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The Community Reinvestment Act & Credit Unions

I. INTRODUCTION

Banks and credit unions have been waging a war since the birth of credit unions. One of the most recent issues in this war involved whether credit unions should be regulated by the Community Reinvestment Act of 1977 (CRA).¹ The issue was spawned by the last major battle between banks and credit unions, one that centered around a challenge by several banks to the National Credit Union Administration's (NCUA) interpretation of the "common bond" requirement for membership in a federal credit union.² The statute requires a common bond of occupation or association or, alternatively, limits membership to "groups within a well-defined neighborhood, community, or rural district."³ The NCUA interpreted the "common bond" rule so as to allow several unrelated employer groups to be members of a single credit union.⁴ The Supreme Court sided with the banks, mak-

1. See 12 U.S.C. §§ 2901-2907 (1994). The CRA regulates banks' service to low and moderate income communities, forcing banks to offer loans and investments to people in these communities. See *id.* Another main issue is that banks feel credit unions should not be tax-exempt. See James M. Culberson, Jr., *The Credit Union Triple Threat*, 88 A.B.A. BANKING J. 13 (1996).

2. See *National Credit Union Admin. v. First Nat'l & Trust*, 522 U.S. 479 (1998). See also Amanda Masset, Note, *The Evolution of the Common Bond in Occupational Credit Unions: How Close Must the Tie That Binds Be?*, 3 N.C. BANKING INST. 387 (1998) (discussing the common bond issue). The common bond issue is not completely solved; the American Bankers Association filed suit against the NCUA, charging that NCUA is violating CUMAA by expanding membership rules beyond the statute's intention. See *American Bankers Ass'n v. National Credit Union Admin.*, 38 F. Supp.2d (D.D.C. 1999). See also *Bank Groups File Suit Decrying Credit Union Membership Expansion*, BANK & LENDER LIABILITY LITIG. REP., Feb. 17, 1999, at 3.

3. Federal Credit Union Act § 109, 12 U.S.C. § 1759 (1994) (describing the membership requirements for federal credit unions).

4. See *National Credit Union Admin.*, 522 U.S. at . 484. See also Masset, *supra* note 2, at 394-398.

ing it clear that a common bond exists when employees of different subsidiaries of the *same* company are joined together in a federal credit union, but not when employees of *unrelated* companies are so joined.⁵

Having lost their battle in court, credit unions and their trade associations lobbied Congress, demanding immediate action reversing the Supreme Court's decision.⁶ Congress responded by producing H.R. 1151, which became known as the Credit Union Membership Access Act (CUMAA).⁷ Banking organizations attempted to persuade Congress to reject the bill.⁸ In addition to arguing in favor of the Supreme Court's decision, bankers took the opportunity to argue in favor of increased regulations for large credit unions, asserting that large credit unions are similar to banks in terms of number of assets and customers, and should be subject to the same regulations, including the CRA.⁹ Congress, however, was not persuaded and passed the CUMAA after removing the CRA-like requirements from the

5. *See id.*

6. *See* Masset, *supra* note 2, at 398-406.

7. *See* Bill Introduced to Amend FCU Act, AM. BANKER-BOND BUYER, March 24, 1997, at 1. *See also* Credit Union Membership Access Act, Pub. L. No. 105-219, 112 Stat. 913 (1998).

8. *See* *The Supreme Court's February 25, 1998 Decision Regarding the Credit Union Common Bond Requirement: Hearings on H.R. 1151 Before the House Committee on Banking and Financial Services*, 105th Cong. 405 (1998) (prepared testimony of Jeff Plagge, President and CEO of First National Bank, in Waverly, Iowa, and a member of the Board of Directors of the American Bankers Association (ABA)) [hereinafter Plagge Testimony]; *The Supreme Court's February 25, 1998 Decision Regarding the Credit Union Common Bond Requirement: Hearings on H.R. 1151 Before the House Committee on Banking and Financial Services*, 105th Cong. 431 (1998) (prepared testimony of John Garrison, President and Chief Executive Officer of Walden Savings Bank, in Walden, New York, and a member of the Board of Directors of America's Community Bankers) [hereinafter Garrison Testimony]. In her testimony on behalf of the Credit Union National Association (CUNA), Rose Bartolomucci stated: "The Supreme Court ruling, if not reversed, spells the demise of certain federal credit unions, denial for millions of Americans of credit union services, and a major restructuring of the credit union system for years to come." *The Supreme Court's February 25, 1998 Decision Regarding the Credit Union Common Bond Requirement: Hearings on H.R. 1151 Before the House Committee on Banking and Financial Services*, 105th Cong. 353 (1998) (prepared testimony of Rose Bartolomucci, President & CEO of Kent Credit Union in Kent, Ohio) [hereinafter Bartolomucci Testimony].

