

January 11, 2016

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

Re: 12 CFR Part 701 Chartering and Field of Membership Manual

Dear Mr. Poliquin:

The National Credit Union Administration (NCUA) Board (the Board) is proposing substantial changes to its field of membership (FOM) and chartering manual.

The proposed rule would amend NCUA's chartering and FOM rule by:

- Facilitating the addition of new groups to multiple common bond credit unions;
- Enlarging the pool of potential members by expanding the areas that may be served by a community charter; and
- Expanding the "rural district" definition to include populations of up to 1 million people.

In justifying the proposed changes to its FOM regulations, NCUA Board Vice-Chairman Metsger stated: "Recognizing that Congress is deadlocked on most financial issues, the agency has an obligation to the system to modernize rules, which haven't been updated in almost two decades, especially when federal rules have not kept up with changes in state charters, and there is a noticeable lack of balance in the dual chartering system. State charters are increasingly more flexible than federal charters and give many state-chartered credit unions opportunities to serve their members and their communities in ways that federal credit unions both lack and need."<sup>1</sup>

### **Position**

In an effort to keep the federal charter relevant, the Board is in a race to the bottom with the states to render the concept of common bond virtually meaningless. Unfortunately throughout this proposed rule, the Board is overstepping its authority as the Board supplants its judgement for that of Congress. Therefore, the Board should not proceed with this proposed rule. If the Board believes these changes are needed, the Board should go to Congress to amend the Federal Credit Union Act (FCUA).

This comment letter will specifically address proposed changes in three areas – well-defined local communities, rural districts, and multiple common bond credit unions.

### **Well-Defined Local Community**

**NCUA's Community Charter Proposal Goes beyond Any Reasonable Definition of Local**

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<sup>1</sup> <https://www.ncua.gov/newsroom/Pages/proposed-field-membership-rule-metsger-remarks.aspx>

NCUA's proposed rule – which significantly expands the definition of community beyond any reasonable definition of “local” – circumvents Congressional intent as expressed in the Credit Union Membership Access Act (CUMAA)<sup>2</sup> and goes beyond NCUA's underlying statutory authority for chartering and establishing field of membership requirements for federal credit unions. The proposed rule ignores CUMAA's mandate to limit the field of membership boundaries of federal credit unions to “a meaningful affinity and bond among members in the context of shared and related work experiences, interests, or activities, the commonality of routine interactions, and a well-understood sense of cohesion or identity.”

The NCUA Board proposes to, in effect, excise the term “local” from the Federal Credit Union Act (FCUA). When Congress amended the Act by enacting CUMAA in 1998, it intentionally inserted this term as a means of limiting the geographic scope of community chartered credit unions.

There are reasons why Congress imposed the limits on community charters. Congress has provided credit unions with certain advantages, but with those advantages there are also limitations, such as the size and scope of community credit unions. It is not the expressed intent of Congress for credit unions to become an alternative, tax-exempt bank. Moreover, Congress understood that if a community credit union were going to fulfill its public mission, there needed to be a meaningful affinity and bond among members, manifested by a commonality of routine interactions. The Act defines the permissible membership for a community credit union as “persons or organizations within a well-defined local community, neighborhood or rural district.” In adding the word “local” to the already existing term “well-defined,” Congress clearly intended to impose finite and narrow limits on the area that a community credit union may serve.

In its proposed rule, the Board is proposing to treat a Combined Statistical Area and a Congressional District as a well-defined local community. Unfortunately, neither a Combined Statistical Area nor, in many instance, a Congressional District is a well-defined local community.

### **Combined Statistical Area Is Not Local**

The National Credit Union Administration (NCUA) Board is proposing to allow a Combined Statistical Area with a population limit of 2.5 million to be treated as a de facto well-defined local community.

