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April 12, 2010

Ms. Mary F. Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Sent via email

Re: PCUA Comments on Proposed Rule IRPS 09-1

Dear Ms. Rupp:

As many of the NCUA Board members and staff are aware, the Pennsylvania Credit Union Association (PCUA) and several of its member credit unions have been embroiled in litigation regarding state community charters. The state litigation began in 2004 and ended in 2009. After five years of defending the community charters granted to several Pennsylvania state-chartered credit unions (and related litigation challenging Pennsylvania credit unions' favorable tax treatment), we are pleased to report that the community charters granted to Pennsylvania credit unions and the processes and procedures employed by the Pennsylvania Department of Banking (Banking Department) have all been upheld by the Pennsylvania courts.

It is against that background that we respectfully submit that the amendments included in NCUA's chartering manual proposal are a ***gigantic step backwards*** for Pennsylvania credit unions. Accordingly, we must strenuously object to the unnecessary limitations NCUA proposes to place on the definition of a community charter for federally chartered credit unions.

Narrowly limiting the definition of community charters for federally chartered credit unions significantly hampers the ability of credit unions to bring financial services and products to consumers, *especially* those in rural or underserved areas.

PCUA is a statewide trade association that represents the majority of the 554 credit unions located within the Commonwealth of Pennsylvania. PCUA and its member credit unions appreciate the opportunity to provide comments on the proposed rule to amend NCUA's chartering and field of membership manual and its proposed community charter policies.

The comments included in this letter are the views of the PCUA Board of Directors and PCUA's Governmental Affairs, Regulatory Review, and State Credit Union Advisory Committees (the Committees). The Association Board and Committees consist of credit union CEOs who lead the management teams of Pennsylvania federal and state-chartered credit unions. *All* of those participating

objected to the proposal in its current form and strongly believe that the proposal has a significant negative impact on credit unions regarding their ability to grow and extend their services to consumers.

Background:

Some brief background regarding the community charter litigation and administrative procedure in Pennsylvania is helpful to illustrate our concerns.

In 2004, the Banking Department held administrative hearings regarding notices filed by two Pennsylvania state-chartered credit unions to amend their charters to serve a five county area in the greater Philadelphia region.[1] After several years of litigation, including appearances in the Pennsylvania Commonwealth Court and the Supreme Court of Pennsylvania, the Commonwealth Court upheld the Banking Department's finding, which was supported by an administrative record, that five counties[2] in the greater Philadelphia area constituted a well-defined local community (WDLC).

During that same time frame, the Banking Department approved a notice filed by another Pennsylvania state-chartered credit union requesting to serve a seven county area in Central Pennsylvania.[3] While the Pennsylvania Supreme Court did not rule on whether the seven-county area in Central Pennsylvania[4] constituted a WDLC, the Court held that the opposition had an opportunity for due process at the administrative level but waived their right to be heard by not following the proper procedure. The Supreme Court upheld the seven-county community awarded to the credit union on the basis that the Banking Department followed the proper procedure and provided due process.

All of the above-referenced cases involved notices, which were filed under the parity provision of the Pennsylvania Credit Union Code. The parity provision allows a Pennsylvania state-chartered credit union to expand its field of membership as authorized by section 109 of the Federal Credit Union Act. 17 Pa. C.S.A. § 501(e)(2).

While the Banking Department acknowledged that it is not bound by NCUA's Chartering Manual in reviewing community charter parity notices filed by Pennsylvania state-chartered credit unions, the NCUA Chartering Manual serves as guidance to the state regulator in implementing the parity provision. The proposed amendments could certainly create outside limits under the state parity authority.

Definition of well-defined local communities:

The primary purpose of NCUA, as stated in the proposal, is to eliminate the uncertainty among community charter applicants regarding two important issues, particularly in connection with applications involving large multi-jurisdictional areas. The first is how an applicant can best demonstrate the requisite interaction and/or shared common interests of a WDLC. The second is how much evidence is required in a particular case.

