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February 8, 2016

Mr. Gerard Poliquin  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314-3428  
Filed via reg comments@ncua.gov

Dear Mr. Poliquin:

On behalf of the interests of CU Counsel's credit union clients, I am pleased to provide comments to the National Credit Union Administration Board on its proposal to amend the agency's field of membership rule, published in the *Federal Register* December 10, 2015.

Field of membership (FOM) issues are fundamental to the distinctions between credit unions and other financial institutions. Yet, there is no reason FOM and common bond rules should needlessly limit credit union growth, as long as the requirements of the Federal Credit Union Act are met. In that connection, NCUA's efforts to reconsider the FOM provisions in 12 USC 1759 and allow more flexibility for federal credit unions than under the agency's current regulations are welcome.

While it is essential that credit unions be allowed to grow, consistent with their capacity to manage risk, it is also important that NCUA policy changes be fully reconciled with the FCUA. Federal credit unions rely on the agency to adopt FOM rules and policies that reflect the FCUA and that will not expose them to litigation risks. As federal courts have determined, agencies including NCUA are allowed to change policies but as we know, courts carefully consider an agency's record and justifications for its changes should they be subject to legal challenge. Shots over the agency's bow have already been fired regarding this proposal. It is critical that NCUA sufficiently articulate in the Supplementary Information to the final rule the legal basis and rationale for every change that becomes part of the final regulation, and particularly for those provisions that materially differ from current policy. In that connection, this letter seeks to

add to the discussion of the legal underpinnings associated with important changes in the FOM rule. The comments in this letter generally correspond to the order of issues presented in NCUA's summary of the proposal. There are additional ways that the FOM rules can be improved, consistent with the FCUA, and those are also addressed below. I urge the Board to include these recommendations in the final rule.

## **I. Community Common Bond**

### **Population Caps Should Be Increased or Removed**

Under the proposal, a Core Based Statistical Area (CBSA), a Combined Statistical Area (CSA), a Metropolitan Division, an adjacent community, or the portion of these areas that the credit union seeks to serve would be subject to the 2.5 million population cap currently in the FOM rule. The proposal would raise to 1 million a population limit of 1 million for a credit union serving a rural district or areas bordering a rural district.

The Board is specifically seeking comment on the 2.5 million population limit for a multi jurisdictional community credit union but is strongly encouraged to eliminate or substantially increase all the population caps in the final rule.

The population cap for a credit union serving a CBSA or metropolitan division was imposed by the NCUA Board in 2010 because it was seeking to increase the objectivity of its FOM approval process. The Board said it chose to apply the 2.5 million population level because it is used by the Office of Management and Budget, based on demographic and economic analyses, in setting parameters for Metropolitan Divisions within a CBSA.

The use of standardized community benchmarks such as population limits can clarify expectations in the approval process, but can also needlessly limit applicants' options.

The FCUA gives the NCUA Board substantial, but not unlimited, authority to determine the criteria for a WDLC. As NCUA seeks to improve the FOM process, it should reconsider the population limits, which are not contemplated by the FCUA.

In addition, NCUA's application of population limits, even ones developed by OMB or the U.S. Census Bureau, seems arbitrary in the context of NCUA's FOM rule.

A single political jurisdiction is not subject to any size limitations and NCUA allows any county to serve as a WDLC. In 2004 the agency approved the largest county in the country as a community, an area which now supports more than 10 million people in eighty-eight cities and townships. According to the U.S. Census Bureau, there were eight other counties that have populations of 2.5 million or more in 2012. Five other counties had more than 2 million in population at that time and may already be approaching 2.5 million.

The U.S. Census Bureau also reported in 2012 that overall urban population growth in the nation was over 12% from 2000 to 2010. As the population of urban areas continues to grow, the 2.5 million cap will become an increasing impediment.

NCUA deserves credit for previously defining “rural district” as a distinct category and retaining that treatment in this proposal in order to facilitate service to such areas that in many cases were underserved. It first imposed a 200,000 or 3% of the population of the state limit on such districts in 2010 but effective April 2013, the agency raised the population cap to 250,000. The current proposal would raise the population limit again to 1 million and eliminate the 3% requirement.

The proposal is a step in the right direction for rural districts but NCUA’s application of size limits to these areas also seems arbitrary. First, it not clear how any of the current or proposed limits were determined, and the latest proposal does not provide economic analysis to support the choice of 1 million.

