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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-204227 **DATE:** October 21, 1981

MATTER OF: National Credit Union Administration - Central Liquidity Facility

DIGEST: The National Credit Union Administration (NCUA) has authority under 12 U.S.C. § 1795f to issue its own debt obligations on behalf of the NCUA Central Liquidity Facility (CLF). However, the debt obligations NCUA issues on behalf of the CLF would not be general obligations of the United States supported by the full faith and credit of the Federal Government. The statutory language, considered together with its legislative history, demonstrates that Congress did not intend that borrowings on behalf of CLF be backed by the full faith and credit of the United States.

This decision is in response to a request from the National Credit Union Administration (NCUA) for a legal opinion concerning its authority "to offer in the public credit markets, certain debt instruments for the purpose of funding activities of the NCUA Central Liquidity Facility" (CLF).

Specifically, the NCUA requests our concurrence in its position that:

> "(1) the National Credit Union Administration has authority under the Federal Credit Union Act, as amended, to issue debt obligations on behalf of the Central Liquidity Facility; and that (2) such obligations shall, when duly executed and authenticated and delivered to the purchasers thereof against payment of the agreed consideration therefore, constitute legal, valid and binding general obligations of the United States of America in accordance with their terms and shall be backed by the full faith and credit of the United States of America."

For the reasons given below, we concur in NCUA's position regarding the first question, but do not concur in its position regarding the second question.

The NCUA was established by Congress in 1970 pursuant to Pub. L. No. 91-206, 84 Stat. 49, March 10, 1970, 12 U.S.C. § 1752a, as an "independent agency" within the executive branch of the Government. The basic responsibility of the NCUA is to administer the provisions of the Federal Credit Union Act, as amended, 12 U.S.C. §§ 1751-1795.

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Initially the NCUA was headed by a single Administrator, but pursuant to Pub. L. No. 95-630, 92 Stat. 3680, November 10, 1978, the responsibility and authority for managing the NCUA was transferred to a three-member NCUA Board.

In 1978, pursuant to Pub. L. No. 95-630, the Federal Credit Union Act was amended by the addition of a new Title III which provided for the establishment of the CLF "to improve general financial stability by meeting the liquidity needs of credit unions and thereby encourage savings, support consumer and mortgage lending, and provide basic financial resources to all segments of the economy." 12 U.S.C. § 1795. The CLF was established as a mixed-ownership Government corporation under 31 U.S.C. § 856, that would "exist within the National Credit Union Administration and be managed by the Board."1/

The question centers around the meaning of the language in § 307 of the Federal Credit Union Act, as amended, 12 U.S.C. § 1795f(a)(4), which grants the Board authority as follows:

> "(a) The Board on behalf of the Facility [CLF] shall have the ability to - * * *
> (4) borrow from
> (A) any source, provided that the total face value of these obligations shall not exceed twelve times the subscribed capital stock and surplus of the Facility * * *."

NCUA maintains that under 12 U.S.C. § 1795f(a)(4), it has authority "acting through the Board on behalf of CLF " to issue its own debt obligations in the private market supported by the full faith and credit of the United States. As explained by NCUA, until now it has acquired virtually all of the funds necessary for the operation of the CLF by selling NCUA debt securities to the Federal Financing Bank (FFB). However, as of the 1982 fiscal year, funding for CLF may no longer be available from FFB and must therefore be obtained in the private market.

The first question, concerning NCUA's authority to issue its own debt obligations on behalf of the CLF, is potentially significant since there is

1/ When CLF was first created, Pub. L. No. 95-630 provided, apparently through an oversight, that the CLF would be managed by the Administrator of NCUA even though an earlier section of the same Act had replaced the Administrator with a three-member Board. Subsequently, pursuant to Pub. L. No. 96-221, 94 Stat. 149, March 31, 1980, the Board was designated to replace the Administrator in title III.

no general presumption that the borrowings of a mixed-ownership Government Corporation, as opposed to an independent executive agency, are supported by the full faith and credit of the United States. NCUA contends that since the Board has authority to borrow on behalf of the CLF, which was established within NCUA, and since all of the operating authorities of NCUA and the CLF are vested in the Board, NCUA can issue its own obligations, acting through the Board, on behalf of the CLF.

Our reading of the statute suggests another possible interpretation of the authorities granted. Since borrowings are "on behalf of" and for the CLF, the obligations involved should be considered to be debts of the CLF and not the NCUA. Taking this view, it could be argued that the statute envisions a Board with dual responsibilities. One responsibility is management of the NCUA. The other is management of the CLF, which although established within the NCUA, is expressly granted a separate identity as a mixed ownership Government corporation. This would explain the meaning of the statutory language authorizing the Board to borrow on behalf of the CLF since all corporate entities, whether private or public, can only act through their corporate officials or other designated agents. Accordingly, under this interpretation, obligations issued by the Board on behalf of and as the managing agent for the CLF would not be obligations of NCUA itself.