9. *See* Garrison Testimony, *supra* note 8, at 431. Larger credit unions operate like banks, and therefore should be treated like banks, and should no longer have tax-free, regulatory-free status. *See id.*

bill.¹⁰

The passage of the CUMAA did not end the effort to impose the CRA on credit unions.¹¹ Surprisingly, banks were not the main proponents of this recent movement. The most current push came from within credit union ranks.¹² The NCUA Chairman Norman D'Amours drafted a proposal calling for NCUA examiners to review community-chartered credit unions' service to low-income members.¹³ The proposal failed to pass the three-member NCUA Board (Board), with two members voting against the proposal.¹⁴

This article will discuss the background legislation and movements involving the CRA and credit unions.¹⁵ It will then explain and analyze the 1999 proposal submitted to the Board by D'Amours, presenting arguments both for and against the proposal.¹⁶ Finally, the article will examine the future of credit unions and the regulation of their services to low-income members.¹⁷ While the proposal did not pass, the board members are committed to implementing new requirements for credit unions, which means that the CRA for credit unions, in some form, is still a likely scenario.¹⁸

10. See Credit Union Membership Access Act § 101, 112 Stat. at 913 (1998). See also Pub. L. No. 105-219, S. AMDT. 3336 (1998). See also H. R. REP. NO. 105-472, at § 204 (1998). See generally Eileen Canning & R. Christian Bruce, *House Passes Credit Union Bill*, BNA'S BANKING REP., Aug. 10, 1998, at 245.

11. See Scott Barancik, *Chief Credit Union Regulator Plans to Propose Own Version of Community Reinvestment*, AM. BANKER, Jul. 29, 1999, at 2.

12. See *id.*

13. See Eileen Canning, *NCUA Board Nixes D'Amours Proposal to Put Community Service Mandates on CUs*, BNA'S BANKING REP., Sept. 20, 1999, at 437.

14. See *id.* D'Amours voted for the proposal, and Yolanda Wheat and Dennis Dollar voted against the proposal. See *id.*

15. See *infra* notes 19-53 and accompanying text.

16. See *infra* notes 54-106 and accompanying text.

17. See *infra* notes 107-130 and accompanying text.

18. See *infra* notes 109-113 and accompanying text.

II. BACKGROUND

A. Community Reinvestment Act of 1977

The Community Reinvestment Act of 1977 was created to prevent financial institutions from "red lining," or refusing to offer loans to low- and moderate-income communities.¹⁹ It called for the assessment of financial institutions' record of meeting the credit needs of their communities by the appropriate Federal agency.²⁰ However, in its definition of financial institutions, Congress included banks and savings and loans, not credit unions.²¹ Credit unions were not even a part of the discussion when the CRA was enacted.²² Congress exempted credit unions from the CRA in 1977, because credit unions were smaller, had fewer assets, and served fewer customers than banks.²³ From 1977 until 1998, the potential application of the CRA to credit unions attracted minimal attention.²⁴ However, in 1998 banks began lobbying very strongly for regulation of credit unions pursuant to the CRA.²⁵ This outcry came as a result of the dramatic increase in the size and wealth of credit unions, who, according to bank-

19. Housing and Community Development Act of 1977, Pub. L. No. 95-128, Title VIII, 91 Stat. 1147 (codified as amended at 12 USC §§2901-2905 (1994)). See Legislative History, Pub. L. No. 95-128, at 2994-2995. See generally Calvin Cunningham, Note, *How Banks can Benefit from Partnership with Community Development Financial Institutions: The Bank Enterprise Awards Program*, 3 N.C. BANKING INST. 261, 281-282 (1998).

20. See Legislative History, Pub. L. No. 95-128, at 2994-2995. The regulatory agencies are the Federal Reserve Board, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. See 79 FED. RES. BULL. 251 (1993).

21. See 12 USC § 2902 (1994). See also 12 USC § 1813 (1994).

22. See Bartolomucci Testimony, *supra* note 8, at 353.

23. See Garrison Testimony, *supra* note 8, at 431. Unlike banks and savings and loans, credit unions are non-profit institutions, which because of their status and exemption from taxes, are able to offer low-interest loans to indigent communities. See Masset, *supra* note 2, at 390-391. Any profit made by a credit union must go back to its members. *Id.*

24. See *The Supreme Court's February 25, 1998 Decision Regarding the Credit Union Common Bond Requirement: Hearings on H.R. 1151 Before the House Committee on Banking and Financial Services*, 105th Cong. 431 (1998) (prepared testimony of John Garrison).

25. See *id.*

ers, were essentially operating as banks.²⁶

B. *The CUMAA -Arguments in Favor of Applying the CRA to Credit Unions*

In 1998, when bank representatives appeared before the House Committee on Banking and Financial Services, their testimony centered on the common bond issue.²⁷ However, banks took the opportunity to argue in favor of the CRA for credit unions as well.²⁸ In testimony before the House, America's Community Bankers (ACB) argued that the CRA should be applied to geography-based or community-chartered credit unions and to credit unions serving multiple-employer groups, because they felt there should be a way for credit unions to prove that they were lending to people in all parts of their communities.²⁹ ACB's representative asserted that credit unions do not want the CRA, because they do not want to spend the extra money and time needed to comply with such regulations.³⁰ Not having to expend time and money on CRA compliance gives them a "competitive edge" over banks.³¹ Also, ACB criticized the credit union argument that credit unions do not need the CRA because the structure of credit unions is to serve their community.³² According to

26. *See id.*

27. *See* Masset, *supra* note 2, at 398-406.

28. *See id.*

29. *See* Garrison Testimony, *supra* note 8, at 431. Cornelius D. Mahoney, president and CEO of the Woronoco Savings Bank of Westfield, Massachusetts stated that credit unions " 'should be treated like any other banking institution and [be] subject to federal taxation and the requirements of the CRA.' " *See Banking Industry Responds to the House's Passage of HR 1151*, COM. LENDING LITIG. NEWS, Apr. 17, 1998, available in LEXIS, Legnew Library, LRPLLN File.

