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IF IT QUACKS LIKE A DUCK: IN LIGHT OF TODAY'S FINANCIAL ENVIRONMENT, SHOULD CREDIT UNIONS CONTINUE TO ENJOY TAX EXEMPTIONS?

Reed White[*]

INTRODUCTION

As our nation's deficit continues to grow[1] and the economic doldrums resulting from the market implosion of late 2007[2] stubbornly resist the U.S. government's fiscal[3] and monetary[4] responses,[5] much attention has been given to congressional authorization of so-called "tax expenditures."[6] By Congress's own

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1. The United States incurred a federal budget deficit of $1.41 trillion in fiscal year 2009 and approximately $1.3 trillion in fiscal year 2010. CONG. BUDGET OFFICE, MONTHLY BUDGET REVIEW FISCAL YEAR 2010, *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/119xx/doc11936/septembermbr.pdf. The CBO is an independent, nonpartisan agency of Congress that provides the House and Senate Budget Committees budgetary and economic information. CONG. BUDGET OFFICE, 111TH CONG., AN INTRODUCTION TO THE CONGRESSIONAL BUDGET OFFICE 1 (2010). Congress established the CBO in the Congressional Budget and Impoundment Control Act of 1974. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (current version at 2 U.S.C. §§ 601–688 (2006)).

2. According to the National Bureau of Economic Research, the last business cycle contraction lasted from December 2007 until June 2009. Nat'l Bureau of Econ. Research, *US Business Cycles and Expansions*, NBER.ORG, http://www.nber.org/cycles/cyclesmain.html (last visited Apr. 13, 2012).

3. Fiscal policy is "[f]ederal government policy regarding taxation and spending, set by Congress and the [Executive] Administration." FED. RESERVE BANK OF S.F., U.S. MONETARY POLICY: AN INTRODUCTION 22 (2004).

4. Monetary policy is a "central bank's actions to influence short-term interest rates and the supply of money and credit, as a means of helping to promote national economic goals." *Id.* at 23. In the United States, the Federal Reserve System—which includes a Board of Governors based in Washington, D.C., and twelve Federal Reserve District Banks located throughout the country—serves the central bank function. *Id.* at 2.

5. *See* CONG. BUDGET OFFICE, PUB. NO. 4156, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE 12 (2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/117xx/doc11705/08-18-update.pdf (revising the estimated total cost of Congressional "stimulus" action in 2009 from $787 billion to $814 billion because certain assumed variables—including the unemployment rate—have not responded as originally predicted).

6. *See, e.g.*, CHYE-CHING HUANG & HANNAH SHAW, CTR. ON BUDGET & POLICY PRIORITIES, NEW ANALYSIS SHOWS "TAX EXPENDITURES" OVERALL ARE COSTLY AND REGRESSIVE (2009), *available at* http://www.cbpp.org/files/2-23-09tax2.pdf; JOHN A. TATOM, TAX FOUND., COMPETITIVE ADVANTAGE:

definition, tax expenditures are "those revenue losses attributable to provisions of the federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."[7] Beginning in 1974, and pursuant to an effort to reduce federal spending and provide transparency to our nation's tax policies, Congress has included a list of tax exemptions[8] and subsidies[9] in its annual budget.[10] Both the Office of Management and Budget (OMB)[11] (via the Office of Tax Analysis of the U.S. Treasury Department)[12] and the Joint Committee on Taxation (JCT)[13] compile annual lists[14] of estimated tax expenditures.[15]

A STUDY OF THE FEDERAL TAX EXEMPTION FOR CREDIT UNIONS (2005); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-690, GOVERNMENT PERFORMANCE AND ACCOUNTABILITY: TAX EXPENDITURES REPRESENT A SUBSTANTIAL FEDERAL COMMITMENT AND NEED TO BE REEXAMINED (2005), *available at* http://www.gao.gov/assets/250/247901.pdf.

7. Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(3) (2006).

8. The United States has a long history of exempting certain public-serving and member-serving organizations from federal taxation. Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. OF INCOME BULL., Winter 2008, at 105. This report was coordinated by the Statistics of Income (SOI) division of the Internal Revenue Service, which collects, processes, and publishes data pertaining to the effect that U.S. internal revenue laws have on both individual and corporate entities. *SOI Tax Stats*, IRS.GOV, http://www.irs.gov/taxstats/article/0,,id=120314,00.html (last updated Jan. 23, 2012). The U.S. government first began publishing this information pursuant to the Revenue Act of 1916. Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756 (1916).

9. As defined by Norman Ture, former Undersecretary of the Treasury, the distinguishing attribute of a subsidy is that it "reduces the cost or the price of the subsidized product below the level that would prevail in a market unaffected by governmental policies or activities . . . [and] therefore, alters the relationship among costs and prices that would otherwise prevail." JOINT ECON. COMM., 106TH CONG., TAX EXPENDITURES: A REVIEW AND ANALYSIS 7 (1999). The Joint Economic Committee is a bicameral congressional committee composed of twenty members—ten from the House of Representatives, and ten from the Senate. *Committee Background,* JOINT ECONOMIC COMMITTEE, http://jec.senate.gov/public/index.cfm?p=CommitteeBackground (last visited Apr. 13, 2012). The Committee's primary task is to "make a continuing study of matters relating to the US economy." *Id.* The Committee was created by the Employment Act of 1946. Employment Act of 1946, ch. 33, § 2, 60 Stat. 23 (1946) (current version at 15 U.S.C. § 1021 (2006)).

10. JOINT ECON. COMM., *supra* note 9, at 2.

11. The OMB "is the largest component of the Executive Office of the President." *Office of Management and Budget*, WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission/ (last visited Apr. 13, 2012). The OMB assists the President in overseeing the preparation of the President's budget and supervises the budget's administration by the Executive Branch agencies. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 10:8 (2010).

12. The Office of Tax Analysis (OTA) is a division of the U.S. Department of the Treasury that "provides economic and policy analyses leading to development of the [Executive] Administration's tax proposals," along with assessing "major congressional tax proposals." *Tax Policy: Tax Analysis*, U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-

Like most matters involving the federal budget, the sheer size of the dollar amounts involved in an analysis of federal tax expenditures boggles the mind. According to one estimate, federal tax exemptions and subsidies in 2008 alone cost the federal government $987 billion of potential revenue.[16] While other more notable exemptions such as the mortgage interest deduction[17] and the favored tax rate of capital gains and qualified dividends[18] are much larger in size,[19] the tax

of-Tax-Analysis.aspx (last visited Apr. 13, 2012).

13. Originally established under the Revenue Act of 1926, the Joint Committee on Taxation is a nonpartisan committee of the United States Congress that operates with an experienced professional staff of Ph.D. economists, attorneys, and accountants who assist members of the majority and minority parties in both houses of Congress on tax legislation. *Overview*, JOINT COMMITTEE ON TAXATION, http://www.jct.gov/about-us/overview.html (last visited Apr. 13, 2012).

14. LEONARD BURMAN ET AL., URBAN INST., HOW BIG ARE TOTAL INDIVIDUAL INCOME TAX EXPENDITURES, AND WHO BENEFITS FROM THEM? 1 (2008), *available at* http://www.urban.org/UploadedPDF/1001234_tax_expenditures.pdf. The Urban Institute (UI) was chartered based on the recommendation of a blue-ribbon panel commissioned by President Johnson in the mid-1960s. *About the Urban Institute*, URBAN INST., http://www.urban.org/about/ (last visited Apr. 13, 2012). The institute "gathers data, conducts research, evaluates programs, offers technical assistance overseas, and educates Americans on social and economic issues" in an effort "to foster sound public policy and effective government." *Id.*

15. OMB and JCT group their expenditure estimates in the same functional categories as the outlay categories used in the official federal budget. JOINT COMM. ON TAXATION, 111TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2009–2013, at 26 (2010).

16. The $987 billion estimate included $878 billion for individuals and $108 billion for corporations. JASON FURMAN, THE CONCEPT OF NEUTRALITY IN TAX POLICY 3 (2008), *available at* http://www.brookings.edu/~/media/Files/rc/testimonies/2008/0415_tax_neutrality_furman/0415_tax%20_neutrality_furman.pdf. "The Brookings Institution is a nonprofit public policy organization based in Washington, D.C.," that conducts research with a goal of providing recommendations that advance three objectives: (1) strengthening American democracy; (2) fostering economic and social welfare, security and opportunity of all Americans; and (3) securing a more open, safe, prosperous and cooperative international system. *About Brookings*, BROOKINGS, http://www.brookings.edu/about.aspx (last visited Apr. 13, 2012).

17. Home mortgage interest is deductible against federal income taxes—subject to certain limitations—per 26 U.S.C. §163(h)(3) (2006). JOINT COMM. ON TAXATION, *supra* note 15, at 33. Experts estimate this deduction will cost the U.S. government $572.9 billion of potential revenue for the five-year period between 2009 and 2013. *Id.* Some officials argue the mortgage interest deduction should be reduced as a means of decreasing the United States' federal deficit. Michelle E. Shaw, *Mortgage Tax Shift Wouldn't Hit Many*, ATLANTA J.-CONST., Nov. 19, 2010, at A1, *available at* 2010 WLNR 23058855 (citing calls to "reduce the mortgage interest deduction for homeowners who have mortgages over $500,000, down from [the] current limit of $1 million").

