

June 20, 2014

Gerard Poliquin  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, Virginia 22314-3428

re: National Credit Union Administration; Chartering and Field of Membership Manual; 12 C.F.R. Part 701; 79 Federal Register 24623, May 1, 2014

Dear Mr. Poliquin:

The National Credit Union Administration (NCUA) has requested comments on a proposal which would amend the associational common bond provision of NCUA's chartering and field of membership (FOM) rules. Specifically, the amendments establish a threshold requirement that an association not be formed primarily for the purpose of expanding a federal credit union's membership. In addition, the amendments expand the totality of the circumstances test to include additional criterion regarding corporate separateness.

This proposal is an improvement in NCUA's current associational common bond requirements and the American Bankers Association<sup>1</sup> (ABA) supports the agency's attempt to filter out groups that do not meet the requirements. The proposal highlights the fact that in an attempt to expand potential FOMs beyond appropriate limits, a few federal credit unions (FCUs) have begun forming their own associations and adding independent associations to their FOMs that may not fully satisfy the intent of the associational common bond rules. ABA believes that the implementation of these proposed amendments could eliminate these violations, if strictly enforced.

While ABA supports NCUA's proposal, ABA believes the proposed rule could be further improved by adding additional factors to be considered when determining corporate separateness during the totality of circumstances test. In addition, ABA wants to stress the importance and responsibility of NCUA to enforce these new amendments.

### ***NCUA's Proposal***

The NCUA has proposed to amend the associational common bond provision of NCUA's chartering and FOM rules. Specifically, the amendments establish a threshold requirement that an association not be formed primarily for the purpose of expanding credit union

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<sup>1</sup>The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its 2 million employees. Learn more at [aba.com](http://aba.com).

membership. If NCUA makes the determination that an association was established for the primary purpose of expanding a credit union's membership, then the analysis would end and the association would be denied inclusion in the credit union's FOM. If NCUA determines the association was formed to serve a separate function as an organization, then NCUA will apply the totality of the circumstances test to determine whether the association satisfies the associational common bond requirements. Moreover, NCUA notes that "the association must have been operating as an organization independent from the requesting FCU for at least one year prior to the request to add the group to the FCU's FOM."

The proposed amendments expand the totality of the circumstances test to include additional criterion regarding corporate separateness between the association and the credit union. The association and the credit union will be required to operate in a way that demonstrates the separate corporate existence of each entity. The proposal lists factors that NCUA will consider in determining if corporate separateness exists, including:

- Their respective business transactions, accounts and records are not intermingled;
- Each observes the formalities of its separate corporate procedures;
- Each is adequately financed as a separate entity in light of normal obligations reasonably foreseeable in a business of its size and character;
- Each is held out to the public as a separate enterprise; and
- The group maintains a separate physical location, which does not include a P.O. Box or other mail drop or on premises owned or leased by the credit union.

The NCUA has also proposed to grant automatic qualification under the associational common bond rules to certain categories of groups that NCUA has approved in the past after applying the totality of the circumstances test. These associations include, but are not limited to, churches, labor unions and scouting groups.

### ***ABA's Position***

ABA believes that there needs to be a meaningful affinity and bond among association members in order to satisfy the associational common bond requirement. As NCUA acknowledged in 1998, "[t]he common bond for an associational group cannot be established simply on the basis that the association exists."<sup>2</sup>

ABA supports the NCUA proposal to strengthen its current associational common bond requirements. If enforced, the proposed amendments should allow the NCUA to stop abuses of the associational common bond rules as a vehicle just to expand the customer base and to ensure there is a strong and true common bond among a credit union's members.

However, ABA would like to make several suggestions that we believe would further strengthen the proposed rule.

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<sup>2</sup> Federal Register, Vol. 63, No. 250, December 30, 1998, p.72027

- (1) ABA believes additional factors should be considered to strengthen the determination of corporate separateness as a part of the totality of the circumstances test.
- (2) ABA would like to stress the importance and responsibility of NCUA to forcefully enforce the proposed amendments.
- (3) ABA is concerned that the proposal grants automatic qualification for some associations that do not meet FOM requirements.
- (4) ABA recommends that NCUA re-instate a geographical restriction for associational common bonds.

### *Strengthening Corporate Separateness Test*

ABA believes additional factors should be considered to strengthen the determination of corporate separateness as a part of the totality of the circumstances test. In addition to the factors listed in the proposal, NCUA should consider the following:

#### *Separateness of Boards*

Persons, who serve as a credit union official or senior management, or any immediate family members, should not receive any type of compensation from the association. Such a measure is necessary and appropriate to assure corporate separateness between the credit union and the association. Likewise, the board of the association should not have any credit union employees or officials, or their immediate family members, as this would represent a lack of separateness between the two.

