

August 14, 2000

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

Dear Ms. Baker:

I am writing on behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions, in response to the agency's request for comment on its proposed changes to the chartering and field of membership manual (IRPS 99-1). NAFCU welcomes the opportunity to comment on this important proposal.

In February, a little more than one year after the implementation of IRPS 99-1, NAFCU wrote to NCUA asking the agency to review the regulation and take steps to modify it. NAFCU has also met with NCUA Board members and staff on various occasions to discuss issues with IRPS 99-1 and potential solutions. NAFCU would like to commend the board and staff on their significant efforts in issuing this proposed rule and in easing the implementation of group additions. While NAFCU is generally pleased with the proposed revisions, there are several provisions of the proposed rule that NAFCU believes warrant further attention.

Common Bond

In the findings of the Credit Union Membership Access Act (CUMAA), Congress acknowledges that credit unions were created to "promote . . . a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared by related work experiences, interests or activities . . ." ¹ However, NCUA has interpreted "common bond" to require employment by the same or related corporation or other legal entity that shares a commonality of ownership.

NAFCU believes the interpretation of "common bond" need not be this restrictive. NCUA's focus should be on the bonds that bring the employees together; this goal would still be served if NCUA were to charter credit unions to serve, for example, all healthcare workers, all public servants or all employees of the same franchise.

¹ Credit Union Membership Access Act, Pub. L. No. 105-219, § 2(3), 112 Stat. 913, 914 (1998).

Although these groups may share unrelated employers, they still share the type of "meaningful affinity" that is required by Congress. NCUA has recognized this fact in other suggested revisions in the proposal that address corporate restructuring. For example, NCUA recognizes in the proposal that a division of a corporation that has been spun off still shares a common bond with the original group and therefore still may be served by the credit union.² Therefore, NAFCU urges NCUA to adopt a broader reading of what is meant by a common bond.

Multiple Common Bond

Two sections of the Federal Credit Union Act (FCUA) (as amended by the Credit Union Membership Access Act (CUMAA)) are crucial in the determination of whether a group may be added to a credit union's field of membership. First, section 109(d) of the FCUA states that only groups with fewer than 3,000 members are eligible to be included in the field of membership of a multiple common-bond credit union.³ The law provides an exception, however, for groups of 3,000 or more that could not "feasibly or reasonably" establish a new single common-bond credit union.⁴ Second, section 109(f) of the FCUA requires that NCUA "encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever *practicable* and consistent with *reasonable standards* for the safe and sound operation of the credit union."⁵

NCUA generally has adopted one approach when determining whether a group can be added to an existing credit union's field of membership. Previously, the information used by NCUA in making this determination was not articulated in IRPS 99-1; however, NCUA has included criteria it will consider in proposed IRPS 00-1. In an effort to recognize that groups of a certain size could not reasonably form a credit union, NCUA implemented an expedited process in IRPS 99-1 for the application of those groups and set the threshold for this process at 200. NCUA now proposes to increase that threshold to 500.

Documentation Requirements

Under IRPS 99-1, NCUA has developed a process whereby the credit union must complete and submit a form detailing information concerning the group that wishes to be added. However, IRPS 99-1 also requires the credit union to provide a letter from the group itself along with that form. This letter from the group is unnecessary as direct contact with the group is not required anywhere in the language or legislative history of

² See 65 Fed. Reg. 37,073 (2000).

³ See 12 U.S.C. § 1759(d).

⁴ See *id.* § 1759(d)(2)(A).

⁵ See *id.* § 1759(f)(1)(A) (emphasis added).

CUMAA. NAFCU believes that, in completing the information for NCUA that is required by the form 4015 or 4015-EZ, the credit union may also provide and attest to the information that is currently required in the group's letter. This would simplify the approval process for the group (which usually does not have the time or expertise to deal with this process) as well as for the credit union and the agency.

NAFCU is pleased that NCUA has included for public comment the criteria it may consider in determining whether a group can form its own credit union. However, NAFCU is still concerned that the proposal does not indicate how the process will be implemented. For example, Chapter 2, Section IV.B.3 of the proposed rule states that the application must include information indicating why the formation of a separate credit union for the group is not practical or consistent with safety and soundness concerns and must provide comments on as many of the factors as are applicable.⁶ Will a discussion of the factors listed satisfy the requirement for indicating why formation of a separate credit union is not practical or consistent with safety and soundness? Also, if all of the factors do not apply in a particular situation, how will NCUA determine that the application has met all of the requirements of the regulation?

