INDEPENDENT COMMUNITY BANKERS of AMERICA®

REBECA ROMERO RAINEY
Chairman
R. SCOTT HEITKAMP
Chairman-Elect
TIMOTHY K. ZIMMERMAN
Vice Chairman
DEREK B. WILLIAMS
Treasurer
J. MICHAEL ELLENBURG
Secretary
JACK A. HARTINGS
Immediate Past Chairman
CAMDEN R. FINE
President and CEO

December 9, 2016

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

Re: Chartering and Field of Membership Manual: RIN 3133-AD31

Dear Mr. Poliquin:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the National Credit Union Administration's (NCUA) proposal to make further changes to its field of membership (FOM) rules for federally chartered credit unions. The NCUA just recently make sweeping changes to the FOM rules that, in ICBA's opinion, violate both the intent and the plain language of the Federal Credit Union Act, as amended by the Credit Union Membership Access Act of 1998 (CUMAA). Now the NCUA wants to go further with these changes by increasing from 2.5 million to 10 million the population limit that a community credit union applicant can apply to a community consisting of a Core Based Statistical Area or a Combined Statistical Area. The Board also proposed to give applicants for a community charter the option to submit a narrative to establish "common interests" or "interaction." This narrative will allow an applicant to prove that the area it wants to serve is a well-defined local community.

Background

On December 10, 2015, the NCUA proposed comprehensive and far reaching changes to its FOM rules (the "2015 FOM Proposal"). With respect to community credit unions, under the proposal, the NCUA would (1) no longer require that a credit union that serves a portion of a Core Based Statistical Area include the Core Based Statistical Area's "core area" in its service area, (2) expand the existing single Core Based Statistical Area definition of a well- defined local community to include Combined Statistical Areas as designated by OMB, subject to the 2.5 million population limit, (3) allow areas adjacent to a well-defined local community to be added to the community, subject to the proposed

[1] The Independent Community Bankers of America®, the nation's voice for nearly 6,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

With 51,000 locations nationwide, community banks employ 700,000 Americans, hold $3.9 trillion in assets, $3.1 trillion in deposits, and $2.6 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at www.icba.org.

population limits for community charters (2.5 million) and rural district charters (1 million), (4) allow an individual Congressional district to serve as a well-defined local community, and (5) and increase the population limit for a rural district from 250,000 people to 1,000,000 people.

With respect to multiple common bond credit unions, the proposal would allow those credit unions to add a group to their field of membership and meet the statutory requirement to have a "service facility within a reasonable proximity to the group" just by having a transactional website or other electronic access that meets minimum levels of service as determined by the NCUA. No longer would the group need to be in "reasonable proximity of the credit union."

On September 7, 2016, ICBA filed a lawsuit against the NCUA in the U.S. District Court for the Eastern District of Virginia regarding its final rule published in March 2016 regarding commercial lending activities of federally insured credit unions. ICBA's suit alleges that the agency violated Section 1757a of the Federal Credit Union Act as well as the Administrative Procedures Act by allowing all federal and state credit unions insured by NCUA to acquire, essentially without limit, (a) entire commercial loans extended by other lenders, including other credit unions, to borrowers who are not members of the acquiring credit union (what NCUA refers to as "non-member commercial loans"), and (b) portions of such commercial loans originated by other lenders, in excess of the member business lending cap. In our complaint, ICBA also cited to the 2015 FOM Proposal as an example of NCUA's escalating transformation from a regulator to more of a "cheerleader" for the credit union industry. In our discussion about the 2015 FOM proposal, ICBA focused on two specific parts of the proposal as examples of NCUA exceeding its statutory authority.

ICBA said that allowing individual Congressional districts to serve as a well-defined community meant that the entire territory of seven different states, including Alaska, would in each case qualify as "local." In Alaska, NCUA would treat towns located more than 1,000 miles apart as within the same local community. In so doing, NCUA's proposed rule would effectively read the critical limiting term "local" out of the statute. ICBA also referenced in the complaint the NCUA's proposal to amend its definition of a credit union "service facility" to include "an online internet channel such as a transactional Web site." ICBA said that "if a Web site can satisfy the statutory proximity requirement, anyone with a smart phone or a local library Internet connection could qualify to join any credit union with a fully featured Web site, no matter how geographically distant."