#### *Prohibit Tying Membership Eligibility Directly to Association Membership*

The proposal notes that a factor to be considered in determining corporate separateness between an FCU and an association will be if “each is held out to the public as a separate enterprise.” When determining if the association and credit union satisfy this objective, the agency should ensure that an FCU does not have a click through option on the credit union’s membership eligibility webpage to the association. Furthermore, an FCU should not be permitted to make statements tying credit union membership eligibility to membership in the association. For example, statements, such as “You can join by joining association for one-time fee,” should reflect negatively on whether the association is being held out as a separate entity from the credit union.<sup>3</sup>

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<sup>3</sup> Pentagon Federal Credit Union makes the following statement on its membership eligibility page: “We’ve made it easy for you to join one of these associations, which makes you eligible to join PenFed.” This type of statement does not support the idea of corporate separateness, nor does it support the idea that members truly support the goals and mission of the associations. These types of statements should not be permitted.

### *Prohibit Simultaneous Membership in Association and Credit Union*

ABA suggests NCUA further strengthen the corporate separateness test by requiring that individuals not be able to join the association and an FCU simultaneously. When an individual joins the association and credit union simultaneously, there is little evidence to support that the member truly supports the goals and mission of the association, and is not solely joining the association to be eligible for membership in the credit union. If a member is using the association solely for credit union membership eligibility, it would suggest that the individual does not see the credit union and association as separate enterprises—a requirement of the corporate separateness totality of circumstances test. ABA would suggest there should be at least a three month period between joining an association and becoming eligible for credit union membership.

### *Prohibit Credit Union from Paying Association Membership Dues*

ABA would ask NCUA to reconsider its opinion that a credit union may pay a member's associational dues if the member has given consent. This transaction suggests a lack of distinction between an association and an FCU and therefore, a lack of corporate separateness. In addition, if a member is unwilling to pay the associational dues, their support of the association's goals and mission should be questioned and one could infer that a meaningful bond among the credit union members does not exist.

### *Strong Enforcement of the Rule is of Utmost Importance*

The importance of strict enforcement of the new amendments put forth in this proposal cannot be overstated. NCUA must create an oversight and enforcement mechanism to ensure that associational common bond requirements are being appropriately met and FOM requirements are not being abused. ABA suggests that NCUA incorporate into its strategic plan a realistic goal specifying a number of credit union FOM audits to be completed each year. It is necessary that NCUA ensure the proposed amendments are properly implemented and adhered to.

In addition, Congress in 1998 amended the Federal Credit Union Act to clarify existing law with regard to the FOM of a FCU. The law states that “a meaningful affinity and bond among members...is essential to the fulfillment of the public mission of credit unions.”<sup>4</sup> It is NCUA's responsibility to ensure the desires of the Congress are upheld, which means ensuring members are truly supportive of an association's goals and mission before joining the credit union. As NCUA determines an association's qualification for credit union membership it should ensure the association truly represents a meaningful bond among its members.

### *Automatic Qualification of Associations*

ABA is concerned that the proposal grants automatic qualification for associations that do not meet FOM requirements. The NCUA has historically approved certain associations almost

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<sup>4</sup> Public Law 105-219, Section 2(3)

without exception due to their structure, practices and functions. For example, churches, labor unions and scouting groups. However, associations based on a client-customer relationship do not meet associational common bond requirements.<sup>5</sup>

ABA would challenge whether electric cooperatives and homeowner associations should qualify for automatic qualification. Electric cooperatives represent a client-customer relationship and therefore do not meet associational common bond requirements. Membership in a homeowner association is typically a condition for purchasing a home—a buyer is not given an option to reject it. Forced membership into an association does not make a meaningful bond among members and should reflect negatively on the association’s qualification for credit union membership. ABA is concerned that automatic qualification for certain associations will allow some associations to qualify that do not truly meet the requirements for an associational common bond. The bottom line is that each association should be carefully examined before approval is given.

### ***Associations Should Be Limited in Geographic Scope***

In 1998, NCUA determined an associational charter may be granted without regard to the geographic location of the association’s members or headquarters.

ABA believes that the absence of a geographic restriction has made it possible for an FCU to serve individuals who would otherwise be ineligible for credit union membership. This has allowed some FCUs to serve anyone in the United States.

Moreover, without geographic limits, it is difficult for the members of the association to have a commonality of routine interactions, interests, or activities, which is essential for the common bond. As a result, a sense of cohesion among the associational members will be lacking. Furthermore, the lack of geographic limitation would appear to violate the totality of the circumstances test.

Therefore, while not part of the proposed rule, ABA requests that the NCUA Board establish geographic limitations on the scope of associational membership.

### ***Conclusion***

The ABA supports the NCUA proposed amendments to strengthen its current associational common bond requirements. However, the ABA believes that additional factors should be considered to further strength the determination of corporate separateness as a part of the totality of the circumstances test in order to ensure FOMs are not being expanded beyond appropriate limits. The ABA believes that rigorous enforcement of the proposed amendments would allow NCUA to better ensure that associations fully satisfy the intent of the associational common bond rules—ensuring a meaningful common bond among a credit union’s members.

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<sup>5</sup> 12 CFR part 701, Appendix B (Chapter 2, Section III.A.1)

ABA appreciates the opportunity to share its views and would be happy to discuss any of them further at your convenience. If you have any question, please contact Keith Leggett at (202)663-5506 or by e-mail at: [kleggett@aba.com](mailto:kleggett@aba.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Leggett". The signature is written in a cursive style with a large initial "K".

Keith Leggett  
Vice President & Senior Economist