According to the Office of Management and Budget (OMB), there are currently 174 Combined Statistical Areas as of July 15, 2015. These Combined Statistical Areas are comprised of 537 Core-based Statistical Areas. A Core-based Statistical Area is either a Metropolitan or Micropolitan Statistical Area.<sup>3</sup>

OMB introduced the concept of Combined Statistical Area in 2000. OMB stated that Combined Statistical Areas can be characterized as representing larger regions that reflect broader social and economic interactions, such as wholesaling, commodity distribution, and weekend recreation activities.

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<sup>2</sup> Public Law No, 105-219

<sup>3</sup> <https://www.whitehouse.gov/sites/default/files/omb/bulletins/2015/15-01.pdf>

However, as OMB noted, a Combined Statistical Area represents a larger region. A region is an expansive area, not a local community.

In fact, a Combined Statistical Area has numerous trade areas, multiple taxing authorities, and multiple political jurisdictions. This makes it more difficult for a Combined Statistical Area to qualify as a well-defined local community.

For example, Salt Lake City-Provo-Orem, UT Combined Statistical Area would qualify as a well-defined local community under the Board's proposal. The Salt Lake City-Provo-Orem Combined Statistical Area includes the Heber, UT Micropolitan Statistical Area; Ogden-Clearfield, UT Metropolitan Statistical Area; Provo-Orem, UT Metropolitan Statistical Area; Salt Lake City, UT Metropolitan Statistical Area; and Summit Park, UT Micropolitan Statistical Area. This Combined Statistical Area would encompass 10 counties. These 10 counties would have a land area of 23,356.18 square miles, which is larger than the land area of nine states and the District of Columbia.

However, two Federal Courts have ruled against NCUA in Utah and Pennsylvania, when the agency approved community charters comprised of multiple core-based statistical areas. The Federal Courts wrote that these areas did not meet the requirement of being a well-defined local community.

The Board should withdraw its proposal that a Combined Statistical Area that does not exceed 2.5 million in population is a de facto well-defined local community.

### **Congressional District Is Not Always a Well-Defined Local Community**

The Board is proposing that a Congressional District is a Single Political Jurisdiction, thus qualifying it as a well-defined local community without regard to population.. This represents a reversal of NCUA's previous position that a Congressional District did not meet the requirement of being a well-defined local community.

In justifying its change in policy, the Board noted that NCUA has, since 1999, approved 21 Single Political Jurisdictions that each have a population in excess of 1 million, while the average population of the United States' 435 Congressional districts is 710,767.

The proposal acknowledges that Congressional districts, structured for purposes of federal representation, reflect interaction and common interests among each district's constituents based on issues and matters decided at the federal level that affect them locally (e.g., economic, agricultural, and environmental).

However, many Congressional districts are not well-defined local communities. While a Congressional District in an urban area may have the characteristics of being local, Congressional Districts outside of urban areas will tend to cover large geographic areas crossing numerous political jurisdictions.

The Board acknowledges in its proposal that as a result of redistricting, the boundaries of an individual Congressional district may be redrawn. Since the boundaries of a Congressional District can change with redistricting, the boundaries of a Congressional District are not well-defined. Redistricting also raises serious concerns that there is a commonality of interests or interaction.

Moreover, this proposal would allow for a state-wide field of membership in states that have a single at large Congressional District. There are seven states represented by a single at large Congressional District. The seven states with a single at large Congressional District are: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. In addition, the District of Columbia and several U.S. territories would qualify as a well-defined local community.

Allowing an at large Congressional District to count as a Single Political Jurisdiction would be at odds to the Board's position that a state does not meet the requirement of being local.

The Board should retain its current policy that a Congressional District does not constitute as a well-defined local community.

## **Other Concerns**

### ***The Board Should Keep Core Area Requirement***

The Board is proposing to repeal the "core area" requirement when a federal credit union (FCU) applies for a community charter consisting of a portion of a Core Based Statistical Area.

As background, NCUA's FOM regulation since 2010 required that when an FCU applies to serve a community consisting of a portion of a Core Based Statistical Area, that portion must include the Core Based Statistical Area's "core area." NCUA defines a "core area" as the most populated county or named municipality in the Core Based Statistical Area.