Even if the 1 million level is appropriate for some states, it is not clear it is appropriate for all. According to the U.S. Department of Agriculture’s website, “over 1,300 nonmetro counties have lost population since 2010, as a group declining by over 500,000 people. At the same time, 666 nonmetro counties gained population, together adding over 400,000 residents.” While there has been an overall decline in the rural population in this country, nine states have more than 40% of their populations in rural areas and 24 states have populations of more than 1 million who live in rural areas. “Population change is very uneven across rural and small-town America,” according to the USDA. <http://www.ers.usda.gov/topics/rural-economy-population/population-migration.aspx>

Lifting the population caps is consistent with the FCUA because they are not required by statute and their removal would facilitate credit union service to more communities, both urban and rural, which is an important objective of the FCUA. It would also eliminate the need for NCUA to revisit these caps periodically due to population changes.

Alternatively, NCUA should not continue different population limitations for urban and rural communities and NCUA should raise the cap for both to the current size of the largest WDLC the agency has approved. The cap should be adjusted with population growth.

At a minimum, NCUA should allow a credit union to submit evidence, including a narrative, that will support a WDLC larger than 2.5 million or 1 million for any community or rural district FOM application.

The issue of population limitations for FOM applications is very significant. It is not size that is the critical issue, but whether a community in fact exists in the area the credit union seeks to serve, regardless of how large the area is or how many people are represented.

Eliminating or increasing the population caps will not mean community standards for FOM approvals are lessened. Rather, instead of relying on artificial numbers, the existence of communities and rural districts should be demonstrated through evidence of sufficient interaction.

### **NCUA Is Right to Eliminate the ‘Core Service’ Area Requirement for CUs But Efforts to Serve Underserved Areas Should Continue**

The proposal would no longer require a community credit union seeking to serve a CBSA or portion of the CBSA to include the “core” of the area in its FOM. Since the FCUA does not require NCUA to base its definition of a WDLC on a CBSA, changing how it applies criteria related to a CBSA does not raise statutory issues. Also, this approach will give credit unions more flexibility in determining their FOMs. In addition, since NCUA has been requiring core areas to be included and given the population cap, it is possible that other areas within a particular CBSA were not receiving the level of service desired. The proposed approach would help address that concern.

However, it is important that core areas not be underserved. To address this issue, individuals and leaders in those communities should be encouraged to work with the National Federation of Community Development Credit Unions, the Community Development Financial Institutions Fund, credit unions in neighboring areas, and others to determine how such locales can best be served, such as by chartering a new credit union, designating additional credit unions as low income or other institutions as CDFI, or expanding the service area of credit unions that already have such designations.

### **CSA Expansions Are Consistent With NCUA’s Current Rule**

Detractors have criticized provisions in the proposal that would allow federal credit unions to serve Combined Statistical Areas and areas adjacent to a CBSA as a WDLC. Such criticisms are self-serving and specious; they ignore the legal rationale that supports the agency’s proposed treatment and credit unions’ potential use of these areas as WDLCs.

Regarding CSAs, OMB and the U.S. Census Bureau distinguish these areas because of the interaction between a smaller community or communities and a larger community or communities. Such interaction is largely based on employment and commuting patterns, focusing on the employment in the larger area of residents of the smaller area and the residents in the larger area who work in the smaller area. In order to be characterized as a CSA, such interaction between these communities must be statistically significant.

It is the economic, commuting, and employment factors that the Census Bureau statistics identified within a CSA that led the OMB to select certain communities over others as a CSA, for a total of 169 such areas.

It is not coincidental that these are many of the same factors that NCUA has relied upon to determine whether a WDLC exists. As stated above, NCUA is not required to use any

other agency's definition of WDLC, but it certainly may use approaches and determinations employed by other agencies in its efforts to implement the authority Congress has provided it regarding the community credit union FOM provisions of the FCUA. This is particularly the case when the agency is the OMB, its approach is statistically based, and it aligns so closely with NCUA's.

Detractors note that OMB has cautioned that its characterizations are for statistical purposes, and agencies should be hesitant to use them for policy purposes.

OMB Bulletin 15-01 states:

In cases where there is no statutory requirement and an agency elects to use the Metropolitan, Micropolitan, or Combined Statistical Area delineations in nonstatistical programs, it is the sponsoring agency's responsibility to ensure that the delineations are appropriate for such use. When an agency is publishing for comment a proposed regulation that would use the delineations for a nonstatistical purpose, the agency should seek public comment on the proposed use.

NCUA's request for comments in the context of the proposal meets the OMB's cautionary note that public comments be solicited for non statistical uses of OMB categories. More important, the criteria OMB uses to determine that an area is a CSA is wholly consistent with NCUA's longstanding use of factors such as employment, commuting patterns and economic interaction to determine the existence of a WDLC.

