

February 5, 2016

Gerard S. 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 CFR Part 701; Federal Register Vol 80, No. 237, 76748, December 10, 2015

Dear Mr. Poliquin:

The National Credit Union Administration (NCUA) has requested comments on a proposal that would comprehensively amend the chartering and field of membership requirements governing federally chartered credit unions (FCUs). The American Bankers Association<sup>1</sup> (ABA) is strongly opposed to this proposal and urges that it be withdrawn.

The proposed amendments would effectively render the concept of a common bond among credit union members meaningless. From quadrupling population thresholds to reimagining definitions of plain language statutory terms, this proposal would eviscerate many major limitations placed on credit union field of membership expansion. Such a drastic expansion of taxpayer subsidized financial institutions is inconsistent with the limited scope of credit union operations envisioned by Congress. Furthermore, NCUA's proposal would directly undermine the ability of taxpaying banks to serve their communities – replacing healthy, private sector financial services with government subsidized competition.

Throughout this proposal the Board oversteps its regulatory authority—sidestepping Federal Credit Union Act (FCU Act) requirements in the name of industry growth and replacing its own judgment for that of Congress. The ABA urges the Board to reconsider this egregious overreach and shelve this proposal in favor of working with Congress to secure any desired modifications to credit union field of membership requirements.

This comment letter will address four primary reasons why this proposal needs to be withdrawn:

- NCUA's community charter proposal goes beyond any reasonable definition of "local" and "well-defined";
- NCUA's rural district definition lacks interaction, common interests and rurality;
- NCUA's expansion of the multiple common bond charter violates the plain language of the statute; and,

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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 \$15 trillion banking industry and its 2 million employees. Learn more at [aba.com](http://aba.com).

- NCUA did not, but should, address the significant adverse effects on competition from this major rule.

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

NCUA’s proposed rule significantly expands the definition of community beyond any reasonable definition of “local”—openly circumventing Congressional intent as expressed in the Credit Union Membership Access Act (CUMAA)<sup>2</sup> of 1998 and overextending well-beyond NCUA’s underlying statutory authority for chartering and establishing field of membership requirements for FCUs.

When enacting the CUMAA in 1998, Congress deliberately inserted the term “local” into the definition of a community credit union’s potential field of membership to reinforce the limited geographic scope intended for this type of charter. Congress deliberated on this specific provision of the FCU Act and determined that the term “well-defined community” was too broad, amending it instead to “well-defined local community” in order to foreclose any expansive interpretation. Nevertheless, NCUA’s proposal drastically expands the scope of a community charter, disregarding Congress’s intent to impose finite and narrow limits on the area that a community credit union may serve.

#### ***Combined Statistical Areas Do Not Meet Local Definition***

Combined Statistical Areas are not local. The NCUA Board has proposed 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. The Office of Management and Budget (OMB) characterizes Combined Statistical Areas as “larger regions.”<sup>3</sup> A region is an expansive area, not a local community.

For example, Boise City-Mountain Home-Ontario, ID-OR Combined Statistical Area would qualify as a well-defined local community under the Board’s proposal. However, this Combined Statistical Area encompasses eight counties and spans over two states. These counties cover 25,135 square miles of land area—larger than the land area of ten states. This is simply inconsistent with any reasonable interpretation of a well-defined local community. The NCUA Board should not allow a Combined Statistical Area to be considered a de facto, well-defined local community.

#### ***Congressional Districts Are Not Well-Defined Communities***

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. Since 1999, the Board has maintained that neither a Congressional district nor a whole state qualifies as a well-

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

<sup>3</sup> OMB Bulletin No. 15-10 to Heads of Executive Departments and Establishment (July 15, 2015)  
<https://www.whitehouse.gov/sites/default/files/omb/bulletins/2015/15-01.pdf>

defined local community.<sup>4</sup> This provision represents a drastic reversal of NCUA's long held position.