18. According to official estimates, the favored rate applied to capital gains and qualified dividends will cost the U.S. government $418.7 billion of potential revenue for the five-year period between 2009 and 2013. JOINT COMM. ON TAXATION, *supra* note 15, at 35. Congress implemented the favored rates in a two-step process: the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001), which generally reduced marginal income tax rates among the various IRS income brackets; and the Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (2003), which lowered the tax rates applied to capital gains (i.e. investment assets held

exemption granted to credit unions has long drawn the ire of the nation's commercial banks[20] and thrifts.[21]

The controversy over credit unions' various tax exemptions boils down to a matter of equity. Since Congress originally exempted federal credit unions from federal taxation in 1937,[22] the credit union industry has repeatedly justified the exemption by focusing on its cooperative ownership structure and restrictive membership guidelines.[23] However, as credit unions have outgrown their original

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longer than one year) and qualified dividends.

19. Government officials estimate the federal tax exemption granted to credit unions will cost the federal government $8.2 billion of potential revenue for the five-year period between 2009 and 2013. JOINT COMM. ON TAXATION, *supra* note 15, at 36. A similar study estimated the same exemption will cost the government $19 billion between 2008 and 2017. THE PRESIDENT'S ECON. RECOVERY ADVISORY BD., THE REPORT ON TAX REFORM OPTIONS: SIMPLIFICATION, COMPLIANCE, AND CORPORATE TAXATION 77 (2010), *available at* http://www.whitehouse.gov/sites/default/files/microsites/PERAB_Tax_Reform_Report.pdf. President Obama created the Economic Recovery Advisory Board by executive order, Exec. Order No. 13,501, 74 FR 6983 (Feb. 11, 2009), in order to solicit independent advice concerning the United States economy. Press Release, Office of the Press Secretary of the White House, Obama Announces Economic Advisory Board (Feb. 6, 2009), *available at* http://www.whitehouse.gov/the_press_office/ObamaAnnouncesEconomicAdvisoryBoard/.

20. *See, e.g.*, *Credit Union Regulation*, AM. BANKERS ASS'N, http://www.aba.com/Issues/Issues_CreditUnion.htm (last updated Dec. 22, 2011). Founded in 1875, the American Bankers Association (ABA) lobbies on behalf of all American banks, including both federal and state-chartered institutions. *About the American Bankers Association*, AM. BANKERS ASS'N, http://www.aba.com/About+ABA/default.htm (last visited Apr. 13, 2012).

21. Commercial banks, credit unions, and savings institutions (i.e., "thrifts") are the three types of depository institutions—financial institutions that take deposits and make loans—that currently operate in the American economy. CONG. BUDGET OFFICE, 105TH CONG., ELIMINATING THE FEDERAL THRIFT CHARTER 1 (1997). Unlike commercial banks, which must be owned by stockholders, thrifts can either be stock-owned or mutually-owned. *Id.* Mutually-owned thrifts are owned by the bank depositors. *Id.* "Thrifts include all federally chartered savings and loans [S&Ls], federally chartered savings banks, and state-chartered savings associations." *Id.* at 2. These "savings institutions" traditionally focused on consumer savings deposits and residential mortgage lending. *Id.* In today's financial environment, the distinctions between commercial banks and thrifts are negligible and are merely rooted in the technical legal distinctions embedded in the respective charters. *Id.*

22. CHMURA ECON. & ANALYTICS, AN ASSESSMENT OF THE CREDIT ENVIRONMENT BETWEEN CREDIT UNIONS AND BANKS 7 (2004) [hereinafter CHMURA, ASSESSMENT]. Chmura Economics & Analytics is a private consultant that specializes in quantitative research and economic development. CHMURA ECON. & ANALYTICS, http://chmuraecon.com (last visited Apr. 13, 2012).

23. *See, e.g.*, CREDIT UNION NAT'L ASS'N., CUNA ISSUE SUMMARY: CREDIT UNION TAX EXEMPTION 1 (2010) [hereinafter CUNA, ISSUE SUMMARY] ("The credit union federal tax-exemption is bound by the not-for-profit, cooperative nature of credit unions, not by the size of the credit union or the products and services that are offered."). CUNA is the premier national trade association serving America's credit unions, and ninety percent of America's credit unions affiliate with the organization. CREDIT UNION NAT'L ASS'N, http://www.cuna.org (last visited Apr. 13, 2012). CUNA "provides legislative, research, and public relations services/advice as well as educational and service development for the national credit union movement." U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-91-85, CREDIT

scope and structure—now including financial institutions with multiple billions of dollars in assets[24]—this rationale has come under increased scrutiny by both governmental and private entities.[25] In addition, states and local municipalities have contested federal credit unions' claims of tax immunity from non-federal taxation.[26] In light of the current economic recession and its debilitating effect on state finances,[27] and in lieu of a pertinent New York state lower court

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24. *America's Largest Credit Unions*, CREDITUNIONACCESS.COM, http://creditunionaccess.com/top50creditunions.htm (last visited Apr. 13, 2012).

25. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-29, CREDIT UNIONS: GREATER TRANSPARENCY NEEDED ON WHO CREDIT UNIONS SERVE AND ON SENIOR EXECUTIVE COMPENSATION ARRANGEMENTS 14 (2006) [hereinafter GAO, CREDIT UNION TRANSPARENCY] ("But, the limited existing data on income levels of credit union customers suggest that credit unions continue to lag behind banks in the proportion of customers that are of low- and moderate-income."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-220T, FINANCIAL INSTITUTIONS: ISSUES REGARDING THE TAX-EXEMPT STATUS OF CREDIT UNIONS 1 (2005) [hereinafter GAO, CREDIT UNION ISSUES] (finding that "assessment of Federal Reserve data suggested that credit unions served a slightly lower proportion of low- and moderate-income households than banks . . . ."); U.S. GEN. ACCOUNTING OFFICE, GAO-04-91, CREDIT UNIONS: FINANCIAL CONDITION HAS IMPROVED, BUT OPPORTUNITIES EXIST TO ENHANCE OVERSIGHT AND SHARE INSURANCE MANAGEMENT 19 (2003) [hereinafter GAO, CREDIT UNION OVERSIGHT] (finding "while credit unions served a slightly higher percentage of moderate-income households than banks, they served a much lower percentage of low-income households"); U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 224 ("What little data are available on membership characteristics now suggest members are not all of 'small means.'"); *see also* KATY JACOB ET AL., WOODSTOCK INST., RHETORIC AND REALITY: AN ANALYSIS OF MAINSTREAM CREDIT UNIONS' RECORD OF SERVING LOW-INCOME PEOPLE 5 (2002) ("This analysis indicates that low-income people are not adequately served by credit unions."). The Government Accountability Office—previously known as the Government Accounting Office—is an independent, nonpartisan agency that works for Congress and serves as a congressional watchdog. *About GAO*, GAO: U.S. GOV'T ACCOUNTABILITY OFFICE, http://www.gao.gov/about/index.html (last visited Apr. 13, 2012). Founded in 1973, the Woodstock Institute is a nonprofit research and policy organization that focuses on the areas of fair lending, wealth creation, and financial systems reform. *Who We Are*, WOODSTOCK INST., http://www.woodstockinst.org/about-woodstock-institute (last visited on Apr. 13, 2012).

26. *See, e.g.*, Cal. Credit Union League v. City of Anaheim, 95 F.3d 30, 31 (9th Cir. 1996) (affirming lower court's determination that the city's levying of a hotel transient tax on federal credit union employees who were visiting on credit union business violated the tax exemption provision of the Federal Credit Union Act); United States v. Michigan, 851 F.2d 803, 804 (6th Cir. 1988) (affirming lower court's determination that Michigan's sales tax law as applied to federal credit unions violated the Supremacy Clause of the U.S. Constitution because federal credit unions are "federal instrumentalities entitled to the same immunity from state taxation as the United States"); Hudson Valley Fed. Credit Union v. N.Y. State Dep't of Taxation & Fin., 906 N.Y.S.2d 680, 686 (Sup. Ct. 2010) (finding defendant's imposition of a mortgage recording tax on the plaintiff credit union is a tax on the "privilege of recording the mortgage and not a tax on property"), *aff'd*, 924 N.Y.S.2d 360 (App. Div 2011), *motion for leave to appeal granted*, 957 N.E.2d 1156 (N.Y. 2011).

27. ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, RECESSION CONTINUES TO BATTER STATE BUDGETS; STATE RESPONSES COULD SLOW RECOVERY 1 (2010) ("The worst recession since the 1930s has caused the steepest decline in state tax receipts on record."). The Center

ruling,[28] the time has come for the state of Georgia to reassess the broad tax exemptions that it grants to state-chartered credit unions.[29]

This Note examines the debate over the federal income tax exemption granted to credit unions, along with Georgia's decision to exempt federal and state-chartered credit unions from its intangible mortgage tax. Part I provides an overview of the history of credit unions and the underlying rationale for their federal income tax exemption, including several court decisions regarding federal credit unions' exemption from state taxation. Part II considers the merits of the arguments both for and against the tax exemption, while also addressing whether credit unions are fulfilling their obligation to provide credit to "low-income" borrowers. The analysis in Part III focuses on a recent New York state court decision, *Hudson Valley Federal Credit Union v. New York State Department of Taxation & Finance*,[30] which provides persuasive authority should Georgia decide to repeal the intangible mortgage tax exemption currently granted to credit unions. Finally, Part IV proposes that Congress should withdraw the federal income tax exemption for those credit unions that are unable or unwilling to verify fulfillment of their mandate to support low-income members, while also arguing that the legislative history regarding thrift institutions should be used as a historical model for such a withdrawal.

