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Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: NCUA Proposed IRPS98-3; Organization and Operations of Federal Credit
Unions; 12 CFR Part 701; 63 Federal Register 49164, September 14, 1998

Dear Ms Baker:

The National Credit Union Administration (NCUA) Board (Board) issued for public comment a proposed rule updating its chartering and field of membership policies through proposed Interpretive Ruling and Policy Statement 98-3 (IRPS98-3). The proposed rule, when adopted, will establish the policies and procedures for the chartering of federal credit unions, the field of membership and common bond requirements for single common bond, multiple common bond and local community credit unions, the special rules for credits unions that serve underserved communities and the definition of "immediate family member."

While there are a number of purposes for NCUA's proposed rule, foremost is implementation of the chartering, field of membership and common bond policies of the recently enacted Credit Union Membership Access Act (Act). It is the proposal's implementation of that Act that will be the focus of the American Bankers Association's (ABA) comments.

The American Bankers Association brings together all categories of banking institutions to best represent the interests of the rapidly changing industry. Its membership – which includes community, regional and money centers banks and holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest banking trade association in the country.

Overview

The Act states that “a meaningful affinity and bond among members ... is essential to the fulfillment of the public mission of credit unions.” (Emphasis added) The Act, as made clear through legislative history, then establishes specific standards and objectives that are to be implemented by NCUA in furtherance of that Congressional finding. Principal among those standards are:

- a charge that NCUA encourage the chartering of separate credit unions for all sized groups;
- a ceiling of 3,000 persons for groups eligible to be included in the field of membership of a multiple common bond credit union;
- that a credit union be within “reasonable proximity” to any group that is being added to its field of membership; and
- that the geographic areas of community credit unions be not only “well defined,” but “local” as well.

By virtually ignoring these specific statutory standards and objectives, NCUA’s proposal does not promote or serve, but rather defeats, the concept of “meaningful affinity” as set forth in the Act.

Multiple Common Bond Credit Unions

NCUA’s proposed rule on multiple common bond credit unions undermines the Act and Congressional intent. Both the explicit wording of the statute and the legislative history make clear that: 1) with limited exceptions, only groups of fewer than 3,000 persons shall be eligible for inclusion in the field of membership of a multiple common bond credit union; 2) the exception that permits groups of greater than 3,000 persons to be added to a multiple common bond credit union is to have limited applicability, and be subject to very specific criteria established by the NCUA Board; 3) in all cases, including those involving groups of fewer than 3,000 persons, the Board must encourage the formation of separately chartered credit unions whenever practicable; and 4) in authorizing the addition of any group to another credit union, the group is to be included in the field of membership of a credit union that is within “reasonable proximity” to the group’s location.

As discussed more fully below, NCUA’s proposed rule would stand these statutory requirements on their head. By effectively ruling out a separate credit union for groups of fewer than 3,000 persons and providing virtually no specific objective criteria by which to evaluate the need for groups of greater than 3,000 to join a multiple common bond credit union, NCUA has virtually obliterated the “3,000-person” numerical limitation established by the Act.

Contrary to statute, NCUA nowhere “encourages,” but instead discourages, groups of fewer than 3,000 persons to form a separate credit union. In fact, NCUA’s proposed rule makes it abundantly clear that groups of fewer than 3,000 persons, ipso facto, will be approved in almost all instances for inclusion in a multiple common bond credit union’s field of membership. At the very outset of the proposed rule, a rebuttable presumption is established that credit unions with fewer than 3,000 primary potential members “may not be economically advisable,” and requires such groups to provide significantly more support for a separate credit union than a proposed credit union with a larger field of membership. Further, the proposed rule on multiple common bonds states flat out that NCUA “will” approve groups of fewer than 3,000 persons to a credit union’s field of membership, so long as the credit union into which the group is being absorbed meets the enumerated approval criteria set forth in the statute and establishment of a separate credit union is not practical or safe and sound in NCUA’s judgment.

Although “encouraging” the separate chartering of groups consisting of 3,000 or more persons, NCUA then establishes no specific criteria for the evaluation of such groups (contrary to the requirements of the statute) and, thus, provides no objective standards to guide credit union applicants, the agency itself or others in making determinations regarding such groups. Further, no provision is made for public notification of such applications. This leaves the door wide open for “self-certification” by applicants and “abuse of discretion” by the agency.

