IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

INDEPENDENT COMMUNITY BANKERS OF AMERICA, Plaintiff, v. NATIONAL CREDIT UNION ADMINISTRATION, Defendant.	)	Civil Action No. 1:16-cv-1141

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Federal Credit Union Act ("FCU Act") and regulations of the National Credit Union Administration ("NCUA") authorize credit unions to purchase interests in loans made to borrowers by other lenders (participation interests). 12 U.S.C. § 1757(5)(E); 12 C.F.R. § 701.22. A separate provision provides that a federally-insured credit union may not "make any member business loan that would result in a total amount of such loans" exceeding the lesser of 1.75 times the credit union's net worth or 12.25% of the credit union's total assets. 12 U.S.C. § 1757a(a).

In 2003, the NCUA issued a Final Rule interpreting the statute such that a federally-insured credit union's purchase of loans made by other lenders to borrowers who are *not members* of the purchasing credit union (nonmember business loans)—as well as a credit union's acquisition of portions of such loans (nonmember participation interests)—do not count towards the statutory limit on "member business" loans. *See* Final Rule, 68 Fed. Reg. 56,537, 56,544-45 (Oct. 1, 2003). As part of its supervisory authority, however, the NCUA imposed a requirement that federally-insured credit unions obtain agency approval for any transaction that would cause the total of purchased nonmember business loans and nonmember participation interests, when added to the

credit union's member business loans, to exceed the statutory cap. *Id.* at 56,544. Although it provided comments during the 2003 rulemaking, the Independent Community Bankers of America ("ICBA" or "Plaintiff") did not challenge the 2003 Final Rule, and the NCUA's current position—that nonmember business loans and nonmember participation interests are not "member business loans" subject to Section 1757a(a)'s limit—has not changed since 2003.

In March 2016, the NCUA issued the final rule that ICBA purports to challenge in this action. *See* Final Rule, 81 Fed. Reg. 13,530 (Mar. 14, 2016) ("2016 MBL Rule"). The NCUA made clear in the 2016 MBL Rule that it "continues to subscribe to" its prior view that a credit union's purchase of nonmember business loans and nonmember participation interests do not count towards the cap on member business loans. 81 Fed. Reg. at 13,549. But the NCUA removed the requirement that credit unions seek agency approval for nonmember business loan acquisitions that, when combined with the credit union's member business loans, exceed the statutory cap, instead moving toward a more principles-based approach to managing lending risks. *Id.* at 13,550.

In this Administrative Procedure Act ("APA") case, ICBA purports to challenge the 2016 MBL Rule. *See* ECF No. 1 ("Compl." or "Complaint") ¶ 1. However, the Complaint makes clear that ICBA's challenge and the relief it seeks are not actually directed to the incremental changes made by that Rule—such as elimination of the approval requirement and similar waiver requirements relating to other aspects of NCUA's member business loan regulation—but is instead an attack on the NCUA's longstanding view that Section 1757a(a)'s member business loan cap does not apply to interests in nonmember loans. This Court should dismiss this action for several reasons.

To begin with, Plaintiff has no Article III standing to bring this suit because it cannot demonstrate that it is threatened with imminent injury by the NCUA's elimination of the requirement that credit unions seek NCUA approval before acquiring interests in nonmember

business loans in excess of the statutory cap on member business loans. The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). This case does not present such a scenario. It is simply too speculative to say that the marginal changes introduced by the 2016 MBL Rule—replacing an administrative requirement that credit unions seek agency approval with a risk-based approach—will imminently cause injury to the ICBA's members. Nor is the case ripe for review. The 2016 MBL Rule has not yet taken effect and, absent any transactions to evaluate the new risk-based approach embodied in the Rule, review now would only entangle this Court in abstract disagreements over administrative policies.

Beyond these defects, this lawsuit is time-barred. Although Plaintiff characterizes this action as a challenge to the 2016 MBL Rule, the Complaint's allegations and the relief Plaintiff seeks consists of various claims that nonmember business loans and nonmember participation interests must be counted towards the statutory member business loan cap—an issue the NCUA resolved in 2003. A six-year statute of limitations applies to APA actions and, for purposes of a facial challenge to an agency regulation, "the limitations period begins to run when the agency publishes the regulation." *Hire Order, Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012). The statute of limitations for any facial challenge to the 2003 Rule thus expired on October 1, 2009, and Plaintiff cannot resuscitate its time-barred challenge by styling what is in substance a challenge to the 2003 Rule as a challenge to the 2016 MBL Rule.

In any event, Plaintiff's APA claims fail as a matter of law because the NCUA's interpretation of Section 1757a(a) is consistent with the text of that provision. Section 1757a(a) states that "no insured credit union may make any *member business loan* that would result in a total amount of *such loans*" to exceed the statutory cap on member business loans. 12 U.S.C. § 1757a(a) (emphasis added). By its plain language, this provision requires a credit union to

include only loans extended *to its members* in calculating its aggregate member business loan limit. The NCUA's view that nonmember business loans and nonmember participation interests are not subject to the statutory cap is thus correct but, in any event, is certainly a *permissible* construction of the statute, warranting deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court should dismiss the Complaint with prejudice.

BACKGROUND

A. Statutory Background

Enacted in 1934 during the Great Depression, the FCU Act authorizes the chartering of federal credit unions and places a number of restrictions on their activities. *See* 12 U.S.C. § 1751 *et seq.* The NCUA is the federal agency charged with administering the FCU Act. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 483 (1998).

This case concerns Section 107A of the FCU Act, 12 U.S.C. §1757a, enacted in 1998 as part of the Credit Union Membership Access Act ("CUMAA"). *See* Pub. L. No. 105-219. Among other provisions, CUMAA imposed a new aggregate limit on a federally-insured credit union's outstanding member business loans. Specifically, in a provision titled "Limitation on member business loans," CUMAA provides that, beginning August 7, 1998, "no insured credit union may make any member business loan that would result in a total amount of such loans outstanding at that credit union at any one time" to exceed the lesser of "1.75 times the actual net worth of the credit union," or 12.25% of the credit union's total assets. 12 U.S.C. § 1757a(a)(1)-(2).[1] The statute defines "member business loan," with certain specified exceptions, as "any loan, line of

[1] More specifically as to this latter measure, Section 1757a(a)(2) specifies that member business loans may not exceed "1.75 times the minimum net worth required under section 1790d(c)(1)(A) of this title for a credit union to be well capitalized," and Section 1790d(c)(1)(A)(1) states that an insured credit union is well capitalized if "it has a net worth ratio of not less than 7 percent." 12 U.S.C. §§ 1757a(a)(2), 1790d(c)(1)(A)(1).