30. *See* Garrison Testimony, *supra* note 8, at 431.

31. *Id.* Mahoney calls credit unions "nothing more than financial services conglomerates" that have "abandoned their original mission" and "are using the tax advantage to grow far and away beyond the original intended common bond." *Banking Industry Responds to the House's Passage of HR 1151*, COM. LENDING LITIG. NEWS, Apr. 17, 1998, Vol. 10, No. 21, available in LEXIS, Legnew Library, LRPLLN File.

32. *See* Garrison Testimony, *supra* note 8, at 431. *See also* Elizabeth R. Schiltz, *Credit Union Lobbyists' Show Kept Big Issues Offscreen*, AM. BANKER, Aug. 19, 1998, at 3.

the ACB, this is a weak argument because there are no regulations to ensure that credit unions are in fact doing what they were created to do.³³ Finally, ACB asserted that if credit unions are fulfilling their mission, then it should not be difficult or burdensome for them to demonstrate that service, which is all the CRA would require.³⁴

C. *The CUMAA- Arguments Against Applying the CRA to Credit Unions*

In response, credit unions testified that the CRA is unnecessary for a number of reasons.³⁵ A representative of the Credit Union National Association (CUNA) argued that the CRA requirement that banks delineate their local community without excluding low-income families need not apply to credit unions because of the field of membership requirements with which credit unions already comply.³⁶ CUNA pointed out, as well, that the CRA requires banks to adopt a CRA statement for each segment of their communities.³⁷ CUNA's representative asserted that this was unnecessary for credit unions, because credit unions must explain in their business plan how they plan to serve their members.³⁸ Another CRA requirement is that banks keep files of comments from the public regarding service to their communities.³⁹ In response, CUNA pointed out that credit unions are

33. See Garrison Testimony, *supra* note 8, at 431.

34. See *id.*

35. See Bartolomucci Testimony, *supra* note 8, at 353. Don Lewis, president and CEO of the Aberdeen Proving Ground Credit Union, Aberdeen, Maryland, spoke for the National Association of Federal Credit Unions, stated that credit unions "have been 'second to none in providing their members with quality personalized service.'" See *Credit Unions Take Their Battle to Congress*, COM. LENDING LITIG. News, Apr. 3, 1998, Vol. 10, No. 20, available in LEXIS, LRP Commercial Lending Litigation News file.

36. See Bartolomucci Testimony, *supra* note 8, at 353. The field of membership requirements force credit unions to give loans only to those who are within their defined field of membership, ensuring that the money goes back to the community that deposits at that credit union. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

owned by their members, so that each member has the ability to affect change through avenues such as voting for board members.⁴⁰ A final requirement banks face is that they must post CRA requirements in their buildings, a requirement that is not necessary to ensure commitment and service to the indigent.⁴¹

CUNA also noted the irony of the fact that banks have been lobbying Congress for years to get rid of the CRA, yet they are spending enormous amounts of time and money attempting to bring other institutions under the same regulations.⁴² While doing so may level the playing field, it does not solve the issue of burden and excessive cost. If the CRA is so financially harmful and burdensome to banks, argued CUNA, then Congress should not make the same mistake and apply the CRA to credit unions as well.⁴³

D. Outcome of the Debate

After hearing this testimony, the House passed the CUMAA, including regulations for credit unions' service to low-income members that were similar to the regulations that the CRA imposed on banks.⁴⁴ The "CRA section" was titled "Serving persons of modest means within the field of membership of credit unions" and required that the NCUA Board develop criteria for reviewing credit unions' service to its entire field of membership and make the results of the reviews public.⁴⁵ In addition, the section provided that the Board must implement a new method for annually evaluating service to the community for community-based credit unions.⁴⁶ The bill gave the Board the power to disapprove applications by any credit unions to expand

40. *See id.*

41. *See* Bartolomucci Testimony, *supra* note 8, at 353.

42. *See id.*

43. *See id.*

44. *See* 144 CONG. REC. H1868, H1884 (1998). *See also* H.R. REP. NO. 105-472, at § 204 (1998). *See generally* Eileen Canning & R. Christian Bruce, *House Passes Credit Union Bill*, BNA'S BANKING REP., Aug. 10, 1998, at 245.

45. H.R. REP. NO. 105-472, at § 204 (1998).

46. *See id.*

their field of membership if they neglect to meet these criteria.⁴⁷

When the bill went to the Senate, the section pertaining to the CRA was met with great opposition.⁴⁸ Senator Phil Gramm, Chair of the Senate Banking Committee, proposed an amendment to delete the CRA-like requirements from the bill.⁴⁹ In support of this amendment Gramm and the other amendment co-signers cited reasons such as the costs (of record-keeping and examinations) to credit unions and their members, the difficulty credit unions would have in complying with the regulations, and the opposition to the CRA by banks.⁵⁰ The Senate was persuaded by these arguments and struck the CRA requirements from the bill.⁵¹ On August 7, 1998, President Clinton signed the CUMAA into law without any CRA-like requirements.⁵² Without those requirements, there is no review of how well credit unions are serving low-income members, which is what led to D'Amours' 1999 proposal.⁵³

47. *See id.*

48. *See* 144 Cong. Rec. S 8999 (1998). *See also* S. REP. NO. 105-193 at 26 (1998). *See generally* *Senators Vow to Protect the "Little Guy,"* COM. LENDING LITIG. NEWS, Apr. 17, 1998, Vol. 10, No. 21, available in LEXIS, LRP Commercial Lending Litigation News file.