Lastly, the proposed rule appears to reflect the statutory requirement that when any group is to be added to an existing multiple common bond credit union, the credit union should be within “reasonable proximity” to the location of the group. However, by vastly expanding the definition of “service facility” in the regulation – which expansion is also directly contrary to legislative history – the service areas of credit unions will be vastly expanded, thus making a mockery of the “reasonable proximity” requirement.

1. Statutory Requirements and Legislative History

The Statute. Subject to three narrow exceptions, the Act establishes a numerical limitation for the groups that are permitted to be included in multiple common bond credit unions. The statute establishes the general rule that only groups with “fewer than 3,000 members shall be eligible to be included in the field of membership category of [multiple common bond] credit union[s].” While the statute provides an exception from that general rule for groups of greater than 3,000 persons, as stated in legislative history, that exception is to be interpreted very narrowly and only in accordance with guidelines and regulations issued by the Board -- which guidelines and regulations are required to include the criteria that the Board will apply. Most importantly, in addition to establishing the criteria that must be met by the credit union seeking to include a new group into its field of membership, the Act also imposes obligations on NCUA to “encourage the formation of separately chartered credit unions.” To the extent a separate

credit union is not practicable or consistent with safe and sound operations (two standards that require objective measurable criteria), the group must be included in the field of membership of a credit union that is within "reasonable proximity" to the group's location.

Legislative History. These statutory requirements are further fleshed out in legislative history. To the extent that there is any doubt, the legislative history makes clear: 1) the strong bias of the Congress for the chartering of separate credit unions whenever practicable; 2) that the "3,000 person" numerical limitation is, for the most part, to be a ceiling for the addition of groups to multiple common bond credit unions; and 3) that, to the extent groups need to be added to multiple common bond credit unions, that there be "local placement" of those groups.

The House Banking Committee Report (House Report), at page 20, specifically states that "the NCUA should charter new credit unions wherever possible... ." It goes on to say that NCUA "shall encourage groups, regardless of size, to form their own credit unions... ." (Emphasis added) See House Report at pages 19 and 20. Thus, legislative history demonstrates a very strong directive to the NCUA to charter new credit unions, rather than almost automatically adding groups to existing multiple common bond credit unions, essentially on request. This directive, as with the statutory provision itself, applies irrespective of whether the group is above or below the 3,000 person limit.

The legislative history also makes very clear that, subject to very limited and narrow exceptions, the 3,000 person limit is to be a ceiling for including groups within multiple common bond credit unions and that even groups under the ceiling should not be absorbed automatically into an existing credit union. The House Report states at page 19:

"The Committee does not intend for this numerical limitation to be interpreted as permitting all groups with 3,000 or fewer members to be included within the field of membership within an existing credit union. The 3,000 member limitation is intended as the maximum size of groups that can organize within an existing credit union," (Emphasis added)

Similarly, the Senate Banking Committee Report (Senate Report) stresses that the 3,000 person limit is intended as the maximum size of an additional group that can be eligible to be included in an existing credit union. See Senate Report at page 7. This requires that NCUA make a specific determination, based on objective criteria and the facts and statistics of each individual case, that a particular group of fewer than 3,000 persons cannot operate independently and would not be viable as a separate credit union.

And, with respect to the limited exception for groups of greater than 3,000, Congress made it very clear that that exception was to be exercised very conservatively. The Senate Report states that it "does not intend for these exceptions to provide the Board with broad discretion to permit larger groups to be included in other credit unions." Senate Report at page 7. Also, see House Report at page 19. Further, both the Senate

and House reports make clear that the Board is to exercise its authority under the exceptions only where it has “sufficient evidence to support a finding” that a separately chartered credit union ... presents safety and soundness concerns. See Senate Report at page 7 and House Report at page 19. “Sufficient evidence” and a specific “finding” would seem to connote that there be specific and measurable criteria, that there be specific and substantial evidence as to those criteria and that the NCUA then make a specific finding based on that record of evidence.

The legislative history also reemphasizes the strong Congressional bias for “local placement” of groups where it is determined that formation of a separate credit union is impracticable. The House Report states that the Committee “strongly believes 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.” See House Report at page 20. The Report also states that the NCUA’s regulations “shall strongly favor placing groups with local credit unions and document in writing their compliance with the local preference requirement.” (Emphasis added) House Report at page 20.