NCUA noted that the primary purpose of this requirement was to acknowledge the core area of a Core Based Statistical Area as the typical focal point for common interests and interaction among residents. An additional purpose was to extend an FCU's services to low-income persons and underserved areas, both typically located in the "core area" of a Core Based Statistical Area.

NCUA is proposing to repeal this "core area" requirement; because the agency's review of FCUs' business and marketing plans over the last five years shows that FCUs are adequately serving low-income persons and underserved areas. In place of the "core area" requirement, NCUA proposes to annually review for three years an FCU's progress in implementing its marketing and business plan.

Unfortunately, the repeal of the "core area" requirement could allow FCUs to design community charters that resemble donuts by serving wealthier suburban counties and excluding markets containing low-income and minority communities that reside in the core area.

NCUA should retain the requirement that an FCU applying for a community charter include the core area. This would ensure that community charters do not redline low-income, minority, and underserved communities.

### ***NCUA Should Solicit Input on Addition of Adjacent Area to A Well-Defined Local Area***

The Board is proposing to allow an FCU to add an adjacent area to a well-defined local community or rural district. An FCU has an option to provide subjective narrative evidence that demonstrate interaction or common interests among residents of the proposed expanded community.

NCUA will base its decision on a consideration of the following factors with respect to the proposed service area in its entirety:

- Economic Hub: Evidence indicates residents commonly travel to a geographically compact locale within the area for work and major commerce needs. Traffic flows, the presence of common or related industries, or unified economic planning demonstrate how the locales have economic interdependence.
- Population Center: Area has a dominant county or municipality with a significant portion of the area's population and evidence exists to support the relevance of the population center to all residents within the area.
- Quasi-Governmental Agencies: A quasi- governmental agency, such as a regional planning commission, covers the proposed service area in its entirety and derives its leadership from the area to advance meaningful objectives advancing the residents' common interests in economic development and/or improving quality of life. Success of agency in meeting its mission depends upon collaboration from throughout the area.
- Government Designations: A division of a federal or state agency specifically designates the proposed service area as its area of coverage or as a target area for specific programs.
- Shared Public Services/Facilities: Formal agreements exist that provide for a common need shared by all of the residents, such as common police or fire protection, or public utilities.
- Colleges and Universities: Evidence exists to demonstrate the common relevance of an institution or institutions to the entire area, such as unique educational initiatives to support economic objectives benefiting all residents and/or partnerships with local businesses or high schools.

However, if NCUA receives an application from an FCU to add an adjacent area to a well-defined local community, the agency needs to have a complete record. NCUA should not rubber stamp information provided by an FCU showing interaction and common interests of residents.

For a community charter application that does not meet the established presumptive definition of "local," the NCUA Board should publish a notice in the Federal Register and on its website seeking comment on whether the proposed community charter application is a local well-defined community. This would assist NCUA with its analysis of whether the area in question is a well-defined local community.

Moreover, NCUA should give interested parties sufficient time to comment on the proposed community charter application.

### **Rural District**

The Board has, since 2013, imposed two requirements for a proposed area to qualify as a well-defined "Rural District." The first is that the area's total population cannot exceed the greater of either 250,000 people or 3 percent of the population of the state in which the majority of the proposed Rural District's residents would be located. The second is that either at least 50 percent of the proposed Rural District's population must reside in census blocks or other geographic units the U.S. Census Bureau designates as "rural," or the proposed Rural District's population density cannot exceed 100 persons per square mile.

The Board proposes to modify the Rural District definition to increase the population limit to 1 million persons. Because the increased population limit would exceed 3 percent of a state's population in all states but California, making that alternative redundant, the proposed rule omits it.

### **Rural District Lacks Interaction, Common Interests, and Rurality**

A Rural District may represent a large region. As a result, it will lack the traditional characteristics of interaction or shared common interests. This lack of meaningful affinity is clearly at odds with statute and would make it more difficult for credit unions to fulfill their public mission.