On October 27, 2016, the NCUA adopted all aspects of the 2015 FOM Proposal except for the two proposals that ICBA had specifically discussed in its complaint filed in connection with its lawsuit against the NCUA; i.e. the proposal to allow individual Congressional districts to serve as a well-defined community and the proposal to amend the definition of a credit union "service facility" to include an online internet channel such as a transactional Web site. However, at the same time it adopted the final FOM rule, NCUA announced that it wanted to push the envelope further with still another proposal concerning community credit unions and what is a local, well-defined community. After reaffirming that the population limit that applies to a community consisting of a Core Based Statistical Area or Combined

Statistical Area under the new FOM rules would be 2.5 million, the agency decided to aggressively go forth with a proposal to increase that limit four-fold to 10 million. The NCUA also proposed to allow a community charter applicant to have the flexibility to use a narrative to establish common interests and interaction within a community rather than rely on objective criteria based on "presumptive communities."

ICBA's Comments

While NCUA was right to drop the indefensible and two most egregious aspects of its 2015 Proposed Rule in response to ICBA's lawsuit, we believe the agency's proposal to increase the population limit from 2.5 million to 10 million for community credit unions makes a mockery of the statutory requirement that a geographic based credit union serve a local, well-defined community. A community of 10 million people cannot possibly be considered a "local" community under any reasonable person's interpretation of that term. Even if the people in the community have some interaction and some common interests, that still does not justify describing such a large community as "local." If it did, then one could justify calling the entire United States "local" since most residents share a common interest in defending the country against terrorism and foreign invaders and interact with each other over the internet.

NCUA's arguments for increasing the population limit to 10 million are also unpersuasive and unjustified. NCUA's main justification is that the NCUA has already approved a Single Political Jurisdiction (i.e., Los Angeles County) as a well-defined, local community and that community has more than 10 million people. Furthermore, the federal credit union that serves Los Angeles County has not experienced any adverse safety and soundness consequences attributable to the population size of the community it serves. In other words, the NCUA is arguing that since it is already exceeded its legal authority once with no consequence, it can dramatically increase the number of times it violates the law so that there is no disparity between community credit unions that serve Single Political Jurisdictions and those that serve Cored Based Statistical Areas and Combined Statistical Areas. Based on the safety and soundness experience of one community credit union, the NCUA is also ready to expand the population limit for all of them even though do so would be in violation of the statute.

The consequences of NCUA's proposal, if adopted, would be staggering. Federal credit unions would be able serve a statistical area with a population that is greater than the population of 41 states and the District of Columbia. Twenty additional Combined Statistical Areas would qualify as presumptive well-defined local communities including the DC-MD-VA-WV-PA Combined Statistical Area, which is a diverse region consisting of many different communities, governments, and metropolitan areas. Indeed, the NCUA has indicated in its budget for 2017 that it anticipates a flood of applicants for new "community" credit unions and for converted or expanded community credit unions.

The real reason for raising the population limit to 10 million appears to be the third argument that NCUA sets forth in its proposal—that since some state credit union regulators do not have population limits and allow their credit unions to serve a state-wide field-of-

membership, then raising the population limit for federal credit unions would "narrow the inherent imbalance" between state credit unions and federal credit unions. In short, the NCUA is saying that for the federal credit union charter to stay competitive, the agency must approve what the state credit union regulators are approving**. But staying competitive with the state regulators is not a legitimate policy justification for violating the intent and the plain meaning of the Federal Credit Union Act.** Nor is it reasonable to conclude that just because one or two of the credit unions that serve large population areas have not experienced safety and soundness issues, that as a general matter, most will not experience such issues.

