Cooperative
Credit Union Association

Creating Cooperative Power

December 9, 2019

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

RE: Cooperative Credit Union Association Inc.'s Comments on Chartering and Field-of-Membership Proposed Policy Changes

BY EMAIL ONLY: regcomments@ncua.gov

Dear Secretary Poliquin:

On behalf of the member credit unions of the Cooperative Credit Union Association, Inc. ("Association"), please accept this letter relative to the National Credit Union Administration Board's ("NCUA") proposed changes to policies set forth in the "*Chartering and Field of Membership Manual*" for federal credit unions. The Association is the state trade association representing credit unions located in the states of Delaware, Massachusetts, New Hampshire, New Jersey and Rhode Island, serving approximately 200 credit unions which further serve over 3.6 million consumer members.

In preparation for the development of this comment letter, the Association recently solicited the views of its members and is pleased to report that both state and federally chartered credit unions were significantly engaged[1]. This letter incorporates feedback received through a member survey regarding the NCUA's field-of-membership ("FOM") proposal.

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[1] Respondents are not only interested in the pending proposal but were directly impacted by the litigation. For example, one member participating in the survey shared that they sought to expand its well-defined rural community to over 250,000 but had to refile its application to be considered under the 2012 FOM rules that required the community be less than 250,000. Another sought to expand membership to an entire county and to the clients of its non-profit sponsor located throughout the state, but the lack of clarity placed the strategic endeavor on hold. Another respondent was impacted by a higher regulatory burden during a merger with a state-chartered credit union. The merger application process was confusing at first due to the changing and lengthy federal FOM application and required numerous forms for completion. Many survey participants noted that it has slowed the regulatory review process down considerably. Finally, one respondent was significantly impacted as the structure of its newly approved community possessed a contiguous portion of a core based statistical area which did not include the core.

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1. NCUA is Urged to Continue Defending FOM Flexibility

As a preliminary observation, the Association seeks to address the efforts of the NCUA to defend its actions against the repeated challenges to its FOM interpretations, including the current litigation pending in the U.S. Court of Appeals for the District of Columbia. The Association strongly supports more latitude for credit unions to serve their members to the extent permitted by applicable law. As a result, NCUA is commended for its continuous review of its rules, guidance and diligence in allocating necessary resources to do so. In addition, NCUA is encouraged to continue defending the legitimate and lawful flexibility of credit unions at every opportunity, especially as other groups turn to the courts or Congress to challenge regulatory actions in an attempt to limit credit union service to members and growth[2]. Finally, to the extent permissible, the Association also supports the work of NCUA to use state FOM rules and guidance as a laboratory for vision and future flexibility in this area.

2. Statistical and Rural Area Applications

The Association supports the NCUA's decision to advance a proposed rule that, once adopted, will allow federal credit unions to again submit applications under the presumption of a well-defined local community or rural district. Also, relative to statistical areas, credit unions continue to support the NCUA's approach to allow a federal credit union to serve a contiguous core based statistical area ("CBSA"), a combined statistical area ("CSA"), or a portion of these areas, without having to include the core area up to 2.5 million people[3]. The Association is in agreement with the additional explanations that NCUA has provided in its Supplementary Information to illuminate its approach to a CBSA field-of-membership.

While the Association offers specific comments designed to improve the proposal and the FOM process, members unanimously agree that the NCUA should not delay in the implementation of these issues so that strategic plans furthering credit union service in communities or rural districts may continue and flourish[4].

3. Service to Low- and Moderate-Income Individuals

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[2] One respondent specifically noted that NCUA is committed to making it easier for credit unions to grow and thrive. As a result, the industry must do its part by honoring the original mission of credit unions, thereby placing NCUA in defensible position.

[3] Some survey respondents noted that removing the core area requirement is generally welcomed as it potentially would make it easier to serve part of a statistical area without having to devote resources to the core. Such flexibility is viewed as a key to growth at a community-based credit union and being able to serve part of a statistical area ensures that it can responsibly serve members. Furthermore, removing the core area requirement can be complementary to any growth strategy to serve low-or moderate-income segments. Finally, others noted that within the core, the need may often exceed the ability of a credit union to deliver services that are truly impactful.

[4] One respondent specifically noted that the lack of clarity in FOM expansion affected its strategic planning and curtailed its growth strategy.

Association members fully acknowledge the mission and role of credit unions in serving low- and moderate-income or underserved consumers and support the NCUA's objectives in addressing such service in FOM applications. It is also acknowledged that the recent FOM litigation raised concerns that credit unions must not, even inadvertently, select service areas on a discriminatory basis. Accordingly, members do not object to reasonable regulatory requirements that demonstrate nondiscrimination in service area selections and that show a credit union's capacity to serve low-and moderate-income or underserved individuals. However, serious concerns exist about the manner in which the NCUA would address such issues in the FOM proposal.

Under the proposal, NCUA will not approve an application for a CSA or CBSA community-based charter unless the business and marketing plans show that the "credit union will provide financial services to low- and moderate-income and underserved people, and that the credit union has not selected its service area in order to exclude low- and moderate-income and underserved people." The proposal further provides that the NCUA will review credit union plans "to ensure that low- and moderate-income and underserved people will be served and that the credit union has not selected the service area in order to exclude" these groups.

