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June 17, 2014

VIA E-MAILONLY:
REGCOMMENTS@NCUA.GOV

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

Re: SW&M Comments on Notice of Proposed Rulemaking Regarding Associational Common Bond

Dear Mr. Poliquin:

We are writing to comment on the Notice of Proposed Rulemaking Regarding Associational Common Bond field of membership (the "Proposed Rule"). Our law firm has represented primarily credit unions for over 30 years, and we currently represent hundreds of credit union clients nationwide. We believe our history and experience with field of membership issues, including representation regarding the issues the NCUA is responding to in the Proposed Rule, may prove helpful for the NCUA in considering Associational Common Bonds and the provisions of the agency's chartering policy. To the extent our comments are not included as a part of this rulemaking, we ask that they be considered as comments to the June 4, 2014 Regulatory Review Pursuant to EGRPRA, which also includes field of membership/chartering in its scope.

Though the NCUA's Field of Membership and Chartering Manual's seven bullet points covering the totality of the circumstances test have not resulted in consistent application of FOM rules, we do not believe the Proposed Rule as currently envisioned will solve that problem. We have strong concerns about the manner in which certain aspects of the Proposed Rule's and Supplementary Information's discussion treats associational groups, and the potential application of the language in the Proposed Rule.

As discussed in the sections below, we believe the Proposed Rule should address the following areas: (1) quality assurance reviews, if not conducted under clear guidelines in this rulemaking, could likely result in unintended consequences for free association and consumer choice; (2) further clarification should be provided that there will not be divestiture of members as a result of application of the Supplementary Information; (3) the totality of the circumstances test has been applied in contradictory manners which should be addressed; (4) service areas for

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multiple common bond credit unions, particularly related to associational groups, do not reflect modern technology and/or are ambiguous in their definitions; (5) the concept of service areas should be revisited; and (6) the threshold test should be supplied with objective criteria on which associations will be judged.

I. Examination of Current FOM Groups

The NCUA's discussion of Quality Assurance Reviews states,

> "Without the geographic limitation, NCUA is finding that associational groups, in conjunction with or at an FCU's instigation, are adding members outside of the FCU's historical operating area to increase FCU membership. This practice does not comply with the limitations in the Chartering Manual. Other associations have changed significantly since they were added to an FCU's FOM, and no longer meet the criteria for the totality of the circumstances test they once met."

We have strong concerns that this language suggests a policy that will limit choices of consumers, as well as create an environment where multiple common bond credit unions are uncertain of the meaning of the "service area" definition and its application. Our concerns are particularly relevant when considering the types of groups to which the Associational Common Bond Rule appears to apply—local, small, and centralized associations which have as their focus physical and personal activities. This focus seems to fail to recognize the significant changes that have taken place over the last twenty years in the manner in which people associate.

Some associations are focused on local interests, and it may seem that such local interest associations may not have appeal to persons outside of the geographic locale. However, in today's highly transient population, and with the viral popularity of many causes, associations, or groups on the internet, it is not unlikely that single individuals or large groups from outside of a local area might support and participate in a local cause.

For example, persons who move away from a locality might continue to support and participate in schools, charities, disability support associations, or other groups, despite their lack of physical presence in the specific geographic locality. As another example, through the internet huge outflows of support and participation from around the country and world frequently go toward local causes.

These are clearly legitimate reasons for members outside of a locality to support and participate in a local cause. The issue is that we do not believe it is the role of the government to determine what is or is not a "legitimate" reason for any individual to join

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an association. Accordingly, we have strong concerns that absent firm guidance from the NCUA Board that the Office of Consumer Protection is not to examine why individuals (individually or en masse) might choose to join an association (provided the individuals appear to have intentionally joined at the time), the application of the above language will result in overly restrictive inquiry into the motives of persons in their associations. Additionally, if credit unions need to be concerned about "adding members outside of the FCU's historical operating area," this calls into question the meaning of a "service area." Historically, and under the language of the Chartering Manual, groups must be within the service area of a multiple common bond credit union in order to be added to their FOM, not all of the members of a group.

The "group" has to be within that service area, but where a "group" is can also carry with it confusion. In the employment context, a group can include either employees who work at a facility or area, or it can include employees "paid from" a facility. We believe the NCUA's discussion in the Supplementary Information makes "location" for associations less clear, and more restrictive than "location" for employment-based groups.

The clear examples for associations occur when the members of the association reside or gather in one geographic area and the headquarters of the association is in the same area. A church is likely to have members all within a reasonable distance from the church itself, and the church facility would need to be within a reasonable distance from the credit union's branch. But for other types of organizations, for example the American Association of Attorney-CPAs,[1] the members of the association may be scattered geographically. In those circumstances and under the current rules, it is normally the headquarters of the association that determines the location of the association. If the "service area" restrictions are retained in the FOM rules, we believe the NCUA should continue to consider the headquarters of an association, or any place where the members of the association gather or participate in activities, to be its "location."