As discussed below, while that “reasonable proximity” rule in the statute is reflected in NCUA’s proposal, the proposal then redefines the term “service facility” to vastly expand credit union service areas and, thus, diminish the intended effect of the “reasonable proximity” requirement. By expanding the definition of “service facility,” NCUA directly contradicts the Act’s legislative history. The House Report specifically states that the term “facility in the Act is meant to be defined in the same way that the [NCUA] has defined ‘service facility,’ (Emphasis added) House report at page 19. Similarly, the Senate Report specifically states: “the term ‘facility’ is meant as it is defined by the NCUA.” (Emphasis added) Senate Report at page 7.

2. NCUA’s Proposed Regulation

NCUA’s proposed rule flat out contradicts the statute and legislative history with respect to: 1) the “3,000 person limit;” 2) the strong bias that the law requires in favor of separately chartered credit unions, irrespective of the size of the group; and 3) the requirement that groups that are determined to be unable to operate a separate credit union be included with a credit union that is within “reasonable proximity” to the group. Further, ABA believes there are significant issues with respect to NCUA’s implementation of the “adequately capitalized” statutory requirement and the implications of the rule for credit union governance.

The 3,000 person limit. With respect to groups of fewer than 3,000 persons, NCUA’s proposal virtually forecloses any such groups from being chartered as separate credit unions. While stating that it “has not set a minimum field of membership size for chartering a federal credit union,” NCUA then uses the statutorily prescribed 3,000 person ceiling as the threshold for a rebuttable presumption that credit unions with fewer than that number of potential members “may not be economically advisable.” Thus,

groups with fewer than 3,000 potential members will be required by NCUA's proposal "to provide significantly more support than a proposed credit union with a larger field of membership" to be established as a separate credit union. This "burden of proof" for groups of fewer than 3,000 persons directly contradicts the law by creating a strong disincentive for such groups, as opposed to providing the encouragement required by the Act."

The bias against such smaller groups, and the strong presumption that such groups are not "economically advisable," is contrary to Congressional intent as reflected in legislative history. The House Report at page 20 specifically states:

"..., the 3,000 member figure is not intended to indicate that groups below 3,000 are incapable of forming new, viable credit unions. To the contrary, over 3,300 credit unions have less than 2 million in assets and average just 700 members."

Currently there are more than 2,000 credit unions with 500 or fewer members. These credit unions are profitable and adequately capitalized. They also have been in existence for years. Thus, the establishment of a "greater-than-3,000-person" standard for economic viability is both contrary to Congressional intent and not supportable by the facts.

Then, the proposed rule specifically states that, subject only to the statutorily prescribed approval criteria that applies to the credit union seeking to absorb the "3,000 or fewer person" group, NCUA "will approve groups of less than 3,000 persons..." to a credit union's field of membership if the formation of a separate credit union is not practical or consistent with safety and soundness standards. The proposed rule provides no standards or criteria for what it will use to evaluate the "practicality of a separate charter." The flat statement that, subject only to the statutory criteria applicable to the acquiring credit union and some nebulous "practicality" determination, NCUA will approve a group of fewer than 3,000 to join that credit union AND the rebuttable presumption of the "economic inadvisability" of groups of fewer than 3,000 create a clear bias AGAINST the chartering of a separate credit union for such groups. This contradicts the statute and legislative history and fails completely to carry out the statutory mandate.

Further, NCUA's proposal inappropriately would exclude eligible "immediate family and household" members in calculating the 3,000-person standard. Clearly, Congress contemplated that such individuals be included in the field of membership for this purpose. In addressing multiple common bond "fields of membership," the statute makes clear that the "membership" of any Federal credit union consisting of more than one group shall not exceed, with respect to each such group, the "number of members" set forth in the statute. The statute then establishes that only groups with fewer than 3,000 "members" are eligible for the "field of membership" of multiple common bond credit unions. And, in establishing the eligibility of "immediate family and household members," the statute again describes such individuals as being "eligible for

membership" in the credit union. Thus, Congress did not intend to exclude such eligible members from the "field of membership" in calculating the 3,000-person limit. In fact, inclusion of all such individuals would be fully consistent with the intent, as reflected throughout the Act's legislative history, to minimize the number of groups that could be cobbled together in multiple common bond credit unions and to "encourage" separately chartered credit unions.

Also, it is clear that the statute in no way distinguishes between multiple common bond credit unions that are created by the addition of a new group and those created through voluntary mergers of credit unions. No such distinction is made in the Act and under no construction can that distinction be read into the Act. The Act establishes three, and only three, "categories of membership," and all credit unions are covered by one of the three. One of those categories is the multiple common bond category. So, in all cases where the end result is a multiple common bond credit union -- whether it is by the addition of a group to another credit union or by the voluntary merger of two credit unions -- the statutory standards, including the 3,000-person limitation, are applicable.

