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December 8, 2016

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

Re: 12 CFR Part 701-Comments on Notice of Proposed Rulemaking re Community Common Bond; RIN 3133–AE31

Dear Mr. Poliquin:

On behalf of America's credit unions, I am writing regarding the National Credit Union Administration's (NCUA) proposed field of membership (FOM) rule. The Credit Union National Association (CUNA) represents America's credit unions and their more than 100 million members.

CUNA strongly supports NCUA's second proposed FOM rule as it includes important changes CUNA recommended to the agency in our June 2015 letter to the NCUA Board and subsequent comment letter. We appreciate the agency adopting CUNA's suggestions that will help credit unions serve more Americans, whose access to consumer-friendly and affordable financial services should not be limited by outdated regulations adopted when financial services were delivered differently.

Narrative Model to Establish a Well-Defined Local Community

CUNA strongly supports the narrative model, which we have urged NCUA to reinstate for years and was one of the four principles we outlined in our June 2015 letter. It is especially important for NCUA to implement the narrative model because defining a community by political subdivision or statistical area alone may be an inaccurate representation of a community and could arbitrarily split access to membership of a credit union.

NCUA has experience with the narrative approach as this was part of the 2010 FOM rules. The use of statistical areas was adopted, in part, to reduce the paperwork burden and give credit unions certainty in defining areas they can serve. We understand it may require more analysis for the NCUA when an applying credit union uses the narrative model. However, with the wide range of options available to credit unions to define a community, we expect this approach will be used primarily when it is too difficult to define a community using statistical areas alone.

In addition, CUNA supports the use of the thirteen criteria detailed in the proposed rule. We believe the totality-of-the-circumstances test is a fair approach for determining whether a credit union has sufficiently defined a community using the criteria. We encourage the Board to ensure that staff use the criteria and create a simplified approach for its use so credit unions do not feel obligated to seek outside consultants if they choose to use the narrative model.

Population Limit

CUNA generally prefers the elimination of a population limit entirely, nevertheless, we feel confident that increasing the population limit to 10 million will provide enough flexibility for most credit unions. More importantly, NCUA clearly has sufficient justification to increase the population limit to 10 million as we explained in our June 2015 letter to the Board, stating:

> In 2003, the Board issued IRPS 03–1 that stated any county, city, or smaller political jurisdiction, regardless of population size, is by definition a (well-defined local community) WDLC. 68 FR18334, 18337 (Apr. 15, 2003). A state or Congressional district is not a WDLC. Thus, a single political jurisdiction (SPJ) can be a county or city regardless of population or square mileage. We support that NCUA currently handles an SPJ and suggest the NCUA consider the true impact of the SPJ when considering communities that are made up of multiple political jurisdictions.
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> A couple of examples are constructive. Let's consider two counties in California and the state of Delaware. Los Angeles County has a population of approximately 10 million and 4,057 square miles of area and San Bernardino County has a population of 2.1 million and is 20,056 square miles of area. Both of these areas are SPJs and thus could serve as WDLC for a community chartered credit union. The state of Delaware is comprised of three counties with a population of 935,000 and a land area of 1,948 square miles. Because Delaware is not an SPJ, a credit union cannot serve its three counties even though there are SPJs with far greater populations and far greater land areas.
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> Los Angeles County has a population of greater than all but eight states and San Bernardino County has land area greater than eight states. These two SPJs represent the outside limits of the area a community credit union can operate with in terms of population and land area. NCUA's community credit union chartering rules should reflect the 10 million population and 20,000 square mile land area as a limitation by a multiple political jurisdiction charter.

Overall, CUNA supports a blanket 10 million population limit for a WDLC based on a statistical area of 10 million people as a minimum. We also support basing the population

limit on the population of the most populous SPJ, so that the limit remains dynamic and increases when the largest SPJ grows.