The legislative history of Pub. L. No. 95-630 was inconclusive on this point in that it did not contain an indication of Congressional desire to prohibit NCUA from issuing its own debt obligations on behalf of CLF. Also, we agree with NCUA's contention that the Board's statutory authority to act for NCUA in implementing the Federal Credit Union Act, as amended, including title III which established the CLF, is set forth in very broad and general terms. Finally, we note that up to this time, all of the debt instruments which NCUA has been selling to the FFB to finance the CLF have been in a similar form -- "direct obligations of NCUA acting through the Board on behalf of CLF." Accordingly, although the matter is not completely free from doubt in our view, we conclude that NCUA does have authority to sell its own debt obligations in the private market on behalf of CLF.

Concerning the full faith and credit question, NCUA contends that "so long as NCUA has the statutory authority to issue the proposed obligations on behalf of CLF and such obligations are not by the terms of the statute limited to the resources of NCUA or CLF as a source of payment, it necessarily follows that those obligations will be general obligations of the United States, backed by its full faith and credit." In support of its position NCUA cites numerous Attorney General opinions to stand for the proposition that when an agency is granted statutory authority to enter into a contractual obligation or to issue a guarantee, it necessarily follows that all of those obligations or guarantees are backed by the full faith and credit of

the United States unless the statute contains specific language to the contrary. See letter from Attorney General John Mitchell to Thomas S. Kleppe, Administrator, Small Business Administration (April 14, 1971), pp. 3-4. Accord, 42 Op. Att'y Gen. 429 (1971); 42 Op. Att'y Gen. 327 (1966); 42 Op. Att'y Gen. 323 (1966); 42 Op. Att'y Gen. 305 (1965); 41 Op. Att'y Gen. 403 (1959).

Although we agree with the holdings of the cited Attorney General opinions, we do not believe that those opinions support NCUA's position here. None of the Attorney General opinions concerned a situation that was truly analagous to the one here, where the agency involved is acting not on its own behalf but on behalf of a mixed-ownership Government corporation, albeit one established within the parent agency. This is a critical distinction, because the presumption of full faith and credit which, at least initially is accorded to a Government agency, does not necessarily apply to a mixed-ownership Government corporation.

Even where the obligation involved was a Government agency's, several of the pertinent Attorney General opinions carefully analyzed and considered the legislative histories of the statutory provisions involved, and concluded that the legislative histories either supported the full faith and credit determination or were inconclusive. See 41 Op. Att'y Gen. 424 (1959); 42 Op. Att'y Gen. 183 (1963); 42 Op. Att'y Gen. 21 (1961); 42 Op. Att'y Gen. 323 (1966). In our view, it is especially important in a situation where a Government establishment is authorized to borrow on behalf of a mixed-ownership Government corporation to examine the legislative history to determine, if possible, the intent of Congress in enacting the authorizing legislation. For the reasons given below, we conclude that when the statutory language in 12 U.S.C. § 1795f is considered in connection with its legislative history, the borrowings in behalf of the CLF, however structured, would not be protected by the full faith and credit of the United States.

When H.R. 14279, 95th Cong. 2d Sess. — the bill that was ultimately adopted as Pub. L. No. 95-630 and which created the CLF — was first passed by the House of Representatives on October 11, 1978 it did not contain a title dealing with the CLF. 124 Cong. Rec. H 12335-36. The initial version of the title establishing CLF was added by the Senate on the very next day—October 12, 1978 — when it considered, amended, and passed its own version of H.R. 14279. 124 Cong. Rec. S.18444-18503. As initially passed by the Senate, the provision in question concerning CLF's borrowing authority read in pertinent part as follows:

> "The Administrator on behalf of the Facility shall have the authority to -- * * *
> "(4) borrow from —
> "(A) any source with or without the guarantee of the United States

> as to prinicipal and interest. The total face value of those obligations guaranteed by the United States shall not exceed twenty times the subscribed capital stock and surplus of the Facility * * * ".

This initial version of the CLF title in H.R. 14279, as passed by the Senate on October 12, 1978, was identical to the language contained in several other bills proposing the establishment of the CLF that had been or were then being considered by the House and Senate. For example, see S. 3499, 95th Cong. 2d Sess. (1978); S. 3520, 95th Cong. 2d Sess. (1978); and H.R. 11310, 95th Cong. 2d Sess. (1978). All of these bills expressly provided that the Administrator, on behalf of the CLF, would be authorized to borrow from any source "with or without the guarantee of the United States as to principal and interest." The Senate Report accompanying S. 3499 explained the purpose of this provision as authorizing the CLF to borrow up to 20 times the paid in capital" * * * utilizing a Federal Government guarantee." S. Rep. No. 95-1273, 95th Cong. 2d Sess. 6 (1978).