I. A HISTORY OF EXEMPTION

The first credit unions[31] were developed in Germany in the 1840s as cooperative associations that made loans to their members.[32]

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on Budget and Policy Priorities (CBPP) is a policy organization that "work[s] at the federal and state level on fiscal policy and public programs that affect low- and moderate-income families and individuals." *What is the Center on Budget and Policy Priorities?*, CTR. ON BUDGET & POL'Y PRIORITIES, http://www.cbpp.org/about/ (last visited on Apr. 13, 2012).

28. *Hudson Valley*, 906 N.Y.S.2d at 688–89. *See* discussion *infra* Part III.

29. *See* discussion *infra* Part IV.

30. *Hudson Valley*, 906 N.Y.S.2d at 680.

31. A credit union is a corporation, organized under special statutory provisions, whose object is to promote thrift among, and provide credit for, its members, who are its only borrowers and the sole beneficiaries of its monetary benefits. . . . According to another definition, a credit union is a democratically controlled, cooperative, nonprofit society

America's first credit union appeared some sixty years later in 1909 when La Caisse Populaire Ste. Marie ("St. Mary's Bank") received its state charter from New Hampshire.[33] American businessman Edward Filene organized the Credit Union National Extension Bureau (CUEB) in 1921 to promote credit union laws and develop state-chartered credit unions throughout the country.[34] By 1934, there were approximately twenty-five hundred state-chartered credit unions in thirty-eight states and the District of Columbia; however, these credit unions were not chartered, supervised or insured at the federal level.[35] Mired in the midst of the Great Depression and responding to the inability of low-income persons to qualify for traditional bank services,[36] Congress passed the Federal Credit Union Act of 1934[37] to facilitate the creation of federally-chartered credit unions. The text of the Act manifests that Congress's main rationale for creating the

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> organized for the purpose of encouraging thrift and self-reliance among its members by creating a source of credit at a fair and reasonable rate of interest in order to improve the economic and social conditions of its members.

12 C.J.S. *Building & Loan Assoc.* § 1 (2004).

32. JACOB ET AL., *supra* note 25, at 8.

33. CHMURA, ASSESSMENT, *supra* note 22, at 6.

34. *Id.* The Credit Union National Association (CUNA) replaced the Credit Union Extension Bureau (CUEB) in 1934. *Id.*

35. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 24. There are currently 2,829 state-chartered credit unions, which account for approximately 39% of all credit unions operating in the United States. *State Credit Union Facts and Figures,* NAT'L ASS'N OF ST. CREDIT UNION SUPERVISORS, http://www.nascus.org/facts-figures/index.php (last visited Apr. 13, 2012). NASCUS is a professional regulators' association that is dedicated to the defense and promotion of state-chartered credit unions. *About NASCUS*, NAT'L ASS'N OF ST. CREDIT UNION SUPERVISORS, http://www.nascus.org/about/index.php (last visited Apr. 13, 2012). Currently forty-seven of the nation's fifty states permit state-chartering of credit unions, and each of these states operate a state agency that charters, regulates, and examines these institutions. *Id.*

36. *See* NAT'L CREDIT UNION ADMIN., 2001 ANNUAL PERFORMANCE PLAN 3 (2001) [hereinafter NCUA, PERFORMANCE PLAN]. The National Credit Union Administration (NCUA), pursuant to the 1970 amendment of the Federal Credit Union Act, replaced the Bureau of Federal Credit Unions. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 234. The NCUA is an independent federal regulatory agency that charters, examines, supervises, and prescribes rules and regulations for federally insured credit unions. NAT'L CREDIT UNION ADMIN., STRATEGIC PLAN: 2011–2016, at 2 (2010). In addition, the NCUA operates the National Credit Union Share Insurance Fund (NCUSIF), which insures the savings of all federal credit union account holders and many state-chartered credit unions. CHMURA, ASSESSMENT, *supra* note 22, at 7. All state-chartered credit unions that offer federal deposit insurance must report to the NCUA. *See Frequently Asked Questions*, NAT'L CREDIT UNION ADMIN., http://www.ncua.gov/DataApps/Pages/SI-FAQs.aspx (last visited Apr. 13, 2012).

37. Federal Credit Union Act of 1934, Pub. L. No. 73-467, 48 Stat. 1216 (1934) (current version at 12 U.S.C. §§ 1751–1795 (2006)).

federal charter was to assist persons of "small means" in obtaining credit.[38]

As signed into law by President Franklin D. Roosevelt, the first federal credit unions bore little resemblance to modern multi-service depository institutions.[39] Loans were available to members, but the maturity dates for those loans were limited to a maximum of two years.[40] Additionally, federal credit unions could not cash or sell checks,[41] and traditional bank services such as checking accounts and certificates of deposit were unavailable.[42] Most importantly, membership in each respective credit union was limited to "groups having a *common bond* of occupation, or association, or to groups within a well-defined neighborhood, community, or rural district."[43]

A. History of Tax Exemptions for State-Chartered Credit Unions

The history of credit unions' tax exemption begins at the turn of the twentieth century.[44] Prior to the passage of the Sixteenth Amendment to the U.S. Constitution[45] in 1913, the United States did not levy a corporate income tax.[46] Following ratification of the

38. *Id.* Section 1 of the Act states its purpose:

> To establish a Federal Credit Union system, to establish a further market for the securities of the United States and to make more available to people of small means credit for provident purposes through a national system of cooperative credit, thereby helping to stabilize the credit structure of the United States.

Id. § 1.

39. *See* CHMURA, ASSESSMENT, *supra* note 22, at 6.

40. *Id.* Over time these loan maturity restrictions were loosened; for example, credit unions were authorized in 1977 to make thirty-year residential mortgage loans, and in 1981 they were permitted to offer variable-rate mortgage loans. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 72.

41. CHMURA, ASSESSMENT, *supra* note 22, at 7. For a partial historical summary of credit unions' expansion of services, see U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 229.

42. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 229 ("These expansions in both account and asset powers have enabled credit unions to offer virtually the same mix of consumer financial services as banks and savings and loans may and enabled them to maintain or increase market share.").

43. Federal Credit Union Act of 1934, Pub. L. No. 73-467 § 9, 48 Stat. 1216, 1219 (1934) (current version at 12 U.S.C. §§ 1751–1795 (2006)) (emphasis added).

44. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 290.

45. U.S. CONST. amend. XVI.

46. *Brief History of IRS*, IRS.GOV, http://www.irs.gov/irs/article/0,,id=149200,00.html (last updated Jan. 23, 2012). Congress authorized the first personal income tax in 1862 in order to assist with the funding of the Civil War. OFFICE OF THE CURATOR, U.S. DEP'T OF THE TREASURY, DEPARTMENT OF THE TREASURY 22 (2006), *available at* http://www.treasury.gov/about/education/Documents/brochure%20(1).pdf. The U.S. Supreme Court

amendment, Congress explicitly exempted domestic building and loan associations (S&Ls) and mutual savings banks from corporate taxation[47] in the Revenue Act of 1913,[48] and later extended the exemption to cooperative banks[49] in the Revenue Act of 1916.[50] Neither of these Acts, however, specifically addressed tax exemption for state-chartered credit unions.[51] The U.S. Attorney General declared in 1917 that credit unions chartered under the laws of Massachusetts were exempt from federal taxation[52] because of the unions' similarity to cooperative banks.[53]

In passing the Revenue Act of 1951,[54] Congress repealed § 101(2) and amended § 101(4) of the 1939 Internal Revenue Code[55] in order to eliminate the tax-exempt status of cooperative banks, savings and loan societies (S&Ls), and mutual savings banks, but specifically retained the tax exemption for state-chartered credit unions.[56] While the legislative history provides extensive discussion of why the tax exemptions were removed,[57] the record is silent as to why state-chartered credit unions were not included.[58]

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ruled in 1895 that, as a direct tax, a federal income tax must abide by the U.S. Constitution's requirement of proportionality among the states (i.e., each state must pay an equal share, regardless of population). *Id.* The Sixteenth Amendment nullified the Supreme Court's decision and granted Congress the power to levy a tax on personal income. *Id.*

47. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 290.

48. Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114, 172 (1913).

49. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 290.

50. Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756 (1916).

51. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 290.

52. 31 Op. Att'y Gen. 176 (1917).

53. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 290.

54. Revenue Act of 1951, Pub. L. No. 82-183, 65 Stat. 452 (1951).

55. Section 101 stated:

> The following organizations shall be exempt from taxation under this chapter—
>
> . . .
>
> (2) Mutual savings banks not having capital stock represented by shares;
>
> . . .
>
> (4) Domestic building and loan associations substantially all the business of which is confined to making loans to members; and cooperative banks without capital stock organized and operated for mutual purposes and without profit; . . . .

I.R.C. §§ 101(2) and 101(4) (1939), *amended by* Revenue Act of 1951, Pub. L. No. 82-183, 65 Stat. 452, 490 (1951).

56. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 290. As originally passed, the Act did provide certain provisions that effectively allowed the bank institutions to escape taxation, but those provisions were removed by Congress over time. *Id.* at 292.