49. *See* 144 CONG. REC. S 8999 (1998).

50. *See* S. REP. NO. 105-193 (1998). Gramm asserted that section 204 was "inconsistent with the nature of credit unions and would result in expensive and wasteful record-keeping and examinations costs." *Id.* He went on to say that the "bill would treat credit unions like public utilities, compelled by law to provide financial services to favored persons identified by the government" forcing credit unions to "use their resources to serve the wants of those who are not members at all." *Id.* In addition, he mocked the "CRA-lite" title, reminding Congress that when the CRA was created for banks it supposed to be a "light burden, merely encouraging banks to do what they should do." *Id.* According to Gramm, the CRA has been anything but a "light burden." *Id.*

51. *See* Pub. L. No. 105-219, S.AMDT. 3336 (1998).

52. *See* Pub. L. No. 105-219 (1998). *See also* 144 CONG. REC. H1868, H1884 (1998) (House discussion and passage of the CUMAA); 144 CONG. REC. S9089, 9097 (1998) (Senate discussion and passage of the CUMAA).

53. *See infra* note 54 and accompanying text.

III. 1999 PROPOSAL

A. Overview of the Proposal

On July 28, 1999, NCUA Chairman Norman D'Amours proposed requirements regulating community credit unions' service to the under-served.⁵⁴ The proposal had three main elements.⁵⁵ The first part of the proposal called for a business plan for all federal credit unions (except small credit unions) explaining how the credit unions plan to increase low-income membership and to encourage low-income members to use more credit union services.⁵⁶ The second aspect of the proposal required NCUA examination of federal credit unions' efforts toward performing the activities outlined in its business plan.⁵⁷ The final aspect of the proposal mandated that the NCUA take into account credit unions' performance on the examination when considering applications from credit unions seeking to alter their charter (multiple group seeking to add new groups or a commu-

54. See CUNA, *Problems with the D'Amours 'Service to Low-Income Members' Proposal* (visited Feb. 5, 2000)

<http://www.cuna.org/data/membercu/gov_affairs/public/damours_sum.html>. See also NCUA: CRA-Type Plan Is Catching On, AM. BANKER, Sept. 16, 1999, at 2.

55. See CUNA, *Problems with the D'Amours 'Service to Low-Income Members' Proposal* (visited Feb. 5, 2000)

<http://www.cuna.org/data/membercu/gov_affairs/public/damours_sum.html>.

56. See *id.* State-chartered credit unions were left out of this proposal. See *id.* Before he submitted the proposal to the board on September 16, D'Amours excluded small credit unions (under \$10 million in assets) from the proposal. See *Credit Unions: D'Amours Amends Controversial Proposal, but CU Groups, Officials Still Stand Opposed*, BNA BANKING DAILY, Sept. 7, 1999. He did so in response to the argument that the proposal would be too harsh on small credit unions. See *id.* D'Amours felt this particular opposition was an attempt to focus on the burden instead of the necessity of the proposal. See *id.* By removing small credit unions from the debate, he felt there could be more focus on the purpose of his proposal, to provide more services to the indigent. See *id.* See also NCUA Press Release (visited Feb. 5, 2000) <http://www.ncua.gov/news/press_releases/pr090299.html>.

57. See CUNA, *Problems with the D'Amours 'Service to Low-Income Members' Proposal* (visited Feb. 5, 2000) <http://www.cuna.org/data/membercu/gov_affairs/public/damours_sum.html>.

nity-chartered credit union seeking to expand its community).⁵⁸

B. Arguments Against the D'Amours Proposal

Most in opposition to the proposal felt that it was unnecessary regulation, and that the result of the proposal would be to impede, rather than foster, service to low-income members.⁵⁹ One objection came from CUNA, which favored a new CUNA-proposed plan, "Project Differentiation," over D'Amours' proposal.⁶⁰ Project Differentiation provides guiding principles for credit unions on how to incorporate their plans for serving their communities into their business plans and how to implement new services to members in the entire field of membership.⁶¹ CUNA argues that there is no need for the proposal if Project Differentiation (Project) is implemented instead, because the Project accomplishes the same goals, without the regulations.⁶² CUNA argues that the project is different than D'Amours' proposal because it is voluntary, whereas the D'Amours proposal would have been mandated by the NCUA board.⁶³ However, without some sort of mandate or "legal teeth", it is unlikely that credit unions, who have already expressed their dislike of any kind of CRA, will be standing in line to sign up for these new "voluntary" guidelines. CUNA does not address how it plans to ensure that credit unions are stepping up their commitment to the un-

58. See *id.*

59. See Eileen Canning, *Proposal to Review Credit Unions' Efforts With Low-Income Continues to Draw Fire*, THRIFT NEWS, Aug. 9, 1999, at 244.

60. See CUNA, *Talking Points on Project Differentiation* (visited Feb. 5, 2000) <http://www.cuna.org/data/membercu/gov_affairs/public/gramm_tp.html>. CUNA stated that they were "blindsided" by the Proposal because they presented the Project to D'Amours and he agreed with it. *Id.* More specifically, they were "under the impression from the Chairman himself that he generally supported the direction credit unions and the trade associations were taking." *Id.*

61. See *id.* The result of this project seems to be nothing more than a "Statement of Commitment to Members' encouraging credit unions to develop their own statements." CUNA, *Project Differentiation: A Statement of Commitment to Members* (visited Feb. 5, 2000) <http://www.cuna.org/data/cu/different/project_dif.html>.

