

**BEFORE THE CREDIT UNION BOARD  
OF THE ALABAMA CREDIT UNION ADMINISTRATION**

ALABAMA ONE CREDIT UNION,	)	
	)	
	)	
Appellant,	)	
	)	
v.	)	<b>APPEAL OF ORDER TO CEASE AND DESIST 2015: 002</b>
	)	
ALABAMA CREDIT UNION	)	
ADMINISTRATION and	)	
SARAH MOORE,	)	
	)	
Appellees.	)	

**MOTION TO CLARIFY**

Alabama Credit Union One ("Alabama One") moves the Alabama Credit Union Administration ("ACUA") and Administrator Sarah H. Moore ("Moore") to clarify the Cease and Desist Order issued April 2, 2015, and states the following grounds for its motion:

1. It is axiomatic that orders and other legal enactments must be capable of interpretation by those ordered to comply. For example, "a statute will be deemed unconstitutionally vague if 'persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Smith*, 111 Wash. 2d 1, 7, 759 P.2d 372, 375 (1988).

2. The standards for evaluating vagueness were described by the United States Supreme Court, and require that an enactment be clearly defined and allow a person of ordinary intelligence and opportunity to know what is prohibited or required:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and

discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application...

*Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). As the Alabama Supreme Court held, a person "of common intelligence cannot be required to guess at the meaning of the enactment." *Hicks v. State*, 153 So. 3d 53, 64 (Ala. 2014). See also *Piggly-Wiggly of Jacksonville, Inc. v. City of Jacksonville*, 336 So. 2d 1078, 1081 (Ala. 1976) ("The Fourteenth Amendment to the United States Constitution echoed by the Constitution of Alabama, Article I, s 6, provides not one may not be deprived of life, liberty or property without due process of law. It has been held as a cornerstone of due process that an enactment is void for vagueness if its prohibition is not clearly defined.").

3. Many of the provisions in the Cease and Desist Order are so vague that it is impossible to know whether Alabama One has complied with the order, making all such determinations arbitrary. The following are examples.

4. Paragraph 3 requires Alabama One to reduce member business loan concentrations "including but not limited to those borrowers as set forth in Confidential Addendum A to this Order." First, the Order does not indicate to what number, level, or amount the loans should be reduced. The Order, in fact, appears to find there is a concentration based on an undisclosed standard because the loans of the borrower on the Confidential Addendum A do not exceed the regulatory concentration level. There is simply no objective criteria by which to measure compliance. A reduction by a dollar is a decrease; however, it is assumed a cease and desist order would not have been issued for such an amount. Consequently, Alabama One has no notion of the amount of reduction that the ACUA is seeking to direct. Second, the cease and desist order directs that loans, including but not limited to those on a confidential memorandum

be reduced; however, there is zero guidance about which other borrowers or kind of loans are the subject of this directive. Alabama One is simply left to guess at the intention of the direction.

5. In a number of paragraphs, including paragraph 17, the Cease and Desist Order requires compliance with all laws and regulations on the one hand and on the other hand directs that Alabama One account for and report certain finances in a manner that would violate Generally Accepted Accounting Principles ("GAAP"). Specifically, paragraph 6 directs Alabama One to report its net worth ratio in a way that violates GAAP and paragraph 7 requires that Alabama One handle charge offs and impairments in ways that conflict with GAAP (even though paragraph 7 specifically requires compliance with GAAP). These conflicting requirements appear to be at odds with the requirement to follow all laws and requirements, and Alabama One is left with a direction to follow GAAP and a direction to violate GAAP.

6. Paragraph 1 requires that Alabama One's Board of Directors "improve oversight of the affairs of the Credit Union..." A requirement to "improve" oversight is open to innumerable interpretations and is too vague to allow compliance or a determination of compliance. Alabama One wants to achieve strong director oversight; however, it is an unquestionably undefined vague standard incapable of objective compliance.

7. Paragraph 2 requires that Alabama One "recruit and retain qualified management with the qualifications and experience commensurate with assigned duties and responsibilities at the Credit Union." It goes on to require that management "include" a Chief Executive Officer, Senior Lending Officer, and Chief Operating Officer with "appropriate" qualifications. It is unclear from the order whether Ms. Moore is attempting to cause or require Alabama One to fire its current CEO and COO and what candidates would be appropriate for it to "recruit and retain" for any of the three positions.