It is noted that NCUA's current FOM policy already directs credit unions to demonstrate how underserved people will be served in the proposed area[5]. Furthermore, it is undisputed that the recent Appeals Court decision raises the need to ensure that the policy be more explicit in terms of demonstrating service to underserved individuals.

The Association, however, believes that the language set forth in the proposal which directs credit unions to demonstrate service to such individuals provides significant latitude to the NCUA without accountability by using open-ended legal bases that are too vague to provide credit unions sufficient clarity as to the source of the NCUA's authority.

The proposal allows the NCUA to conduct "further inquiry or evaluation" without any timetable, "consistent with the principles of this Manual, other federal laws and public policy." Members believe that the scope of these sources of NCUA authority is simply too broad for a credit union to have a reasonable understanding of the specific authority relied upon by NCUA. This approach to rulemaking is inconsistent with the spirit, if not the letter, of the Administrative Procedure Act, which calls for agencies to identify legal authorities in the development of regulations. In requesting more information from an applicant, the Association suggests that NCUA should be required to provide the specific legal provisions under which the credit union's application is inadequate. This approach will provide both the NCUA and applicants a basis upon which to identify any flaws and to address them consistent with a clearly delineated and easily verifiable standard.

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[5] One respondent went so far to note that the inherent nature of credit unions is always to serve low- and moderate-income segments which exist within most local communities so that they support its exclusion as redundant.

The Association also notes that in the "Supplementary Information" portion of the proposal, NCUA lists some examples of evidence that it would consider in determining whether more review is needed, such as income distribution or other statistical evidence. The Association believes that it would be useful to include these examples in the final policy so that credit unions can address them in initial applications.

The proposal further provides that NCUA will also consider whether the credit union included or excluded certain census tracts within a statistical area. The Association firmly believes that the inclusion or exclusion of areas should not, in any way, raise negative inferences, provided that a credit union has stated a rational explanation, using sound business judgement, for the area selected. Any other approach by NCUA undermines an applicant credit union's ability to serve a statistical area without serving the core.

NCUA also proposes that it will review statements from a credit union on how "it intends to serve low- and moderate-income individuals." The Association believes that the intent of any applicant can be difficult to prove or disprove, thereby opening a door to challenge[6]. NCUA is urged to rely on evidence provided by a credit union, such as products, pricing and underwriting standards, as well as any documented statistical data and research for evaluation purposes[7].

Finally, the NCUA proposes to consider "the FCU's record of consumer compliance or fair lending violations." The Association questions the relationship of such record to the substantive provisions of FOM. It is advisable that NCUA make the legal basis to connect these issues clearer. Moreover, the NCUA is encouraged to also consider the nature and age of the violations, what steps had been taken by a credit union to address violations, whether violations were isolated or continual, whether there were any mitigating circumstances, whether violations were self-detected and corrected, whether independent, third party experts were consulted, whether any adverse practices were eliminated, and whether such measures were undertaken in a timely manner. The Association also suggests that any such records of compliance, if used at all, are more appropriately considered in relation to administrative processes and the timing of FOM considerations, rather than the automatic or outright rejection of an application in whole or in part.

The Association seeks to be very clear in its comments in this area. Service to low, moderate and underserved individuals is a central and significant part of the purpose of credit unions. This mission is part of the fabric of credit unions, is welcomed, and is not sought to be diminished. Objections are not directed to reasonable documentation requirements that show a credit union's

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[6] One respondent observed that proving discriminatory intent is difficult, unless it is blatantly and expressly communicated or practiced as in redlining. Since it is difficult to recognize and prove, then it can become subjective. The credit union questioned that if NCUA has the power to reject an application based on their perception of discriminatory intent, then will a credit union have an opportunity to be heard and to address such a concern prior to the rejection of an application.
[7] One respondent noted that their goals and objectives include addressing financial inclusion. Commitment to providing financial counseling, access to pay-day loan alternatives, and encouraging savings are key components of any commitment to underserved areas.

plans to serve such individuals, but rather, to a process that provides too much flexibility to the NCUA to suspend or deny applications and too little certainty to credit unions regarding the specifics of federal regulatory authority and scope of review.

4. Filing Under a Narrative Instead of a Statistical Area

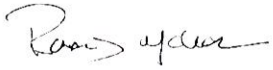
While not part of this proposal, the Association believes that credit unions would benefit from more guidance on the use of a narrative in applications and best practices in this area shared by regulatory experiences to date. The NCUA is encouraged to address this issue in the coming months.

Conclusion

The Association strongly supports the NCUA's efforts to move forward with FOM changes to facilitate credit union service to communities and rural districts. Association members, however, continue to have serious concerns about the NCUA's proposed treatment of its application review authority. Accordingly, the Association urges reconsideration of this approach and further adjustments in promulgating the final policy.

Thank you for the opportunity to share our member's views on the proposal and for your consideration of the Association's comments. If you have any questions about the recommendations set forth in this comment letter or require further information, then please do not hesitate to contact me.

Sincerely,



Ronald McLean
President/CEO
Cooperative Credit Union Association, Inc.

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