62. See CUNA, *Talking Points on Project Differentiation* (visited Sept. 11, 1999) <http://www.cuna.org/data/membercu/gov_affairs/public/gramm_tp.html>.

63. See *id.*

der-served, without any kind of mandatory requirements. Another reason CUNA believes that the Project is better than the D'Amours proposal is that the Project defines the under-served as including more than just low-income members.⁶⁴ According to CUNA, NCUA examiners often discourage credit unions from taking action to better assist the under-served because it is too risky for the credit unions.⁶⁵ CUNA's Project encourages examiners to work with credit unions in taking risks to serve their communities—another reason why CUNA says the Project is more favorable than the D'Amours proposal.⁶⁶

There are, however, two problems with this argument. First, there is no evidence that the D'Amours proposal discourages examiners from working with credit unions on their implementation of strategies to serve the under-served. In fact, the D'Amours proposal says that examiners should "recommend" actions to help credit unions carry out their plans.⁶⁷ Also, if it is true that examiners often discourage these kinds of actions, then simply encouraging them not to do so may not be enough. The D'Amours proposal would *require* examiners to help credit unions carry out their business plans.⁶⁸

Even without an alternative program, CUNA and the majority of the other critics of the D'Amours proposal felt that the proposal was still unnecessary and excessively burdensome.⁶⁹ There was an overwhelmingly negative response to the Proposal, as evidenced by numerous letters written to Senator Gramm

64. *See id.* However, CUNA fails to point out how the proposal excludes "youth, seniors, rural communities, and ethnic minorities" by using the term "low-income." *Id.*

65. *See id.* There is a belief among some credit union trade groups that "poor" equals high credit risks. D'Amours suggests that this is a mistaken belief and that the risks are manageable. *See* Scott Barancik, *Regulator, Credit Union Groups Keep Brawling Over Duty to Poor*, AM. BANKER, Aug. 30, 1999, at 3.

66. *See* CUNA, *Talking Points on Project Differentiation*, (visited Feb. 5, 2000) <http://www.cuna.org/data.membercu/gov_affairs/public/gramm_tp.html>.

67. *See* CUNA, *NCUA Chairman Norman D'Amours' Draft of a Proposed Low-Income Member Service Regulation* (visited Feb. 5, 2000) <http://www.cuna.org/data/membercu/gov_affairs/public.html>.

68. *See id.*

69. *See* Marc Selinger, *Credit Union Regulator Pressed To Drop Proposal on Low-Income Members*, BNA'S BANKING REP., Sept. 13, 1999, at 391.

from credit union executives and a survey by CUNA indicating such opposition.⁷⁰ NCUA board member Dennis Dollar said that there was no indication from members (or otherwise) that credit unions are not serving their communities.⁷¹ He said that credit unions need to be empowered by the NCUA, not hindered by it.⁷²

Another point CUNA asserts is that the regulatory power given to examiners by the D'Amours proposal is too broad.⁷³ CUNA's concern is that when examiners take into consideration a credit union's efforts to carry out its business plan (in determining whether or not to accept its application to change charter or field of membership), the examiners will not have any guidelines on how to determine what is an appropriate level of effort.⁷⁴ National Association of Federal Credit Unions (NAFCU) agreed with CUNA.⁷⁵ In addition, a NAFCU representative noted that it should be the board of each individual credit union that decides whether the credit union has complied with its business plan and not the NCUA examiners.⁷⁶ NAFCU insisted that the proposal would be the CRA for credit unions, because these examiners

70. *See id.* Dan Mica is President of CUNA. *See id.* Mica noted that most credit unions are offended by the suggestion of mandating service to the community in this way: "As an example, Mica pointed to the letter from the Texas credit union CEO that said the proposed regulation would be like passing a law requiring a cow to give milk." CUNA, *News Now* (visited Sept. 11, 1999) <http://www.cuna.org/data/newsnow/nm_main.html> (print out on file with University of North Carolina School of Law Banking Institute).

71. *See* Eileen Canning, *Proposal to Review Credit Unions' Efforts With Low-Income Continues to Draw Fire*, THRIFT NEWS, Aug. 9, 1999, at 244.

72. *See id.*

73. *See* CUNA, *Problems with the D'Amours 'Service to Low-Income Members' Proposal* (visited Feb. 5, 2000)

<http://www.cuna.org/data/membercu/gov_affairs/public/damours_sum.html>. Ken Robinson, President of National Association of Federal Credit Unions, felt that it will be too difficult for examiners to on 'one hand criticize the credit union if it were not meeting its goals in offering loans . . . yet, on the other hand, verify that the credit union is operating in a safe and sound manner.'" *See also* Canning, *supra* note 71, at 244.

74. *See* Canning, *supra* note 71, at 244.

75. *See id.* *See also* Scott Baranick, *Regulator, Credit Union Groups Keep Brawling Over Duty to Poor*, AM. BANKER, Aug. 30, 1999, at 3. *See generally* Selinger, *supra* note 69, at 391.