Finally, NCUA's final regulation should make it clear that the 3,000-person limit cannot be circumvented through the sequential addition to a credit union of segments of an otherwise cohesive employment or other group. In other words, a group of individuals of fewer than 3,000 from a single company, association or entity cannot be added to a credit union pursuant to the 3,000-person limit, followed at a later date by the addition of another fewer-than-3,000 group from the same organization to the same credit union. This sort of "division-of-a-group" abuse in order to evade the statute must be prevented by specifically prohibiting any credit union that has taken in one such group from later adding another "same-entity" group.

Encouraging separately chartered credit unions. Further, and in contrast to its proposal with respect to groups of 3,000 or more persons, the proposed rule nowhere "encourages" the formation of separately chartered credit unions for groups of 3,000 or fewer persons. In fact, as discussed above, it blatantly discourages such formations. This is directly contrary to the Act's requirement, as expounded upon in legislative history, that requires NCUA to encourage the formation of separately chartered credit unions for groups of all sizes.

While the NCUA proposal does state that it "encourages" the formation of separately chartered credit unions for groups consisting of 3,000 or more persons, it then goes on to permit such groups to be included in multiple common bond credit unions if the formation of a separate credit union is not practical and subject to the acquiring credit union meeting the specified statutory criteria. Contrary to the legislative mandate, NCUA does not establish specific criteria by which to judge which larger groups can operate as separate credit unions. Further, the proposed rule provides no public notification of such applications. With no specific, measurable criteria and no public notice, the proposal's standards and closed procedures are so subjective, vague and open-ended as to give no guidance to applicants, no means for consistent application by

the NCUA, and no avenue for external evaluation of applicants' qualifications. Thus, it seems to leave the door wide open for self-certification by the applicants and possibly abuse of discretion by the agency

The "reasonable proximity" requirement. NCUA's proposal does incorporate the statutory requirement that any groups that are to be added to multiple common bond credit unions must be added to a credit union that is within "reasonable proximity" to the group. Legislative history reflects the importance of this geographic nexus requirement and its "limited geographic" nature. As stated on the floor of the House by Congressman LaFalce, the ranking Democrat on the House Banking Committee:

"This 'proximity' requirement is extremely important, and I insisted on its inclusion in the bill to ensure that we maintain, to the maximum extent practicable, the closest feasible geographic common bond. It was my intent in offering this provision that NCUA give a conservative interpretation to the term 'reasonable proximity,' allowing credit unions located in a larger city to incorporate only common bond groups located within nearby sections of that city. [The legislative history goes on to provide specific examples of that intent.] This is an area where NCUA will not [sic] to provide detailed guidance to credit unions." See *Congressional Record* of August 4, 1998, page H7050.

NCUA's proposal contains no detailed guidance to credit unions as to what will be deemed "reasonable proximity" under the regulation. In fact, NCUA has eliminated any definition of "proximity to a service facility" from its policy. Under previous rules, NCUA had indicated that "groups of persons with occupational common bonds which are located within 25 miles of one of the credit union's service facilities was deemed to be within proximity of a service facility." Here again, the absence of any clear, objective criteria is a recipe for unequal and inconsistent treatment, self-certification by applicants and agency abuse of discretion.

NCUA appropriately implements this geographic nexus requirement by requiring that the group be within the service area (i.e. reasonable proximity) of the credit union's service facilities. But, then, the NCUA virtually nullifies the requirement by taking this opportunity to increase the operational areas of credit unions exponentially (and, thus, their potential fields of membership) through a vast expansion of its definition of "service facility." This flies directly in the face of Congressional intent, which requires, as cited above, that NCUA maintain its current definition of "service facility."

The existing definition of "service facility" is changed so as to eliminate any criteria that would seem to encourage personal contact and interaction with respect to credit union dealings and transactions. First, NCUA's proposal would eliminate the requirement that a "service facility" be a place where a member can deal directly with a credit union representative and where the service provided is clearly associated with that particular credit union. Further, for the first time the definition would include not only a credit

union owned branch, but also a shared branch and a credit union owned electronic facility (other than an ATM). The inclusion of shared branches and electronic facilities are a major departure from the historical understanding of a service facility and the current definition of service facility under NCUA's regulation. And, by including an electronic facility in the definition, it contradicts the legislative history which specifically precludes "an automatic teller machine or similar device" from qualifying as a service facility. (Emphasis added) House Report at page 19 and Senate Report at page 7.