57. S. REP. NO. 82-781 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1968, 1991–96. The Senate report

In a letter dated January 14, 1966, the IRS revoked St. Mary's Bank's tax-exempt status under the premise that the financial institution was operating more like a cooperative bank than a credit union.[59] St. Mary's filed suit in December 1975 to enforce its requested tax refund and enjoin future income tax collections by the IRS.[60] The district court ruled for the taxpayer,[61] and the federal appellate court upheld the ruling one year later.[62] Following its defeat on appeal, the IRS concluded that the provision of banking services by a state credit union could not serve as a basis for challenging tax-exempt status.[63] The IRS currently exempts state-chartered credit unions from most federal income taxes pursuant to § 501(c)(14)(a) of the Internal Revenue Code.[64] This section of the Code has no bearing on the various taxes imposed by the states, but a large majority has chosen to exempt state-chartered credit unions from state income taxes as well.[65]

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indicates the tax exemption of mutual savings banks was removed in order to provide parity for competitive financial institutions, while the exemption of savings and loans was repealed because membership characteristics no longer provided adequate justification. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 291.

58. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 290–91. The lone mention of credit unions is limited to a single sentence: "Credit unions without capital stock organized and operated for mutual purposes and without profit will remain tax-exempt under section 101(4) of the [1939 income tax] code." S. REP. NO. 82-781 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1968, 2128.

59. La Caisse Populaire Ste. Marie (St. Mary's Bank) v. United States, 425 F. Supp. 512, 515 (D.N.H. 1976).

60. *See id.*

61. *Id.* at 524. Noting that the "words 'credit union' are not defined in the [1954 Internal Revenue Code]," *Id.* at 515, the presiding judge refused to "defin[e] new tests for determining when an institution is a credit union," *Id.* at 523, especially when "neither the Congress, through legislation, nor the Internal Revenue Service, through rule making, has seen fit to do so." *Id.*

62. La Caisse Populaire Ste. Marie (St. Mary's Bank) v. United States, 563 F.2d 505 (1st Cir. 1977).

63. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 293.

64. I.R.C. § 501(c)(14)(a) (2006). Unlike federal credit unions, state-chartered credit unions are subject to the federal unrelated business income tax (UBIT), I.R.C. § 512–513, which imposes a tax on income derived by tax-exempt organizations that is not substantially related to the organization's purpose for exemption. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 294. However, this apparent restriction may be experiencing a loosening of interpretation by our nation's courts. *See* Bellco Credit Union v. United States, 735 F. Supp. 2d 1286, 1306 (D. Colo. Apr. 2, 2010) (finding that a state-chartered credit union was not subject to UBIT for income from investment products sold to members, income derived the direct and indirect sale of credit life and disability insurance, and royalty income from accidental death and dismemberment insurance).

65. TATOM, *supra* note 6, at 5. As of 2005, only five states subjected state-chartered credit unions to state corporate income taxes. *Id.* The record is more diverse concerning state franchise, sales, and property taxes. *See id.* This study was performed in conjunction with the Tax Foundation, a nonpartisan

B. History of Tax Exemptions for Federal Credit Unions

As originally passed in 1934, the Federal Credit Union Act (FCUA) did not exempt federal credit unions from federal income taxation or any applicable state tax.[66] In 1937 Congress amended the FCUA to exempt federal credit unions from federal and state income taxes,[67] while also limiting state taxation to taxes on real and tangible personal property.[68] Legislative history indicates the rationale behind the amendment was to preserve capital within the member-owned federal credit unions.[69] The broad federal and state tax exemptions enjoyed by federal credit unions are codified in § 501(c)(1) of the Internal Revenue Code.[70] Pursuant to this section of the Code, federal credit unions are exempt from federal income taxes, federal unrelated business income taxes, state income taxes, and state sales taxes.[71] Federal credit unions are subject, however, to payroll taxes and certain municipal property taxes.[72]

Some states and municipalities have tried in vain to argue that modern federal credit unions do not deserve such wide-ranging tax exemptions. In 1981 the state of Maine attempted to charge a "sliding

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educational organization founded in 1937 that focuses on government financing. *About the Tax Foundation*, TAX FOUND., http://www.taxfoundation.org/about (last visited April 13, 2012).

66. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 294.

67. Federal credit unions are exempt from taxation by virtue of I.R.C. § 501(c)(1) (2006). Certain corporations that are organized under an act of Congress, that are designated as instrumentalities of the United States, and that have been specifically exempted from tax under either the Internal Revenue Code or certain congressional acts qualify for tax-exempt status under § 501(c)(1). U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 294–95. Although federally-chartered banks are also instrumentalities of United States, they have not been exempted from taxation by the IRS or congressional statute. *Id.* at 295.

68. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 294. Section 122 of the Federal Credit Union Act provides, in relevant part:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; *except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.*

12 U.S.C. § 1768 (2006) (emphasis added).

69. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 294.

70. I.R.C. § 501(c)(1) (2006). This section of the Code addresses corporations that are "organized under Act of Congress which [are] instrumentalit[ies] of the United States." *Id.*

71. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 295; TATOM, *supra* note 5, at 4–5.

72. CUNA, ISSUE SUMMARY, *supra* note 23, at 1.

scale fee" on all consumer loans—including those made by federal credit unions—within the boundaries of the state.[73] The United States filed suit on behalf of the federal credit unions operating within Maine, arguing that the state law violated § 122 of the Federal Credit Union Act[74] and the Supremacy Clause[75] of the U.S. Constitution.[76] The court agreed with the government's argument and summarily dismissed the state's contention that federal credit unions should no longer be viewed as instrumentalities of the U.S. government.[77] In a 1988 decision, the Sixth Circuit Court of Appeals ruled in similar fashion that federal credit unions, serving as instrumentalities of the federal government, were exempt from state sales taxes.[78] A decision in 1995 by the First Circuit Court of Appeals affirmed the status of federal credit unions as "government instrumentalities,"[79] and in 1996, the Ninth Circuit Court of Appeals ruled that employees of federal credit unions are "constituent parts" of credit unions while

73. United States v. Maine, 524 F. Supp. 1056, 1057–58 (D. Me. 1981).

74. For relevant language of Section 122 of the Federal Credit Union Act, see *supra* note 68.

75. The Supremacy Clause states:

> 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.

U.S. CONST. art. VI, cl. 2.

76. *Maine*, 524 F. Supp. at 1058.

77. *Id.* at 1058–59. The court based its decision to view federal credit unions as instrumentalities of the U.S. government on a long history of judicial interpretation of the Supremacy Clause. *Id.* at 1058. This interpretation, which holds that federal instrumentalities are immune from state taxation unless such taxation is explicitly authorized by Congress, was first proffered by the seminal Supreme Court decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436–37 (1819). According to Justice Marshall's opinion, "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government." *Id.* at 317.

78. United States v. Michigan, 851 F.2d 803, 805 (6th Cir. 1988). The court's analysis included the separate question of whether the state sales tax at issue fell upon the retailer or the purchaser. *Id.* at 807. The importance of this question was highlighted by the court's determination that a "tax is not unconstitutional . . . if the legal incidence of the tax falls on a party who deals with the federal government and merely the economic burden of the tax is passed on to the United States by that party." *Id.*

79. T I Fed. Credit Union v. DelBonis, 72 F.3d 921, 924, 935 (1st Cir. 1995) (finding that DelBonis, a member of the Texas Instruments (TI) Federal Credit Union and a debtor for several TI-issued education loans, should not be able to discharge the debts in bankruptcy due to the federal credit union's status as a "governmental unit" within the meaning of the bankruptcy code).

acting in their official capacities and thus are immune from state or municipal taxation.[80]

II. ARGUMENTS FOR AND AGAINST CREDIT UNIONS' TAX EXEMPTIONS

Throughout their history, credit unions have relied on several key attributes to justify their tax exemption: their cooperative, not-for-profit ownership structure, their restrictive membership guidelines, and their stated mission of providing financial services to underserved and lower income demographics.[81] The American Bankers Association (ABA), serving in its role as the predominant banking industry lobbyist,[82] has consistently argued that these attributes are insufficient to justify credit unions' tax exemption.[83] The contentious nature of this ongoing debate led to a controversial Supreme Court ruling,[84] followed by a swift response from Congress.[85]

A. Does a Cooperative Organizational Structure Justify a Tax Exemption?

One argument in favor of federal credit unions' tax exemption is that their cooperative, not-for-profit ownership structure provides communal benefits by focusing on members instead of stockholders.[86] Alleged benefits include financial education for members, volunteer management boards consisting of local members, democratic voting rights for each member (one vote per

80. Cal. Credit Union League v. City of Anaheim, 95 F.3d 30, 32 (9th Cir. 1996). The case concerned a hotel occupancy tax that was assessed on federal credit union employees—who were attending a federal credit union seminar—during their stay at their Disneyland Hotel in Anaheim. *Id.* at 31.

81. *See, e.g.*, CUNA, ISSUE SUMMARY, *supra* note 23, at 1; NCUA, PERFORMANCE PLAN, *supra* note 36, at 3; GAO, CREDIT UNION ISSUES, *supra* note 25, at 10.

82. *About the American Bankers Association*, *supra* note 20.

83. *Credit Union Competition Resources*, AM. BANKERS ASS'N, https://www.aba.com/Industry+Issues/Issues_CU_Menu.htm (last updated Apr. 1, 2009).

84. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998).

85. Credit Union Membership Access Act, Pub. L. No. 105-219, 112 Stat. 913 (1998) (current version at 12 U.S.C. §§ 1751–1795 (2006)).