In addition, the proposal is missing the one item that NAFCU believes is crucial to whether a credit union could survive – group desire and support. NAFCU believes this is the most important factor in determining whether a group could reasonably form a credit union; if the desire to form a credit union is absent, it is unreasonable to expect the formation of a safe and sound credit union to be possible for that group. In fact, group support is one of the main factors NCUA examines in determining whether a group applying for a credit union charter can form a successful credit union. Under IRPS 99-1, a charter applicant must be able to demonstrate group support to ensure viability of the credit union.⁷

The American Bankers Association (ABA) challenged NCUA's consideration of group support for groups with more than 3,000 potential members in its lawsuit against NCUA. The district court, in the memorandum opinion dismissing the ABA's lawsuit, supports the importance of this factor: "...[T]he NCUA enjoys explicit discretion to ascertain the criteria necessary for 'the likelihood of success in establishing and managing a new credit union.' Given that the putative 'desire' of the group speaks directly to its volunteer resources and *other factors likely to determine its success in administering an effective credit union*, this factor deserves serious consideration."⁸ Therefore, NAFCU believes group support should be accorded much more weight in the SEG addition approval process.

⁶ See 65 Fed. Reg. at 37,078.

⁷ See 63 Fed. Reg. 72,019 (1998).

⁸ American Bankers v. Nat'l Credit Union Admin., 93 F. Supp.2d 35 (D.D.C. 2000) (emphasis added).

Expedited Process for Groups of 500 or Less

NAFCU supports efforts by NCUA to ease the approval process for groups; however, NAFCU questions the number used in setting a threshold for the expedited process. NAFCU believes it is not practicable that a group of 500 individuals could form a credit union in today's fast-paced, competitive and highly sophisticated financial market. This fact is evidenced in the district court's memorandum opinion denying the ABA's petition for a preliminary injunction:

“In the NCUA's considerable experience, it has found that the modern financial services market renders small credit unions particularly susceptible to insolvency. During 1998, for example, all eighteen credit unions that the NCUA either involuntarily liquidated or merged with other institutions had 3000 or fewer members. *See* NAFCU Opp'n to Mot. for Prelim. Inj. at Ex. 4 (Decl. of Dr. Tun A. Wai ¶ 6). As of June 1998, over 65% of the federally insured credit unions that were suffering from severe financial difficulties had memberships under 3000. *See id.* (Decl. of Wai ¶ 4). Moreover, every federal credit union that had been classified with the lowest financial-performance rating had 3000 or fewer members. *See id.* Nonetheless, as IRPS 99-1 candidly acknowledges, today there are approximately 3100 federal credit unions with fewer than 3000 members. *See* 63 Fed. Reg. at 72001. *The vast majority of them, however, were chartered long before the advent of sophisticated electronic banking services, when both the economic conditions and the financial-services expectations of credit-union members were dramatically different.*”⁹

NCUA states in the preamble to proposed IRPS 00-1 that the smallest federal credit union chartered in 1999 had a primary potential membership of 2,000 and the smallest state credit union chartered had a primary potential membership of 1,651.¹⁰ NCUA also recognizes in IRPS 99-1 that a charter applicant with fewer than 3,000 potential members may not be economically advisable.¹¹ Furthermore, the district court supported this approach in stating that it is “eminently reasonable for the NCUA to take a ‘hard look’ at groups with fewer than 3,000 members to ascertain the economic feasibility of chartering new credit unions.”¹²

NAFCU is not aware of what, if any, studies NCUA conducted to arrive at 500 (or 200, for that matter) as the minimum number of potential members that could reasonably form a credit union. NAFCU believes that if the expedited process is utilized, the threshold at which groups will be eligible should accurately represent the practicability of the formation of a safe and sound credit union. NAFCU suggests a

⁹ American Bankers v. Nat'l Credit Union Admin., 38 F. Supp.2d 114 (D.D.C. 1999) (emphasis added).

¹⁰ *See* 65 Fed. Reg. at 37,067.

¹¹ *See* 63 Fed. Reg. at 72,019.

¹² American Bankers, 38 F. Supp.2d 114 (D.D.C. 1999).

threshold of 2,000 potential members as an interim measure until NCUA has had the opportunity to study the matter further.