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[1] A third state-chartered credit union was initially involved in the litigation but was later dismissed after amending its notice filed with the Banking Department.
[2] Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties.
[3] During that same time frame one other state-chartered credit union filed a notice to amend its charter to a community charter. The notice was challenged and the case was consolidated with the lead case related to the five counties in Philadelphia. The case was later withdrawn.
[4] Adams, Cumberland, Dauphin, Lancaster, Lebanon, Perry and York, Counties.

In order to eliminate uncertainty, NCUA proposed a definition of a WDLC that it believes to be based upon objective and quantifiable criteria that in the Board's opinion conclusively demonstrates interaction and/or common interest.

Our group unanimously objects to the proposal, which establishes a statistical definition of WDLC in cases involving multiple political jurisdictions, in part, because we believe such an exclusive and narrow definition to be inconsistent with the underlying statute.

The specific language of the Federal Credit Union Act deserves review:

> (b) **Membership field.**—Subject to the other provisions of this section, the membership of any Federal credit union shall be limited to the membership described in one of the following categories:
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> * * *
>
> (3) **Community credit union.**— Persons or organizations within a well-defined local community, neighborhood, or rural district.
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> * * *
>
> (g) **Regulations Required for Community Credit Unions**.—
> (1) **Definition of well-defined local community, neighborhood, or rural district.**—
> The Board shall prescribe, by regulation, a definition for the term 'well-defined local community, neighborhood, or rural district' for purposes of—
> (A) making any determination with regard to the field of membership of a credit union described in subsection (b)(3); and
> (B) establishing the criteria applicable with respect to any such determination.

12 U.S.C. §1759(b)(3), (d)(3),(g).

The actual language of the Federal Credit Union Act supports a much broader definition of a WDLC than the one proposed by NCUA. We submit that the rights of federally-chartered credit unions (and state-chartered credit unions through the state parity provisions) are severely abrogated by NCUA's decision to limit WDLC to those areas that meet the statistical area definitions.

In particular, we raise the following objections:

- The statute does not require a population cap on multi-political jurisdictional areas; nor does prudent public policy dictate that one be imposed.
- The statute does not require definitive or objective criteria for establishing a geographical limit on multi-political jurisdiction areas and reasonable minds can differ as to the most compelling information, data, or evidence that proves a WDLC.

NCUA's proposal to cap the population of a WDLC consisting of multi-political jurisdictional areas at 2.5 million is not consistent with the empowering statute. To further illustrate this point, we refer to the conclusions reached by the Commonwealth Court in Pennsylvania in reviewing and interpreting the provisions of the Federal Credit Union Act for purposes of interpreting the parity provision included in Pennsylvania's Credit Union Code.

As referenced above, the Banking Department approved a parity notice filed by two Pennsylvania state-chartered credit unions to serve a community consisting of five counties in the greater Philadelphia region. The counties: Bucks, Chester, Delaware, Montgomery and Philadelphia, make up the Philadelphia

Metropolitan Statistical Area (MSA) and have a population greater than 2.5 million. Accordingly, this community could not have been approved under the current proposed definition of a WDLC.

The Pennsylvania Commonwealth Court stated in its opinion that:

> Initially, we recognize it would seem unlikely that a large geographic area with a significant population could constitute a "well-defined local community." Our task, however, is not to make such a finding but only to decide whether substantial evidence supports the [Banking] Department's finding to that effect. In its determinations, the Department found Credit Unions' Conversion Notices contained evidence of the proposed community constitutes a "well-defined local community" based on historical ties; public transportation; highways; entertainment; sports and cultural events; shopping centers; government and community organizations; and shared media [citations omitted]. The evidence supports the Department's conclusion.[5]

The Court's finding is illustrative that evidence can be produced to show that a large geographic area with a significant population constitutes a WDLC. Our group does not object to NCUA including single political jurisdictions and statistical areas as "presumptive" communities and, in fact, encourages NCUA to do so. However, credit unions *must* have the opportunity to submit evidence and prove that other types of multi-political jurisdictional areas also meet the definition.