86. *What is the Credit Union Difference?*, CREDIT UNION NAT'L ASS'N, http://www.cuna.org/gov_affairs/legislative/cu_difference.html (last visited Apr. 14, 2012).

member, regardless of account balances), reduced loan rates and higher deposit rates.[87] Credit unions can afford to be aggressive with their rates by retaining their untaxed profits and not issuing dividends, as typically done by tax-paying financial institutions.[88] In addition, some proponents of the tax exemption note that credit unions' cooperative structure does not permit capital to be raised via sale of stock, thus taxation would threaten the entities' capital reserves.[89]

Critics of the tax exemption point to the apparent hypocrisy of Congress repealing the tax exemption of mutual savings banks in 1951.[90] Similar to credit unions, mutual savings banks are owned by their depositors and do not raise funds through the sale of stock.[91] Prior to 1951, mutual savings banks, like credit unions, were not subject to federal income taxation.[92] Congress rationalized its repeal of this exemption by focusing on the "active competition" between mutual savings banks and commercial banks, noting that the "continuance of the tax-free treatment now accorded mutual savings banks will be discriminatory."[93] The Senate report further noted, "So long as they are exempt from income tax, mutual savings banks enjoy the advantage of being able to finance their growth out of earnings without incurring the tax liabilities paid by ordinary corporations."[94] Finally, the report stated, "The tax treatment provided by [the] committee would place mutual savings banks on a parity with their competitors."[95]

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87. *Id.*
88. *Id.*
89. GAO, CREDIT UNION ISSUES, *supra* note 25, at 10.
90. *See, e.g.*, CHMURA, ASSESSMENT, *supra* note 22, at 45–46; TATOM, *supra* note 6, at 5; U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 290–92; GAO, CREDIT UNION ISSUES, *supra* note 25, at 6–7.
91. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 301.
92. Revenue Act of 1951, Pub. L. 82-183, § 313, 65 Stat. 452, 490 (1951).
93. S. REP. NO. 82-781 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1968, 1993–94.
94. *Id.*
95. *Id.*

B. Does a Restrictive Membership Requirement Justify a Tax Exemption?

Throughout the history of the Federal Credit Union Act and its many congressional amendments, credit unions always have been subject to a "common bond" restriction to potential membership.[96] Congress originally used the "common bond" restriction to "guarantee close knowledge of the character and antecedents of any given member,"[97] which ideally would lead to members making "sound judgments about extending credit to one another."[98] Over time, however, the common bond requirements at the state and federal levels were loosened,[99] and eventually multiple bond credit unions came into existence.[100] In today's environment, federal credit union membership is limited to one of three fields: single common-bond, multiple common-bond, and community credit union.[101]

In 1991, five commercial banks and the American Bankers Association sued the NCUA over its interpretation of § 109 of the Federal Credit Union Act (FCUA) as permitting multiple occupational bond credit unions.[102] At that time, the text of the

96. JACOB ET AL., *supra* note 25, at 21 (finding that the Federal Credit Union Act, as originally enacted, permitted three types of common bonds—occupational, associational, and residential).

97. *Id.*

98. *Id. But see* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 217 ("Congress did not, however, elaborate on this definition at the time or express the reason for the requirement. Although courts have inferred that the purpose of the 1934 common bond requirement was to facilitate safe and sound operations, the legislative history does not make this explicit.").

99. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 217. "In 1967, NCUA replaced its prior requirement that members be 'extensively acquainted' with the requirement that members 'know'" each other. *Id.* "[I]n 1968, the NCUA adopted lifetime membership privileges." *Id.* In 1980, the NCUA broadened its definition of "common bond," and in 1982 major changes were implemented that permitted credit unions to have members with different common bonds, while also allowing occupational and associational credit unions to merge. *Id.* at 218–19. The loosened membership standards have led some to question whether the assumed structural protections against imprudent lending are no longer relevant. *Id.* at 58. "By virtue of their common bond of membership credit unions are, in theory, believed to have better information about the credit worthiness of borrowers. Loosening of the common bond requirement has diminished what impact this may traditionally have had." *Id.*

100. *Id.* at 219. Although the changes made by the NCUA in 1982 ultimately increased the number of potential members, the original intent of the "multiple group charter" was to respond to economic difficulties that threatened both banks and credit unions. *Id.* The NCUA asserted that the expansion policy prescribed in 1982 grew out of a need to stabilize credit union failures that drained the credit union insurance fund. CHMURA, ASSESSMENT, *supra* note 22, at 10.

101. 12 U.S.C. § 1759 (2006).

102. *See* First Nat'l. Bank & Trust Co. v. Nat'l Credit Union Admin., 772 F. Supp. 609, 609–10

FCUA regarding membership qualification held that "[f]ederal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."[103] The United States Supreme Court ultimately reviewed the case in 1998.[104] Writing for the majority in its decision against the NCUA, Justice Clarence Thomas held that "Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union."[105]

Congress reacted swiftly to the Court's attempt to restrict credit union membership. Six months after the Court's February 1998 ruling, Congress passed the Credit Union Membership Access Act (CUMAA),[106] which amended the Federal Credit Union Act and mitigated the Supreme Court decision.[107] The CUMAA reaffirmed Congress's belief that credit unions provide credit services to those citizens who otherwise would not qualify for traditional bank services.[108] Curiously, Congress used the phrase "modest means" in

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(D.D.C. 1991).

103. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 482–83 (1998) (alteration in original) (citing 12 U.S.C. § 1759).

104. *Id.* at 479.

105. *Id.* at 500. Justice Thomas noted:

> Until 1982, the NCUA and its predecessors consistently interpreted § 109 to require that the *same* common bond of occupation unite every member of an occupationally defined federal credit union. In 1982, however, the NCUA reversed its longstanding policy in order to permit credit unions to be composed of multiple unrelated employer groups.

Id. at 484. As of year-end 1996, approximately three-fourths of the 7,068 federally-chartered credit unions were occupational credit unions. William R. Emmons & Frank A. Schmid, *Membership Structure, Competition, and Occupational Credit Union Deposit Rates*, FED. RES. BANK ST. LOUIS REV., Jan./Feb. 2001, at 41, 42. In addition, "Most members of occupational credit unions easily could (and often do) obtain financial services from a for-profit financial intermediary such as a commercial bank or a thrift institution." *Id.*

106. Credit Union Membership Access Act, Pub. L. 105-219, 112 Stat. 913 (1998).

107. JACOB ET AL., *supra* note 25, at 21.

108. The first two provisions of § 2 of the Credit Union Membership Access Act state:

> The Congress finds the following:
>
> (1) The American credit union movement began as a cooperative effort to serve the productive and provident credit needs of individuals of *modest means*.
>
> (2) Credit unions continue to fulfill this public purpose, and current members and membership groups should not face divestiture from the financial services institution of their choice as a result of recent court action.

Credit Union Membership Access Act § 2 (emphasis added).

its justification for the CUMAA,[109] although the original language of the Federal Credit Union Act specified "small means."[110] The significance of this change is not readily apparent, but could signal a more lenient policy for potential credit union membership.[111]

The 1998 amendment affected credit unions in several important ways. First, the CUMAA "grandfathered all existing credit union members, no matter the basis of their membership, and expressly permitted multiple occupational and associational common bonds within certain limits and under certain circumstances."[112] Secondly, CUMAA "amended the provision of the [FCUA] permitting the federal community charter by changing the description of its field membership from 'groups within a well-defined neighborhood, community, or rural district' to 'persons or organizations within a well-defined local community, neighborhood, or rural district.'"[113] Finally, in 2003 the NCUA retracted a previous regulation requiring credit unions to document that residents of a proposed community area interacted or had common interests.[114]

Congress's amendment of the FCUA had an immediate and continuing impact on the credit union landscape. Between 1999 and 2002, the loosened restriction for multiple common bonds permitted credit unions to add two million potential members per year,[115] with a majority of the growth coming from community chartered credit unions.[116] Since the beginning of 2000, over six hundred and fifty federal credit unions (and hundreds of state chartered credit unions) have opted for community charters that permit service to anyone who lives, works, or worships in a "community."[117] The NCUA has

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109. *Id.*

110. Federal Credit Union Act of 1934, Pub. L. No. 73-467, § 1, 48 Stat. 1216 (1934) (current version at 12 U.S.C. §§ 1751–1795 (2006)).

111. CHMURA, ASSESSMENT, *supra* note 22, at 11 n.23.

112. JACOB ET AL., *supra* note 25, at 21–22.

113. GAO, CREDIT UNION TRANSPARENCY, *supra* note 25, at 11.

114. *Id.* at 11–12.

115. CHMURA, ASSESSMENT, *supra* note 22, at 25.

116. *Id.*

117. AM. BANKERS ASS'N, CREDIT UNIONS: A CHANGING INDUSTRY (2010), *available at* http://www.aba.com/NR/rdonlyres/804662A0-4225-11D4-AAE6-00508B95258D/65043/CreditUnionsAChangingIndustry100202.pdf. Between 2000 and 2006, community-chartered credit unions nearly tripled their membership and nearly quadrupled their assets. GAO, CREDIT UNION TRANSPARENCY,

adopted a broad interpretation of "community," including, for instance, an area encompassing all of Los Angeles and four surrounding counties that houses approximately eighteen million residents.[118]

C. Do Credit Unions Adequately Provide for Lower Income Demographics?

The language of the Federal Credit Union Act of 1934 specified that one purpose of the legislation was to "make more available to people of small means credit for provident purposes through a national system of cooperative credit."[119] Testing credit unions' adherence to this policy is difficult, however, because Congress has not quantified the terms "small means" or "modest means."[120] Additionally, the NCUA does not require credit unions to provide the specific data necessary to complete a meaningful review.[121]

Although "[p]reliminary versions of CUMAA included legislation similar to the 1977 Community Reinvestment Act (CRA), which is intended to encourage banks and thrifts to help meet the credit needs

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supra note 25, at 10. In addition, most of the new community charters approved between 2000 and 2005 were charter conversions by multiple-bond credit unions rather than new credit unions. *Id.*

118. AM. BANKERS ASS'N, *supra* note 117.

119. Federal Credit Union Act of 1934, Pub. L. No. 73-467, § 1, 48 Stat. 1216 (1934) (current version at 12 U.S.C. §§ 1751–1795 (2006)).