credit, or letter of credit, the proceeds of which will be used for a commercial, corporate or other business investment property or venture, or agricultural purpose." *Id.* § 1757a(c)(1)(A).[2]

In a report summarizing CUMAA's amendments to the FCU Act, the U.S. Senate Committee on Banking, Housing, and Urban Affairs noted that Section 1757a(a) "provides that no insured credit union may make any *member business loan* that would result in a total amount of such loans outstanding at that credit union" exceeding the statutory cap. S. Rep. No. 105-193 (1998), at *10 (emphasis added). The Committee further characterized the exemptions from the cap as "exceptions from the limit on *member business loans*." *Id.* (emphasis added). "Those restrictions," the Committee explained, "are intended to ensure that credit unions continue to fulfill their specified mission of meeting the credit and savings needs of consumers, especially persons of modest means, through an emphasis on consumer rather than business loans." *Id.* at *9-*10.

B. The 1998-99 Rulemaking

Shortly after CUMAA's enactment, NCUA first interpreted the scope of the statutory cap on member business loans beginning with a September 1998 Interim Final Rule (with a request for comments) and culminating in a Final Rule in May 1999. *See* Interim Final Rule, 63 Fed. Reg. 51,793 (Sept. 29, 1998); Final Rule, 64 Fed. Reg. 28,721 (May 27, 1999).

Providing "guidance on how loan participations are treated for purpose of the aggregate loan limit," the 1999 Final Rule stated that "[u]nless otherwise exempt, loan participations that are made without recourse . . . are to be counted against the aggregate loan limit for the participating credit union." 64 Fed. Reg. at 28,725. During the notice-and-comment process, multiple

[2] Section 1757a(b) also exempts from this member business loan cap certain credit unions: those that serve predominantly low-income members, those that qualify as "community development financial institution[s]," and those chartered for the purpose of making, or that have a history of primarily making, member business loans to their members. 12 U.S.C. § 1757a(b).

commenters had argued that loan participations should be *categorically* excluded from the statutory member business loan cap (i.e., excluded regardless of whether the borrower was a member or nonmember of the participating credit union). *Id.* at 28,726-727. Most of these commenters argued that Section 1757a(a) refers to loans "made" by federally insured credit unions and that, in the case of a participation interest, the originating credit union "makes" the loan; thus, the commenters urged, participation interests should not count toward the statutory limit for the purchasing credit union. *Id.* at 28,727. The NCUA rejected this argument, contending that such a reading "would promote form over substance" and would lead to a result that "was not intended by Congress and does not make sense within the statutory scheme." *Id.* But in concluding that participation interests were not *categorically* outside the statutory cap on member business loans, the 1999 Final Rule did not address whether a credit union's interests in loans extended *to nonmembers* of the purchasing credit union count towards the statutory limit.

C. The 2003 Rulemaking

The NCUA next addressed the statutory restriction on member business lending in 2003. On April 4, 2003, the NCUA issued a notice of proposed rulemaking stating that the agency had "reconsidered its position regarding the treatment of loan participations by purchasing credit unions and proposes to exclude participation interests from the calculation of the aggregate MBL limit." Notice of Proposed Rulemaking, 68 Fed. Reg. 16,450, 16,451 (Apr. 4, 2003). In support of this position, the agency reasoned that the FCU Act requires inclusion only of loans a credit union makes to its members, and contended that participation interests in loans that were originated from another source are not loans "made" by the participating credit union. *Id.*

In the October 2003 Final Rule, however, the agency stepped back from its proposal to exclude *all* loan participations from the aggregate limit. Instead, the NCUA adopted an approach, which remains its approach today, which distinguishes between member and nonmember

participation interests. *See* Final Rule, 68 Fed. Reg. 56,537, 56,539 (Oct. 1, 2003). The agency explained that, "if a credit union holds an interest in a business purpose loan of its member, the interest will be treated the same *irrespective of whether it was made by the credit union or purchased from another lender*." *Id.* at 56,539 (emphasis added); *see also* 12 C.F.R. § 723.1(d)[3] ("Any interest a credit union obtains in a loan that was made by another lender to the credit union's member is a member business loan . . . to the same extent as if made directly by the credit union to its member."). By contrast, the 2003 Final Rule excluded nonmember loans and nonmember participation interests from the statutory limit, but mandated that, when a transaction would cause the total of such nonmember business loans, when added to member business loans, to exceed the statutory limit on member business loans, the credit union was required to obtain approval from the NCUA Regional Director pursuant to an application and review process. 68 Fed. Reg. at 56,539; *see also* 12 C.F.R. §§ 723.1(e), 723.16(b).

In support of this action, the NCUA explained that Section 1757a(a)'s mandate—that "no insured credit union may make any member business loan that would result in the total amount of such loans outstanding" exceeding the limit—"lends itself to several possible interpretations." 68 Fed. Reg. at 56,543. The NCUA delineated the three possible interpretations as follows:

> The narrowest interpretation would apply the limit only to loans made by a credit union to its members and not to loans and loan interests purchased from another lender. A second interpretation would apply the limit to all business loans to a credit union's members, whether made by the credit union or purchased from another lender, but not to purchases of loans or loan interests where the borrower is not a member. The most inclusive interpretation would apply the limit to all business loans, whether made or purchased, and irrespective of whether the borrower is a member.

Id.

[3] Unless otherwise indicated, the NCUA's citations to its regulations are to the versions of the regulations currently in force. Effective January 1, 2017, the 2016 MBL Rule will make certain changes to the NCUA's regulations, which NCUA will explain in this brief.

After considering the comments it received in response to the notice of proposed rulemaking, the NCUA adopted the second interpretation—applying the statutory limit to all business loans extended to a credit union's members, but not to a credit union's purchases of loans or loan interests where the borrower is not a member of the purchasing credit union. 68 Fed. Reg. at 56,543-44. "[P]urchases of nonmember loans and participation interests," the NCUA concluded, "do not involve the provision of member loan services, and the acquired loan assets are not [member business loans]." *Id.* at 56,544.