Subsequently, on October 14, 1978, the House concurred in the Senate amendment to H.R. 14279, but further amended the provision in question by reducing the permissible level of borrowing from 20 times to 12 times the subscribed stock and surplus of the facility and by eliminating the language authorizing such borrowings to be made "with or without the guarantee of the United States." 124 Cong. Rec. H 13071. The language of this provision, as adopted by the House on October 14, 1978, was concurred in by the Senate (124 Cong. Rec. S 19146) and was enacted in precisely that form as title XVIII of Pub. L. No. 95-630.

In its analysis of the legislative history of the statute (which NCUA provided to us informally), NCUA argues that the Congress enacted the final language of this provision "without providing a clear record of why it preferred the language of the present statute to the earlier House and Senate versions, which had provided for the availability of a Federal government guarantee." Therefore, in NCUA's view, "it is difficult to discern a clear Congressional intent concerning whether or not obligations issued pursuant to section 307(a)(4)(A) carry the full faith and credit of the United States."

We disagree. In our view, there is ample evidence of the reasons for, and the intent behind, the deletion of the language in question from 12 U.S.C. § 1795f (a)(4)(A). First, this issue was raised in the hearings on the legislation that proposed the establishment of the CLF -- H.R. 11310, 95th Cong. 2d Sess. (1978). See Community Credit Needs Hearings before the Subcommittee on Financial Institutions Supervision Regulation and Insurance of the House Committee on Banking, Finance, and Urban Affairs, 95th Cong., 2d Sess. (1978) pp. 208, 322, 345, 795, 796. The applicable

provision in H.R. 11310 concerning CLF borrowing provided, as stated above, for the issuance of obligations with or without the guarantee of the Federal Government, provided the level of such guaranteed obligations did not exceed twenty times the subscribed capital stock and surplus of the CLF. Although several witnesses objected to the provision in that form, the statement of Phillip C. Jackson, Jr., member of the Board of Governors of the Federal Reserve System, is especially helpful. Mr. Jackson, on behalf of the Federal Reserve Board, offered an amendment that would have reduced the CLF's borrowing authority from 20 times to 10 times stock and surplus and would have eliminated completely the language allowing such obligations to be issued "with or without" the Government's guarantee. See Hearings, at 208 and 345. In summarizing the effect of the proposed amendment, Mr. Jackson's prepared statement said that the amendment "would clarify that the private borrowings of the facility would not have the U.S. Government's guarantee."

In discounting the significance of Mr. Jackson's statement in this respect, NCUA argues that the opinion of the Federal Reserve Board "is neither binding upon Congress nor dispositive of the issue." Of course, the opinion is not binding. However, at the time this matter was raised in the hearings, it apparently was also the opinion of the NCUA that acceptance of the change recommended by the Federal Reserve Board would eliminate the authority for a Federal guarantee of CLF borrowings. In his testimony opposing the change supported by the Federal Reserve Board, Mr. Lawrence Connell, then NCUA Administrator (and now chairman of the NCUA Board), testified as follows:

> "The Federal Reserve Board proposal would change 307(4)(a) by eliminating the Government guarantee on CLF borrowing and reducing the borrowing capacity to 10 times capital stock and surplus." See Hearings at 322.

Although the opinion of the Federal Reserve Board and the NCUA during the Hearings as to the effect of enactment of the modified version of this provision is not necessarily dispositive of the issue, it does suggest a logical reason why the Congress adopted the modification in question. Such comments become part of the record available to the Congress in its consideration of legislation. It has been specifically recognized by a number of authorities that "statements by a witness urging an amendment to a proposed bill in order to remedy a certain evil that would arise thereunder should be admitted as evidence of the legislative intent where the amendment was adopted." See e.g., Sutherland 2A Statutory Construction § 48.10 (Sands ed. (1973)) and cases cited therein. That is precisely what occurred in this instance. The Federal Reserve Board recommended that Congress delete certain language in order to be sure that obligations issued on behalf of CLF could

not be guaranteed by the United States. The amendment, in the form proposed by the Federal Reserve Board and opposed by the NCUA, was adopted, thus indicating that Congress intended to eliminate authority which the Federal Reserve Board thought was unwise.

There is additional evidence that the House of Representatives, and by extension of the Senate as well, adopted the amended version of 12 U.S.C. § 1795f(4)(A) in order to effect the recommendation of the Federal Reserve Board. It is true, as stated by the NCUA, that when the House on October 14, 1978 substituted its revised version of this provision for the language that had previously been adopted by the Senate, the basis for the House's action was not immediately made evident. However, after Pub. L. No. 95-630 was enacted, Congressman Fernand J. St. Germain, who had introduced in the House the CLF borrowing language that was ultimately adopted, provided an explanation of its origin. See 124 Cong. Rec. E 5952-53 (November 9, 1978). As explained by Congressman St. Germain, the CLF borrowing provision that the House substituted for the Senate version and which became 12 U.S.C. § 1795f(a)(4)(A), originated in title III of H.R. 14044, 95th Cong. 2d Sess. (1978), The Community Credit Needs Act of 1978.

