Via electronic submission

December 9, 2019

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

RE: ICBA Comments on Chartering and Field of Membership Proposed Rule [RIN 3133-AF06]

Dear Secretary Poliquin:

The Independent Community Bankers of America ("ICBA")[1] is writing in response to the National Credit Union Administration's ("NCUA" or "Agency") proposal to amend its chartering and field of membership ("FOM") rules with respect to applications for a community charter approval, expansion, or conversion. NCUA is interested specifically in how the removal of the urban core area service requirement may affect Federal Credit Unions' ("FCU") ability to serve low- and moderate-income ("LMI") populations. As discussed more fully below, ICBA has several procedural and substantive concerns with the proposal.

Background

Prior to 2016, the NCUA allowed FCUs to draw boundaries and only serve portions of a core-based statistical area ("CBSA") or metropolitan statistical area ("MSA"), but required urban cores to be included within the geographic fields of membership ("FOM"). Then, in December 2016, the Agency finalized a rule that removed the required inclusion of urban cores. As a

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5 trillion in assets, nearly $4 trillion in deposits, and more than $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org..

result, NCUA's rule was challenged as being arbitrary and capricious. The challenge made its way to the United States Court of Appeals for the District of Columbia Circuit, which agreed that the provision creates the potential for FCUs to redline their FOM boundaries and remanded the issue to NCUA to explain how it would prevent FCUs from redlining.

In accordance with the Court's remand, the NCUA's proposed rule attempts to (1) provide further explanation and support for its elimination of the requirement to serve the urban core as provided for in the 2016 rulemaking, and (2) clarify existing requirements and add an explicit provision to its rules to address concerns about potential discrimination in the FOM selection for MSAs and CBSAs.

The issue is not ripe for formal rulemaking

Aside from the substance of the re-proposal, ICBA urges the NCUA to abstain from taking formal action on this matter until all legal challenges and remedies have been exhausted. As the Agency is aware, a *writ of certiorari* has been filed for the full United States Court of Appeals for the District of Columbia Circuit to reconsider the panel's decision.

Though this issue is under remand from a panel of the Circuit Court, acting now risks implementation of a rule that the full Court or the U.S. Supreme Court might eventually overturn. This would result in an inequitable result for credit unions that relied on the rulemaking, but more importantly, may confuse and harm consumers. As such, ICBA believes that the Agency should rescind its proposed rule until the matter has reached full maturation. In the alternative, ICBA urges the Board to postpone final action on this re-proposed rule until all current legal challenges have been exhausted.

The re-proposal fails to sufficiently address the court's concerns about redlining

In its current proposal, the NCUA explains that the 2016 rule's elimination of the urban core area service requirement was intended to provide additional flexibility to community-based FCUs, thereby enabling FCUs to provide financial services to LMI segments located outside the urban core. NCUA posits that certain areas *inside* the urban core have smaller LMI populations than areas *outside* the urban core. NCUA also attempts to justify its proposal by stating that urban cores are relatively populous, and that "retaining the core area service requirement would in many instances make it more difficult for an FCU applicant to serve areas beyond the core."

While it may be true that certain parts of the country have a higher percentage of LMI populations outside the urban core, the Agency's response does not address the Court's concern that a community credit union can engage in more unconventional redlining practices: "gerrymander[ing] to create its own community of exclusively higher-income members." The fact

that LMI communities might exist outside an urban core does not prevent the type of gerrymandering of which the Court is concerned.

If the prime reason behind a FCU's FOM adjustment is to serve LMI people *outside* an urban core, then NCUA should require those FCUs to establish a plan that demonstrates how the geographic shift will better serve a greater number of LMI populations outside the core than inside the core. Simply put, the FCU should demonstrate how the revised geographic boundaries would result in *more* LMI populations being served. Otherwise, the redrawing of the boundary could have the net effect of serving fewer people of modest means, which is precisely what the Court feared.

NCUA's current compliance and fair lending practices do not instill confidence of adequate safeguards against discriminatory FOM boundaries

The Agency's proposal makes several attempts to explain how it will protect against illegal discrimination. First, the NCUA argues that the potential for discrimination by an FCU is lessened because, like other financial institutions, FCUs are subject to consumer protection statutes, such as the Equal Credit Opportunity Act. However, ICBA notes that the Agency only aspires to conduct 25 on-site compliance and fair lending exams every year, despite the fact that NCUA supervises nearly 3,000 FCUs. ICBA contends that this is not sufficient to ensure compliance with fair lending laws.

While NCUA is not mandated to supervise FCUs' branching decisions, ICBA believes it is in consumers' best interest for NCUA to utilize reasonable practices to oversee and regulate the credit union industry, especially in response to practices that increase the potential for illegal discrimination, intentional or not.

Then, NCUA notes its "mandate to consider member complaints alleging discriminatory practices affecting low-income and underserved populations, such as redlining, and to respond as necessary when such practices are shown to exist." However, as ICBA's December 2, 2019 letter to the NCUA indicated, the Agency's existing complaint practices are not sufficient safeguards against illegal discrimination.

For example, credit unions added 22 million members since 2013, now totaling approximately 117 million. Given the membership growth, there has been an increase in consumer complaints, from 3,480 complaints in 2013, to 53,337 complaints in 2018. Yet despite the substantial growth in membership and consumer complaints, the NCUA still only conducted 25 fair lending exams and supervisory contacts in 2018, a decrease from 2013. These facts and figures should not assuage the Court's fears of the Agency's willingness or ability to identify and tamp-out illegal discriminatory practices at FCUs.

Community groups should have opportunity to weigh-in on exclusion
ICBA recommends that the Agency require FCUs to demonstrate a compelling interest or need to exclude urban cores from their FOMs, and that such actions be subject to heightened scrutiny by affording communities to provide input on proposed exclusion. The FCU can obtain public input in a variety of ways, such as holding meetings with community groups and other interested parties, seeking comments from members through branch notifications, and mailing statement stuffers to members and residents within the urban core that is at risk of being excluded.

The current system of complaints, upon which the proposed framework would also rely, only focuses on *existing* FCU members. This does not include the potentially impacted urban core residents that are not, or have yet to become, members. It seems quite implausible, absent some contrary evidence that the agency failed to detail, that existing members will file grievances on behalf of non-member consumers excluded by potential illegal gerrymandering and redlining.

Members should have an opportunity to vote on decision

Under the Agency's policy of, 'once a member, always a member,' members within an excluded urban core have the ability to continue being members of an FCU, despite the fact the members no longer live within the FOM boundaries.

A member should reasonably expect less access or convenience to an FCU when he or she moves away, but that is the member's choice. But what happens when an FCU leaves a member, especially when that member is of modest means and has few options? What happens if there's an entire LMI community that loses its FCU? These are important considerations that deserve the consideration of the full membership of the FCU.

As the Circuit Court explained, allowing FCUs to exclude urban cores from their FOMs has real consequences and increased potential for unintentional discrimination. It is ICBA's opinion that the safeguards and remedies put forth in the Agency's proposed rules are not sufficient to address the Court's concerns. ICBA appreciates the opportunity to express this sentiment, and we urge the Agency to consider implementing the recommendations made in this letter. ICBA would be pleased to discuss further upon your request.

Sincerely,

Michael Emancipator
Vice President & Regulatory Counsel