The NCUA supplemented this statutory analysis with a number of economic and practical considerations. The agency expressed its expectation that purchases of interests in nonmember loans would "be made only as a productive method of placing excess funds after member loan demands are met, and that they [thus] need not count against the purchasing credit union's aggregate [member business loan] limit." 68 Fed. Reg. at 56,544. The NCUA explained that, when a credit union meets the loan demands of its members and retains excess funds, "it is important to avoid unnecessary interference with the ability of credit unions to place their excess funds in the manner that best serves the credit union, its members, and the credit union system." *Id.* In the NCUA's judgment, allowing credit unions to use their excess funds to acquire interests in nonmember loans—"without being concerned that it will bar the purchasing credit union from meeting its own members' future loan needs"—would deliver a number of benefits to individual credit unions and their members, since nonmember participation interests "provide[] a better rate of return for the credit union and its members as compared to a typical investment asset, provide[] for risk diversification within the credit union system, and foster[] the cooperative spirit that has traditionally existed and continues to exist among credit unions." *Id.*

Although the NCUA concluded that interests in nonmember business loans were not

"member business loans" for purposes of Section 1757a(a)'s statutory cap, the agency recognized that such an interest "is a business loan asset with all of the attendant risks." 68 Fed. Reg. at 56,543-44. Accordingly, the Final Rule subjected nonmember business loan interests to the same safety and soundness requirements set forth in the NCUA's regulations for member business loans. "A participating credit union, therefore, must otherwise comply with Part 723 [the regulatory requirements for member business loans] and subject these loans to the [prompt corrective action] risk-weighting standards under Part 702 [capital adequacy requirements] for MBLs as though the credit union had originated the loans." *Id.* at 56,544. In short, the Rule "provide[d] that purchased nonmember loans and participation interests are treated the same as MBLs for all purposes under the rule except the aggregate limit." *Id.*

Finally, "to address concerns that the proposed rule would have created a loophole enabling credit unions to escape the [statutory member business loan] limit," the Final Rule required approval from the NCUA's Regional Director for any transaction that would cause the total of purchased nonmember business loans and nonmember participation interests, when added to the credit union's member business loans, to exceed the statutory cap. 68 Fed. Reg. at 56,544. The application must, inter alia, confirm that the credit union follows the NCUA's regulations with respect to purchases of nonmember business loans and nonmember participation interests, and "attest that the purchase is not being used, in conjunction with one or more other credit unions, in a manner that has the effect of trading [member business loans] that would otherwise exceed the aggregate limit." *Id.*; *see also* 12 C.F.R. § 723.16(b)(2). The Rule further provided that the Regional Director would issue a decision within 30 days of receipt of the credit union's completed application (or within 30 days of both receipt and state approval for a state-chartered federally insured credit union). 12 C.F.R. § 723.16(b)(3).

D. The 2016 MBL Rule

In March 2016 the NCUA issued the Final Rule—preceded by a Proposed Rule in July 2015—that ICBA purports to challenge here. *See* Proposed Rule, 80 Fed Reg. 37,898 (Jul. 1, 2015); Final Rule, 81 Fed. Reg. 13,530 (Mar. 14, 2016) ("2016 MBL Rule"). With one exception not relevant here, the 2016 MBL Rule becomes effective January 1, 2017. 81 Fed. Reg. at 13,530.

The 2016 MBL Rule is principally focused on providing credit unions with greater flexibility in safely and soundly providing commercial and business loans to serve their members. In furtherance of that goal, the Final Rule eliminates the specific prescriptive limits and requirements related to collateral in the NCUA's current regulations, in favor of a new focus which stresses a principles-based approach to managing lending risks. *See* 81 Fed. Reg. at 13,543. In particular, the new regulations provide, inter alia, that federally insured credit unions "must require collateral commensurate with the level of risk associated with the size and type of any commercial loan," ensure that collateral is sufficient to ensure both adequate loan balance protection and appropriate risk sharing between borrowers and principals, as well as determine prior to making any unsecured loan that mitigating factors sufficiently offset the risks associated with the proposed unsecured loan. *Id.* at 13,557; *see also* 12 C.F.R. § 723.5(a) (effective Jan. 1, 2017).

With respect to non-member loan interests, the Proposed Rule explained that "a credit union's non-member commercial loans or participation interests in non-member commercial loans made by another lender continue to be excluded from the [member business loan] definition and are not counted for . . . calculating the statutory aggregate amount of [member business loans]" (provided that, as under the 2003 Rule, the credit union acquired the non-member loan interest in compliance with applicable laws and regulations and is not, in conjunction with one or more other credit unions, trading member business loans to circumvent the aggregate limit). 80 Fed. Reg. at

37,909-10. "However," the NCUA explained, "the proposed rule eliminates the need to apply for prior approval from the NCUA regional director" where the total of purchased nonmember business loans and nonmember participation interests, when added to the credit union's member business loans, exceeds the statutory cap. *Id.* at 37,910

In support of its proposal to lift the current application requirement, the Proposed Rule noted that the requirement "was driven in part by safety and soundness concerns," which could be better addressed by "focus[ing] [] on the risks associated with [the credit union's loan] balance and how the credit union should manage the risks." 80 Fed. Reg. at 37,547. And although the NCUA was proposing to eliminate the approval requirement, the agency explained that it would continue to require that credit unions acquire non-member participation interests in compliance with applicable laws and regulations, and not engage in such transactions for the purpose of circumventing the statutory limit on member business loans. *Id.*

The NCUA adopted this approach in the Final Rule. The agency began by noting that, under the preexisting system, "[n]on-member business loans and non-member participation interests in business loans are currently excluded from the aggregate MBL limit, but credit unions are subject to a regulatory requirement to seek prior approval from NCUA for their non-member business loan balances to exceed the lesser of 1.75 times the credit union's net worth or 12.25 percent of the credit union's total assets." 80 Fed. Reg. at 13,548. Quoting from the 2003 Rule, the agency then "emphasize[d] that [its] current approach with respect to MBL loan participations has been unchanged since 2003," and "continue[d] to maintain that a plain reading of the FCU Act requires a credit union to include only loans it makes to its members in calculating its aggregate MBL limit." *Id.* at 13,548-49. "Thus, consistent with the current rule, non-member commercial loan participations are not included in calculating the participating credit union's aggregate MBL limit under the final rule." *Id.* at 13,549; *accord* 12 C.F.R. § 723.8(b)(2) (effective Jan. 1, 2017)

(defining "member business loans" for purposes of the statutory cap and stating that "[a]ny non-member commercial loan or non-member participation interest in a commercial loan made by another lender" is not counted towards the statutory limit). The NCUA went on to explain the benefits of this longstanding interpretation of the statute, reemphasizing many of the points it made in 2003. *See* 81 Fed. Reg. at 13,549 (noting that "[s]elling MBL participations permits an originating credit union to obtain additional liquidity, enabling it to meet loan demand for both consumer and small business members," while "diversify[ing] the risk of MBLs within the credit union system, ultimately making credit unions safer and better able to meet the needs of individual consumer and small business members").