This proposal would allow for a state-wide field of membership in seven states that have a single at large Congressional District: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming. Furthermore, Congressional districts are created by political compromises, frequently divide municipalities, and are subject to change by legislatures and courts at least every ten years, sometimes more with litigation under the Voting Rights Act. Indeed, the Board acknowledges in the proposal that as a result of redistricting, the boundaries of an individual Congressional district may change—meaning the well-defined area would only be so for a short period in time. Constant redistricting also raises serious concerns that there is a lack of commonality of interests or interaction, as is required by statute. NCUA should retain its current policy that a Congressional District does not constitute as a well-defined, local community.

***“Adjacent Areas” Do Not Meet a “Well-Defined” Definition***

The Board is proposing to allow an FCU to add an adjacent area to an otherwise objectively identified well-defined, local community or rural district. An FCU would have an option to provide *subjective narrative* as somehow “evidence” of interaction or common interests among residents of the proposed adjacent community. Approval would be based on a subjective assessment of whether there are sufficient “affinities” between the two areas. This can easily lead to a complete lack of transparency on the part of the Agency. Moreover, the example affinities provided in the proposal have absolutely nothing to do with consumer financial services or routine interactions. The Board lacks the authority to implement the proposed change and should therefore not allow adjacent areas to be added to a FCUs field of membership.

In addition, the proposed rule’s embracement of a non-transparent, subjective standard for appending such areas fails to provide necessary safeguards against abuse. The NCUA cannot allow information provided by an FCU alleging interaction and common interests of resident to be simply rubber stamped. 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 well-defined, local community. NCUA should allow interested parties sufficient time to comment on the proposed community charter application. To do less than this would be tantamount to shirking its responsibilities to enforce limitations that Congress has imposed.

Moreover, one way in which the NCUA Board justifies adding adjacent areas is to claim that some areas may lack a credit union presence and/or lack sufficient access to financial services. To the extent that the Board proceeds with allowing the addition of adjacent areas, it should require credit unions to provide hard, factual evidence that residents on both sides of the perimeter interact or share common interests and hard, factual evidence that there is a lack of

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<sup>4</sup> 63 FR 72013, 72037 (December 30, 1998); Appendix B, Ch. 2, Section V.A.2

financial services offered in the adjacent area. We believe that with the breadth and scope of the banking industry there will not be any case where financial services are not available in some form.

### ***Continue to Require FCUs to Serve “Core Area”***

The Board is proposing to repeal requirements that a FCU serve the “core area” when seeking to add a Core Based Statistical Area. NCUA currently requires that when a credit union 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, which NCUA has defined as the most populated county or named municipality in the Core Based Statistical Area’s title.<sup>5</sup> NCUA noted that one purpose of this existing requirement was to encourage credit unions to serve low-income individuals and underserved areas—something Congress intended the credit union industry to fulfill—both typically located in the core area.

Unfortunately, the repeal of the core area requirement could allow FCUs to design community charters that resemble donuts—serving wealthier suburban counties and excluding markets containing low-income and minority communities that reside in the core area. Furthermore, credit unions are not subject to the Community Reinvestment Act (CRA)—nor have any obligation to document publicly that they are meeting their chartered responsibilities to serve people of modest means. Because of this fundamental lack of accountability, NCUA should at the very least retain the core area requirement. This would help to ensure that community charters do not redline low-income, minority, and underserved communities.

### ***Maintain Population Threshold of 2.5 Million***

Current NCUA regulations allow a Core Based Statistical Area to qualify as a well-defined local community, but only if its population does not exceed 2.5 million. The Board has requested comments on whether the 2.5 million population threshold remains appropriate.

