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February 8, 2016

VIA E-MAIL ONLY: regcomments@ncua.gov

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

Re: SW&M Comments on Notice of Proposed Rulemaking Regarding the Chartering and Field of Membership Manual

Dear Mr. Poliquin:

We are writing to comment on the Notice of Proposed Rulemaking Regarding the Chartering and Field of Membership Manual (the "Proposed Rule"). Our law firm has primarily represented 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 ("FOM") issues, including representation regarding some of the issues the NCUA is responding to in the Proposed Rule, may prove helpful for the NCUA in considering chartering and FOM policy.

We agree with most proposed changes, and believe that the Proposed Rule is attempting to codify resolutions to ambiguities that have already been implemented in practice and/or are needed to better serve the ever-changing and evolving credit union existing and potential member base. However, we do have concerns about the manner in which the Proposed Rule would treat industrial parks and the impact it may have as it pertains to the relationship between community and employment-based charters. Our full discussion is in the sections below.

I. Underserved Areas

We support the NCUA's move to create greater flexibility and clarity in the underserved application process. Currently, investigations to determine "underservice" and to submit an application can take a significant amount of time and specialized resources. In our experience, the required expense to determine whether an area is underserved has been significant enough to disincentivize credit unions from pursuing this type of FOM. With this change the NCUA is decreasing the burden and as such has the potential to incentivize credit unions to "rise to the occasion."

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Moreover, while we believe that the NCUA's proposed alternatives to determine underservice by other depository institutions¹ will significantly improve the ability to identify underserved areas, additional markers and clarity can provide even more simplicity to the process.

The NCUA could go further in resolving how unaddressed aspects of the shared branching regulatory paradigm will affect this part of the rule. Related to shared branching, two separate areas of the rule merit different treatment. On the one hand it is important to count shared branching as a service facility because they increase accessibility of services to members; however, on the other hand, for the purpose of determining the concentration of facilities ratio ("CFR"), it does not make sense to (and it would be impracticable to) count all participants in a shared service center as individual separate service providers in the area. The Board should ensure that there is clarity in the Final Rule or accompanying commentary regarding the inclusion of shared branch facilities in each of these contexts.

The NCUA could also further support credit unions establishing their own metrics; the NCUA should consider allowing credit unions to use United States Census Bureau data directly (including estimates from the census) in addition to NCUA and Federal Banking agency data, in order to better capture and meet the needs of the underserved. These resources may assist in capturing underservice that has resulted from developments between each census.

II. Multiple Common Bond Expansion

a. Service Facility

We firmly support the board's inclusion of a transactional web site to the definition of "service facility." This has been a long-needed modernization of the FOM rules, and moves toward recognition of the ways in which consumers share common bonds and access financial services in the internet age. We believe that it will improve consumer choice, in that employers and associates will have additional freedom in selecting the credit unions that best fit their unique needs.

The NCUA's proposal is consistent with the purpose of the "service area" requirement, as it allows consumers to obtain financial services from their credit union. The method by which they receive such service should not be limited to "brick and mortar" facilities—as the Proposed Rule mentions, the credit union

¹ Through (1) CFPB designation of "underserved counties" and (2) a credit union's own metric that it can submit as evidence of underservice (based on NCUA or Federal banking agencies' data).

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member base is evolving and there is a “strong consumer preference for online financial services.” Recognition of these changes will help keep the credit union movement relevant.

Nonetheless, we believe that the NCUA could go further in modernizing its FOM rules to recognize the realities of the internet age. For example, the NCUA’s rules and guidance do not offer any framework for determining where associational groups gathering online “exist” for the service facilities requirement. While it does not appear to impact multiple common bond credit unions with transactional websites, after the finalization of the proposed rule, it might impact those without one. Issues like this lead us to continue to recommend the removal of the service area requirement entirely.

b. Select Employment Group

We believe there should not be a distinction between treatment of employment relationships between single common bond and multiple common bond charters. The NCUA could draft its regulations in such a way as to refer to definitions of employment common bonds, and then provide that a multiple common bond credit union can merely add multiple relationships of that type. Such a wholesale revision could assist in preventing the accumulation of minor differences like this between the sections in the FOM rules.

Barring such a wholesale reorganization of the FOM rules, we agree with this proposed change. Employees of companies that have strong dependency relationships with key companies share loyalties and economic interests with employees of the primary employer. Indeed, in some cases, long term contractors are indistinguishable from the actual employees of a company. This change thus furthers the goal of having employees who share common interests being able to obtain credit union services from the same institution, while also decreasing the administrative work required to get there.

We note that the addition of the “strong dependency relationship” language to additional sections of the FOM rules may raise questions as to the meaning of that term. The NCUA may wish to provide some guidance regarding what it believes are “strong dependency relationships.” Such tests should, however, be ones that are able to be researched without requiring companies to reveal trade secrets or confidential financial information. For example, while it makes sense that one conceivable test might be a company which has a high proportion of its business through one customer, companies might be reluctant to share that information with a credit union. Alternatively, the NCUA could provide that credit unions will be able to provide in

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their files good faith support for the “strong dependency relationship” in accordance with the particularities of the industries in which they operate—while this would not provide specificity, it would provide the Office of Consumer Protection with a guidepost regarding deferential treatment of such additions.

c. Industrial Parks

We have concerns that this change may imperil the other beneficial revisions in the Proposed Rule. Defining employment by geography begins to blur the lines between community and employment based charters—it creates a bond based on the location of the potential member’s employment, not their employment alone, unlike all other employment definitions in the FOM rules.² This is particularly true because the Proposed Rule would have employers cease to be eligible when they leave the geographic confines of the industrial park. Without significant justification as an administrative convenience to add employment groups,³ this appears questionable and could create a forum for disruption of FCU membership practices on a larger scale.

To the extent that the Board believes this change is permissible, we believe that “industrial park” should be clearly defined. The Board has indicated that the term will include shopping malls and office parks; we believe that it should also include skyscrapers or any other similar structures.

III. Single Common Bond Expansion

We support the NCUA’s proposed expansion to the definition of the Trade, Industry, or Professional (“TIP”) single occupational common bond to include employees of certain entities that have previously been excluded or considered too far from an industry’s core. As “old economy” industries continue to fragment in the global modern economy, we continue to see companies outsource certain functions to highly dependent subsidiaries or contractors. The employees of those contractors have jobs that were once within the primary employers themselves—those employees should not be excluded from credit union membership in a TIP charter merely because of the corporate forms of their employers. We note that this proposed change has already been included in several TIP charters, and is an important revision to keeping TIP charters viable as industries continue to change and as companies continue to outsource functions.

² This sounds more like a community credit union under which the FCUA limits membership to “[p]ersons or organizations within a well-defined local community, neighborhood or rural district.”

³ A justification that we believe would be supported by having employer groups remain within the credit union’s FOM after they leave the industrial park.

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Conclusion

We believe the Proposed Rule succeeds in further modernization of the Field of Membership and Chartering Manual. We generally support these efforts, and call on the NCUA to go further in allowing credit unions to serve all members who share common bonds. Administrative convenience in adding FOM groups decreases burdens on the credit union industry and on the NCUA. We look forward to additional revisions of this nature where the NCUA believes they are supportable under the FCUA.

If we can be of assistance in providing any other information or comments to the NCUA, please do not hesitate to contact us.

Sincerely,

STYSKAL, WIESE & MELCHIONE, LLP



Timothy I. Oppelt



Griselda Perez

BAP/GP/no