We do not refute, and agree with the NCUA Board, that the current process and procedure for evaluating subjective criteria is unwieldy. It is true that our members have voice frustration that the current procedure is often inconsistent since it relies on the individual preferences and prejudices of the particular NCUA analyst reviewing the application.

To that end, we believe that the answer is not to limit the definition of WDLC using definitive criteria but rather to change the procedure and process so that contrary information and opinions are vetted during the administrative approval process.

WDLC Recommendations:

Process and Procedure:

Due largely to our experience in Pennsylvania related to the litigation involving state-chartered credit unions' community charters, our members recommend that NCUA implement a notice and comment procedure at the Federal administrative level that concludes with the issuance of findings of fact and conclusions of law.

This type of procedure allows NCUA to consider the concerns of other parties, as well as, weigh supportive and non supportive evidence in order to determine whether a proposed area constitutes a WDLC. NCUA would be given the opportunity to review evidence, information and data that third parties believe do not support a determination that the proposed area qualifies as a WDLC.

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[5]Pennsylvania Bankers Association, et al. v. Pennsylvania Department of Banking, et al., 42 M.D. 2005, 98 M.D. 2005, 157 C.D. 2005, 158 C.D. 2005 (page 23). http://www.pacourts.us/OpPosting/Cwealth/out/42MD05_9-28-09.pdf

We are not necessarily suggesting that you adopt the procedure in Pennsylvania, which provides for a notice and comment period and subsequently provides a procedure for requesting an administrative hearing.[6]

However, we submit that a notice and comment period when coupled with the regulators' factual findings and legal conclusions assists the appeals court in reviewing the regulators' decision and provides protection for the credit union.

Suggested Criteria:

Our group believes that other evidence and data exists that is more relevant and compelling in certain cases in establishing common interests and interaction than commuting patterns, census data, and political jurisdictions. Our group cites the following alternative principles and criteria worthy of consideration in analyzing WDLCs:

- The use of media marketing data. Our group believes that media marketing data and trends are a very good indicator (and a more relevant indicator than commuting data) for purposes of establishing common interest and interaction. We strongly recommend that media marketing data should be given greater weight in establishing WDLCs. For example, Pennsylvania is divided into six media markets. The design of the media marketing areas suggest interaction and common interest among residents in multi-jurisdictional areas that may include more than one Metropolitan Statistical Area for purposes of shopping, entertainment, and emergency information (as examples). We are not suggesting necessarily that those areas be designated as presumed communities. Rather, we believe that the design of those media markets suggest that statistical areas designed by the US Census Bureau is not the exclusive indicator of areas that have significant interaction and common interests.

As noted in Wikipedia, media markets, broadcast market, media region, designated market area (DMA), Television Market Area (FCC term) or simply market is a region where the population can receive the same (or similar) television and radio station offerings, and may also include other types of media including newspapers and Internet content. They can coincide or overlap with one or more metropolitan areas, though rural regions with few significant population centers can be subdivided into multiple segments. Market regions may overlap, meaning that people residing on the edge of one media market may be able to receive content from other nearby markets.

- The use of state regulators in assisting NCUA in analyzing local data and information. For example, our members and staff submit that NCUA should collaborate with state regulators who have expertise and knowledge regarding interaction and common interests of areas within their state. We suggest that NCUA consider adopting a "reverse parity" provision that would allow NCUA to recognize WDLCs that have been approved or acknowledged by the various credit union state regulators. NCUA may be able to use the National Association of State Credit Union Supervisors (NASCUS) as a resource in helping to develop common criteria among the state credit union regulators for purposes of helping to standardize relevant data and information. Federally chartered credit unions should enjoy the same right to parity as their state-chartered colleagues.

[6] *See*, 71 P.S. § 733-503.