120. GAO, CREDIT UNION TRANSPARENCY, *supra* note 25, at 21 n.32 (lacking a formal definition of "modest means," the GAO used a group consisting of "low- and moderate-income households as a proxy for purposes of [the] analysis"). The NCUA objected to this proxy definition in its official response to the report, arguing instead that "modest means" is more accurately interpreted as a "shorthand reference to members of the broad working class." *Id.* at 83–84.

121. *See id.* at 14 ("Although federal credit unions increasingly have participated in [two NCUA provisions that seek to increase credit union services to low- and middle-income individuals], lack of data on the income levels of credit union members has made it difficult to determine how effective these programs have been in providing services to individuals of modest means."); GAO, CREDIT UNION ISSUES, *supra* note 25, at 19 ("[L]imited comprehensive data are available to evaluate the income of credit union members. . . . Although NCUA has undertaken initiatives to enhance the availability of financial services to individuals of modest means, . . . it ha[s] not implemented our 2003 recommendation to develop indicators to evaluate the progress credit unions made in reaching the underserved."); GAO, CREDIT UNION OVERSIGHT, *supra* note 25, at 17 ("Information on the extent to which credit unions are lending and providing services to households with various incomes is scarce because NCUA . . . ha[s] not collected specific information describing the economic status of credit union members who obtain loans or benefit from other credit union services."); *see also* CHMURA, ASSESSMENT, *supra* note 22, at 12 ("Conclusive evidence of credit union efforts to serve people of modest means is lacking.").

of the communities in which they operate[,] . . . the final version of the bill did not include any community reinvestment provision."[122] In 1999 Norman D'Amours,[123] the then-Chairman of NCUA, attempted "to impose very modest mandatory disclosure requirements on credit unions about their level of service to low-income members."[124] The proposed Community Action Plan (CAP) met much industry opposition, and in late 1999 the NCUA Board approved a voluntary survey but shielded the information from third-party review.[125] The survey asked only one direct question about member income, which was limited to a query about the number of loans made to members in several broad income categories.[126] Mr. D'Amours denounced the "watered-down" disclosure requirements as a "sham that no self-respecting researcher would give credence to."[127] Just two years later, and shortly after Mr. D'Amours term as Chairman expired, the NCUA Board repealed the regulation.[128] Furthermore, in June 2001, a commission appointed by the CUNA chairman argued that "any and all efforts to monitor credit unions' service to low-income people" should be discontinued.[129]

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122. CHMURA, ASSESSMENT, *supra* note 22, at 12; *see also* Community Reinvestment Act of 1977, Pub. L. No. 95-128, §§ 801–804, 91 Stat. 1111, 1147 (1977) (current version at 12 U.S.C. §§ 2901–2908 (2006)). "The Community Reinvestment Act is implemented . . . through a detailed regulation that mandates the examination of specific aspects of bank activity in a bank's service area (technically called its CRA assessment area), including low- and moderate-income neighborhoods." JACOB ET AL., *supra* note 25, at 29. "[M]uch of the raw data used in CRA examinations is public, as is the regulator's report on the financial institution's examination." *Id.* at 29–30. "CRA provides for enforcement only when regulators evaluate an institution's application for a merger or new branch, requiring that [bank and thrift regulators] take an institution's record of meeting the credit needs of its community into account." GAO, CREDIT UNION ISSUES, *supra* note 25, at 22 n.36.

123. President Clinton appointed Mr. D'Amours, a former Congressman, to the position of NCUA chairman. JACOB ET AL., *supra* note 25, at 28.

124. *Id.* at 29.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. JACOB ET AL., *supra* note 25, at 30. The Commission's report stated in part:

> The Commission is of the strong opinion that supervisory authorities must limit their activities to those related to safety and soundness and compliance with applicable laws and regulations. In particular, it is not the responsibility of regulatory authorities to define, direct, or examine the social mission of credit unions. That is the responsibility of each credit union's board of directors.

Id. (citing CUNA RENAISSANCE COMM'N, REPORT TO THE CUNA BOARD, at ix (2001)).

In spite of the difficulty in obtaining empirical evidence regarding credit unions' service to low-income members, several studies have attempted to address the issue. In a 1989 study commissioned by the American Bankers Association, the Secura Group[130] concluded that "based on the data in various surveys in the late 1980s, the typical credit union member would be in his early forties, a homeowner, employed, with well above average income, better educated than a nonmember, and with access to financial services from a variety of sources."[131] In that same year, a study by CUNA found that "people in low-income households . . . were less likely to belong to credit unions than people in middle and upper income households."[132] The Woodstock Institute[133] completed a study in 2002 of credit unions in the six-county Chicago region.[134] Among its findings were that credit unions "serve[d] a much lower percentage[] of lower-income households than they d[id] middle- and upper-income households."[135] The study's authors advocated amending the Community Reinvestment Act to include credit unions, and also encouraged the NCUA to conduct its own examinations to ensure that credit unions comply with the mandate to serve low-income people.[136]

Based upon its 2003 review of the 2001 Federal Reserve Survey of Consumer Finances (SCF), the U.S. Government Accounting Office (GAO) concluded that credit unions serve a much lower percentage of low-income households than banks.[137] The GAO reported similar findings in 2006 when it reviewed the 2004 Federal Reserve SCF.[138]

130. The Secura Group, LLC is a financial consulting firm that provides expertise in regulatory compliance, credit and risk management, and technology. *Company Overview of the Secura Group, L.L.C.*, BLOOMBERG BUSINESSWEEK, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=25476934 (last visited Apr. 14, 2012). The firm was acquired by LECG, Corp. on March 16, 2007. *Id.*

131. U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 224.

132. *Id.* at 225.

133. *See* WOODSTOCK INST., *supra* note 25.

134. JACOB ET AL., *supra* note 25, at 4.

135. *Id.*

136. *Id.* at 6.

137. GAO, CREDIT UNION OVERSIGHT, *supra* note 25, at 19 (finding that "credit unions overall served a lower percentage of household of modest means (low- and moderate-income households combined) than banks").

138. *Id.* ("Despite the shift toward community charters and the increase in the number of credit unions participating in NCUA's low-income and underserved programs, our analysis . . . indicated that credit

Research conducted by Chmura Economics & Analytics[139] in 2004 summarized several previous studies concerning the fulfillment of the low-income mandate by credit unions. Two Virginia studies—one in 1997, the other in 2003—both found evidence that banks were serving the low-income population better than their competitor credit unions.[140]

III. SPLITTING HAIRS: A GAME OF SEMANTICS?

As mentioned previously,[141] § 501(c)(14)(a) of the Internal Revenue Code, which grants state-chartered credit unions immunity from federal corporate income taxes, does not restrict a state's ability to charge a state corporate income tax.[142] Like most states,[143] however, Georgia has elected to exempt state-chartered credit unions from most applicable taxes.[144] Some argue that these broad tax exemptions have allowed credit unions to gain market share at the expense of traditional commercial banks.[145]

One exemption of particular interest concerns the state's mortgage recording tax (MRT),[146] which applies to any mortgage that

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unions had a lower proportion of customers who were of low- and moderate-income than did banks.").

139. CHMURA, ASSESSMENT, *supra* note 22.

140. *Id.* at 34.

141. *See* discussion *supra* Part I.A.

142. 26 U.S.C. §501(c)(14)(a) (2006).

143. TATOM, *supra* note 6, at 5 (noting that as of 2005, only five states subjected state-chartered credit unions to state corporate income taxes).

144.
> Credit unions shall not be subject to any tax except the ad valorem tax upon property imposed by the Constitution of this state unless made subject thereto by express provision of the law specifically naming credit unions and making them subject thereto. . . . [A]nd the rate of taxation shall not exceed the rate of taxation imposed on banking corporations, provided that, so long as federal credit unions are exempt from the payment of the tax imposed under this Code section, state credit unions shall likewise be exempt.

GA. CODE ANN. § 7-1-662 (2004).

145. Paul Donsky, *State's Credit Unions Make Gains as Banks Suffer*, ATLANTA J.-CONST. (May 19, 2009), http://www.ajc.com/business/content/business/stories/2009/05/19/georgia_credit_unions.html ("Credit union loan volume rose 14 percent last year [2008], . . . while lending by Georgia banks was flat. Deposits at credit unions climbed nearly 10 percent, vs. 3 percent at banks."). *Id.*

146.
> Every holder of a long-term note secured by real estate shall . . . record the security instrument in the county in which [the real estate] is located . . . . There is imposed on each instrument an intangible recording tax at the rate of $1.50 for each $500.00 or fraction thereof of the face amount of the note secured by the recording of the security instrument. . . . The maximum amount of any intangible recording tax payable as

collateralizes a long-term note.[147] Mortgage recording taxes generally are considered to be a form of excise tax,[148] and not an ad valorem tax.[149] Georgia's code explicitly limits taxation of credit unions to ad valorem taxes;[150] thus, credit unions have been shielded from paying the applicable MRT.[151] However, a recent decision by a New York state court[152] provides persuasive authority to Georgia legislators should they decide to withdraw the MRT exemption not only for state-chartered credit unions, but also for federal credit unions.