76. *See* Canning, *supra* note 71, at 245 (NAFCU's President Ken Robinson speaks on its behalf).

would be rating credit unions to in order to determine whether they can change their charters or expand their membership.⁷⁷

Another argument made by opponents of the proposal was that it is not authorized by law.⁷⁸ Senator Gramm stated that Congress deleted the CRA-like language out of the CUMAA, and therefore D'Amours' proposal was not authorized.⁷⁹ He challenged D'Amours' statement that there will be no rating and no data collection or publication.⁸⁰ He points to the language in the proposal that requires credit unions to have a section of their business plans outlining service to low-income members, and the fact that examiners would review performance on the business plans.⁸¹ He felt that this is in fact rating credit unions, and that these requirements are too similar to the CRA provision that had been eliminated from the CUMAA.⁸²

C. Arguments in Favor of the D'Amours Proposal

Despite credit union trade groups branding the proposal as the CRA for credit unions, D'Amours insisted that the proposal was not the CRA: "There will be no 'rating' or 'grading' of credit unions, and NCUA will not set any numerical or other goals for credit unions."⁸³ Instead of rating, NCUA examiners will be reviewing credit unions' efforts to fulfill their business plans.⁸⁴ D'Amours asserted that the proposal is simply a way for

77. See *id.*

78. See Mary Dixon & Tom Coyle, *Gramm Opposes CRA-Style Requirements For Credit Unions*, AMERICA'S COMMUNITY BANKER, Sept. 1, 1999, at 12.

79. See *id.* Gramm stated that the proposal was "an effort by a regulator to make laws without the inconvenience of running for office." See NAFCU, *Gramm: D'Amours proposal seeks to override Congress* (visited Sept. 11, 1999) <<http://www.nafcunet.org/latest>> (print out on file with the University of North Carolina School of Law Banking Institute).

80. See Dixon & Coyle, *supra* note 78, at 12.

81. See *id.*

82. See *id.*

83. See Eileen Canning, *Proposal to Review Credit Unions' Efforts With Low-Income Continues to Draw Fire*, THRIFT NEWS, Aug. 9, 1999, at 244. See also Dixon & Coyle, *supra* note 78, at 12.

84. See *Credit Unions to Face Community Reinvestment*, CREDIT RISK MGMT. REP., Aug. 9, 1999.

credit unions to “demonstrate concretely their ongoing commitment to serve the underserved.”⁸⁵ In fact, the banking industry supported D’Amours’ proposal and affirmed the notion that it was much less burdensome than the CRA.⁸⁶

In addition, D’Amours contended that his proposal was in fact legislatively authorized, contrary to Senator Gramm’s statements.⁸⁷ He said that the proposal was merely a requirement that credit unions include in their business plan an outline of how they *intend* to serve their low-income members, which according to D’Amours, is “fully authorized by law.”⁸⁸ Furthermore, the proposal submitted included requirements different from those deleted from the CUMAA.⁸⁹ For example, the first part of the proposal called for a business plan or plan of action for how credit unions are going to encourage low-income members to join and increase low-income members’ use of their services.⁹⁰ The section deleted by Gramm’s amendment made no mention of a business plan like the one D’Amours proposed.⁹¹ Instead there was a requirement that the Board create a way to evaluate services to “all individuals of modest means (including low- and moderate-income individuals)” — a requirement that was more strict than the D’Amours proposal.⁹² The second part

85. *Id.* See also Katharine Fraser, *Gramm Says He Will Confirm Hawke as Comptroller, Finally*, AM. BANKER, Sept. 10, 1999, at 2.

86. See Canning, *supra* note 71, at 244.

87. *Id.* See also Pub. L. No. 91-206, 84 Stat. 49 (1969). See generally Legislative History, Pub. L. No. 91-206 at 2479-2486.

88. See Canning, *supra* note 71, at 244. See also Daniel J. Forte, *Letters: Regulator Right to Consider Credit Unions’ Social Obligations*, AM. BANKER, Aug. 6, 1999, at 6.

89. See CUNA, NCUA Chairman Norman D’Amours’ Draft of a Proposed Low-Income Member Service Regulation (visited Feb. 5, 2000)

<http://www.cuna.org/data/membercu/gov_affairs/public/proposal.html>.

90. See *id.* D’Amours stated: “Simply asking a credit union to include language [in its business plan] on serving low-income members . . . is not unreasonable or onerous.” Katharine Fraser, *Two Agency Heads Respond to Sen. Gramm’s Criticism Of Their Reinvestment Ideas*, AM. BANKER, Aug. 6, 1999, at 2. He added that his proposal is less extensive than one Congress rejected last year and would be justified by an upcoming academic study. See *id.*

91. See Pub. L. No. 105-219, S. AMDT. 3336 (1998). See CUNA, NCUA Chairman Norman D’Amours’ Draft of a Proposed Low-Income Member Service Regulation (visited Feb. 5, 2000)

<http://www.cuna.org/data/membercu/gov_affairs/public/proposal.html>.