Reasonable Proximity for Select Group Expansions

Shared Branch

If the formation of a separate credit union is not practicable or consistent with safety and soundness concerns, section 109(f) of the FCUA requires NCUA to add groups to a “credit union” that is within “reasonable proximity to the location of the group.”¹³ In IRPS 99-1, NCUA expanded on this provision by stating that a group must be within reasonable proximity of a “service facility.”

A service facility is defined as “a place where shares are accepted for members’ accounts, loan applications are accepted, and loans are disbursed.”¹⁴ This definition includes several types of facilities, including a shared branch. Proposed IRPS 00-1 adds a restrictive definition to “shared branch” and requires that (1) the credit union have at least 5 percent ownership in the facility; or (2) the facility must be “local” to the credit union and the credit union must be an authorized participant in the shared branch network.

In response to the ABA’s challenge that NCUA had impermissibly liberalized the reasonable proximity requirement by including facilities ranging from the main office to a credit union-owned electronic facility, Judge Kollar-Kotelly stated that “the agency’s decision to account for ‘advantages acquired from advancing technologies’ is a permissible one.” In a following footnote, the judge further stated, “Indeed, the departure from a policy that envisions a world of service centers where customers always receive personal attention from live representatives is both realistic, and in accordance with Congress’s overarching intent in enacting the CUMAA: to ‘modernize’ credit union law.”¹⁵

Furthermore, the FCUA specifically requires an “office or facility” only in the case of adding underserved areas; these terms are not used in connection with the matter of law and unwarranted as a matter of agency discretion. Therefore, this proposed limitation should be eliminated from the final rule. Members can perform the basic services at a shared branch facility, which is more than what is explicitly required by CUMAA; the degree of ownership or locality to the credit union has neither legal nor practical significance.

¹³ 12 U.S.C. § 1759(f).

¹⁴ 63 Fed. Reg. 72,032 (1998).

¹⁵ American Bankers, 93 F. Supp.2d 35 (D.D.C. 2000); *see* 144 Cong. Rec. H1868-02, H1874 (daily ed. April 1, 1998) (statement of Rep. Vento) (“Credit union law needs to be modernized, addressing the membership base of credit unions because they would not be able to sustain a membership base and reasonable services under the strict interpretation of a 1934 federal credit union law.”)

Many members are moving away from the traditional brick-and-mortar services and using telephone, ATM and electronic means to conduct transactions. Based on this fact, the recent district court decision and the legislative history of CUMAA, NAFCU believes that NCUA has the statutory authority to further liberalize the reasonable proximity requirement.

Mileage Restrictions

The preamble to IRPS 99-1 states that mileage requirements are “inappropriate and not advisable” because they are “artificial and cause unfair results.”¹⁶ Neither IRPS 99-1 nor IRPS 00-1 contains specific mileage restrictions, but it has come to NAFCU’s attention that, in practice, agency officials in some regions have uniformly denied applications to add groups when the credit union was located 15 or more miles from the group. NAFCU would like to take this opportunity to remind the agency of its statement that these types of uniform mileage restrictions are inappropriate. Furthermore, based on the above discussion of the need for modernization in the delivery of credit union services based on technological advancements, such a conservative mileage restriction will virtually always be unreasonable. Therefore, NAFCU urges the agency to refrain from the use of this mileage restriction and to immediately notify all regional personnel that the practice of utilizing mileage measures as a litmus test must cease.

Voluntary Mergers

NAFCU supports the revisions that would allow credit unions, pursuant to an intervening event, to voluntarily merge without the agency analyzing the group’s ability to form its own credit union. However, NAFCU believes the agency can broaden this interpretation within the confines of the FCUA. Consistent with the argument above that common bond relates to “a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared by related work experiences, interests or activities,” credit unions that share this common bond should be able to voluntarily merge without the existence of an intervening event, such as a corporate restructure. The voluntary merger restrictions of the FCUA do not impact mergers of groups that share a common bond; only additions of new groups to multiple common-bond credit unions are restricted.

Furthermore, the legislative history of CUMAA and the recent district court decision supports a broader interpretation of NCUA’s voluntary merger authority. In addressing the voluntary merger exception to the restrictions on adding groups of more than 3,000 to multiple common-bond credit unions, Rep. Paul Kanjorski, a co-author of CUMAA, stated:

¹⁶ 63 Fed. Reg. 72,003 (1998).