The New York case of *Hudson Valley Federal Credit Union v. N.Y. State Department of Taxation & Finance*[153] provides an interesting parallel to Georgia's current exemption for its intangible mortgage tax. The case concerns a similar MRT and New York's decision not to exempt federal credit unions.[154] The New York state trial court addressed three main issues in its decision for the defendant, but only the third—the application of the MRT to federal credit unions—is relevant to the subject discussion.[155]

> provided in this Code section with respect to any single note shall be $25,000.00.

GA. CODE ANN. § 48-6-61 (2010)

147.
> "Long-term note secured by real estate" means any note representing credits secured by real estate by means of mortgages, deeds to secure debt, purchase money deeds to secure debt, bonds for title, or any other form of security instrument, when any part of the principal of the note falls due more than three years from the date of the note or from the date of any instrument executed to secure the note and conveying or creating a lien or encumbrance on real estate for such purpose.

GA. CODE ANN. § 48-6-60(3) (2010).

148. 85 C.J.S. *Taxation*§ 1813 (2010) ("Generally, mortgage recording taxes . . . have been held to be an excise or privilege tax on the privilege of recording or registering the mortgage or similar instrument and not an ad valorem tax or a tax on property in the ordinary sense.") "An 'excise tax' is a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." *Id.* "Under most statutes, a mortgage recording tax is held to be an excise or privilege tax." *Id.*

149. "The phrase 'ad valorem' means, literally, 'according to the value,' and is used in taxation to designate an assessment of taxes against property, real or personal, at a certain rate upon its value." 17 AM. JUR. 2D *State and Local Taxation* § 18 (2001).

150. GA. CODE ANN. § 7-1-662 (2004); *see supra* note 144 for relevant language.

151.
> Any mortgage, deed to secure debt, purchase money deed to secure debt, bond for title or any other form of security instrument is not subject to intangible recording tax where any of the following applies: . . . (b) Where any of the following is Grantee: a federal credit union, a state of Georgia chartered credit union, or a church.

GA. COMP. R. & REGS. 560-11-8-.14 (2011).

152. Hudson Valley Fed. Credit Union v. N.Y. State Dep't of Taxation & Fin., 906 N.Y.S.2d 680 (Sup. Ct. 2010).

153. *Id.* at 680.

154. *Id.* at 683.

155. *Id.* at 683–85. The remaining two issues concerned a failure to exhaust administrative remedies

The court justified its ruling for the defendant by interpreting the MRT to be a tax on the privilege of recording the mortgage, and not a tax on the mortgage itself.[156] This issue is dispositive of the underlying debate, as the United States Supreme Court ruled in 1988[157] that a "general exemption from taxation has an understood meaning, to wit: that property is exempt from direct taxation and direct taxation does not include excise taxes."[158] The court agreed with the defendant's argument that the Federal Credit Union Act does not provide federal instrumentalities a blanket exemption from all state taxation, but is limited by the exemptions expressly stated in the Act.[159] Relying on a 2001 United States Supreme Court decision,[160] the court held that federal instrumentalities enjoy "no greater immunity from State taxation than as specified in the applicable statute."[161] The court summarized its position by stating, "Thus, even an instrumentality of the United States enjoys no greater immunity from taxation under the Supremacy Clause than what is provided for in the express applicable statutory provisions."[162]

To answer the question of whether the specific language of the FCUA provides a statutory exemption from the MRT, the court examined two prior United States Supreme Court rulings.[163] Noting that both decisions appeared to conflict with the court's characterization of the MRT as a privilege tax, the court nonetheless deferred to the precedence of two prior New York Court of Appeals decisions[164] to determine that a "tax on privilege, like the MRT, is an excise tax."[165] The court also distinguished the two contradictory

and the primary jurisdiction doctrine. *Id.*

156. *Id.* at 686.

157. United States v. Wells Fargo Bank, 485 U.S. 351 (1988).

158. *Hudson Valley*, 906 N.Y.S.2d at 686 (summarizing the Supreme Court's holding in *Wells Fargo Bank*, 485 U.S. at 355).

159. *Hudson Valley*, 906 N.Y.S.2d at 687.

160. Dir. of Revenue v. CoBank ACB, 531 U.S. 316 (2001).

161. *Hudson Valley*, 906 N.Y.S.2d at 687.

162. *Id.*

163. Pittman v. Home Owners' Loan Corp. of Washington, D.C., 308 U.S. 21 (1939); Fed. Land Bank of New Orleans v. Crosland, 261 U.S. 374 (1923).

164. S.S. Silberblatt, Inc. v. Tax Comm'n, 159 N.E.2d 195 (N.Y. 1959); Franklin Soc'y for Home Bldg. & Sav. v. Bennett, 24 N.E.2d 854 (N.Y. 1939).

165. *Hudson Valley*, 906 N.Y.S.2d at 686.

United States Supreme Court decisions by noting that the FCUA lacked specific language concerning MRTs, whereas the statutes in those cases specifically addressed the issue being debated.[166]

IV. DON'T TAX YOU, DON'T TAX ME, TAX THE MAN BEHIND THE TREE: APPLYING COMMON SENSE MEASURES TO LEVEL THE PLAYING FIELD

The spider web of federal and state laws dealing with tax exemptions for credit unions has evolved over the last one hundred years.[167] Any effort to change these long-accepted exemptions will undoubtedly be met with skepticism by the various legislatures[168] and resistance by the beneficiaries.[169] However, in light of our nation's recent economic troubles,[170] all areas of tax expenditures deserve a thorough examination.[171] If anything, the proposals outlined below—which address both national and local concerns—should serve as a catalyst for addressing the inherent inequities that currently exist in our nation's financial industry.

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166. *Id.* at 688.

167. *See* discussion *supra* Part I.

168. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 306–08.

169. *See, e.g.*, CUNA, ISSUE SUMMARY, *supra* note 23, at 1.

170. CONG. BUDGET OFFICE, 111TH CONG., THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2010 TO 2020, at 1 (2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10871/01-26-outlook.pdf ("Projected deficits total $6.2 trillion for the 10 years starting in 2011, raising federal debt held by the public to more than 69 percent of GDP by 2020, almost double the 36 percent of GDP observed at the end of 2007.").

171. In 2010, President Obama created by executive order, Exec. Order No. 13,531, 75 Fed. Reg. 7927 (Feb. 18, 2010), the National Commission on Fiscal Responsibility and Reform. *About the National Commission on Fiscal Responsibility and Reform*, FISCALCOMMISSION.GOV, http://www.fiscalcommission.gov/about (last visited Apr. 14, 2012). The Commission is charged with identifying policies to improve the nation's fiscal situation by proposing recommendations designed to balance the national budget. *Id.* The Commission has pledged to address all existing tax breaks, no matter how sacrosanct. Damian Paletta, *Key Tax Breaks at Risk as Panel Looks at Cuts*, WALL ST. J., Oct. 25, 2010, at A1.

A. Federal Credit Unions Should Justify Their Tax Exemptions With Empirical Evidence

The time has come for federal credit unions to justify their exemption from the federal corporate income tax. When Congress originally granted the exemption,[172] both federal credit unions and mutual savings banks could point to their cooperative ownership structure as one rationale for the exemption.[173] However, the repeal of mutual savings banks' tax exemption in 1951[174] nullified such an argument. The only remaining justification for the exemption lies in federal credit unions' supposed focus on persons of "small" or "modest means."[175] Although such an amorphous characterization has never been quantified by Congress,[176] there is no valid reason for federal credit unions to operate free of the CRA examinations that are required of commercial banks.[177] Congress should immediately amend the FCUA to require federal credit unions to undergo CRA examinations, especially in light of the industry's resistance to regulatory oversight.[178] For those entities that refuse to comply or that are unable to prove they are meeting their mandate of providing services to persons of low income, the tax exemption from federal corporate income taxes should be repealed.

Should Congress decide to consider repealing federal credit unions' tax exemption, it can look to the history of the Revenue Act of 1951 for guidance and justification. In 1950 the Joint Staff on Taxation for Congress, under recommendation from President Truman to find offsetting tax revenues for a planned reduction in excise tax rates, recommended taxing the undistributed earnings of

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172. *See* discussion *supra* Part I.B.

173. *See* discussion *supra* Part I.

174. *See* discussion *supra* Part I.A.

175. Edward L. Yingling, *What Is the Justification for the Credit Union Tax Exemption?*, HOOSIER BANKER, Jan. 2006, at 36, *available at* 2006 WLNR 4675319.

176. *See supra* note 120 and accompanying text.

177. *See* discussion *supra* Part II.C.

178. *See supra* note 129 and accompanying text; *see also* GAO, CREDIT UNION TRANSPARENCY, *supra* note 25, at 42 ("[S]tatistically reliable data on credit union members by charter type and field of membership were not available . . . . The lack of this type of data was the primary basis for the report's recommendation that NCUA systematically obtain information on the income levels of federal credit union members.").

previously tax-exempt mutual savings banks, buildings and loans, and savings and loans.[179] A report issued by the committee rationalized the recommendation by focusing on four factors: (1) the entities' retained income provides a benefit to their members in the same way that retained earnings provide a benefit to stockholders of taxable entities; (2) the tax exemption gives these entities a competitive advantage against taxpaying financial institutions when making loans and soliciting deposits; (3) the entities no longer require tax exemption to ensure protection against failure; and (4) increased corporate income tax rates, as compared to when the exemptions were first granted, have greatly increased the cost to the government via foregone revenues.[180] In addition, the report focused on the fact that there was no evidence to suggest that the depositors and borrowers at the institutions were one and the same.[181] Finally, the report noted that while interest or dividends from the institutions' deposits would be taxed at the individual level, the mere fact that some profits were retained did not change the profit's characteristic of being income and, thus, should be taxable.[182]

The same arguments that were made by the Joint Staff on Taxation apply just as easily to modern federal credit unions. First, the ability of federal credit unions to retain untaxed profits allows these institutions to offer higher deposit rates and lower loan rates than competitor commercial banks and thrifts.[183] These advantageous rates, in turn, provide federal credit unions a competitive advantage against taxpaying banks.[184] Second, federal credit unions are protected by federal deposit insurance that is identical in substance to

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179. John D. Birchby, *The Bad Debt Reserves for Mutual Savings Banks: Legislative Developments*, 93 BANKING L.J. 800, 802 (1976).

