
Philadelphia, PA 19103

Dear Mr. Chamberlain:

This is in response to your telephone conversation of February 14, 1985, with Yvonne Gilmore of this Office concerning Federal credit union (FCU) branching.

Enclosed, you will find copies of three opinion letters or memorandums outlining our position on FCU branching.

You will note that there are no restrictions on FCU branches other than that it must either accept member accounts or lend money to be classified as a branch pursuant to Section 101(9) of the Federal Credit Union Act, 12 U.S.C. §1752(9).

I am sorry that we do not have more recent opinions to send to you. However, the enclosed opinions represent the current position of this Office. (Of course, NCUA is no longer run by an Administrator and thus, the references to an Administrator in the enclosures are inapplicable.)

Please do not hesitate to contact Ms. Yvonne Gilmore, Esq. of this Office if you have further questions.

Sincerely,

(S)

STEVEN R. BISKER
Assistant General Counsel

Enclosures

VOL. III Part C 5 Branch Offices

GC/SBSeltm
4690

24 JAN 1978

Mr. William H. Hughes
Commissioner of Credit Unions
State of Wisconsin
4802 Sheboygan Ave.
Madison, WI 53702

Dear Mr. Hughes:

The National Credit Union Administration has recently received a letter from the IBM Mid-America Employees Federal Credit Union regarding its plans to open a branch office in your state. They have informed us that it is your position that Section 186.25 of Wis. Stats. Ann. empowers you to regulate such activity. Further, you contend that the Federal Credit Union Act does not provide Federal credit unions with the authority to branch. In light of the above, we understand that you do not intend to permit the IBM Mid-America Employees Federal Credit Union to branch into your state.

With the hope that a legal confrontation might be avoided between your office and the Credit Union, I would like to take this opportunity to discuss some of the pertinent issues, as we see them, involved in this matter.

First, you apparently base your authority over Federal credit unions branching in the state of Wisconsin on Section 186.25 of your statute. That section states that:

> [illegible] credit unions formed under this [illegible] other similar law, or authorized to [illegible] in this state a business similar to that authorized to be done by this Chapter, shall be under the control and supervision of the Commissioner.

January 19, 1978

Vol I C.5.

A-12-58

> Each corporation shall make a full and detailed report of its business as of December 31 for that year, and of its condition on such date, in such form and containing such information as the commissioner may prescribe, and shall file with the commissioner a true and verified copy thereof. . . .

If it is in fact your position that Federal credit unions are subject to this provision of State law, how do you reconcile the provision with Section 106 of the Federal Credit Union Act (12 U.S.C. §1756) which provides that:

> Federal credit unions shall be under the supervision of the Administrator, and shall make financial reports to him as and when he may require, but at least annually. Each Federal Credit Union shall be subject to examination by, and for this make its books and records accessible to, any person designated by the Administrator. . . .

Is it your view that Section 186.25 preempts Section 106 of the Federal Credit Union Act? It seems clear that the converse is true, in view of Article VI, Clause 2 of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

There has been a litany of cases decided by the U.S. Supreme Court and other lower courts recognizing

[redacted] of Congress to enact laws which shall [redacted] laws dealing with the same subject [redacted] e.g., Easton v. Iowa, 188 U.S. 220 (1903); Franklin National Bank v. New York, 347 U.S. 373 (1953); Northern States Power Co. v. State of Minn., 447 F. 2d 1143 (8th Cir. 1971), affirmed 405 U.S. 1035.

Thus, we believe it is quite clear that your department has no authority to regulate Federal credit unions. In this respect, it is our position that Section 186.25 of Wis. Stat. Ann. applies only to state credit unions or other such institutions organized under state law, not credit unions chartered under Federal law.

Second, from discussions with your office in October 1976, we understood that you also believe that Section 186.113 of your statute applies to Federal credit unions. Section 186.113 states, in part, that:

> "A credit union may: (1) If the need and necessity exists, establish subsidiary offices within the state with the approval of the Commissioner. . . ."

however, a closer examination of your statute reveals that the term "credit union", as defined in Section 186.01 "means a cooperative nonprofit corporation, incorporated under this chapter to encourage thrift among its members. . . ." (Emphasis added.) Federal credit unions are not within this definition since they are incorporated under the Federal Credit Union Act and not under State statute. Therefore, Section [redacted] does not apply to Federal credit unions.

Lastly, you contend that the Federal Credit Union Act does not empower Federal credit unions to operate branch offices. We do not concur with your position. Although not explicitly authorized in the Federal Credit Union Act, the legislative history and other references within the Act reflect the authority of Federal credit unions to branch.

[redacted] of the Federal Credit Union Act, [redacted]; Section 120(b)(4) of the Federal [redacted] Act, (12 U.S.C. §1766(b)(4)); see also, S. 3822, 91st Congress, 2d Sess. §205(c) (May 1970); Hearing on S. 3822 before the Subcomm. on Financial Institutions, 91st Congress 2d Sess., at 116 and 130 (June 1970); S. Rep. No. 91-1128, 91st Cong., 2d Sess. 7(1970). In addition to these specific references, it is our position that branching falls squarely within Section 107(15) of the Act (12 U.S.C. 1757(15)) which gives Federal credit unions the power "to exercise such incidental powers as shall be necessary or requisite to enable it to carry out effectively the business for which it is incorporated." See, 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).

We would greatly appreciate a reply at your earliest convenience.