NCUA would subject a CSA for WDLC purposes to the 2.5 million population limit. As mentioned previously in this letter, the population cap is arbitrary and should be removed or substantially increased.

### **Adjacent Areas Should Be Allowed for Community Expansions**

The proposal would allow a credit union with a WDLC based on CBSA, CSA, single jurisdiction or rural district to add an adjacent area, and the credit union would submit subjective information to demonstrate that sufficient interaction with the proposed community exists. The agency is proposing a streamlined process for such approvals but would subject expanded communities to the population cap of 2.5 million, except for those bordering rural districts that would be limited to 1 million.

In general, the proposed treatment is consistent with the FCUA for several reasons. Communities are not static and adjacent areas often become fully integrated into, and integral parts of, a community. If a credit union is able to demonstrate that sufficient common interests and interaction exist between its current WDLC and the adjacent area, it should be permitted to add the bordering area. Also, without this policy change, as long as NCUA focuses on generally using OMB jurisdictional designations to help it determine the scope of a WDLC, areas outside those designations may have a more difficult time obtaining credit union service.

The streamlined approval process is a good approach and the elements appear reasonable. NCUA should allow such an approach for other additions, such as when a credit union seeks to include an additional area within a CBSA or CSA that the credit union is already serving. NCUA should also permit credit unions to supplement any application with narrative information, not just when applying to include bordering communities.

It would be helpful if NCUA clarified the proposed changes to the Section V.A.2, “Definition of Well Defined Local Community and Rural District” in a few areas. Under V.B., a credit union serving a single political jurisdiction, rural district or statistical area could add an adjacent area. However, under V.A.2, a credit union could seek approval of the statistical area and the adjacent area during the same process. It would seem that should be the case for rural district and single political jurisdiction credit unions as well. Also, the subsection on ‘Compelling Evidence...’ says credit unions have the option of providing a narrative while the Supplementary Information indicates the narrative is required. (80 Federal Register 237 (10 December 2015) pp 76772, 76750)

### **Congressional District as a WDLC Should Be Permitted**

The proposal would allow an individual congressional district to be a WDLC. This change has been long sought and is wholly consistent with the agency’s approach to determining the existence of a WDLC.

More important, by their nature, congressional districts provide an appropriate FOM category that is a WDLC consistent with the FCUA. Under the U.S. Constitution, congressional districts are intended to reflect equal apportionment of the population according to the U. S. census and “as nearly as is practicable.” Drawn by the states, districts are also intended to reflect community interests and interaction, as well as protect proportionality of representation.

The Supplementary Information notes that while state boundaries are well-defined, “states themselves do not meet the requirement that the proposed area be a local community...” However, under the proposal if a congressional district comprises an entire state, a credit union could seek and obtain approval of that district as a WDLC. (80 Federal Register 237 10 December 2015, p 76772). It would be useful if the discussion above ‘Single Political Jurisdiction’ added a reference that whole states as congressional districts are a permissible WDLC.

The proposal would prohibit a credit union from adding a congressional district that has already been approved for another credit union if boundaries of the district are redrawn. Given the fact that congressional districts are subject to legal challenge, as for two North Carolina districts that have been ordered to be redrawn this month, NCUA is encouraged to provide flexibility in situations where a credit union has expended considerable resources in order to serve a district that is redrawn.

## **Rural District Credit Unions Should Also Have Flexibility To Expand**

A rural district is often more difficult to delineate than an urban-centric one because population hubs are scattered and individuals and businesses are spread out. Likewise, credit unions serving rural districts often have unique challenges and FOM provisions should facilitate the ability of such credit unions to reach out and serve rural areas that have widely dispersed populations.

NCUA is proposing changes for the treatment of rural districts but more can be done to simplify the FOM process and expedite rural service. NCUA should consider revising its proposed definition of 'rural district' to give credit unions more latitude to serve rural areas.

Under the proposal, a rural district is one that has well-defined, contiguous geographic boundaries, the total population is not more than 1 million, the boundaries are limited as prescribed and more than half of the district's population resides in areas designated as rural by the Consumer Financial Protection Bureau or the U.S. Census Bureau or because the population of the area does not exceed 100 people per square mile. However, this approach could be further streamlined.

The U.S. Census Bureau's approach to designating rural areas would seem to fit for NCUA. That is, any area that is not urban, is rural. Such an approach is simple, yet consistent with NCUA's recognition that a rural district has separate characteristics from other WDLCs.