92. See CUNA, NCUA Chairman Norman D’Amours’ Draft of a Proposed Low-Income

of the D'Amours proposal required that NCUA examiners review credit unions' performance on their business plan, and "recommend appropriate actions."⁹³ The third part stated that NCUA would take into account credit unions' efforts to implement their business plan when considering charter changes.⁹⁴ However, one could argue that factoring in whether or not a credit union has encouraged low-income members to join and encouraged members to use more services is different than factoring in whether credit unions have met the credit needs and credit union service needs of the entire field of membership (including low- and moderate-income members of the field).⁹⁵ The latter is more restrictive and burdensome on credit unions.⁹⁶

A final argument in favor of the proposal is that all financial institutions, including credit unions, have a social responsibility to help the low-income members of their communities.⁹⁷ The Federal Credit Union Act of 1934 created federal credit unions for the sole purpose of making "credit available to people of small means for provident purposes."⁹⁸ Sixty-four years later, the CUMAA described the purpose of credit unions very similarly: "to serve the productive and provident credit needs of individuals of modest means."⁹⁹ In his proposal, D'Amours noted that the mission of credit unions is made clear through these Acts.¹⁰⁰ He feels that with the increase in cash stores and other

Member Service Regulation (visited Feb. 5, 2000)

<http://www.cuna.org/data/membercu/gov_affairs/public/proposal.html>.

93. *See id.* (emphasis added).

94. *See id.*

95. *See* Pub. L. No. 105-219, S. AMDT. 3336 (1998). *See* CUNA, NCUA Chairman Norman D'Amours' Draft of a Proposed Low-Income Member Service Regulation (visited Feb. 5, 2000)

<http://www.cuna.org/data/membercu/gov_affairs/public/proposal.html>.

96. *See id.*

97. *See* CUNA, NCUA Chairman Norman D'Amours' Draft of a Proposed Low-Income Member Service Regulation (visited Feb. 5, 2000)

<http://www.cuna.org/data/membercu/gov_affairs/public/proposal.html>.

NCUA board member Dennis Dollar, in response to the aspect of the NCUA's responsibility, stated: "It is not our responsibility to regulate the social conscience of credit unions." Canning, *supra* note 13, at 437.

98. 12 USC § 1751 (1994).

99. *See* Pub. L. No. 105-219, § 2 (1998).

100. *See* CUNA, NCUA Chairman Norman D'Amours' Draft of a Proposed Low-Income Member Service Regulation (visited Feb. 5, 2000)

finance businesses preying on low-income families, credit unions must increase their service and commitment to these members.¹⁰¹

IV. OUTCOME

On September 16, 1999, the proposal requiring federal credit unions with more than \$10 million in assets to include in their business plan an outline detailing their service to low-income members failed to pass the board vote.¹⁰² Board member Dennis Dollar voted against the proposal, because he felt the proposal was unnecessary and that it not was the NCUA's responsibility to "regulate the social conscience of credit unions."¹⁰³ D'Amours voted in favor of his proposal.¹⁰⁴ The vote, therefore, hinged on Yolanda Wheat, who voted against the proposal because of "administrative shortcomings."¹⁰⁵ Credit union trade groups such as NAFCU and CUNA were pleased with the result.¹⁰⁶

IV. THE FUTURE OF THE CRA AND CREDIT UNIONS

This issue will likely arise again, for many reasons. There was more support for the D'Amours proposal requirements than was made known. The opposition to the proposal came mostly from credit union trade groups, whose voices usually are the loudest. D'Amours noted that he received widespread support in

<http://www.cuna.org/data/memberscu/gov_affairs/public/proposal.html>. Daniel J. Forte, President of the Massachusetts Bankers Association, wrote to the editor of *American Banker* in support of D'Amours proposal. See Forte, *supra* note 88, at 6. He said that without this necessary focus on indigent people there is no basis for the credit unions' "unique status." *Id.* In addition, he stated that the controversy caused by D'Amours "serves a very meaningful purpose from a public policy perspective." *Id.*

101. See Selinger, *supra* note 69, at 391. See also CUNA, *NCUA Chairman Norman D'Amours' Draft of a Proposed Low-Income Member Service Regulation* (visited Sept. 11, 1999)

<http://www.cuna.org/data/memberscu/gov_affairs/public/proposal.html>.

102. See Canning, *supra* note 13, at 437.

103. *Id.*

104. See *id.*

105. *Id.* Wheat did not explain what she meant by "administrative shortcomings." *Id.*

106. See *id.*

the "town meetings" he held with credit unions in several areas of the country.¹⁰⁷ His proposal was endorsed by groups and individuals such as the Consumers Union, the National Community Reinvestment Coalition, the National Federation of Community Development Credit Unions, 24 African-American lawmakers, and Rep. John J. LaFalce, ranking member of the House Banking Committee.¹⁰⁸

Many of the opponents of the proposal, were not opposed to the main goals of the proposal. NCUA Board Member Yolanda Wheat voted against the proposal, because she felt that some changes needed to be made.¹⁰⁹ However, she did indicate that the proposal was a movement in the right direction.¹¹⁰ She appears to be committed to creating a proposal that would serve similar goals, and with her vote (and D'Amours' vote) the proposal would pass.¹¹¹ Even more telling is that despite his criticisms of the proposal, Dennis Dollar stated that he too supports the effort to help credit unions better serve the low-income members of their communities.¹¹² The NAFCU and CUNA also stated that they would be willing to work with the Board on this issue.¹¹³ So, with this level of commitment to the assistance of low-income members, it appears only to be a matter of developing a proposal everyone can support.