By including electronic facilities and shared branches and by eliminating the current "service facility" requirements that encourage member interaction and customer nexus, NCUA has vastly expanded the types of facilities that are deemed "service facilities" for purposes of all field of membership determinations under the regulation. This vast expansion would seem to permit almost unlimited credit union service areas and, thus, potential to expand fields of membership. It also makes a mockery of the requirement that a group that is being absorbed into a multiple common bond credit union be absorbed into one that is in "reasonable proximity" to the group.

"Adequately capitalized" requirement. Under the Act, NCUA may not approve the addition of a group to a credit union's field of membership unless it determines, in writing, that "the credit union is adequately capitalized." NCUA's proposal defines a credit union as being "adequately capitalized" if it has a net worth of not less than 6 percent. ABA believes that this definition is not consistent with the law. Section 301 of the Act mandates that for a complex credit union to be adequately capitalized, the credit union must meet both a minimum risk-based standard and a leverage ratio. Thus, NCUA must both define "complex credit union" and establish its risk-based capital standard before implementing the new field of membership rules. Although the Act does not require the new risk-based capital rules to be in effect until January 1, 2001, NCUA cannot make the determination required by the Act as to the adequacy of the credit union's capital, and thus cannot approve the addition of a group to a credit union's field of membership, unless and until it has a definition of "adequately capitalized" that complies with the Act.

Governance. ABA also believes that the proposed multiple common bond policy will create governance problems for members in multiple group credit unions. In the past, NCUA has expressed concerns about credit union members being fully informed regarding the corporate governance structure of a credit union when the credit union has sought to switch from a credit union charter to some other mutual organizational structure. In the same vein, NCUA should be concerned about the impact of membership expansion in multiple common bond credit unions on the existing members' control over such credit unions. At a minimum, NCUA should require the acquiring credit union to notify all existing members when a new group is being added to the field of membership, and inform them that this might dilute their control over their credit union. Additionally,

NCUA should formally notify any group that is seeking to join any existing credit union's field of membership that they might not have the same control over the institution as they would have if they set up their own credit union.

Single Occupational Common Bond Credit Unions

NCUA's proposed rule also seriously stretches the eligibility requirements for single common bond groups, particularly single occupational common bond groups. NCUA appropriately recognizes that the members of single occupational common bond groups must be related through an employment relationship with a recognized legal entity. However the proposed rule's "controlling interest" and "related to" eligibility provisions are so broad and flexible as to stretch the single common bond principle beyond reason.

First, to be part of a single occupational common bond, the proposed rule would require only that two or more legal entities be in control of or controlled by the other legal entity(ies). ABA believes that the single occupational common bond should be limited only to a single legal entity and not embrace entities that control it or which it controls. Such multi-legal entity credit unions should be treated instead as multiple group credit unions. Furthermore, using a threshold as low as 10 percent as the standard for "control" in this instance is inappropriate and well outside corporate norms.

Second, the proposed rule also provides that legal entities that are "related to" each other can be part of a single occupational common bond. While not defining what constitutes "related to," NCUA gives as an example "a company under contract and possessing a strong dependency relationship with another company." This provision makes an absolute mockery of the single occupational common bond concept. By permitting single common bond credit unions to embrace all entities that are "related to" each other, including through contractual relationships, NCUA makes single common bond credit unions indistinguishable from those with multiple common bonds. This standard would permit a company to include within its "single occupational common bond" credit union all of its suppliers, law firms, accounting firms, maintenance contractors and any other service organizations on which it depends. Further, it would appear to provide significant potential for overlap among single occupational common bond credit unions, since contractors, even where there is a "strong dependency relationship," for the most part serve more than one client.

Without question, entities that are "related to" each other must come under the multiple common bond rules. Further, including companies that are "related to" one another under the same single occupational common bond would seem to directly contradict the single associational common bond section of the proposed rule which states that "associations based primarily on a client-customer relationship do not meet single associational common bond requirements."

Local Community Credit Unions

1. Statutory Requirements and Legislative History

The Statute. The Act defines the permissible membership for a community credit union as “persons or organizations within a well-defined local community, neighborhood or rural district. (Emphasis added) In adding the word “local” to the already existing term “well-defined,” Congress clearly intended to impose finite and narrow limits on the area that can be served by a community credit union. In fact, it is clear that Congress added the word “local” in order to be more limiting than under current law.