On September 11, 1978, Congressman St. Germain had introduced H.R. 14044 containing precisely the same "borrowing" language that was ultimately adopted in title XVIII of Pub. L. No. 95-630. See 124 Cong. Rec. H 9465. In introducing H.R. 14044, Congressman St. Germain provided the following explanation of the CLF provisions in the proposed bill:

> "Title III establishes a Central Liquidity Facility for credit unions and is almost identical to H.R.11310. The changes reflect suggestions made by National Credit Union Administrator Lawrence Connell, Gov. Phillip Jackson of the Board of Governors of the Federal Reserve System and others during subcommittee hearings. The changes are:
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> * * * * *
>
> "Sixth. Revised borrowing authority to limit the total amount of such borrowing to 12 times capital stock and surplus of the Facility. The 12 would apply whether the borrowings have a Government guarantee or not. This is comparable to the borrowing authority for other Federal Government entities."

Although at first glance, Congressman St. Germain's comments might appear to suggest that CLF borrowings could, even under the revised language, be covered by a Federal guarantee, we do not believe that was the intended meaning of his comments. In our view, his statement that the "12 would apply whether the borrowings have a Government guarantee or not" referred to the fact that as originally written, the limitation on the level of CLF borrowings of 20 times stock and surplus only applied to those obligations that were guaranteed by the United States, whereas the amended version in H.R. 14044 would apply a limit of 12 times stock and surplus to all borrowings on behalf of CLF, even though not guaranteed by the Federal Government. We believe that the most significant part of Congressman St. Germain's explanation is his statement that the changes that were made reflect suggestions made by Phillip Jackson of the Federal Reserve Board (among others). As indicated above, one of the primary recommendations of Mr. Jackson was the elimination of the Federal Government guarantee of CLF borrowings.2/

Although we recognize that this issue also is not entirely free from doubt, it is our view, based on the foregoing, that it was the intent of Congress in adopting the language in 12 U.S.C. 1975f that borrowings on behalf of CLF would not be supported by the full faith and credit of the United States.

Finally, there is additional support for our position in the first annual appropriation for CLF--Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1980, Pub. L. No. 96-103, 93 Stat. 771, 780, November 5, 1979. Congress imposed a $300 million limitation on the "amount which may be borrowed, from the public or any other source except the Secretary of the Treasury, by the Central Liquidity Facility as authorized by the National Credit Union Central Liquidity Facility Act (12 U.S.C. § 1795) * * * ." In its explanation of the $300 million dollar limitation, the Senate Appropriations Committee summarized the manner in which CLF obtained its funding as follows:

2/ Although Congressman St. Germain's explanation also states that the changes reflect suggestions by NCUA Administrator Lawrence Connell, it must be remembered that with respect to the issue of the Government guarantee of the CLF borrowings the Administrator strongly opposed any changes. Nevertheless a change in that provision was made--almost certainly as a result of the Federal Reserve Board's objection to the original language.

> "The principle source of funds for the lending operations are the stock subscriptions by credit unions and the sale of obligations by the facility. These obligations are not guaranteed by the U.S. Government as to either principal or interest.* * *" (Emphasis Added.) S. Rep. 96-258, 96 Cong. 1st Sess. 63 (1979).

Thus, less than one year after Pub. L. No. 95-630 which created the CLF was enacted, the Senate Committee on Appropriations, as part of the legislative history of a statutory provision establishing a specific limitation on the amount of CLF borrowing, expressed in clear and absolute terms its understanding that 12 U.S.C. § 1795f(a)(4)(A) did not authorize the issuance of obligations on behalf of CLF that could be guaranteed by the Federal Government. Also, in the hearings on the NCUA appropriations for the 1980 fiscal year, NCUA Administrator Lawrence Connell again expressed what seemed to be the view of NCUA, until recently, that under the legislation, "the Central Liquidity Facility should go to that private market and use private funds as opposed to using the full faith and credit of the Government." See Hearings on Department of Housing and Urban Development -- Independent Agencies Appropriations for 1980 before a Subcommittee of the House Committee on Appropriations, 96 Cong., 1st Sess. at 595 (1979). In addition, similar comments were made by the Administrator elsewhere in those hearings. See Hearings pp. 593, 594, 597.

Accordingly, although we concur in NCUA's position that it has the authority to issue its own debt obligations on behalf of the NCUA Central Liquidity Facility, we do not believe that these debt obligations would be general obligations of the United States supported by the full faith and credit of the Federal Government.

for Milton J. Socolar
Comptroller General
of the United States