Moving to its elimination of the approval requirement, the NCUA once again explained that this requirement had been partially driven by safety and soundness concerns, which could be addressed instead by focusing on the risks associated with the credit union's loan balance and how the credit union should manage those risks. 81 Fed. Reg. at 13,549. The agency emphasized that the 2016 MBL Rule retains in substance the pre-Rule requirement that a credit union must acquire non-member business loans and non-member participation interests in compliance with applicable laws and regulations, and also highlighted the mandate that credit unions cannot swap or trade member business loans with other credit unions for the purpose of circumventing the statutory member business loan limit. *Id.* "Attempts to circumvent the statutory aggregate limit," the NCUA admonished, "will not be tolerated and will be treated as a violation of this final rule." *Id.*

E. <u>This Action</u>

On September 7, ICBA filed the Complaint in this case. *See* Compl. Although ICBA styles this action as a challenge to the 2016 MBL Rule, the Complaint's allegations, legal arguments, and the relief ICBA seeks are all based on ICBA's contention that "the commercial loans subject to the statutory restriction are *not* limited to loans made to members of the credit union and do *not*

exclude loans or portions of loans the credit union acquires from other lenders." *Id.* ¶ 3. In support of this theme, the Complaint: (1) contends that refusing to count non-member commercial loans and non-member participation interests towards the cap violates the FCU Act, Compl. ¶¶ 2-3; (2) contains extensive criticism of the 2003 rulemaking, *id.* ¶¶ 43-53; and (3) seeks to require the NCUA to count nonmember commercial loans and nonmember participation interests in such loans towards the statutory member business loan cap, *id.* ¶¶ 80-90.[4]

The Complaint contains three counts, none of which address the recent change regarding approval. Count One, a claim under the FCU Act and the APA, contends that Section 1757a requires the NCUA to count towards the statutory limit all loans with a commercial purpose that are "carried on the balance of the credit union, regardless of whether the borrower is a member of the credit union or the loan was acquired in whole or in part from another lender," and asserts that the NCUA's purported determination in the 2016 MBL Rule "that federally insured credit unions may exclude such acquired loan interests from the statutory lending cap is therefore unauthorized." Compl. ¶ 81. Count Two, also brought under the FCU Act and the APA, contends that, "[i]n the context of an acquired commercial loan, the term 'make' in section 1757a plainly includes the purchase of a loan or loan interest from another lender," and (apparently imputing to the NCUA a contrary view) contends that NCUA's supposed determination on this point is unlawful. *Id.* ¶ 84.

The final count, brought solely under the APA, accuses the NCUA of acting arbitrarily and capriciously and without reasoned decisionmaking. Compl. ¶ 87. Specifically, ICBA contends that: (a) "[i]n the context of a commercial loan cap created to protect against excessive risk from

[4] The Complaint also criticizes a different Proposed Rule related to the terms for chartering federal credit unions and the range of members who may be served by a single credit union. Compl. ¶¶ 31-35. ICBA does not challenge that Proposed Rule in this lawsuit and the Government will not address ICBA's criticisms of it here.

commercial lending, there is no meaningful distinction between commercial loans originated by the credit union itself versus commercial loans acquired from another lender"; (b) NCUA failed to address a supposed "contradiction" between recognizing the safety-and-soundness implications of acquired interests in commercial loans on the one hand, and refusing to count such loans towards the statutory cap on the other hand; and (c) NCUA's supposed "determination that purchasing a commercial loan interest is not 'making' the loan within the meaning of 12 U.S.C. § 1757a was arbitrary and capricious." *Id.* ¶¶ 87-88.

STANDARD OF REVIEW

Defendant moves to dismiss the Complaint for lack of subject-matter jurisdiction under Rule 12(b)(1). Plaintiff bears the burden of demonstrating jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *See Richmond, Fredericksburg, & Potomac R.R. Corp. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). In the alternative, Defendant also moves to dismiss the Complaint under Rule 12(b)(6). Under Rule 12(b)(6), a court must determine whether a complaint fails to state a claim upon which relief can be granted. Although a court must accept as true all well-pleaded factual allegations in a complaint, it need not credit allegations that are merely conclusory. *See Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Furthermore, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

This motion cites and quotes from several regulations, final rules, and notices of proposed rulemaking issued by the NCUA. All of the cited information "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid.

201(b)(2). Thus, this Court can take judicial notice of the cited information. *See Ebersole v. Kline-Perry*, No. 1:12CV26 JCC/TRJ, 2012 WL 2673150, at *3 (E.D. Va. July 5, 2012) (Cacheris, J.) ("Laws—including statutes and formal rules and regulations—are subject to judicial notice because they are matters of public record and common knowledge.").

ARGUMENT

I. Plaintiff Lacks Standing Because It Alleges No Certainly Impending Injury Traceable to the 2016 MBL Rule.

This Court has no jurisdiction because Plaintiff has not demonstrated that it has suffered an injury-in-fact that is concrete, imminent, and fairly traceable to the changes introduced by the 2016 MBL Rule. "Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* "To establish Article III standing, an injury must be [1] concrete, particularized, and actual or imminent; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling." *Id.* at 1147. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Id.* The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Id.*

Plaintiff fails to demonstrate that it or its members are threatened with "certainly impending" injury that is "fairly traceable" to the 2016 MBL Rule. Plaintiff contends that, through that Rule, "NCUA is now purporting to eliminate the commercial lending limit mandated by Congress entirely for broad categories of commercial credit." Compl. ¶ 20(d). But although Plaintiff may disagree with NCUA's position that nonmember loans and nonmember participation

interests in such loans are not subject to Section 1757a(a)'s member business loan cap, that position is *not a creature of the 2016 MBL Rule*. The NCUA concluded in the *2003* rulemaking that "purchases of nonmember loans and participation interests . . . do not involve the provision of member loan services, and the acquired loan assets are not [member business loans]," 68 Fed. Reg. at 56,544, and the 2016 MBL Rule merely noted that the agency's "current approach with respect to MBL loan participations has been unchanged since 2003," 81 Fed. Reg. at 13,548.