Legislative History. Legislative history makes clear the intent of Congress that “well-defined local community, neighborhood or rural district” was to be narrow and limiting in its application. A colloquy between Senator Bennett (a member of the Senate Banking Committee) and Senator D’Amato (Chairman of the Committee) drives that point home. See *Congressional Record* of November 12, 1998, page S13003. Senator Bennett, in expressing his concern over the way that the NCUA would “design their regulations dealing with the size and scope of community credit unions,” queried Chairman D’Amato about the necessity for an amendment Senator Bennett intended to offer.

Senator Bennett stated: “Although I had initially intended to offer an amendment limiting the size of a federally-chartered community credit union to three or four contiguous census tracts, after discussing the matter with the Chairman I decided that my amendment would be unnecessary. (Emphasis added)

Chairman D’Amato responded: “The Senator is quite correct when he states that his amendment would be unnecessary. The Banking Committee was very careful and direct in its instructions to the NCUA The Committee intends for the NCUA to limit federally-chartered community credit unions to be subject to well-defined, local, geographic expansion limits.”

Senator Bennett then concludes: “I thank the Chairman for his clarification on this issue I am satisfied by the Committee’s report and by the remarks of the Chairman that such an amendment would be redundant and unnecessary.”

This colloquy demonstrates that in adopting the change to the community charter definition and including the term “local,” Congress intended the permissible membership of a community credit union to be confined to a narrow geographic area – no greater than three or four contiguous census tracts. So, clearly the addition of the term “local” was meant to force NCUA, in adopting its regulations, to truly limit the geographic area of such credit unions. As discussed below, NCUA’s proposed rule for all practical purposes has made the addition of the term “local” mere surplusage.

2. NCUA's Proposed Regulation

Indeed, NCUA's proposed rule is more expansive, rather than more restrictive, than the current regulation. For example, the current rule requires "interaction" among individuals to qualify as a "community" for a community credit union. But, the proposed rule adds another option, requiring that individuals demonstrate *either* interaction *or* "common interest." Thus, instead of restricting the definition of community, NCUA gives the word a new, additional meaning. As it turns out, both concepts ("interaction" and "common interest") are too nebulous and subjective to serve as real criteria for determining whether a community is local and well-defined.

NCUA appropriately recognizes that limits on BOTH geographic boundaries AND population size are essential for defining "well-defined local." But, as with the "3,000-person" numerical limitation for multiple common bond credit unions, any real limitation on community credit unions, either by geographic boundaries or population size, is virtually nonexistent under the proposed rule. Here, as with the multiple bond credit unions, NCUA establishes a dividing line that is functionally illusory. Those that fall below the arbitrarily selected dividing line are presumptively "well-defined, local" community credit unions, while those above the line have to provide greater evidence to demonstrate that they are "well-defined" and "local." However, when all the illusion is swept away, under the proposal there is no absolute size, geographic boundary or number-of-individuals limitation that in any way establishes objective criteria by which to evaluate these applicants.

The proposed rule states that, in most cases, the "well-defined local community... requirement will be met if the area to be served is in a recognized single political jurisdiction... and if the population of the requested well-defined area does not exceed 300,000." (Emphasis added) In that instance, minimal documentation is required (the mere submission of a letter) to describe how the area meets the standards in the regulation for "community interaction or common interest." Since the proposed rule has no definitive guidance or criteria for what constitutes "community interaction or common interest," this essentially allows for applicant self-certification.

First, ABA believes that a potential population of 300,000 people does not meet neither the definition of well-defined nor local. According to census data, there are only 65 (.3%) incorporated places out of 19,314 in the United States with populations in excess of 250,000. In fact, there are over 18,000 incorporated places with populations below 25,000 people. Thus, if NCUA is going to establish a presumption of acceptable "well-defined local" communities for the purpose of a community credit union charter, the 300,000 population dividing line is patently absurd.

Second, the 300,000 person standard as a limitation on the size and geographic reach of community credit unions is illusory at best. In trying to describe this illusory concept, NCUA's proposal states that "a large population in a small geographic area or a small population in a large geographic area" may meet the community chartering

requirements, while conversely, a “larger population in a large geographic area may not meet” the requirements. The fact that there really is no limitation at all is demonstrated by the statement that follows in the proposal. It states: “It is more difficult for a major metropolitan city, a densely populated county, or an area covering multiple counties with significant population to have sufficient interaction and/or common interests, and to therefore demonstrate that these areas meet the requirement of being ‘local.’” (Emphasis added) It then states that, in such cases there is a greater burden to prove interaction and/or common interest. Therefore, no geographic size area and no population size is ruled out – all are fair game, subject only to NCUA’s discretion. So, effectively, there is no geographic or population size limitation for the chartering of community credit unions in the NCUA proposal.