Under that determination of "location," it should not matter where members of the association live or from where they participate in the association. It should be made clear that associations need not restrict their membership to the service area of a credit union in order to be included in the credit union's charter, and that credit unions without geographic limitations in their charters need not artificially restrict credit union membership to persons within their service areas.

Between the issue of "location" of associations, the ambiguity of service areas (discussed in additional detail below), and the potential encroachment of quality assurance reviews of consumers' freedom to associate, we believe that quality assurance reviews should be

[1] https://www.attorney-cpa.com/eweb/startpage.aspx.

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carefully circumscribed to ensure that they do not becomes unnecessary and impermissible inquiries.

II. Results of Examinations

The Supplementary Information alludes to the concept that members added through associations will be permitted to remain members of a credit union if the NCUA determines that the association does not meet the totality of the circumstances test in any examination. Divestiture of members and loans is an extreme remedy which we have observed at least one examiner suggest to a credit union as a result of a quality assurance review. We have strong concerns that absent clear communications from the NCUA Board examiners may threaten credit unions with divestiture as a result of adding members through an association approved by the NCUA which is later deemed to not comply with FOM rules. Accordingly, we believe the Supplementary Information should clearly provide that divestiture of members will not be required of credit unions absent fraud in the application for the group.

III. Application of the Totality of the Circumstances Test

We are concerned that some of the statements in the Supplementary Materials regarding the Totality of the Circumstances test appear to conflict with the practices we have observed in quality control reviews of the NCUA Office of Consumer Protection.

For example, the Supplementary Information states that, "An FCU may pay a member's associational dues if the member has given consent." We agree that this is and should continue to be the case, as FCUs are permitted to both offer incentives for membership and provide various types of assistance to sponsor groups. Paying dues directly to an association is merely an administrative convenience.

However, the OCP has previously suggested that a credit union paying dues on behalf of a prospective member lends itself as a fact toward an adverse finding regarding multiple bullets in the totality of the circumstances test, including payment of dues and member participation in the furtherance of the association's goals. Credit union incentives for membership should not be counted against associations in the totality of the circumstances test.

Additionally, we have concerns about the revised wording of newly arranged factor number 4: whether the association's membership eligibility requirements are authoritative. This has been adjusted from "the association's membership eligibility requirements." The word "authoritative" in this context appears to be ambiguous. It is unclear to us whether it means that the eligibility requirements are not deviated from (its

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most obvious meaning), or some other requirement that the eligibility requirements have a definitive character. For those groups with eligibility requirements based on an interest in a hobby, cause, or belief, it may be "authoritative" that the individuals express an interest in that cause and there are no exceptions, or it may not be "authoritative" because it cannot be confirmed apart from the member's expression of interest.

Again, this is an area where we see danger of the rule introducing analysis which we do not believe are appropriate for the federal government, such as determining which interests are or are not legitimate bases for associations. We do believe that associations must have some variety of eligibility requirement, and that associations making exceptions to those requirements should be a factor. However, we do not believe that differentiating between the type of interest needed to be expressed in order to join a church or the type of interest needed to join an association based on an interest in preserving the American Chestnut[2] is an appropriate analysis. We hope that this can be clarified in the Final Rule.

IV. Additional Aspects of Modern Associational Bonds

While the totality of the circumstances test has been in place for many years and continues to describe many traditional types of associations, we are concerned that the test may not adequately capture communities of people participating in shared interests and goals using modern technology. Numerous communities exist on the internet, remotely, using Skype or similar technology, or even entirely virtually in environments like *Second Life*.[3] Some groups in long-standing popular video games[4] are more closely knit and regularly share experiences and further goals than many alumni groups.

However, the totality of the circumstances test, particularly when combined with the requirement that an association be within the service area of a multiple common bond credit union, would appear to practically speaking preclude those types of associations from obtaining credit union membership. For example, an internet forum might have a membership list, requirements of interest in a cause to join, and participation in discussions, research, and public activism. Some also sponsor in person gatherings around the country and world and require dues payments. But where would that

[2] See the American Chestnut Foundation: http://www.acf.org/.
[3] *Second Life* (http://secondlife.com/) is a software environment created by Linden Lab in which individual users can interact through "avatars." Users have even created and participated in entire college campuses through this software, which also supports its own marketplaces and forums. For more information on *Second Life*, its Wikipedia page is informative: http://en.wikipedia.org/wiki/Second_Life.
[4] Such groups have been memorialized in popular culture via TV shows in the past decade. See *Big Bang Theory* (http://www.imdb.com/title/tt0898266/), *The Guild* (http://www.imdb.com/title/tt1138475/), and numerous other shows and movies for examples.

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association be "located"? Would the members of Fark.com[5] be "located" in Kentucky because that is where the founder lives, despite worldwide participation in the internet community? Would a group based in Second Life be "located" in San Francisco because Linden Lab (the maker of the software) is located there?