The NCUA offers no other compelling need to raise the population limit other than to keep up with population increases in those areas served by community credit unions. But a four-fold increase in the limits far exceeds the population increases that are occurring in these communities. Regardless, the key is whether an area crossing political jurisdictions with a population of 10 million can legitimately be deemed to be a local, well-defined area. It cannot.

Of all the reasons, the NCUA's race to keep up with the state credit union regulators explains why the agency is constantly pushing the envelope and why it consistently violates the intent and plain language of the statute to advance the cause of the industry. Since every year, the number of federal credit unions shrinks significantly, the NCUA feels that its very existence is threatened and must engage in a "race to the bottom" to keep up with the state chartered credit unions.

Furthermore, the agency consistently overlooks the fact that the limitations in the Federal Credit Union Act—the member business lending cap of 12.25% as well as the requirement that credit unions serve only a well-defined, local community-- were political accommodations that resulted from the dispute between the credit union industry and the banking industry when the Credit Union Membership Access Act was passed in 1998 and were designed to ensure that credit unions focus on their principal mission which is to serve people of modest means. Therefore, such limitations must be carefully complied with and not looked at as obstacles to be circumvented for the sake of carrying out some perceived mission of expanding credit union membership indiscriminately.

The NCUA's proposal to allow community charter applicants to submit narratives to demonstrate that the residents of the proposed community have common interests and interaction is also troubling. **Since the NCUA has proven time and time again that it cannot be objective when it comes to credit union expansion, ICBA is concerned that the agency will use the narrative application process to rubber stamp any application for a new, expanded or converted community credit union.**

Furthermore, the criteria that NCUA has proposed for determining whether the residents of the proposed community have common interests and interaction—local television and radio audiences, organizations and clubs, shopping, etc.—makes it very easy to demonstrate common interaction and common interests within a geographic area. To give an example, it would be relatively easy to make the case that Norfolk, Virginia and Washington, D.C.

should be considered in the same well-defined local community because its residents have similar shopping habits and watch some of the same television programs. In fact, it will be very easy to demonstrate in narrative form that any part of the country is a well-defined, local community particularly if the population limit becomes as high as 10 million. In ICBA's opinion, the NCUA needs to continue using its objective criteria for determining whether a geographic area is "local" and "well-defined." Otherwise, like a child in a toy store, it will be too tempted to say "yes" to everything it sees.

Conclusion

NCUA's most recent FOM proposal to raise the population limits for most community credit unions to 10 million violates the intent and the plain language of the Federal Credit Union Act requirement that a geographic based credit union may serve only a well-defined, local area. The proposal would significantly ease the field of membership requirements for many community credit unions to the point that the restrictions would become essentially meaningless. With such loose and expansive criteria, community credit union applicants would be able to claim a well-defined local community almost anywhere and existing community credit unions would be able to expand into any area they wanted, rendering the statutory restriction meaningless. Together with the final FOM rule that was approved last October, these changes would further erode any meaningful distinction between tax-exempt credit unions and taxpaying community banks, thereby further undermining any justification for credit unions to remain tax exempt.

This proposal is another example of the NCUA illegally extending the industry's government-subsidized competitive advantage and shows how captive the agency really is to the industry it regulates. This proposal should be rejected by the NCUA Board and, as we noted in our last comment letter to the NCUA, the agency should hereinafter focus on implementing and enforcing both the intent as well as the plain language of the Federal Credit Union Act and carrying out the principal mission of credit unions which is to serve people of modest means. If community credit unions want to eliminate the "local" and "well-defined community" restrictions of the statute and operate without geographic boundaries, they should become a bank or a non-bank financial institution and be taxed like those entities.

ICBA appreciates the opportunity to comment on the NCUA's proposal to expand the field of membership rules for federally chartered credit unions. If you have any questions or would like additional information, please do not hesitate to contact me by email at Chris.Cole@icba.org.

Sincerely,
/s/ Christopher Cole

Christopher Cole
Executive Vice President and Senior Regulatory Counsel