180. *Id.*

181. This report stated in part that the income of mutual savings banks was primarily earned from interest on loans. There was no evidence that persons who had deposits in these banks had any considerable share of these loans. Therefore, it could not be said that depositors or members were loaning money to themselves and paying interest to themselves and that there was no profit accruing to the savings banks, which acted merely as middleman.

Id. at 803.

182. *Id.*

183. *What is the Credit Union Difference?*, *supra* note 86.

184. TATOM, *supra* note 6, at 6.

that offered by taxpaying banks.[185] Buoyed by this protection, federal credit unions are no more at risk of failure than commercial banks,[186] thus nullifying the argument that credit unions cannot survive without the exemption.[187] And finally, government officials estimate that federal tax exemptions as granted to our nation's credit unions will cost our government approximately $8.2 billion of foregone corporate income tax revenue between 2009 and 2013.[188]

B. States Should Reconsider Granting Tax Exemptions to State-Chartered Credit Unions

Applying the same logic, states should reconsider the almost automatic tax exemption that is granted to state-chartered credit unions.[189] Similar to the pains experienced at the national level, the state of Georgia is currently undergoing significant pressure to reduce its expenses.[190] Although state authorities are powerless regarding the tax exemption granted to federal credit unions,[191] they are fully within their rights to assess a state corporate income tax

185. *Suze Ormon Helps Consumers Stay NCUA-Safe*, NAT'L CREDIT UNION ADMIN, http://www.ncua.gov/ncuasafe/pages/default.aspx (last visited Apr. 14, 2012). Individual deposit accounts held at federally-insured commercial banks are guaranteed, to a certain extent, by the Federal Deposit Insurance Corporation (FDIC). *See Are My Deposits Insured?*, FDIC, http://www.fdic.gov/deposit/deposits/index.html (last visited Apr. 14, 2012). Individual deposit accounts held at federally-insured credit unions are guaranteed, to a certain extent, by the NCUA through the National Credit Union Share Insurance Fund (NCUSIF). CHMURA, ASSESSMENT, *supra* note 22, at 7.

186. Mark Maremont & Victoria McGrane, *Credit Unions Bailed Out*, WALL ST. J., Sept. 25, 2010 (reporting that 66 retail credit unions, versus 290 banks and savings institutions, have failed since the beginning of 2008). *But see Forecasts for Management Decisionmaking*, KIPLINGER LETTER, Oct. 8, 2010, at 2 (noting that "five of the [eighteen] corporate entities that serve as central banks to the nation's credit unions have failed"). These failures are projected to cost the NCUSIF approximately $16 billion. *NCUA Liquidates Fifth Corporate Failure, Constitution Corporate FCU*, CREDIT UNION J. (Nov. 19, 2010), http://www.cujournal.com/dailybriefing/13_483/-1006108-1.html.

187. CREDIT UNION NAT'L ASSOC., *supra* note 23, at 1 ("Many in the credit union movement believe credit unions would not be able to survive as cooperatives if the federal tax status were reversed, which could potentially lead to a sharp decline or elimination of credit unions.").

188. *See* JOINT COMM. ON TAXATION, *supra* note 15, at 36.

189. *See* Tatom, *supra* note 6, at 5 (noting that as of 2005, only five states subjected state-chartered credit unions to state corporate income taxes).

190. James Salzer, *Perdue Orders New State Spending Cuts*, ATLANTA J.-CONST., July 23, 2010, *available at* 2010 WLNR 14691782 ("Georgia's state budget has been cut more than $3 billion during the past two years."); *See* Henry Unger, *October Jobless Rate Stays at 9.9%*, ATLANTA J. CONST., Nov. 19, 2010, at A15, *available at* 2010 WLNR 23058791.

191. *See supra* note 67 and accompanying text.

against state-chartered credit unions.[192] At a minimum, state-chartered credit unions that receive federal depository insurance[193] should be required to undergo CRA examinations. Additionally, the various state regulatory bodies should be proactive in ensuring that state-chartered credit unions are fulfilling the various mandates as prescribed by their state charters.

C. Georgia Should Repeal Its Mortgage Recording Tax Exemption for Credit Unions

Relying on the reasoning used by the state court in the *Hudson Valley* case,[194] Georgia should immediately repeal the tax exemption granted to credit unions for its mortgage recording tax. At a time when the state is desperately trying to balance its budget,[195] the state's legislature should consider any source of potential revenue.[196] Even absent budgetary concerns, common sense principles of equity and fairness lead one to recognize that the current exemption serves no purpose other than to further subsidize an industry that already pays no federal or state corporate income taxes.[197]

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192. *See* discussion *supra* Part I.A.

193. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23 at 30 (noting that some states require state-chartered credit unions to have federal insurance, while others require state-chartered credit unions to have "either federal or some other officially approved insurance program").

194. *See* discussion *supra* Part III.

195. In July 2010, the Georgia legislature created the Special Council on Tax Reform and Fairness for Georgians—composed of business people, economists, and then Georgia governor Sonny Perdue—to consider changes to the state tax code. James Salzer, *State's Money Issues Beckon*, ATLANTA J.-CONST., Nov. 7, 2010, at 1A. The legislature established the council pursuant to GA. CODE ANN. § 28-12-2 (repealed effective 2012) to "conduct a thorough study of the state's current revenue structure and make a report of its findings and recommendations for legislation to the Speaker of the House and the Lieutenant Governor." *Special Council on Tax Reform and Fairness for Georgians*, GA. ST. U., http://fiscalresearch.gsu.edu/taxcouncil/index.htm (last visited Apr.14, 2012).

196. Estimates of the amount of revenue foregone as a result of the mortgage recording tax exemption are not currently available, as Georgia just recently passed a law requiring such an accounting. *See More States Join the Majority in Producing Tax Expenditure Reports—Only Seven Holdouts Remain*, CITIZENS FOR TAX JUST. (May 27, 2010, 4:59 PM), http://www.ctj.org/taxjusticedigest/archive/2010/05/more_states_join_the_majority.php.

197. *See* discussion *supra* Part I.A.

CONCLUSION

Any attempt to change a tax system that has been in place for over eighty years will undoubtedly face strong resistance. Like commercial banks, credit unions enjoy considerable influence in our nation's capital.[198] In the heydays of the economic boom, the argument in favor of repealing credit unions' tax exemption was often drowned out by reports of record earnings by our nation's commercial banks.[199] The economic landscape has changed, however, and foregone tax revenues now demand front-page status in financial periodicals. The time has come for Congress to cut through the rhetoric of "cooperative organizational structure," to uphold the Supreme Court's common sense interpretation of "common bond," and to establish an explicit, testable definition for the term "modest means."

There is no doubt that credit unions at one time played an important role in society. Our nation's citizens faced many obstacles at the turn of the twentieth century, and a lack of banking services clearly deserved attention. In many segments of our population, citizens still lack adequate access to fundamental necessities such as checking and savings accounts, money transfers, and small consumer loans.[200] Lacking access to these services, this segment is easy prey for check cashing outlets and payday lenders.[201] Our nation's credit unions, both federal and state, are chartered with the specific purpose

198. *See* Ylan Q. Mui & Brady Dennis, *Small Players Best Wall St. in Shaping Overhaul Bill*, WASH. POST (June 10, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/09/AR2010060905907.html (describing "grass roots" efforts by community bankers and credit unions to influence legislation pending before Congress); *see also Lobbying: Credit Union National Association*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/clientsum.php?lname=Credit%20Union%20National%20Assn (last updated Mar. 26, 2012) (noting credit unions spent almost $6 million on lobbying efforts in 2011).

199. After a brief downturn, commercial banks have, for the most part, returned to profitability. FDIC insured banks reported net income of $119.5 billion in 2011, the "highest annual net income total since the industry earned $145.2 billion in 2006." FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE, FOURTH QUARTER 2011 2 (2012), *available at* http://www2.fdic.gov/qbp/2011dec/qbp.pdf. However, enthusiasm over these results was tempered by the fact that "net interest income and noninterest income were lower than in 2010, as full-year operating revenue declined for only the second time since 1938." *Id.*

200. JACOB ET AL., *supra* note 25, at 7.

201. *Id.*

of addressing this inequity. As an incentive to encourage such charters, federal and state legislatures have exempted these entities from federal and state corporate income taxation. Despite such enticement, these entities have not upheld their end of the bargain. Unable to provide empirical data that supports their contention of adequately serving the low-income population, credit unions instead resist strict regulation and obfuscate with circular arguments. The argument for the repeal of credit unions' tax exemptions can be summarized simply enough: Either justify the exemption with empirical evidence, or face taxation like every other financial institution. This premise is rooted not in spite or jealousy, but in a common sense understanding of fairness and equity.