Thus, the only material change the 2016 MBL Rule makes to the NCUA's treatment of nonmember business loans and nonmember participation interests for purposes of the statutory cap—and the only possible source of "certainly impending" injury here—is the Rule's elimination of the requirement that credit unions obtain agency approval for nonmember loan transactions that, when combined with member loans, would exceed the statutory limit on member loans. *See* pp. 10-12, *supra*. As noted above, the agency removed the approval requirement in favor of an approach that requires credit unions to consider broad, yet well-defined principles to evaluate the risk of each proposed transaction. *See* p. 10, *supra*; 12 C.F.R. § 723.5(a) (effective Jan. 1, 2017).

The mere elimination of an administrative requirement of this sort—an administrative requirement that has never even applied to ICBA's members—is plainly not the type of regulatory action that gives rise to "certainly impending" injury. Simply put, to the extent Plaintiff challenges the removal of this approval requirement, it is entirely speculative to say that the NCUA's substitution of the current approval requirement for a risk-based approach will have any impact on ICBA's members at all, much less imminently cause them injury. In particular, it is entirely unknown at this point whether (and which) credit unions will seek to increase their nonmember loan interests, whether any future nonmember loan acquisitions would have been approved by NCUA under the pre-2016 MBL Rule approval system, and what steps NCUA might or might not take in the event that particular credit unions acquire nonmember loan interests without paying

adequate heed to the regulatory standards set forth in the Rule. Indeed, the Complaint does not appear even to *allege* any injury fairly traceable to the elimination of this approval requirement.

Other factors also call into question whether any alleged injury to Plaintiff is "certainly impending" based on the 2016 MBL Rule. Even in the absence of an agency approval requirement, credit unions have ample reasons to limit their non-member loan interests. For example, acquisition of such interests necessarily reduces the purchasing credit union's net worth, which both affects the credit union's lending authority under the NCUA's regulations, and subjects them to the progressively more stringent prompt corrective action requirements for "adequately capitalized," "undercapitalized," "significantly undercapitalized," and "critically undercapitalized" credit unions, leading up to conservatorship or involuntary liquidation by NCUA. *See* 12 U.S.C. § 1790d; 12 C.F.R. §§ 702.201-204. Among other consequences, an insured credit union that is undercapitalized and subjected to prompt corrective action requirements may not increase the total amount of member business loans until the credit union becomes adequately capitalized. *See* 64 Fed. Reg. at 28,725. And to the extent particular credit unions attempt to acquire nonmember business loan interests in a manner designed to circumvent the statutory cap, NCUA retains the ability to intervene and has stated its intention to do so. *See* 81 Fed. Reg. at 13,549 ("Attempts to circumvent the statutory aggregate limit will not be tolerated.").

Nor does the competitor standing doctrine support Plaintiff's claim of standing. The doctrine of competitor standing recognizes that "economic actors 'suffer [an] injury in fact when [government] agencies lift regulatory restrictions on their competitors or otherwise allow increased competition' against them." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010). But that standard excludes allegations of competition where an agency action permits at most "the first step in the direction of future competition," rather than "itself impos[ing] a competitive injury." *New*

World Radio, Inc. v. FCC, 294 F.3d 164, 172 (D.C. Cir. 2002). ICBA cannot show that the NCUA's elimination of the approval requirement "will almost surely" increase competition against them, causing them to lose business or to change the terms of their loans. Elimination of the approval requirement does not itself impose a competitive injury because it is unlike a decision permitting new market entrants whose entry can be predicted to increase competition. That is particularly true where, as here, the regulated credit unions are already market participants. ICBA cannot satisfy "the basic requirement common to all [competitor standing] cases," which is that there is a showing of "an actual or imminent increase in competition." *Sherley*, 610 F.3d at 73.

In sum, at this juncture, any theory of injury to ICBA's members from the 2016 MBL Rule is merely based on "a highly attenuated chain of possibilities," *Clapper*, 133 S. Ct. at 1148, which cannot establish that any injury is "certainly impending." *Id*. at 1147.

II. Plaintiff's Claims Are Not Ripe Because the 2016 MBL Rule Is Not Yet Effective and Has Not Been Applied to Specific Transactions

There is a second jurisdictional defect in Plaintiff's claims. Plaintiff seeks to challenge the issuance of the 2016 MBL Rule. The challenge is not ripe, and will not ripen until the regulation is implemented and unless and until regulated credit unions attempt to acquire nonmember loan interests in a manner that ICBA believes is inconsistent with the statutory cap.

"Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] until . . . [there is] some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (quotation marks omitted). Thus, "judicial review is generally facilitated by waiting until administrative policy is implemented for then a court can be freed, at least in part, from theorizing about how a rule will be applied and what its effect will be." *Nat'l Ass'n of*

Regulatory Utility Comm'rs v. U.S. Dept. of Energy, 851 F.2d 1424, 1428 (D.C. Cir. 1988). The Supreme Court has further explained that "[t]he major exception" to this principle "is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808.

ICBA's purported challenge to the 2016 MBL Rule falls comfortably within the heartland situation the Supreme Court has identified as presenting an unripe dispute. The Rule has not yet taken effect and, as discussed in the previous section, the impact of the Rule as it pertains to credit unions' acquisitions of nonmember loan interests—to the extent there is any meaningful impact at all—is wholly speculative. *See* pp. 15-18, *supra*. Plaintiff also clearly does not fall within the "major exception" noted in *National Park* and *Lujan*, as the 2016 MBL Rule does not directly regulate ICBA's members *at all*, much less require them "to adjust [their] conduct immediately." *See Texas v. United States*, 523 U.S. 296, 301 (1998) (a challenge to a regulation is not ripe if a plaintiff is "not required to engage in, or refrain from, any conduct"). Even if Plaintiff had standing—and even if, contrary to the argument below, this action were not time-barred—this Court should refrain from reviewing Plaintiff's challenge to the 2016 MBL Rule until after the Rule becomes effective and can be evaluated in the context of specific credit union acquisitions.