To meet the requirements of the statute that there be a “well-defined local” community, neighborhood, or rural district,” very objective and quantitative standards should be included in the regulation. Then, groups wishing to charter a community credit union or convert to a community charter should be required to provide detailed support that those objective standards will be met. Also, there must be public notice of such applications and a mechanism for public comment on any credit union seeking a community charter. Such objective, measurable standards and the opportunity for public comment on whether the proposed credit union meets those standards are essential to ensuring that a community credit union is truly “local” in nature.

With no real limits in the proposal, the ABA believes that the proposed community charter rules represent the death knell of the credit union movement with its “meaningful affinity and bond among members.” This directly contradicts the intent and purpose of the law – as it was articulated by Congressman LaFalce whose words are quoted above. The proposal creates an environment in which smaller credit unions (the backbone of the movement since its inception) will be seriously disadvantaged in the future. In many cases, small credit unions will face enormous difficulty competing with the larger community based credit unions in offering services to their members.

Exception for Underserved Areas

The Act provides a specific exception for “underserved areas,” as defined in the statute. Under the Act, any person or organization within a locality that qualifies as an “underserved area” may join the field of membership of another credit union irrespective of multiple common bond criteria elsewhere in the statute. The only criterion is that the credit union which absorbs the “underserved area” must establish and maintain a service facility in that underserved area.

NCUA’s proposal fairly closely tracks the requirements of the statute. Specifically, it recognizes that all federal credit unions may include in their fields of membership communities satisfying the definition of “underserved areas,” and specifically states that once an underserved area has been added to a credit unions field of membership, a credit union “must establish and maintain an office or facility in the community.”

The primary objection, as discussed at length above, is that NCUA's proposed definition of "service facility" is so broadened from current law that it imposes no real effective "service" requirements on such facilities, particularly as to the types of "service" that might be needed in underserved areas. The proposal requires no real physical presence or local office that contains personnel with whom the underserved area's residents can interact in carrying out their credit union activities. Since, under the proposal, an electronic facility would qualify as a "service facility" for meeting this requirement, the proposal would permit minimal service – specifically excluding real human contact – in meeting the statutory requirement.

ABA believes that before adding an underserved area to an existing credit union's field of membership, NCUA should encourage the chartering of new credit unions to serve those areas. By doing so, the boards of these credit unions would be comprised of people from the underserved community and the credit union's policies would better reflect the needs of that community. Further, NCUA should encourage credit unions to volunteer their technical and managerial expertise to help credit unions in underserved areas. And, in adding underserved areas to an existing credit union, NCUA should look to credit unions in proximity to the underserved area, so that members from that underserved area have the ability to participate in the credit union's governance.

Finally, ABA believes it is vitally important that NCUA ensure that credit unions that have added underserved areas to their field of membership are actually serving the needs of these communities. NCUA must ensure that the credit union is following through on its business plan and providing credit and service to the people of the underserved area. Thus, NCUA should include in its examination guidelines the guidance necessary to enable examiners to determine whether credit unions are actually serving the underserved areas that are a part of their membership.

Immediate Family Member

The Act requires NCUA to define the term "immediate family or household" for purposes of determining which individuals are eligible to become members of a credit union based on a family member's membership. ABA believes that, for the most part, the definition as proposed by NCUA is reasonable in circumscribing what constitutes "immediate family or household" and in its application of that definition.

NCUA's proposed rule has tightened the definition of immediate family, since prior to the new statutory requirement, NCUA left the definition of "family member" to the discretion of each individual credit union. The Act, in designating the definition of "immediate family or household" as a major rule, clearly contemplates a tight, objective standard that promotes uniformity and consistency of application across all credit unions. NCUA generally seems to have achieved that objective in its proposal.

Further, the proposed rule now requires the individual who is a part of the company or community that defines a particular credit union's "common bond" to actually be a member of the credit union as a condition of eligibility for the immediate family or household member. ABA believes that this aspect of the proposal is a great improvement over the current system and is a reasonable and rational interpretation of the intent and objectives of the new law that is consistent with its legislative history.