NCUA determined the 2.5 million population threshold an appropriate level as it conforms to the population parameters by which the OMB recognizes metropolitan divisions with a Core Based Statistical Area. As a practical matter, the 2.5 million person cap helps ensure that credit unions are serving well-defined local communities with meaningful close-knit interaction among residents, as Congress intended. The larger an area’s population, the less likely that there is local-level interaction as the statute requires. Indeed, even 2.5 million strains credibility. NCUA should examine whether the 2.5 million cap should be lower as an indicia of common, close-knit interaction.

### **NCUA’s Rural District Definition Lacks Interaction, Common Interests and Rurality**

The Board’s proposal to *quadruple* the population limit of a rural district to one million persons is an alarming abuse of discretion. A one million person limit, especially in a low population density area, is not a limit at all.

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<sup>5</sup> 75 FR 36257, 36260 (June 25, 2010)

Expanding the rural district in such great measures creates the possibility of a large region qualifying as a rural district despite a lack of interaction, shared common interests and rurality of membership. More likely, credit unions will use the increased population limit to arbitrarily cobble together densely populated urban areas within thinly populated counties—serving just enough of a rural population to satisfy the population density limit of 100 persons per square mile. For example, this amendment would allow statewide field of membership in five states, despite more than half of the residents in four of those five states residing in urban areas.<sup>6</sup>

Instead of expanding the population threshold of a rural area by fourfold, the Board should concentrate on ensuring the true rurality of a rural district by requiring 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 designates as rural.

### **NCUA’s Expansion of the Multiple Common Bond Charter is Counter to Statute**

The proposed changes to multiple common bond regulations are contrary to the FCU Act.

#### ***Online Internet Channels Do Not Qualify as a Service Facility***

The Board is proposing to amend its definition of a “service facility” to include online financial services, including computer-based and mobile phone channels. 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.<sup>7</sup> 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.<sup>8</sup>

The proposed change effectively removes the statutory requirement that multiple common bond credit unions be in a “reasonable proximity to the location” of groups they are looking to add.<sup>9</sup> NCUA’s proposal would allow a credit union in Florida to add employer groups in Nebraska, paving the way for national online credit unions and further devaluing the common bond. The House Committee Report to CUMAA shows this is not what Congress intended. Noting a “local preference,” the Committee “strongly believe[d] credit union members who live, work and interact in the same geographic area are likely to have more of a meaningful affinity and common bond than those who do not. The NCUA’s regulations shall strongly favor placing groups with local credit unions and document in writing their compliance with the local preference requirement.”<sup>10</sup> NCUA’s proposal is squarely at odds with Congress’s policy decision.

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<sup>6</sup> 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.

<sup>7</sup> Appendix B, Ch.2, Section IV.A.1 and appendix 1(glossary).

<sup>8</sup> Appendix B, Ch.2, Section IV.A.1.

<sup>9</sup> 12 U.S.C. 1759(f)(1)(B)

<sup>10</sup> H. Rept. 105-472 (1998).

### ***Unilaterally Raising Numerical Limitation is Contrary to FCU Act***

NCUA's proposed changes to the requirements for adding a group with over 3,000 members to the field of membership of a multiple common bond credit union violates sections 1759(d) and (f) of the FCU Act. Although NCUA characterizes the change as a simple "streamlining" of regulatory requirements, in reality the proposal unilaterally raises a numerical limitation prescribed by law.

CUMAA limited the maximum size for a group to be added to an existing multiple common bond credit union to 3,000 members, permitting the NCUA Board to add larger groups only 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."<sup>11</sup> Congress explicitly directed NCUA to "encourage the formation of separately chartered credit unions"<sup>12</sup> and created a statutory presumption that groups with over 3,000 members are capable of pursuing an independent charter.

NCUA's proposal directly contradicts that presumption, replacing it with a 5,000 member threshold of presumed viability. By adopting a numerical proxy for viability that is at odds with the threshold provided in the FCU Act, the Board is substituting its judgement for that of Congress and has overstepped its regulatory reach. 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 Congress amend the FCU Act and raise the numeric threshold. Absent Congressional action, NCUA must continue to perform an analysis of the qualitative factors that could impact the likelihood of a group's success in establishing and managing a new credit union.