8. Paragraph 17 requires Alabama One to "eliminate and/or correct all violations of laws, regulations, non-compliant LUA concerns and/or contraventions of statements of policy in the LUA, and all Reports of Examination, including DORs..." It is unknown, however, to which laws, regulations, or purported violations this paragraph is referring. Alabama One certainly desires to be in compliance with all laws, regulations, etc. However, the general and vague directive provides no notice. Indeed, if this directive were legally sufficient, then there would be no need for any of the other paragraphs in the cease and desist order. For that, and other reasons, "obey the law injunctions" have been roundly rejected by courts. The United States Court of Appeals for the Eleventh Circuit held:

Because the injunctions are still before the district court, we would be remiss if we did not inform the court that they are **unenforceable**. The injunctions contained in paragraphs II, III, and IV of the consent decree are identical to the injunction in paragraph I to the extent that they track the provisions of the statute or regulation the violation of which is enjoined. The paragraphs differ only with respect to the conduct that the statute or regulations explicitly proscribe. **Each of the injunctions is a quintessential "obey-the-law" injunction.** See *Florida Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehabilitative Servs.*, 225 F.3d 1208, 1222-23 (11th Cir.2000):

**This Circuit has held repeatedly that "obey the law" injunctions are unenforceable.** See, e.g., *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir.1999) (holding that injunction which prohibited municipality from discriminating on the basis of race in its annexation decisions "would do no more than instruct the City to 'obey the law,' " and therefore was invalid); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 899 (5th Cir.1978) (invalidating injunction that prohibited defendant from violating Title VII in its employment decisions). **The specificity requirement of Rule 65(d) is no mere technicality; "[the] command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order."** *Payne*, 565 F.2d at 897. **An injunction must be framed so that those enjoined know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law.** See *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir.1981) (citing *International Longshoremen's Assoc. v. Philadelphia Marine Trade Assoc.*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967)).

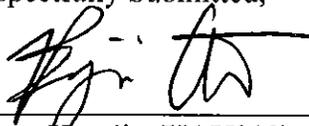
*S.E.C. v. Smyth*, 420 F.3d 1225, 1233 (11th Cir. 2005) (emphasis added). Paragraph 17 is exactly this sort of unenforceable "obey the law" injunction.

9. Paragraph 5(a) requires that Alabama One ensure that all "appropriate Credit Union employees" are aware of Alabama One's SAR and CTR monitoring and reporting procedures. It is unclear, however, who the ACUA believes are appropriate employees.

10. **WHEREFORE**, Alabama One respectfully requests that the April 2, 2015 cease and desist order be vacated and that a clarifying order be issued. Alabama One further requests that the enforcement of the April 2, 2015 order be stayed<sup>1</sup> pending a hearing and ruling on its motion to clarify.

Dated: April 16, 2015

Respectfully Submitted,



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Victor Hayslip (HAY019)  
Benjamin B. Coulter (COU027)

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Alabama One Credit Union

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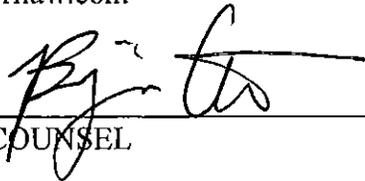
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<sup>1</sup> A stay of enforcement issued by the ACUA Board or Ms. Moore is all that is needed to effectively stay this matter entirely. While Alabama One initially believed the NCUA was joining in the cease and desist order and appealed to the NCUA at the same time it appealed Ms. Moore's order, its counsel has received a communication from the NCUA making clear that the NCUA considers this an order from the ACUA alone, not a joint order in which the NCUA joined in. See email attached as Exhibit 1.

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing document by U.S. First Class Mail and email on April 16, 2015:

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OF COUNSEL

## Coulter, Benjamin

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**From:** Salva, Dianne M <DSALVA@NCUA.GOV>  
**Sent:** Wednesday, April 15, 2015 11:00 AM  
**To:** Hayslip, Victor; Coulter, Benjamin  
**Subject:** Alabama One

Dear Mr. Hayslip and Mr. Coulter:

I am writing in reference to our telephone conversations on Monday April 13, 2015, regarding Alabama One Credit Union. As we discussed, the Order to Cease and Desist dated April 2, 2015, was issued by the Alabama Credit Union Administration (ACUA) and any appeal must be directed to the ACUA in accordance with Alabama law and any applicable ACUA regulations. As a federally-insured credit union, Alabama One continues to be subject to the supervision and regulation of NCUA. As you know NCUA has independent oversight and enforcement authority over Alabama One pursuant to Title II of the Federal Credit Union Act. *See* 12 U.S.C. §§1781 to 1790e. Should NCUA elect to pursue an administrative enforcement action against Alabama One it will proceed in accordance with that authority and an appeal if any, would be governed by federal law and NCUA regulations.

**Dianne M. Salva**

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