Additionally, while the proposed regulation is not clear on this point, ABA believes it is vitally important that an "immediate family or household" member constitute a derivative member, so that a "family member" of that derivative member is not also considered part of the field of potential membership of a credit union. While "family members" of the individuals that have the appropriate "common bond characteristics" for the credit union should be part of that credit union's field of membership, "family members" of those "family members" clearly should not be considered within the field of membership. To determine otherwise would create a never ending chain or web of "family members" so that a "field of membership" could be virtually infinite. That clearly is not what Congress intended and NCUA's final regulation must directly and clearly reject that result.

Finally, once NCUA adopts the definition, it is not evident that NCUA possesses any mechanism for ensuring compliance with its standards. ABA believes NCUA must publicly adopt procedures to ensure credit unions are complying with the "immediate family or household" definition.

Grandfather Provisions

The supplementary information to NCUA's proposed rule contains misinformation as to the scope of the Act's grandfather provisions. While correctly stating that any employee who was eligible for membership prior to the Act's enactment is still eligible to join that credit union, it incorrectly states that "[t]his also applies to new employees hired subsequent to the date of enactment." *Federal Register* of September 14, 1998, page 49169. This conclusory statement is not supported by the Act.

The Act clearly grandfathered members who were members of a particular credit union as of the date of enactment. The Act then also grandfathered certain other individuals who were not members, but who were, on the enactment date, eligible for membership in a particular credit union. The Act states that "a member of any group ... shall continue to be eligible to become a member of that credit union, by virtue of membership in that group, after that date of enactment." (Emphasis added) That section, and the specific use of the phrase "continue to be eligible," clearly contemplates **only** that individuals who were **existing** members of the group on the date of enactment would continue to be eligible to join the credit union. If Congress had wanted to extend eligibility to individuals added to the group after the date of enactment, it would have stated so. But, it

did not. Thus, NCUA's statement that all future employees hired subsequent to enactment are embraced by the grandfather provisions is erroneous and contrary to the plain meaning of the words of the statute.

Regulatory Flexibility Act

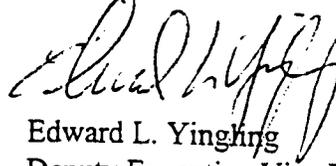
The proposed rule is also deficient because it fails to comply with the requirements of the Regulatory Flexibility Act. The Regulatory Flexibility Act states that when an agency proposes and promulgates a rule, it must prepare and make available for public comment a "regulatory flexibility analysis" describing the impact of the proposed rule on "small entities." See 5 U.S.C. §§ 603 and 604. The Regulatory Flexibility Act defines "small entities" as including "small business concerns," and the Small Business Administration, which is charged with defining the term "small business concern" for this and other purposes, designates as "small business concerns" commercial banks with assets of \$100 million or less. See 62 Fed. Reg. 26994, 26997 n 1 (noting that the Regulatory Flexibility Act's definition of "small business entity" is derived from the Small Business Administration's rules and regulations which provide, in part, "that any national bank or commercial savings association, or credit union with assets of \$100 million or less qualifies as a small business concern").

An agency may eliminate the requirement of preparing a regulatory flexibility analysis only after first "certify[ing] that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). To so certify, "the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification." (Emphasis added).

The NCUA has asserted that it need not prepare a regulatory flexibility analysis because the proposed rule will not affect one class of small entities -- small credit unions. See 63 Fed. Reg. 49169 ("The proposed rule will not have a significant economic impact on a substantial number of small credit unions and therefore, a regulatory flexibility analysis is not required"). But the NCUA's proposed certification does not comply with the requirements of the Regulatory Flexibility Act. First, the proposed certification does not address, or even reflect any consideration of, other small entities including small commercial banks. The Regulatory Flexibility Act, however, requires that the impact on all small entities -- including commercial banks -- be considered. The rule, if adopted as proposed, would make possible and, in fact, promote a dramatic expansion in the number and size of conglomerate credit unions. That expansion would have an obvious (and detrimental) affect on small commercial banks, which must compete with these large credit unions for business without enjoying the substantial tax and regulatory benefits provided to credit unions by federal law. Second, the proposed certification is insufficient even as to the likely affect on small credit unions because it does not include "a statement providing the factual basis" for concluding that the proposed rule will not have a significant economic impact on a substantial number of small credit unions.

Before issuing its final rule, the NCUA must comply with the requirements of the Regulatory Flexibility Act by preparing a regulatory flexibility analysis reflecting the rule's likely affect on all small entities, including small commercial banks, or submitting a certification that provides a factual basis for concluding that the rule will not significantly impact a substantial number of small entities.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward L. Yingling", written in a cursive style.

Edward L. Yingling
Deputy Executive Vice President