A similar issue arises with the factors that ask whether an association sponsors activities, or whether there is a frequency of meetings. An internet community might meet constantly, even if it does not have in-person gatherings. "Sponsoring activities" begs the question of what an activity entails, and whether political activism, discussing topics of common interest within the mission of the organization, or gathering to discuss strategies to deal with credit card debt constitute "activities" in the eyes of the NCUA.

Because of the changing ways that individuals can associate, we believe recognition of those changes may also be necessary in the NCUA's FOM rules.

V. Revisiting Service Areas

While the NCUA is revisiting the Chartering Manual, we strongly believe the NCUA should entirely revisit its discussion of service areas as they relate to multiple common bond credit unions. As discussed above, this affects what groups can join credit unions (as a result of their locations), and how the Office of Consumer Protection examines credit unions on FOM issues.

Currently, groups are required to be within a multiple common bond FCU's "service area" to be added to its FOM. Service area has generally (through legal opinion letters and the definitions in the Chartering Manual) defined as the area in which consumers would reasonably go to obtain financial services based on the local geography. This has resulted in a 25 mile radius from branches being applied as a base service area assumption.

However, as discussed in part above, neither common bond[6] nor ability to serve can reasonably be related to geographic location today. Many consumers of all ages now receive all of their financial services electronically. With Home Banking, Mobile Banking, Remote Deposit Capture, and fee-free ATMs, a connection to a financial institution need not be geographic. Non-documentary methods of performing CIP functions continue to grow in popularity.

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[5] Fark.com is a website which acts as a news aggregator, but also has users who participate in more private web discussions and community participation, including occasionally meeting at "Fark Parties" in person. *See* http://www.fark.com/farq/.

[6] As addressed above.

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The trend away from geographic links to financial institutions is further evidenced by the wide-scale closure of bank and credit union branches in recent years. As of 2013, bank branches were at their lowest level since 2006.[7] Credit Unions downsized their branch networks significantly with the financial crisis, though their members continued to obtain services.

With these historical developments, continuing to tie membership availability to geography seems to be somewhat antiquated. Additionally, these historical trends are likely to continue. Accordingly, the NCUA should revisit the "service area" requirement, and potentially replace it with a requirement that credit unions show instead that they have the ability to leverage technology to provide services to members of the requesting group.

VI. Application of the Threshold Test

We are concerned about how the "threshold test" for associational common bonds will be applied, considering the paucity of discussion of this issue in the Proposed Rule or its Supplementary Information. The NCUA has proposed that an association only be acceptable if it has not been "formed primarily for the purpose of expanding credit union membership." We note with interest that the word "primarily" in other contexts in the NCUA's Rules and Regulations has been purposefully undefined (e.g., the "primarily serves" test in the CUSO context).

The Proposed Rule then proceeds to offer an alternative statement of the rule, that the association must have been "formed to serve some other separate function as an organization." This is a separate test from "not formed primarily for the purpose of expanding credit union membership." The distinctions between these two tests will, doubtless, make it difficult for this rule to be enforced in a consistent and objective manner.

In the Supplementary Information to the Proposed Rule, in a single footnote, objective content has been supplied which is not contained in the Proposed Rule (which Proposed Rule otherwise contains identical language as the Supplementary Information): an 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."

[7] See Saabinra Chaudhuri, *U.S. Banks Prune More Branches*, Wall Street Journal (Jan. 27, 2014), *available at* http://online.wsj.com/news/articles/SB10001424052702303277704579347223157745640.

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A test involving one year of corporate separateness and independent mission does provide an objective measure, but through its application may result in groups that want credit union service being delayed from obtaining it until they have been established for a sufficient period of time. Such a duration standard is not applied to employer groups. But, if one year of existence is to be a measure of primary formation, then we believe it should be clearly stated in the Proposed Rule. If there are to be other measures, then we believe those should be clearly delineated as well, with an opportunity for the public to comment on the full contents of the proposal.

However, we also have concerns that with any threshold test involving formation and operation separate from the requesting FCU, the application of these tests will involve such intensive application materials as to effectively prohibit less well-run or administratively adroit associational groups from receiving credit union services.

Accordingly, we are unsure whether the threshold test, to the extent it is even necessary to avoid abuse of associational common bond FOMs, is practical. Rather, we believe the NCUA could use its current (or a modified) totality of the circumstances test to determine whether the members of an association actually interact with each other if the NCUA suspects that an association does not have true member interaction. In short, a separate test may not be necessary.

Conclusion

Because of the above issues, we believe the Proposed Rule, or at least the Supplementary Information, should be altered to address FOM examination rules and the application of the factors included in the rule. We also believe the NCUA should revisit service areas and the general tests for associational common bonds to ensure that they allow for modern types of associational connections.

If you have any questions, please do not hesitate to call.

Sincerely,

STYSKAL, WIESE & MELCHIONE, LLP

Timothy I. Oppelt

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