Although the NCUA has some discretion to provide exceptions to the statutory limitation, that discretion is intended for use on a limited scale and should not be interpreted as a wholesale waiver of FCU Act requirements. In fact, when considering CUMAA, the Senate specifically noted that the exceptions were meant to be narrowly construed: "The Committee does not intend for these exceptions to provide the Board with broad discretion to permit larger groups to be included in other credit 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."<sup>13</sup>

The Board must determine in writing that a group lacks sufficient financial resources, volunteers or operational capacity to establish and operate a new single common-bond credit union, or that the group would be unlikely to operate a safe and sound credit union.<sup>14</sup> To determine whether a group would cause a safety and soundness concern, the Board must complete an evaluation of that specific group. Given NCUA's statutory mandate to encourage the formation of new credit

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<sup>11</sup> Senate Report to CUMAA

<sup>12</sup> 12 U.S.C. § 1759(f)(1)(A).

<sup>13</sup> Senate Report to CUMAA

<sup>14</sup> 12 U.S.C. § 1759(d)(2)(A).

unions, the Board has an obligation to perform a meaningful analysis of applicant groups before adding them to an existing credit union's membership. A conclusory statement by the applicant group that they fall within one of those exceptions does not rise to the standard of a separate analysis and written determination specific to each applicant group as contemplated by the FCU Act.

### ***An Industrial Park Is a Community, Not a Select Employee Group***

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). The FCU Act limits the field of membership of a multiple common bond credit union to groups that have a common bond of occupation or association—something tenants of an industrial park lack. The FCU Act does not permit a hybrid charter comprised of both community and single common bond groups.<sup>15</sup> The Board's proposal disregards this restriction by enabling multiple common bond credit unions to add a membership group that the Board itself has—and continues to—categorize as a community.<sup>16</sup> If an industrial park or office building can be considered a "special community charter," it cannot also be included in the membership of a multiple common bond credit union.

Even if NCUA decides to eliminate the special community charter designation, offices and industrial parks do not conform to NCUA's criteria for establishing a single common bond of occupation or association and, consequently, are still not eligible to join a multiple common bond credit union. The FCUA requires that each group in the field of membership of a multiple common bond credit union must have its own occupational or associational common bond. NCUA's proposal suggests that an industrial park could be considered a SEG with an occupational bond, but tenants of an industrial park do not share any of the five characteristics required by NCUA to establish an occupational common bond:

1. Employment in a single corporation;
2. Employment in a corporation with a controlling ownership interest in or by another legal entity;
3. Employment in a corporation which is related to another legal entity (such as a company under contract and possessing a strong dependency relationship with another company);
4. Employment or attendance at a school; or
5. Employment in the same Trade, Industry, or Profession (TIP).<sup>17</sup>

The Board's proposal is unpersuasive and inconsistent with NCUA's definition of a strong dependency relationship. The common bond of tenants in an industrial park, if any, is geographic instead of occupational or associational. Consequently, NCUA should retain the classification of this type of entity as a community instead of circumventing FCU Act restrictions by distorting the nature of an industrial park.

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<sup>15</sup> A multiple common bond charter may add underserved areas to its field of membership if certain conditions are met, but no requirement that the industrial park be underserved is contemplated in NCUA's proposal. 12 U.S.C. §1759(c)(2).

<sup>16</sup> Appendix B, ch.2 §V.A.6.

<sup>17</sup> 80 FR 76759-60 (Dec. 10, 2015).