III. This Action Is in Substance a Challenge to the 2003 Rule and Is thus Time-Barred

Even if this Court were to conclude that it otherwise has jurisdiction over this action, the Complaint must be dismissed because it is time-barred.[5] Although the Complaint is styled as a challenge to the 2016 MBL Rule, Plaintiff's allegations and requested relief all pertain to matters

[5] The Fourth Circuit does not appear to have decided whether 28 U.S.C. § 2401(a)—the statute of limitations applicable here—is jurisdictional, and other courts have reached conflicting conclusions on this issue. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 145 (2008) (Ginsburg, J., dissenting) (collecting cases). This Court need not address that issue here.

resolved in the 2003 rulemaking. Under Fourth Circuit precedent, any challenge to the 2003 Final Rule was required to be filed no later than October 1, 2009—six years after the NCUA published that Rule. This action, filed nearly thirteen years after the Rule's publication, is thus time-barred.

1. As an initial matter, although Plaintiff's Complaint attempts to cast the 2016 MBL Rule as the basis for this lawsuit, *see* Compl. ¶ 1, ICBA's allegations and requested relief concern the 2003 rulemaking—which is presumably why ICBA devotes eleven paragraphs to criticizing it. *See id.* ¶¶ 43-53. ICBA's Complaint is based on its contentions that "the commercial loans subject to the statutory restriction are *not* limited to loans made to members of the credit union" and that the statute does not "exclude loans or portions of loans the credit union acquires from other lenders." *Id.* ¶ 3; *see also id.* ¶ 90 (Prayer for Relief). As discussed at greater length in the subsequent section, the second argument is a strawman. The NCUA has not taken the position that participation interests are categorically outside the statutory cap and, indeed, the agency's regulations provide that "[a]ny interest a credit union obtains in a loan that was made by another lender to the credit union's member is a member business loan . . . to the same extent as if made directly by the credit union to its member." 12 C.F.R. § 723.1(d); *see also* pp. 22-23, *infra*.

And while ICBA is correct that NCUA treats non-member business loans and non-member participation interests in such loans as not subject to Section 1757a(a)'s member business loan cap, that position is a creature of the 2003 Rule, not the 2016 MBL Rule. The NCUA concluded in 2003 that "purchases of nonmember loans and participation interests . . . do not involve the provision of member loan services, and the acquired loan assets are not [member business loans]," 68 Fed. Reg. at 56,544, and the 2016 MBL Rule merely noted that the agency's "current approach with respect to MBL loan participations has been unchanged since 2003," 81 Fed. Reg. at 13,548.

The only material change the 2016 MBL Rule makes to the NCUA's treatment of nonmember business loans and nonmember participation interests for purposes of the cap is to

eliminate the current agency approval requirement. *See* pp. 10-12, *supra*. But ICBA does not challenge elimination of the approval requirement and, indeed, appears to believe that the soon-to-be-obsolete approval regime is unlawful (based on its view that the cap applies to nonmember loan interests). *See* Compl. ¶ 52. In short, ICBA's legal claims here are directed to the 2003 Rule, not the 2016 MBL Rule.

2. Once it is understood that ICBA's lawsuit is in substance a challenge to the 2003 Rule, it is clear that this action is time-barred. "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This statute of limitations applies to APA actions, and an APA action accrues on the date of the "final agency action." *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999).

In *Hire Order, Ltd. v. Marianos*, 698 F.3d 168 (4th Cir. 2012), the Fourth Circuit concluded that, when a Plaintiff brings a facial challenge to a regulation under the APA, Section 2401(a)'s "limitations period begins to run when the agency publishes the regulation." *Id.* at 170 (quoting *Dunn-McCampell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997)). The Fourth Circuit accordingly ruled that the plaintiff's claim in that case—asserting a pre-enforcement challenge to a 1969 revenue ruling which limited the ability of federal firearms licensees to sell firearms at out-of-state gun shows—was untimely. *Id.* at 170-71; *accord Exela Pharma Sciences, LLC v. Kappos*, No. 1:12–cv–469, 2012 WL 6697068, at *2 (E.D. Va. Dec. 21, 2012) ("The six-year statute of limitations under 28 U.S.C. § 2401 . . . begins to run on the day that the final regulation is published in the Federal [Register]."), *aff'd on other grounds*, 781 F.3d 1349 (4th Cir. 2015).

Hire Order bars ICBA's lawsuit. ICBA's challenge is a "facial challenge" of the sort to which *Hire Order*'s holding applies. *See Hire Order*, 698 F.3d at 170-71; *Exela*, 2012 WL

6697068, at *2 (claim that agency promulgated an improper regulation that was in conflict with "express statutory language" was a facial challenge subject to the *Hire Order* accrual rule). And if anything, the plaintiffs in *Hire Order* had a far stronger argument for a later accrual date than ICBA does here. The *Hire Order* plaintiffs *could not* have facially challenged the revenue ruling at issue during the limitations period because the ruling was issued in 1969 and the plaintiffs did not become subject to the ruling until 2008; the Fourth Circuit nonetheless concluded that their assertion "that their cause of action did not accrue until they became federally licensed firearms dealers in 2008 utterly fails." 698 F.3d at 170. By contrast, nothing prevented ICBA from bringing a challenge to the 2003 Rule prior to October 2009; indeed, ICBA commented on the 2003 Rule before it was finalized. Plaintiff's attempt to challenge the 2003 Rule now—cloaked as a challenge to the 2016 MBL Rule—is time barred. For this reason too, the Complaint must be dismissed.

IV. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted, Because the NCUA Has Adopted a Permissible Construction of the FCU Act

Even if the Court concludes that it has jurisdiction to hear Plaintiff's claim and that this action were not time-barred, the Complaint still must be dismissed because ICBA has failed to state a claim upon which relief can be granted. As a threshold matter, it is important to note again that, although Plaintiff's challenge here is based on its disagreement with NCUA's interpretation of the loans to which Section 1757a(a)'s member business loan cap applies, *see, e.g.*, Compl. ¶¶ 2-3, the Complaint repeatedly misdescribes the NCUA's interpretation, repeatedly asserting that the NCUA has excluded *all* loans purchased from other lenders and *all* participation interests from the member business loan cap.[6] That is *not* what the NCUA has done. As the agency explained in

[6] *See*, *e.g.*, Compl. ¶¶ 72-77, ¶ 84 (asserting that "the term 'make' in Section 1757a plainly includes the purchase of a loan or loan interest from another lender"), ¶ 88 (asserting that the NCUA's supposed "determination that purchasing a commercial loan interest is not 'making' the loan within the meaning of [Section] 1757a was arbitrary and capricious"); pp. 12-14, *supra*.