Sincerely,

/S/

JOHN L. OSTBY
General Counsel

cc: Mr. W. R. Utecht
Assistant Treasurer - General Manager
IBM Mid-America Employees Federal
Credit Union
3605 Highway 52 North
Rochester, MN 55901

[redacted] Director
[redacted] (Toledo)

[redacted]

GC/JLC:vhw
6/1/77

FROM: John Culhane
Paralegal Specialist

TO: Robert F. Fenner
Assistant General Counsel

SUBJ: FCU Branch or Sub-office

REF: (a) Letter from M.R. Utecht, Ass't Treasurer-General Manager, IBM MidAmerica Employees FCU, to Frank Wiegla, President, NAFCU
(b) GC memo, GC/SRB:vhw, dated November 1, 1976, subject: IBM Mid-America Employees Credit [redacted] #62399, and GC Comments

ENCL: (1) Reference (a)
(2) Reference (b).

1. There is ample authority for the proposition that a Federal credit union has the power to open a branch or sub-office. With respect to involuntary liquidations, Section 120(b)(6) of the Federal Credit Union Act specifically requires publication of legal notice "in each county in which the Federal credit union in liquidation maintained an office or branch for the transaction of business. . . ." (Emphasis added.) This language expressly authorizes Federal credit unions to operate branch offices. The language has remained unchanged since added to the Act in 1946, so that the fact that it does not appear in the FCU powers clause, Section 107, seems inconsequential.

2. As indicated in reference (b), NCUA has also interpreted Section 107(15) of the Act (the incidental powers section) as permitting Federal credit unions to branch. In addition to the express language quoted above, this interpretation is supported by the legislative history of Title II of the Act, state statutes on subsidiary offices, and by Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 422 F.2d 504 (10th Cir. 1970).

3. Provisions from the legislative history are quoted in reference (b). To summarize, Congress rejected a proposed amendment to the Act that would have required the Administrator to consent to the operation of a branch office. It was Congress' view that it was not necessary for this Agency to regulate branching specifically. Rather, Congress determined that the power should be left to the Federal credit unions, free from Federal or state regulation.

June 1, 1977 III C A.5 branch office - authority in FCU Act

4. Several state statutes authorize their respective state credit unions to operate branch or subsidiary offices where "necessary" to enable the credit unions to serve their members, e.g., Ark. Stat. Ann. §67-939 (Supp. 1977); Ga. Code Ann. §41A-3116 (1974); Hawaii Rev. Stat. §410-39(1) (Supp. 1973); Idaho Code §26-2165 (Supp. 1975); Me. Rev. Stat. Ann. tit. 9-B, §826 (Supp. 1975); Ch. 292, §34(1) [1975] Nev. Laws; Wis. Stat. Ann. §186.113(1) (Supp. 1976).

5. Finally, in Central, the Court upheld the Federal Home Loan Bank Board's regulations authorizing the use of mobile facilities (the ultimate in branch offices) over a claim that the Board exceeded its statutory authority in promulgating the regulations, thereby sub silentio upholding the Board's authority to regulate the use of branch offices. The underlying statute did not even mention the power to operate branch offices, unlike the Federal Credit Union Act.

6. There being substantial authority, both express and implied, to support the use of branch offices, the question left is whether or not the State can regulate the operation of branch offices. The normal rule, of course, is that Federal law is controlling on the issue. Since Congress has clearly given Federal credit unions the power to branch, any state regulation in this area would be an unconstitutional interference with the power of Congress. Support for this argument lies in the fact that where Congress wishes to permit state control over the operation of branch offices, it expressly does so. National banks are only authorized to operate branch offices "if such establishment and operation are at the time expressly authorized to State banks by the statute law of the State." 12 U.S.C.A. §36(c)(1),(2) (Supp. 1977).

7. Since the State cannot regulate Federal credit union branching, it cannot of course, discriminate between Federal credit unions within the State and those without.

8. Obviously, this is just a cursory examination of the issues. If you feel that a detailed letter is necessary to persuade Mr. Hughes, the Commissioner of Credit Unions of the State of Wisconsin, I'll do more research on this matter.

JOHN CULHANE

GC/SRB:vhw
CU #62399

1 NOV 1976

General Counsel

Regional Director
Region IV (Toledo)

IBM Mid-America Employees Credit Union #62399

REF: (a) RD, Region IV (Toledo), memo IV/RNL:mlm, dtd. July 30, 1976, same subj
(b) Steve Bisker Telecon with Mr. Hughes, Commissioner of Credit Unions, Wisconsin, Oct. 14, 1976, same subj

1. Reference (a) requests our comments regarding Wisconsin State law and its effect on a Federal credit union branching into that state.

2. My Office conversed with Mr. Hughes of the State Bank Commissioner's Office. He contended that NCUA is not specifically given authority to allow Federal credit unions to branch, therefore, State law would be controlling on this issue.

3. NCUA has interpreted Section 107(15) of the FCU Act (incidental powers section) as permitting credit unions to branch. While the Commissioner's Office is correct in its statement that there is no specific authority, it is NCUA's position that §107(15) would provide such authority. In addition the legislative history of Title II of the Act adds further support to this contention.

4. In the event that the credit union does branch in Wisconsin and is faced with legal action by the State, NCUA will consider intervention in its behalf. However, such intervention would first be subject to Department of Justice approval.

5. Please advise the credit union accordingly.

JOHN L. OSTBY

10/28/76

GC-8-1

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

7/1 (branch)

NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

GC/NS/bl
7/11/80

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:

> (e) 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 Mestlerode, 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).