Legal Authority

The Federal Credit Union Act (FCUA) grants the NCUA authority to make the proposed changes contemplated in the rule. The basic framework for analyzing an agency's authority comes from various sources. As a general matter, Congress intends for courts to have the final say as to how a statute should be interpreted. According to the Administrative Procedure Act (APA) (codified at 5 U.S.C. §§ 551-59, 701-706, 1305, 3105, 3344, 5372, 7521), 12 CFR § 706(2)) provides in pertinent part that a reviewing court shall:

> Hold unlawful and set aside agency action, findings, and conclusions found to be:
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The Supreme Court, in the seminal case of *Chevron, U.S.A., Inc. v. NRDC, Inc.* 467 U.S. 837 (1984), established that a court should, under certain circumstances, give deference to an agency's interpretation of a statute. The *Chevron* doctrine provides a two-prong test: 1) to determine whether Congress has directly spoken to the precise question at issue (if it is clear in addressing the issue, the court must "give effect to the unambiguously expressed intent of Congress"); and 2) if there is ambiguity, then the court must determine if the agency's interpretation is reasonable or based on a permissible construction of the statute. The agency's interpretation will generally be deemed permissible and given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.

In short, there are essentially four questions to answer when analyzing an agency's authority to promulgate a rule: 1) Is the statutory provision ambiguous; 2) Has Congress delegated to the agency the authority to interpret the statute; 3) Has the agency properly exercised its authority to make the regulation; and 4) Is the agency's interpretation of the statute reasonable.

I. NCUA'S PROPOSED RULE

NCUA's proposed rule on amendments to the Chartering and Field of Membership Manual contains essentially two major revisions as follows:

1. **Narrative Approach:** This provision gives applicants for community charter approval, expansion, or conversion the option, in lieu of a presumptive community, to submit a narrative to establish common interests or interaction among residents of the area it proposes to serve to qualify as a WDLC.

2. **Population Limits:** This provision increases, up to 10 million, the population limit on a community consisting of a statistical area or a portion thereof. When such an area is subdivided into metropolitan divisions, the rule permits a credit union to designate a portion of the area as its community without boundaries.

II. NCUA'S STATUTORY AUTHORITY

12 U.S.C. § 1759 contains NCUA's grant of authority to engage in rulemaking in connection with FOM requirements. This provision notably was amended in 1988 by the Credit Union Membership Access Act, wherein Congress stated its support for credit unions by noting their "specific mission of meeting the credit and savings needs of consumers, especially persons of modest means." The provision limits membership categories to three charter types: 1) A single group sharing a single occupational or associational common bond; 2) A multiple common bond, with each group having a distinct occupational or associational common bond among group members; and 3) A community common bond among persons or organizations within a well-defined local community, neighborhood, or rural district. The statute also provides some general criteria and various exceptions. However, many of the essential terms are left undefined and are otherwise ambiguous, allowing the agency to further define the provisions. Moreover, several provisions specifically direct the NCUA to promulgate regulations and definitions of certain items. For example:

1. 12 U.S.C. § 1759(d)(3) for multiple common bond credit unions provides as follows:

   Regulations and guidelines

   The Board shall issue guidelines or regulations, after notice and opportunity for comment, setting forth the criteria that the Board will apply in determining under this subsection whether or not an additional group may be included within the field of membership category of an existing credit union described in subsection (b)(2).

2. 12 U.S.C. § 1759(g)(1) for community credit unions provides as follows:

> **Definition of well-defined local community, neighborhood, or rural district**
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> The Board shall prescribe, by regulation, a definition for the term "well-defined local community, neighborhood, or rural district" for purposes of –
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> (A) making any determination with regard to the field of membership of a credit union described in subsection (b)(3); and
> (B) establishing the criteria applicable with respect to any such determination.

There are additional areas as well where Congress specifically delegated the NCUA "fill in the gaps" and establish definitions and criteria for the FCUA.