- The term "local" is not as narrow or limiting as opposing parties have advocated. Again, we reference the opinion of the Commonwealth Court in Pennsylvania:

> "In addition, the term "local" is not as narrowly interpreted as the Banks would like. The [NCUA] Federal regulation, above, specifically provides that charters consisting of "multiple counties or local areas with populations of any size" may meet the community requirements….While we agree with the Banks that every charter must be based solely on the evidence presented, the Department's reference to the NCUA orders merely demonstrates that a large population or geographic area does not preclude a finding of local community.[7]

  Provided the administrative record supports an agency's findings, there is at least one state court that has recognized that the current NCUA regulations allow for large population or geographic areas to meet the definition of "local" as long as the evidence supports the conclusion.

  As another example, the IRS regulations define an organization of a purely local charter as one whose business activities are confined to a particular community, place or district, irrespective, however, of political subdivisions. If the activities of an organization are limited only by the borders of a State it cannot be considered to be purely local in character.[8]

  "Major Trade Areas" (MTAs), identified in the *Rand McNally 1992 Commercial Atlas and Marketing Guide*, 123rd Edition at pages 38-39, serve as the most appropriate definition for "local service areas" under the Federal Communications Commission regulations.[9]

- The recognition that defining and proving a WDLC is not an exact science. Rather than trying to use definitive criteria, credit unions would be better served with a definitive review process that results in NCUA determinations that the credit unions can rely upon in developing and implementing their business plans and strategies.

- The use of criteria that is applicable across the county. For example, using school districts and taxing authorities as criteria to prove WDLC doesn't make sense in every state. Again, the use of NASCUS as a resource for developing common and standardized criteria among the state regulators would be helpful.

Business and Marketing Plans:

As noted in the proposal, the second criterion, after establishing the existence of a WDLC, is for a Federal credit union to demonstrate it is able to serve the WDLC.

The proposal includes additional guidance regarding NCUA's expectations with regard to the credit union's business and marketing plans. The example cited by NCUA is that a Federal credit union with $150 million in assets cannot reasonably expect to be able to serve a community of 1.5 million people. The proposal lists what NCUA believes a meaningful market plan must demonstrate.

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[7] Pennsylvania Bankers Association, et al. v. Pennsylvania Department of Banking, et al., 42 M.D. 2005, 98 M.D. 2005, 157 C.D. 2005, 158 C.D. 2005 (page 27).
[8] 26 C.F.R. § 1.501(c)(12)-1.
[9] 47 C.F.R. § 51.701. *Verizon Wireless (VAW) LLC, et. al. v. Sahr, et. al.*, 457 F.Supp.2d 940, 948 (2006).

Our group respectfully requests that NCUA clarify and acknowledge that the standards identified in the proposal do not mean a credit union has to reach all corners of a proposed community at the time of approval. Rather, it is our position, which we submit is consistent with the principals of safety and soundness, that a credit union should be able to grow into its business and marketing plans in a systematic and controlled manner.

We also recognize that there may be instances in which the NCUA, based upon its experience, believes it to be in the best interest of the credit union, its members and the NCUSIF to approve a smaller area until the credit union demonstrates its ability to grow its operations in a safe and sound manner. Accordingly, NCUA must find a way to permit smaller credit unions to serve a portion of a county, such as adjacent school districts or a cluster of boroughs/townships. To do that, the credit union arguably needs the flexibility of demonstrating a WDLC through a narrative approach.

In addition, our group respectfully objects to provisions included in the proposal that require the appropriate regional office to follow-up with a federal credit union every year for three years after approval. These follow up visits are designed to determine if the credit union is "satisfying the terms of its marketing and business plans." We acknowledge that it may be appropriate for NCUA to monitor whether a credit union serving an underserved community is actually serving its members. However, our group does not believe that it is appropriate for NCUA to interfere with the business and marketing plans of a well-capitalized, well-managed community chartered credit union.