“[I]n granting this specific retroactive exception from the multiple common bond requirements we are not in any way diminishing the existing authority of the National Credit Union [sic] authority under section 205 of the Federal Credit Union Act to grant or withhold approval for voluntary mergers of credit unions. All of the federal banking regulators, including the National Credit Union Administration, have broad authority to approve and disapprove mergers of institutions under their jurisdiction, and *this legislation is not intended to obstruct that authority in any way.*”¹⁷

Judge Kollar-Kotelly, in denying the ABA’s challenge against NCUA’s voluntary merger policy, directly cited this language and stated that “the explanation of at least one legislator suggests that Congress intended to leave substantial authority with the agency to decide matters involving voluntary mergers.”¹⁸

Corporate Restructuring

NAFCU strongly supports the changes that have been proposed to respond to problems with corporate restructuring. The proposal correctly recognizes that credit unions are not seeking to add additional groups but are instead reaching out to additional individuals sharing a common bond with the credit union’s existing field of membership.

NAFCU suggests that NCUA eliminate the requirement that credit unions amend their charters to list each subsidiary of a group served by the credit union. This requirement was included in IRPS 99-1 in order for NCUA to monitor overlap situations. However, the agency has correctly removed overlap analysis in the proposal and thus has eliminated the need for subsidiaries to be listed in the charter. As the subsidiaries served through a corporate restructuring share a common bond with the original group, the credit union should not be required to add these subsidiaries separately to the charter. This would certainly simplify the process for both the agency and the credit union and allow the credit union to effectively serve its field of membership without interruption.

Community Charters

Section 109(g) of the FCUA requires the field of membership of a community-chartered FCU to be a “well-defined local community, neighborhood or rural district.”¹⁹ NCUA has implemented a process in IRPS 99-1 whereby credit unions must provide evidence to the agency of community interaction or common interests. Within this process, NCUA has included a presumption in favor of a single political jurisdiction with a population of 300,000 or multiple political jurisdictions with a total population of 200,000.²⁰

¹⁷ 144 Cong. Rec. H7037, 7045 (Aug. 4, 1998).

¹⁸ American Bankers, 93 F. Supp.2d 35 (D.D.C. 2000).

¹⁹ 12 U.S.C. § 1759(g).

²⁰ See 63 Fed. Reg. at 72,037.

While this presumption helps to ease the process, NAFCU is concerned with the process endured by groups that do not meet this presumption. NCUA states in the preamble to the proposal that there is “no negative presumption for larger geographical areas” but that “more detailed documentation will be necessary to support that the proposed area is a well-defined community.”²¹ NAFCU understands that this process is often arduous and extremely time-consuming and supports the agency’s recent statements that community charter applications will be evaluated within 60 days. However, NAFCU believes that NCUA should recognize that the term “local community, neighborhood or rural district” is unique to the group and may very well include larger populations than those provided for within the presumption.

Congress has provided NCUA with very little input on the definition of a local community, neighborhood or rural district. However, NAFCU notes that the Federal Reserve Board in its Community Reinvestment Act regulation, which requires banks to meet the needs of the “*local* communities in which they are chartered,”²² has determined that service to a bank’s “local community” will be evaluated through the bank’s service to its “assessment area.” An assessment area is defined as one *or more* metropolitan statistical areas (MSA), as defined by the Office of Management and Budget, or one *or more* contiguous political subdivisions, such as counties, cities or towns.²³ NAFCU suggests NCUA consider this definition in attempting to ascertain whether the local community requirement has been met.

Community Action Plan (CAP)

While NAFCU wholeheartedly supports many of the revisions to the chartering and field of membership manual in proposed IRPS 00-1, NAFCU strongly opposes CAP. In response to reports of the impending CAP proposal, NAFCU sent a letter to each member of the NCUA Board on June 1, 2000, communicating its opposition to this initiative and asking NCUA to refrain from including it in the proposal. NAFCU continues to believe that this requirement is unnecessary, would impose an unwarranted cost and paperwork burden on credit unions and would serve to divide credit unions.

NAFCU reiterates Congress’ findings in CUMAA that “the American credit union movement began as a cooperative effort to serve the productive and provident credit needs of individuals of modest means... [and] [c]redit unions continue to fulfill this public purpose...”²⁴ In addition, NAFCU points to recent letters to the NCUA from four senior members of Congress, each of whom serves as chairman of a subcommittee of the House Banking Committee, and the Chairman of the Senate Committee on

²¹ 65 Fed. Reg. 37,071 (2000).