2003, "if a credit union holds an interest in a business purpose loan of its member, the interest will be treated the same irrespective of whether it was made by the credit union or purchased from another lender." 68 Fed. Reg. at 56,539. The NCUA's current regulations likewise make clear that, if a credit union purchases an interest in a *member* business loan, such an interest counts towards the statutory cap in the same way it would if the purchasing credit union had originated the loan. *See* 12 C.F.R. § 723.1(d) ("Any interest a credit union obtains in a loan that was made by another lender to the credit union's member is a member business loan . . . to the same extent as if made directly by the credit union to its member.").

Plaintiff's misunderstanding of the NCUA's regulations means that much of the Complaint fails to address the NCUA's actual interpretation of the statute. The NCUA's actual view is merely that "purchases of nonmember loans and participation interests . . . do not involve the provision of member loan services, and the acquired loan assets are not [member business loans]." 68 Fed. Reg. at 56,544; *see also* 12 C.F.R. §§ 723.1(e), 723.16(b); 12 C.F.R. §§ 723.2 (effective Jan. 1, 2017), 723.8 (effective Jan. 1, 2017). That longstanding view—that nonmember business loans and nonmember participation interests do not count towards Section 1757a(a)'s cap on member business loans—follows ineluctably from the plain text of the statute. In any event, the agency's interpretation is certainly a *reasonable* reading of Section 1757a(a), and is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In reviewing agency action under the APA, just as courts grant deference to agency policy judgments and factual findings, so too must a court grant deference to agency interpretations of ambiguous statutes or regulations. *See*, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In *Chevron*, the Court re-affirmed this principle in establishing a two-step process of statutory construction in the APA review context. First, if Congress has unambiguously spoken to the issue in question,

the court must give effect to Congress's intent. 467 U.S. at 843. Second, if a statute is silent or ambiguous, the court should accord deference to the agency's construction of its own statute. *Id.*

It is not difficult for an agency to establish that its statutory construction "reflects a reasonable interpretation of the law." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996). To find an agency's interpretation permissible, this Court "need not conclude that the agency construction was the only one it permissibly could have adopted," *Rust v. Sullivan*, 500 U.S. 173, 184 (1991), or that it is "the best interpretation of the statute," *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999), or that it is "the most natural reading." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991). The agency's view is deemed to be reasonable so long as it is not "flatly contradicted" by plain language. *Dep't of the Treasury v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990). It is thus not enough for a plaintiff to argue that the words of the statute "support" its view, *Auer v. Robbins*, 519 U.S. 452, 457 (1997), or that the plaintiff's interpretation is a "plausible" one, *Reno v. Koray*, 515 U.S. 50, 62 (1995), or that the plaintiff's view is "consistent with accepted canons of construction." *Pauley*, 501 U.S. at 702. Rather, a plaintiff must show that its reading of the statute is the "inevitable one," *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 (1998), because Congress made a deliberate decision to "compel" the result the plaintiff urges, *Auer*, 519 U.S. at 458, in terms so "unambiguously manifest," *Babbitt v. Sweet Home Chapter of Cmtys. of Great Oregon*, 515 U.S. 687, 703 (1995), that the statutory language "cannot bear the interpretation adopted by the [agency]." *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990). Thus, for a plaintiff to prevail, its view of the statute must be "the only possible interpretation." *Regions Hosp.*, 522 U.S. at 460.

Plaintiff does not come close to meeting that daunting standard. Section 1757a(a) provides that a federally insured credit union may not "make any *member business loan* that would result in a total amount of *such loans*" exceeding the lesser of 1.75 times the credit union's net worth or

12.25% of the credit union's total assets. *See* 12 U.S.C. § 1757a(a) (emphasis added). This statutory cap appears in a section *titled* "Limitation on member business loans." *See, e.g.*, *Carter v. United States*, 530 U.S. 255, 267 (2000) (noting that, if statute is ambiguous, a title may "she[d] light on some ambiguous word or phrase in the statute itself"). The Senate Committee Report accompanying CUMAA's amendments to the FCU Act likewise described the cap as applying only to member business loans. *See* p. 5, *supra*. Prior to CUMAA's enactment, moreover, the NCUA's regulations consistently interpreted "member business loans" as loans and participations to the credit union's members only, and legislative history accompanying CUMAA shows that Congress intended to codify the NCUA's then-extant interpretation. *See* 12 C.F.R. § 701.21(h)(2) (1990); S. Rep. No. 105-193, at *10; *see also* H.R. Rep. 105-472, at *21 (noting that NCUA's pre-CUMAA regulations related "to business loans and lines of credit to members"). All of these sources strongly support the NCUA's view that the statutory cap does not apply to interests in loans extended to borrowers who are not members of the applicable credit union.

If there were any ambiguity as to what the phrase "member business loan" means, a separate provision of the FCU Act explains exactly what it means to be a "member" of a particular credit union. That section provides that each federally-chartered credit union's membership "shall consist of the" credit union's incorporators, as well as any individuals and organizations that own at least one share of the credit union's stock, and pay any initial installment and uniform entry fee required by the credit union's Board of Directors. 12 U.S.C. § 1759(a). The statute further recognizes three categories of federally-chartered credit unions—single common bond, multiple common bond, and community—and requires each credit union's membership to be limited to the membership allowed for the applicable category. *Id.* § 1759(b).

Thus, as the NCUA has long recognized, the plain language of the statute limits the statutory cap to loans extended to member borrowers. It cannot be read to include a credit union's

interests in loans made to borrowers who are *not* members of the credit union. And even if it were *plausible* to interpret Section 1757a(a) as applying to such interests, that is certainly not "the *only* possible interpretation." *Regions Hosp.*, 522 U.S. at 460 (emphasis added). ICBA's efforts to show otherwise fail.

ICBA appears to acknowledge that the ordinary meaning of "member business loan" would not extend to loans made to non-member borrowers. *See* Compl. ¶ 67. In urging that the statute nonetheless mandates a contrary interpretation, ICBA principally relies on Section 1757a(c)(1)(A), which defines "member business loan" as "any loan, line of credit, or letter of credit, the proceeds of which will be used for a commercial, corporate or other business investment property or venture, or agricultural purpose." 12 U.S.C. § 1757a(c)(1)(A). That definition, ICBA contends, "as distinct from the term itself, sweeps in 'any' commercial loan, not just loans made to the credit union's own members." Compl. ¶ 67.