We absolutely recognize NCUA's responsibility and authority to examine federally chartered credit unions for safety and soundness and to impose any necessary conditions in order to protect the share deposit insurance fund. However, the proposal goes beyond the scope of safety and soundness. As NCUA knows, business and marketing plans are fluid documents that must be adjusted from time to time to respond to the conditions of the economy and the markets it serves. Accordingly, if the credit union is well-capitalized and well-managed, the management and business decisions of the credit union must be left in the hands of its officers and directors.

Rural Districts:

The NCUA Board proposes to define a rural district as a contiguous area that has more than 50% of its population in census blocks that are designated as rural and the total population of the area does not exceed 100,000 persons. NCUA's stated goal is to ensure that a rural district has both a small total population and a majority of its population in areas classified as rural by the Census Bureau.

The following definitions are included on the US Census Bureau website:

Urban

- All territory, population, and housing units in urban areas.
- A cluster of one or more block groups or census blocks, each of which has a population density of at least 1,000 people per square mile at the time.
- Surrounding block groups and census blocks, each of which has a population density of at least 500 people per square mile at the time.
- Less densely settled blocks that form enclaves or indentations, or are used to connect discontiguous areas with qualifying densities.

Rural

- All territory, population, and housing units not classified as urban

Urban areas can be inside or outside of metropolitan areas. Geographic areas such as counties and places can contain urban areas, rural areas, or both.[10]

The proposed definition of a rural district is unworkable and meaningless in Pennsylvania due to the demographics of the state. Almost every county or area in Pennsylvania that would qualify as rural has an urbanized area or cluster as those terms are defined by the US Census Bureau.

The impact of implementing the proposed definition of rural district in Pennsylvania would be the following:

- Only very small and sparsely populated areas would qualify as rural districts. Those areas could not support a viable credit union.
- Credit unions interested in serving areas that meet the definition of rural would be required under the new definition of WDLC to serve the entire county that includes the rural area (under the single political jurisdiction definition of WDLC) and then in most cases be limited to only serving that one county. Most of the more sparsely populated counties in Pennsylvania are designated as their own Micropolitan Statistical Area.
- Due to the above restrictions, it is likely that many of the areas that qualify as rural in Pennsylvania would not have access to the benefits of credit union membership.

For the reasons stated above, our group objects to the definition of rural district in the proposal and also reiterates its objection to the elimination of being able to prove a WDLC by tying together subjective evidence and data. It is imperative that Pennsylvania credit unions retain the ability to submit narratives in order to protect the possibility of credit union membership for Pennsylvania residents in rural areas.

We also object to the population cap proposed in the definition of rural district as being unnecessarily limiting under the provisions of the Federal Credit Union Act that allow rural district credit unions.

Again, we encourage NCUA to look to demographics and media markets for purposes of establishing rural districts.

Underserved Communities:

As stated in the proposal, NCUA adopted final rules modifying its chartering manual to update and clarify four aspects of the process and criteria for approving credit unions to serve underserved areas.

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[10] https://ask.census.gov/cgi-bin/askcensus.cfg/php/enduser/std_adp.php?p_faqid=623&p_sid=gP55jBWj&p_created=1092150238&p_sp=cF9zcmNoPSZwX3NvcnRfYnk9JnBfZ3JpZHNvcnQ9JnBfcm93X2NudD0mcF9wcm9kcz0mcF9jYXRzPSZwX3B2PSZwX2N2PSZwX3BhZ2U9MQ!!&p_search_text=rural%20areas%20classification

The rule clarified that an underserved area must independently qualify as a WDLC. Again, if the narrow definition of WDLC is adopted by NCUA as proposed, this requirement alone would make the ability to serve underserved communities in Pennsylvania meaningless for the same reasons the definition does not work for rural districts. Accordingly, we ask for the opportunity to prove underserved areas using subjective criteria and analysis. We also believe that state regulators could be helpful to NCUA in identifying areas/residents within their borders in need of reasonably priced, wealth building financial services and products.