²² 12 U.S.C. § 2901 (emphasis added).

²³ 12 C.F.R. § 228.41(c) (emphasis added).

²⁴ Credit Union Membership Access Act § 2(1).

Banking, Housing and Urban Affairs urging NCUA to reject this proposed action.²⁵ These letters point out the repeated failures of past attempts to subject credit unions to Community Reinvestment Act-type requirements. These failures all center around one fact, as stated directly by NCUA in the preamble to this proposed rule: *“There is no evidence to support that community credit unions have failed to fulfill their responsibility to serve the entire community.”*²⁶

Implementation of this plan would no doubt require NCUA to allocate staff and resources to monitor and enforce the plan. NAFCU considers this an absolute waste of resources and strongly opposes additional expenditures by the agency to implement the plan. Furthermore, NAFCU opposes the use of the agency’s existing staff and resources, which would be better allocated to other needs.

Furthermore, consider the following consequence, which NAFCU assumes the agency has not anticipated. Suppose a community credit union completely overlaps the field of membership of a smaller, single common-bond credit union. However, in the spirit of the cooperative credit union movement, that community credit union partners with the smaller credit union to help it serve those members and remain a viable institution. Under the CAP requirement, that community credit union would be subject to a regulatory mandate to market its services to all of its members, including those within the field of membership of the smaller credit union. As there is a danger that NCUA will conclude that the community credit union, by partnering with the smaller credit union, has not “reasonably complied” with its community action plan, rest assured that partnership will cease to exist.

NAFCU would like to note the NCUA Board chairman’s previous statement to NAFCU in a letter dated March 10, 2000, regarding conversions to community-chartered credit unions:

“Regrettably, when it adopted IRPS 99-1, the NCUA Board stripped away virtually all overlap protection for credit unions overlapped by community credit unions, even in cases in which the safety and soundness of the overlapped credit union is seriously jeopardized... I believe this is a serious abrogation of NCUA’s regulatory and insurance responsibilities under the law and have stated that I will not vote for any community conversion without knowing the safety and soundness implications of any resulting overlaps.”²⁷

²⁵ See Letter from Sen. Phil Gramm to Norman D’Amours (June 5, 2000) (Attachment 1); Letter from Reps. Spencer Bachus, Richard Baker, Marge Roukema and Peter King to Norman D’Amours (June 29, 2000) (Attachment 2).

²⁶ 65 Fed. Reg. 37,071 (2000).

²⁷ Letter from Norman D’Amours to Fred Becker (March 10, 2000) (Attachment 3).

August 14, 2000
Page Ten

As mentioned above, NAFCU believes that any community-chartered credit unions that have attempted in good faith to resolve overlaps with other credit unions will no longer be permitted to honor those commitments if they are to assure compliance with the CAP requirement. NAFCU would think that NCUA would not support an initiative that would create this result. Furthermore, by implementing this rule for community credit unions, NCUA is encouraging those credit unions to abandon the cooperative movement and is dividing federal credit unions as a whole. This result is unacceptable.

NCUA has recognized that there is no evidence that credit unions are failing to serve their communities, and the detrimental effect this regulation will have on credit unions is obvious. Furthermore, it certainly does not serve to address any potential safety and soundness concerns. Therefore, NAFCU asks the agency to heed the warnings of Congress, the legislative history of CUMAA and the negative reaction from hundreds of credit unions and remove this provision from the final rule.

Underserved Areas

NAFCU supports NCUA's efforts to simplify service to underserved areas. Many credit unions have expressed a desire to reach out to communities that need their services but have had difficulty with the process. NAFCU supports the addition to this section of a presumptive community. However, as stated earlier, NCUA should take steps to ease the process for those communities that do not meet the specific population requirements of this presumption.

In addition, NAFCU does not believe that regulatory flexibility is an appropriate incentive for the addition of underserved areas. As stated in its comment letter on RegFlex, NAFCU believes that regulatory flexibility should be used to reward credit unions that have demonstrated strong financial performance and effective risk management.

NAFCU would like to thank you for this opportunity to share its views on the proposed amendments to the chartering and field of membership manual. We look forward to continuing collaboration with the agency on this issue. Should you have any questions or require additional information, please call me or Gwen Baker, NAFCU's Director of Regulatory Affairs, at (703) 522-4770 or (800) 336-4644 ext. 266.

Sincerely,

Fred R. Becker, Jr.
President and CEO

Attachments