In addition, with their growing size, there are new challenges credit unions will face in serving larger communities.¹¹⁴

107. See Canning, *supra* note 71, at 245. See also *Credit Unions to Face Community Reinvestment?*, CREDIT RISK MGMT. REP., Aug. 9, 1999 (Executives and directors of credit unions in Los Angeles support the proposal in one of D'Amours' town meetings.).

108. See Scott Barancik, *Capital Briefs: NCUA: CRA-Type Plan is Catching On*, AM. BANKER, Sept. 16, 1999, at 2.

109. See Canning, *supra* note 13, at 437.

110. See *id.*

111. See *id.* Wheat commended D'Amours for starting the dialogue on how to better serve low-income members. See *id.*

112. See *id.* While Dollar said that it was not the responsibility of the NCUA to "regulate the social conscience of credit unions," he also said that he "would support any reasonable effort to pursue this noble cause." *Id.*

113. See *id.*

114. See *Credit Union Bill Opens Doors for Consumers*, U.S. Newswire, Aug. 4, 1999 (Over 10,000 new groups have joined credit unions since CUMAA was passed in

This new growth is another reason why the conversation regarding the CRA and credit unions is likely to continue. For example, some states and some individual credit unions have taken the issue into their own hands.¹¹⁵ In Massachusetts, state-chartered credit unions have CRA obligations, including making their CRA exam results public.¹¹⁶ Their record is not held to the same standard as banks, but it nonetheless entails a regulatory review of their service to low-income members.¹¹⁷ In addition, it is possible that a new proposal would include both state and federal credit unions.

The banking industry will most likely keep pursuing the issue, as well. The banking industry supports the proposal,¹¹⁸ and will continue to be supportive of any effort to impose taxation and other regulations on large credit unions. As long as the large credit unions continue to operate in a manner almost indistinguishable from banks, the banking industry will attempt to bring them under the CRA.¹¹⁹ Even if the NCUA is unsuccessful with a CRA proposal, the bankers will not likely surrender this fight.

On November 18, 1999, the NCUA Board voted to send out a voluntary survey to federal credit unions on service to low-income members.¹²⁰ During the discussion on whether to send out the survey, many of the same issues involving imposing a community service requirement on credit unions were debated.¹²¹ Yolanda Wheat introduced the survey idea to the board, stating that it would give the NCUA valuable information

1998, including low-income communities and small businesses.).

115. See Daniel J. Forte, *supra* note 88, at 6.

116. See *id.*

117. See *id.*

118. See *id.* See Canning, *supra* note 71, at 244. After the passage of CUMAA, American Bankers Association officials were quoted as stating that bankers "are committed to a long-term effort to ensure that large credit unions are taxed and regulated like other financial institutions." See R. Christian Bruce, *Senate Passes Credit Union Measure As Backers Hope for Accord by House*, BNA'S BANKING REP., Aug. 3, 1998, at 195.

119. See Bruce, *supra* note 118, at 195.

120. See Scott Barancik, *Credit Union Group Blasts Regulator's Planned Survey*, AM. BANKER, Dec. 28, 1999, at 2. The survey will not be sent out to state chartered credit unions, but the survey will be posted on NCUA's website, so credit unions can still respond. See *id.*

121. See Kenneth Talley, *Credit Unions: NCUA Delays Action on Strategic Plan Criticized by Credit Union Industry Groups*, BNA'S BANKING REP., Jan. 24, 2000, at 156.

about the status of service to low-income members.¹²² D'Amours was opposed to the survey, mainly because it will be voluntary.¹²³ He feels that without a mandate, this is not an adequate method of obtaining empirical data.¹²⁴ Dennis Dollar supported the proposal, because he feels it will prove that credit unions are in fact serving their low-income members well.¹²⁵ D'Amours countered by adding that the only credit unions to respond will most likely be the credit unions which are already doing well fulfilling their statutory mission.¹²⁶ The survey appears to be the next round in the debate on whether the NCUA should regulate credit unions' service to low-income members.¹²⁷

V. CONCLUSION

So, the battles wage on. In 1998, credit unions managed to win battles against the membership requirements, the taxation issue, and the CRA.¹²⁸ The CUMAA negated the Supreme Court's decision in *NCUA v. First National* and preserved tax-free, CRA-free status for credit unions.¹²⁹ Last year, a proposal to impose CRA-like requirements on credit unions failed to pass the NCUA board by one vote.¹³⁰ However, the average size of credit unions is ever increasing and there will be serious issues to solve, including how the NCUA can ensure that credit unions are not abandoning their mission. Perhaps that is why D'Amours and others are working towards creating new rules— they know that

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. There is also a battle brewing over NCUA's strategic plan (NCUA is required by law to develop a strategic plan). *See id.* CUNA is arguing that NCUA has "gone beyond safety and soundness and put too much emphasis on a social mission for credit unions." *Id.* D'Amours said that criticism by CUNA is unfounded, pointing out that credit unions were created to serve a social mission. *See id.*

128. *See supra* notes 1-10 and accompanying text.

129. *See id.*

130. *See supra* notes 102-105 and accompanying text.

some form of the CRA is an inevitable consequence of credit union growth and would rather impose it on themselves, than let Congress or the banking industry write the requirements to which they will be subject. Either way it is clear that credit unions, not just banks, have a social responsibility to help their communities, and a proposal, such as D'Amours', is a reasonable way to help credit unions uphold that responsibility. So, the discussion will continue and perhaps lead to a higher level of dedication to the under-served and possibly even a level playing field for banks and credit unions.

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