Another aspect of the rule that is problematic is the implementation of the requirement for documentation demonstrating that a proposed area has "significant unmet needs" among a range of specified financial products and services. PCUA provides assistance to credit unions that apply for underserved areas. In order to satisfy this requirement, NCUA staff has been requiring credit unions to show that they provide financial services that are not currently being offered in the proposed underserved area. This requirement has proven to be un-provable and has resulted in credit unions abandoning their request to serve underserved areas.

We agree that credit unions wanting to serve underserved areas should demonstrate the ability to serve the area through marketing and business plans. However, the goal should be to make adding and serving underserved communities under their fields of membership easier for credit unions so that underserved areas/individuals has access to credit union products and services. We submit that an area should qualify as underserved if it is designated as such under the Community Development Financial Institutions (CDFI) definitions.

Emergency Mergers:

The Federal Credit Union Act allows a credit union that is either insolvent or in danger of insolvency to merge with another credit union if the NCUA Board finds that an emergency requiring expeditious action exists, no other reasonable alternatives are available, and the action is in the public interest. The Board may approve an emergency merger without regard to common bond or other legal constraints, such as obtaining the approval of the members of the merging credit union to the merger.

As noted in the proposal, the statute does not define when a credit union is "in danger of insolvency" nor has NCUA previously issued a formal definition. We appreciate NCUA's goal to provide certainty and consistency in how NCUA defines "in danger of solvency." However, we submit that the standards proposed are too restrictive and will result in unintended consequences:

- The requirement that the credit union's net worth be declining at a rate that will render it insolvent within 24 months and/or take it under two percent net worth within 12 months is too late and will eliminate voluntary supervisory/emergency mergers.

- The requirement that the credit union's net worth is significantly undercapitalized, given existing stress on the capital, creates a disincentive for a healthy credit union to consider or participate in an emergency merger transaction.

- The above criteria will result in all supervisory/emergency mergers being categorized as assisted mergers. Meaning, healthy merger partners will scrutinize classified assets and negotiate for supervisory assistance, which will result in more costs to the share insurance fund, and, ultimately insured credit unions.

Supervisory/emergency mergers should be permitted at earlier stages prior to the complete depletion or elimination of the credit union's capital and assets. Allowing a failing credit union to merge earlier than proposed is in the public's best interest as it preserves both the safety and soundness of the acquiring credit unions, as well as, the National Credit Union Share Insurance Fund (NCUSIF).

Equally important in the merger context is the merger accounting rules in supervisory mergers and in mergers with small credit unions (asset size equal to less than $20 million). Our group asserts that the current accounting rules need to be more flexible in these instances. In particular, supervisory mergers or mergers involving small credit unions should be exempt from the market evaluation and analysis requirement of assets and liabilities due to the complexity, costs and burden of developing and creating such evaluations and analysis. We assert that this requirement is unnecessary and does not provide benefits that outweigh the significant costs and expenses in those instances.

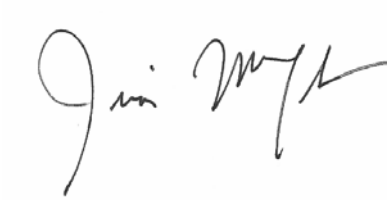
PCUA is able to provide more detailed and antidotal information regarding this request to NCUA. Our group's position is very strong that the market evaluation requirement in the context of small credit union mergers does not provide benefits to the member/owners of either credit union.

Again, we believe that the regulations/requirements lose sight of the goal, which should be to provide for the continuation of credit union service to members from a financially strong credit union (as stated in the NCUA proposal).

Thank you again for this opportunity to provide comments on this very important proposal. Please feel free to contact me or any of the PCUA staff at 1-800-932-0661 if you have any questions or if you would like to discuss the contents of this letter.

Sincerely,

PENNSYLVANIA CREDIT UNION ASSOCIATION



James J. McCormack
President/CEO

JJM:LSK:llb

cc: Association Board
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