

January 7, 2015

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Debbie Matz, Chairman
Rick Metsger, Vice Chairman
J. Mark McWatters, Board Member
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Dear Chairman Matz, Vice Chairman Metsger, and Mr. McWatters:

We write on behalf of our client, the National Association of Federal Credit Unions, regarding proposed revisions to the Prompt Corrective Action framework for credit unions.¹ On February 27, 2014, the National Credit Union Administration (NCUA) issued a proposal providing that the NCUA may require a higher minimum risk-based capital requirement for an individual credit union in any case where the NCUA deems such a requirement appropriate.²

We do not believe that the Federal Credit Union Act (FCUA), 12 U.S.C. §§ 1751, *et seq.*, authorizes the NCUA to promulgate this provision, because neither the text nor the structure of the FCUA provides for the NCUA to prescribe individual minimum capital requirements.

First, § 1790d of the FCUA authorizes the NCUA to “prescribe a system of prompt corrective action” that is “comparable to [12 U.S.C. § 1831o],”³ which sets forth the authority of the Federal Deposit Insurance Corporation (FDIC) to take prompt corrective action. But § 1831o does not include any provision for establishing individual minimum capital requirements. Instead, federal banking regulators like the FDIC derive such authority from an express provision in 12 U.S.C. § 3907. That provision states that “[e]ach appropriate Federal banking agency *shall have the authority* to establish such minimum level of capital for a banking institution as the appropriate Federal banking agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution.”⁴ 12 U.S.C. § 3907(a)(2) (emphasis added). Section 3907 applies only to “Federal banking agencies” under 12 U.S.C. § 1813, which does not include the NCUA.

Second, no other provision in § 1790d grants the NCUA authority to impose individual minimum capital requirements. Section 1790d(d) establishes a risk-based net worth requirement for complex credit unions, but does not provide authority for individual minimum capital requirements. The NCUA’s own proposal disavows reliance on that provision in stating that the

¹ See 79 Fed. Reg. 11184.

² See 12 C.F.R. § 702.105 (proposed).

³ 12 U.S.C. § 1790d(b)(1)(A)(ii).

⁴ See 12 U.S.C. § 3907(a)(2) (emphasis added).

National Credit Union Administration
January 7, 2015
Page 2

individual minimum capital requirement “varies from any of the risk-based capital requirement(s)” otherwise applicable to a credit union under the regulations.⁵

In addition, individual minimum capital requirements are not authorized by § 1790d(h), which instead permits the reclassification of an insured credit union into a “lower net worth category” for reasons “pertaining to the safety and soundness of that credit union.”⁶ This provision addresses “reclassify[ing]” credit unions into other net worth *categories*; it does not provide for the NCUA to prescribe individual minimum capital requirements for particular credit unions. In any event, § 1790d(h) is limited to NCUA’s exercise of its authority under regulations “comparable to section 1831o(g),” which itself does not provide any authority for individual minimum capital requirements.

Far from authorizing individual minimum capital requirements, these provisions of § 1790d by implication appear to prohibit NCUA from implementing individual minimum capital requirements. Congress expressly legislated specific circumstances in which a credit union could be “reclassif[ied]” and subjected to more stringent capital standards—but made no provision for individual minimum capital requirements. Together with the lack of any express authority, these provisions suggest that Congress never intended for the NCUA to have the power to prescribe individual minimum capital requirements. *See Continental Casualty Co. v. U.S.*, 314 U.S. 527, 533 (1942) (“[A] legislative affirmative description implies denial of the nondescribed powers.” (internal quotation marks omitted)); *cf. Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (“[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” (internal quotation marks and citation omitted)).

Section § 3907 also demonstrates that Congress would have expressly granted the NCUA authority to prescribe individual minimum capital requirements if it had so intended. *See Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm’n*, 824 F.2d 108, 114-15 (D.C. 1987) (Congress “knew how to say so” when it “desired to permit” agencies to consider economic costs in their decision-making). Like the NCUA, bank regulatory agencies have general authority to regulate the safety and soundness of institutions within their jurisdictions—yet Congress expressly authorized the banking agencies to issue individual minimum capital requirements

⁵ 12 C.F.R. § 702.105(a) (proposed).

⁶ 12 U.S.C. § 1790d(h)(1).

⁷ There is likewise no authority for the NCUA’s proposal in the other provision cited as authority for the rulemaking, 12 U.S.C. § 1766. *See* 12 C.F.R. § 702.1(a) (proposed) (citing 12 U.S.C. § 1790d and 12 U.S.C. § 1766). That provision sets forth the general powers of the Board, including rulemaking authority. It is silent as to NCUA’s specific authority to impose individual minimum capital requirements.

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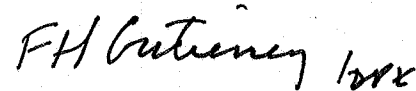
National Credit Union Administration
January 7, 2015
Page 3

under § 3907. The absence of any such express provision in the FCUA strongly suggests that Congress did not intend to provide the NCUA the same authority.

For these reasons, the NCUA would be acting outside its statutory authority if it were to promulgate a rule prescribing individual minimum capital requirements for credit unions. We urge the NCUA to reconsider this issue when it proposes a revised risk-based capital rule.

Thank you for considering this submission. Please contact me or my colleagues Jonathan Paikin (202-663-6703) and Dan Kearney (202-663-6825) if you have any questions or concerns.

Very truly yours,

A handwritten signature in black ink that reads "FH Gutierrez" followed by a stylized flourish.

Franca Harris Gutierrez

cc:

Carrie Hunt, National Association of Federal Credit Unions