Moreover, NCUA's Rural District definition currently allows a FCU to arbitrarily cobble together densely populated urban areas with thinly populated counties under the criteria that a Rural District's population density cannot exceed 100 persons per square mile. As a result, NCUA's Rural District definition could define a region as rural, despite having more than half of the population living in urban areas.

NCUA should ensure that a Rural District is truly rural. This would require that a majority of all persons in a proposed Rural District live in census blocks or other geographic units that the U.S. Census Bureau designate as rural.

### **Proposed Rural District Could Permit State-wide FOM**

Increasing the size of a Rural District to a population limit of 1 million could result in a state-wide FOM. Currently, the states of Alaska, North Dakota, South Dakota, Vermont, and Wyoming have low population densities and are under the 1 million population threshold requirement.

However, more than half of the residents in the states of Alaska, North Dakota, South Dakota, and Wyoming live in urban areas.

Permitting a state-wide FOM under the proposed Rural District definition for these four states would represent an abuse of the agency's discretion.

In conclusion, the Board should not expand the population size threshold for a rural district to 1 million. The Board should revise its Rural District definition to require that a majority of the residents in a Rural District live in census blocks or other geographic areas designated by the U.S. Census Bureau as rural.

### **Community Chartering Rule Provides Slippery Slope to State-wide FOM**

While the Board continues to reaffirm its position that a state does not meet the requirement of being well-defined local community, the proposed changes to its FOM and Chartering Manual could provide a slippery slope to a State-wide FOM.

As previously pointed out in this comment letter, the Board proposes to expand the population threshold for a Rural District to 1 million residents or allow a Congressional District to be treated as a presumptive well-defined local community. These proposed changes would provide a backdoor for an FCU to serve a state-wide FOM. Seven states have at large Congressional Districts. Five

states have fewer than 1 million residents and a population density that does not exceed 100 persons per square mile.

However, the Board has used its previous experience to justify changes in its FOM rules. For example, the Board has justified treating a Congressional District as a well-defined local community because the NCUA has, since 1999, approved 21 Single Political Jurisdictions that each have a population in excess of 1 million, while the average population of the United States' 435 Congressional districts is 710,767.

This would suggest that once the agency has limited experience with state-wide FOMs, it would treat a state within a certain population threshold as a well-defined local community.

### **Multiple Common Bonds**

The Board is proposing multiple changes related to multiple common bond credit unions.

### **Online Internet Channels Are Not a Service Facility**

The Board is proposing to amend its definition of a “service facility” to include online internet channels. Online internet channels would include laptop computers, personal computers, and mobile devices.

As background, the Board in 1998 acknowledged that “reasonable proximity” is an essential factor in determining whether a select group can be added to a multiple common bond credit union. However, the Board did not require an added group’s location to be within reasonable proximity of the credit union’s main office, but rather, within the service area of a “service facility” of the credit union.

As currently defined, a “service facility” includes a credit union branch, a shared branch, a mobile branch that visits the same location on a weekly basis, and a credit union-owned electronic facility. To qualify as a service facility, a group’s members must be able to deposit funds, apply for a loan or obtain funds on approved loans.

This proposed change would apply solely to meet the “reasonable proximity” requirement that applies to a multiple common bond credit union and its select occupational and associational groups. It would not apply to meet the requirement that a credit union serving an underserved area “must establish and maintain an office or facility in [the underserved area].” The proposed change would not permit an individual to qualify remotely for membership in a community credit union based on electronic access to it from outside its well-defined local community.

While individuals are increasingly using online internet channels to manage their finances, it is a stretch to define online internet channels as a service facility. Laptop computers, personal computers, and mobile devices do not possess the same full functionality of a credit union branch, a shared branch, a mobile branch, or a credit union-owned electronic facility. Laptop computers, personal computers, and mobile devices can neither accept a deposit of cash nor dispense currency.

Therefore, the Board should not amend its current definition of a service facility.

## **Streamlining Application Process for Groups in Excess of 3,000 Members Contrary to FCUA**

The Board is proposing to modify NCUA's process for assessing the stand-alone feasibility of groups that seek to be added to the FOM of an existing multiple common bond credit union, rather than forming the group's own single common bond credit union.