NCUA's proposed boundaries for credit unions servicing rural areas would further help to define the district. NCUA notes that the affinities that apply to WDLC would also need to be present for a rural district. However, NCUA should permit a credit union wishing to add a rural district to use narrative information to support its application.

## **Underserved Areas Should Not Be Off-Limits from Community and Single Common Bond CUs That are Not LICUs**

While not the subject of this notice, NCUA should work with the credit union system to reconsider requirements for low income credit unions and develop a new proposal on that issue.

Regarding underserved areas, it is regrettable that community credit unions and single common bond credit unions cannot add underserved areas, and NCUA is urged to work with Congress to change the FCUA to rectify this anomaly. While being able to apply for LICU status helps alleviate the concern regarding the inability of some credit unions to add underserved areas, not every credit union qualifies or is able to utilize the LICU designation successfully.

NCUA's proposed approach regarding the assessment of the concentration of facilities in an underserved area that a credit union seeks to serve should facilitate the

application process and ultimately service to the underserved. These changes are supported by the FCUA and should be adopted.

Excluding credit unions that cannot serve an underserved area from the group of institutions that NCUA considers in calculating the extent to which an area has adequate service is appropriate and within NCUA's statutory authority. That is because the FCUA directs NCUA to determine if an area is 'underserved' by other financial institutions using its own data and data of the federal bank agencies. Financial institutions in the area to be considered are other federally credit unions, banks, savings associations, members as defined under the Federal Home Loan Bank and others. While the FCUA references this list of institutions, it is within NCUA's authority to exclude credit unions and others such as trust companies that cannot serve the area because Congress expects NCUA will use its judgment in implementing the FCUA.

NCUA is also proposing several additional methods to identify underserved areas, such as using the CFPB's list of 'underserved counties' and allowing credit unions to develop their own approaches for evaluating the level of service in an area. These are good ideas and should be approved. Other methodologies or references that credit unions could rely on are data from the USDA, reports from Pew Research, Federal Reserve data and reports, and surveys developed by the applying credit union.

### **'Reasonable Proximity' for Multi-Group CUs Should be Revised**

NCUA is proposing to allow multiple group credit unions to use Internet access to their services, such as the acceptance of shares, loan applications or the disbursement of loan proceeds, as a service facility to satisfy 'reasonable proximity' requirements for adding a group. NCUA is also considering allowing a service area to include one or more political jurisdictions. A number of financial institutions have offered access to banking services though the Internet for quite some time and consumers will increasingly use the Internet to conduct their financial business. In light of that, NCUA is correct to permit Internet access to be included as a service facility for multiple group credit unions.

Also, allowing a service area to include at least one political jurisdiction is consistent with the overall objectives of the proposal. The FCUA does not stipulate what Congress intended in terms of 'reasonable proximity' for a group to be added to a multiple group credit union, so NCUA is not precluded from adopting this approach. A permissible political jurisdiction should include a congressional district even if an entire state comprises the district.

### **Applications for Groups of Over 5,000 Should Be Streamlined**

NCUA is proposing a three tiered application process to add groups, with increasing requirements depending on the size of the group. In addition, NCUA would no longer require an overlap analysis for groups of between 3,000 and 5,000. These are positive changes. Regarding the size of a group needed to sustain a new credit union, NCUA

should undertake an economic study to determine the appropriate size of potential and actual members needed to operate a new credit union successfully. However, NCUA should permit groups, regardless of size, that wish to form a new credit union to present evidence that they can operate a credit union.

### **Active Duty Military**

NCUA is proposing to allow federal credit unions to include members of the Armed Services in their fields of membership who have been honorably discharged. While credit unions that serve service members during their active duty can continue serving them after they are discharged, it is positive to recognize the role service members play in protecting our country and to help ensure they have access to credit union services following their active duty.

### **Duplicative Provisions Can Be Consolidated**

While comments have not been requested on this, there are several provisions in the FOM rule that apply to more than one charter type, such as provisions on mergers, purchases and assumptions, appeals and others that appear in several places with only a few wording differences. As NCUA is reviewing large portions of the FOM policy, it would be good if the final rule streamlined these provisions and consolidated them.

### **Conclusion**

To help support their viability and growth, credit unions need flexibility that is in accordance with the FCUA. This letter acknowledges positive changes contained in the agency's proposal and in a number of areas addresses the agency's legal authority to effect material changes to its current policy to help ensure the best possible outcome for credit unions, their members, and the agency. If you have any questions about these comments, please do not hesitate to contact me at 202 508 3795.

Sincerely,

/s  
Mary Mitchell Dunn  
Partner  
CU Counsel PLLC