Furthermore, the FCU Act requires a detailed analysis for groups of 3,000 or more primary potential members requesting to be added to a multiple common bond credit union. Groups of this size are not permitted to join the credit union unless the Board makes a written determination that the group lacks the resources and abilities to form a standalone credit union. The Board's proposal would not require a detailed analysis and written determination regarding an industrial park with more than 3,000 potential members—in direct violation of the FCU Act. For example, if an industrial park has 10 tenants, each with 1,000 employees, the credit union will be able to add 10,000 new potential members without having to perform the group limitation analysis required under the FCU Act. If NCUA is going to treat the entire park as a single group, then the numerical limitation analysis needs to be applied to the membership of the park as a whole, and cannot be separated out by tenant.

#### ***Alternative Methodologies & Metrics to Define Underservice Should Not Be Used***

The FCU Act authorizes the NCUA Board to allow multiple common bond credit unions to serve members residing in an “underserve area,” provided the FCU establishes and maintains a service facility in the area.<sup>18</sup> The FCU Act limits the sources of data which may be used and defines “depository institutions,” but prescribes no specific test or criteria to assess “underservice.”

It has been NCUA's practice to calculate an area's concentration of facilities ratio to determine the designation of an underserved area. The Board has proposed to exclude two data components from the ratio moving forward—non-community credit unions and non-depository institutions. ABA supports the Board's attempt to refine the data used in its concentration of facilities ratio. These types of institutions are by their very charter unable to serve certain sections of the general public, therefore, it is reasonable to exclude the institutions from the concentration of facilities ratio calculations. Conversely, ABA does not support the alternative methodologies and metrics put forth in the proposal. Allowing a credit union to choose a metric of its own choosing to submit as evidence of underservice is misguided, arbitrary and capricious.

#### **NCUA Did Not Address Significant Adverse Effects on Competition From this Major Rule**

Section 205 of CUMAA requires NCUA to designate as a “major rule” for purposes of the Congressional Review Act any change to the definition of “well-defined local community.” Such a designation acknowledges that changes to this definition will likely result in “significant adverse effects on competition, employment, investment, productivity, [or] innovation”<sup>19</sup> – and should not be undertaken lightly.

Congress explicitly directed NCUA to consider the implications of expanding credit union field of membership on the wider financial services industry. It is therefore incumbent on NCUA to perform a thorough cost-benefit analysis of the proposal's impact on competition in the financial services market. In any meaningful analysis, the cost to our nation's taxpaying banks and the

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<sup>18</sup> 12 U.S.C. 1759(c)(2).

<sup>19</sup> 5 U.S.C. § 804(2)(C).

communities they serve will significantly outweigh any perceived benefit of this taxpayer subsidized expansion of the credit union industry.

Unfortunately, the preamble to the proposal contains no mention of the major rule requirement, and the Office of Information and Regulatory Affairs at the OMB's website indicates that this proposal was filed without the major rule designation.<sup>20</sup> The Board should make every effort to provide transparency regarding the heightened standards of Congressional review that accompany this proposed rulemaking, and should consider whether this proposal is consistent with Congress's intent that a "well-defined local community" be construed as narrowly as possible. The Board should not move forward with this proposal without first addressing this fundamental obligation and performing a thorough analysis of the adverse effects of competition from this major rule.

### **Conclusion**

In conclusion, ABA opposes NCUA's proposal which would comprehensively amend its chartering and field of membership requirements governing federally chartered credit unions. The proposed amendments are contrary to both statutory constraints and congressional intent to limit the field of membership boundaries of federal credit unions to "a meaningful affinity and bond among members." The NCUA Board should not proceed with this proposal. If the Board believes these field of membership requirements need to be changed, it should request Congress amend the FCU Act.

ABA appreciated the opportunity to share its views and would be happy to discuss any of them further at your convenience. If you have any questions, please contact me at (202)663-5130 (e-mail: [jchessen@aba.com](mailto:jchessen@aba.com)) or Brittany Kleinpaste at (202)663-5356 (e-mail: [bkleinpaste@aba.com](mailto:bkleinpaste@aba.com)).

Sincerely,



James Chessen  
Executive Vice President & Chief Economist  
American Bankers Association

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<sup>20</sup> <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=3133-AE50>