The Board justifies the changes based on the agency's experience in assessing the stand-alone feasibility of groups in excess of 3,000 members and data regarding the failure rate of credit unions during a 12-year period. The Board notes that 80 percent of credit union failures occurred in credit unions with fewer than 5,000 members.

Accordingly, the Board proposes to reorganize and streamline the application process for multiple common bond expansions according to a group's size. Groups of fewer than 3,000 members will be subject to the existing application process.

Since the statute presumes a group of 3,000 or more members can form a credit union, there is a higher burden of proof to establish that such a group cannot form its own credit union. When a group has between 3,000 and 5,000 members and displays evidence of a lack of available subsidies, disinterest among the group's members, and an overall lack of sufficient resources, the Board has historically determined that the group could not feasibly or reasonably establish a new single common bond credit union. In such cases the Board will accept a written statement indicating these conditions exist as sufficient documentation the group cannot form its own credit union. Consistent with current policy on incidental overlaps, the Board will no longer require an overlap analysis of a group between 3,000 and 5,000 members, given that groups in this size range rarely have been able to form a stand-alone credit union.

Groups with more than 5,000 members will be subject to the existing standard application process, requiring a group to fully describe its inability to establish a new single common bond credit union. However, the Board is particularly interested in comments on whether to consider a larger number than 5,000 for this threshold.

The proposal to streamline the application process for groups with over 3,000 potential members is contrary to Congressional intent. CUMAA limited the maximum size for a group to be added to an existing multiple common bond credit union to 3,000. CUMAA permits NCUA to add a group with more than 3,000 members to an existing credit union under certain conditions.

According to the Senate Report to CUMAA, "[t]he 3,000 member limitation is intended as the maximum size of an additional group that can be eligible to be included within an existing credit union, unless a specified exemption applies. The NCUA may permit groups with over 3,000 members to join an existing credit union after the Board determines in writing that the group lacks sufficient financial resources, volunteers or operational capacity to establish and operate a new single common-bond credit union, or if the group would be unlikely to operate a safe and sound credit union."<sup>4</sup>

The Senate Report further states that "[t]he Committee does not intend for these exceptions to provide the Board with broad discretion to permit larger groups to be included in other credit

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<sup>4</sup> Senate Report 105-193

unions. These exceptions are intended to apply where the Board has sufficient evidence to support a finding that creation of a separately chartered credit union, or the continued operation of an existing credit union presents safety and soundness concerns.”

The Board’s proposal has made the determination that a group with more than 3,000 members are presumptively unable to form a viable stand-alone credit union. However, this proposal is at odds with the FCUA. If the Board believes that a group with 5,000 or fewer members is unable to charter a viable stand-alone credit union, the Board should request that Congress amend the FCUA and raise the numeric threshold from 3,000 to 5,000.

### **An Industrial Park Is a Community, Not a SEG**

The Board is proposing to permit a multiple common bond credit union to include as a select employee group (SEG) the employees of a park’s tenants (e.g., retail tenants of a shopping mall, business tenants of an office building or complex).

However, NCUA has previously recognized industrial parks, shopping mall, office complex, or similar development as a special type of community charter.

The inclusion of a community in a multiple common bond charter violates the FCUA. The FCUA limits a FCU’s field of membership to one of the following – a single common bond credit union, multiple common bond credit union, or community credit union. The FCUA does not permit a hybrid charter comprised of a community and multiple common bond charter, except when a multiple common bond credit union adds an underserved area to its FOM.

The Board should not move forward with this proposed change in its FOM and Chartering Manual.

### **Conclusion**

The Board is proposing substantive changes in its FOM regulation, which will render the concept of common bond moot. The Board justifies these changes because Congress has failed to act. Regrettably, the Board in this proposal is substituting its judgement for that of Congress. If the Board believes these FOM changes are needed, it should request Congress amend Section 1759 of the FCUA

In conclusion, the Board should not adopt these proposed FOM changes.

Sincerely,

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