That is not a sensible interpretation of this provision, much less an interpretation so "unambiguously manifest," *Sweet Home*, 515 U.S. at 703, that the statutory language "cannot bear the interpretation adopted by the [agency]." *Sullivan*, 494 U.S. at 92. As the Supreme Court recently explained, "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014). In *Bond*, for example, the Court addressed the application of 18 U.S.C. § 229, which prohibits the use or possession of any "chemical weapon," to a Pennsylvania woman's efforts to poison a romantic rival, causing a minor thumb burn. 134 S. Ct. at 2084-85. The statute at issue in that case defined "chemical weapon" as a "[a] toxic chemical and its precursors," *id.* at 2080, and the Supreme Court accordingly acknowledged that the term "is defined extremely broadly." *Id.* at 2090. Notwithstanding this broad definition, the Court concluded that "[w]hen used in the manner

here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare," and held that the statute did not extend to Bond's conduct. *Id.* Similarly, in *Johnson v. United States*, 559 U.S. 133 (2014), the Court considered the scope of the statutory term "violent felony," which the Armed Career Criminal Act defined as any offense that "has as an element the use . . . of physical force against the person of another." *Id.* at 136 (quotation marks omitted). Although the statutory definition, when read in isolation, would seem to encompass any physical force no matter how slight, the Supreme Court deemed it "clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140.

The same interpretive principle applies here. Although Section 1757(c)(1)(A) is phrased to apply to "any loan" used for particular purposes, the term being defined is "member business loan," and the definition is contained in a section titled "Limitation on member business loans." It is simply not plausible to contend that Congress intended to define "member business loans" to include "nonmember business loans," much less that it took such a strange step—defining a term to include the opposite of its ordinary meaning—without providing any indication that it was doing so, in legislative history or otherwise. As in *Johnson* and *Bond*, it is obvious that in the context of a definition of "member business loan," the provision is limited to the defined loans, lines of credit, and letters of credit that *are extended to the credit union's members*. And again, even if ICBA's contrary reading were plausible—indeed, even if it were the best reading of the statutory language (which it is not)—it is certainly not the only reasonable interpretation.

ICBA also highlights a transitional provision in section 1757a(d), which provides that:

> An insured credit union that has, on August 7, 1998, a total amount of outstanding member business loans that exceeds the amount permitted under subsection (a) shall, not later than 3 years after August 7, 1998, reduce the total amount of outstanding member business loans to an amount that is not greater than the amount permitted under subsection (a).

12 U.S.C. § 1757a(d). According to ICBA, "[t]his provision makes it plain that over the three-year transition period, the credit union must reduce, without differentiation, the 'total amount' of *all* commercial loans held on its books, regardless of the source of the loans and the identity of the borrower or originating lender." Compl. ¶ 65.

The transition provision is in fact wholly irrelevant to this case. The provision would arguably be relevant if NCUA took the position that participation interests were categorically outside the scope of Section 1757a(a). But although the Complaint repeatedly insists otherwise, *see* p. 22, *supra*, that is not the interpretation embodied in the NCUA's regulations and is thus not the legal issue raised by this lawsuit. Rather, the issue in dispute here is whether, consistent with NCUA's longstanding interpretation, Section 1757a(a) does not encompass a credit union's purchase of nonmember business loans or nonmember participation interests. As to *that* question, the transition provision is wholly silent: it requires credit unions to reduce their outstanding "member business loans" to a level consistent with the statutory cap, but says nothing about what constitutes a member business loan for purposes of either Section 1757a(a) or Section 1757a(d).

Finally, ICBA cites snippets of legislative history that it contends supports its reading of the statute, pointing to a statement in the Senate Committee Report indicating that Congress established the commercial lending limit to "prevent significant . . . credit union resources from being allocated in the future to large commercial loans that may present . . . safety and soundness concerns" and opining that using credit union resources in this way could "potentially increase the risk of taxpayer losses." Compl. ¶ 38 (quoting S. Rep. No. 105-193); *see also id.* ¶ 39 (quoting statement in report that the lending restrictions were "intended to ensure that credit unions continue to fulfill their specified mission of meeting the credit and savings needs of consumers . . . through an emphasis on consumer rather than business loans" (emphasis omitted)). But even putting aside

that the Senate Committee Report consistently describes Section 1757a(a) as applying only to member business loans, *see* p. 5, *supra*, the legislative history ICBA cites simply does not address the interpretive question at issue in this lawsuit, and cannot possibly serve as a basis under *Chevron* for disturbing the NCUA's reasonable interpretation of Section 1757a(a).[7]

In any event, the agency's rulemaking is entirely consistent with the broad principles reflected in the legislative history Plaintiff cites. Bringing its expertise to bear on these subjects, the agency explained in the 2003 rulemaking that, inter alia: (1) the agency believed that purchases of interests in nonmember loans would "be made only as a productive method of placing excess funds after member loan demands are met"; and (2) nonmember participation interests "provide[] a better rate of return for the credit union and its members as compared to a typical investment asset, provide[] for risk diversification within the credit union system, and foster[] the cooperative spirit that has traditionally existed and continues to exist among credit unions." 68 Fed. Reg. at 56,544.[8] And while the NCUA has long interpreted Section 1757a(a) as not applying to credit unions' interests in nonmember loans, its regulations recognize that these interests do carry risks and are thus subject to other requirements. *See* pp. 8-9, 12, *supra*.

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In short, the NCUA permissibly interpreted Section 1757a(a)'s cap on member business

[7] ICBA also points to a statement from a Congressman that "the competitive regulatory playing field between banks and credit unions is pretty well evened under this legislation." Compl. ¶ 39 (quoting 144 Cong. Rec. H7043 (daily ed. Aug. 4, 1998) (statement of Rep. Leach)). This high-level assessment of CUMAA likewise does not address the scope of Section 1757a(a) and, in any event, only represents the views of a single legislator.

[8] *See also* 81 Fed. Reg. at 13,549 (noting that "[s]elling MBL participations permits an originating credit union to obtain additional liquidity, enabling it to meet loan demand for both consumer and small business members," while "diversify[ing] the risk of MBLs within the credit union system, ultimately making credit unions safer and better able to meet the needs of individual consumer and small business members").

loans to apply only to loans extended to the applicable credit union's members—not to the credit union's purchase of nonmember business loans or nonmember participation interests. Although ICBA may disagree with the NCUA's judgments in this area, the agency's interpretation is consistent with the plain text of Section 1757a(a), and nothing in the statute or CUMAA's legislative history provides any basis for displacing the agency's interpretation. This action should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's complaint in its entirety.

Respectfully Submitted,

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DATED: November 2, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 2, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of electronic filing to the following:

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