III. BACKGROUND AND RULE DISCUSSION

Until 2010, the NCUA allowed for approval of a narrative, supported by documentation, that presented indicia of common interests or interaction among residents of a proposed community. The approach was abandoned for an objective model that allowed for choices between two "presumptive communities" that by definition qualified as a WDLC (a single political jurisdiction or contiguous portion thereof) or a Core Based Statistical Area as designated by the U.S. Census (or a well-defined portion thereof subject to a 2.5 million population limit). While the NCUA abandoned the narrative approach in 2010, it gained experience to recognize the "presumptive community" approach was quite limiting and confined credit unions to options unsuitable or less than ideal for them. As such, the proposed rule seeks to re-adopt a suitable method used previously for defining a WDLC in addition to the presumptive communities already defined by rule. This allows for the endless universe of potential communities to be considered and approved by the NCUA.

The NCUA has even gone further and provided criteria, based on its experience with community charter applications under the pre-2010 regime, that identify those categories or criteria that were most useful and compelling to demonstrate common interests or interaction among residents of a proposed community. Each of the criterion are explained at length in the proposed rule.

The increase to 10 million of the population limit that applies to a local community also is a limit that is not contained in the statute, but one that is at the discretion of the NCUA to impose and maintain. While NCUA has previously stated that 2.5 million was appropriate in a multiple political jurisdiction context to demonstrate cohesion, NCUA has indicated it wants to explore the possibility of increasing it to 10 million, and it has the authority to do so. The 10 million threshold is not the sole

determining factor of a WDLC, but merely an upper threshold that must be coupled with other factors establishing the WDLC.

IV. ***CHEVRON* ANALYSIS**

A. Is the statutory provision ambiguous?

For both proposals, the underlying rule relates to the interpretation of a WDLC. The narrative approach and the 10 million population limits are merely detailed explanations as how to qualify for a WDLC.

B. Has Congress delegated to the agency the authority to interpret the statute?

Clearly. 12 U.S.C. § 1759 contains numerous grants of express authority to the NCUA to define terms and issue guidelines and regulations.[1]

C. Has the agency properly exercised its authority to make the regulation?

The agency is in the process of engaging in the rulemaking process. While this process is not complete, it is expected that the NCUA will follow all applicable procedures required by the Administrative Procedure Act (APA). While CUNA is not privy to all the facts, the public record appears to demonstrate compliance with the notice and comment requirements of the APA.

D. Is the agency's interpretation of the statute reasonable?

In examining the proposed notice, both items appear to have a justification as to the reasoning behind the amendments. All appear to be supported by some semblance of logic. In *Chevron*, the Court indicated that the agency construction of the regulation does not need to be the **only** construction the agency could have reached nor does it need to be the construction the court would have reached if the provision arose in a judicial proceeding. However, the construction needs to be within the range of possibilities permitted by the enabling act.

In analyzing the major provisions, they are all attempts to define the boundaries of the statutory definitions and do not go outside of these boundaries. In this case, the NCUA is defining what constitutes a WDLC. All of these definitions are further couched within the context of safety and soundness. For example, the use of statistical areas or combined statistical areas are not statutory requirements, but instead are definitions common to the public via the census, statutes, or otherwise that are reasonable interpretations of what constitute well-defined communities. It would appear to be difficult to call those criteria unreasonable. Further, the extensive criteria proposed for the narrative requirement are rational to providing

[1] 12 U.S.C. §1759(d)(2)(A), 12 U.S.C. §1759(d)(3), 12 U.S.C. §1759(g)(1)

acceptable criteria for a narrative, and are in fact based upon a previously utilized methodology by the NCUA.

V. CONCLUSION

Based on a review of the major provisions of the rule, and on the APA and *Chevron* deference, the NCUA proposal appears to fall well within the agency's statutory authority. The NCUA Board's interpretation of the FCUA appears reasonable and supported by the record.

Again, CUNA strongly supports the changes proposed by the NCUA as it updates its FOM requirements to better serve consumers in the financial marketplace. Thank you for the opportunity to express our views. If you have any questions about our comments, please do not hesitate to contact me.

Sincerely,

J. Lance Noggle
Senior Director of Advocacy and Counsel