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A Member of the Credit Union System

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March 28, 2006

Ms. Mary Rupp  
Secretary to the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314

Re: Part 701.1, Proposed Rule on Service to  
Underserved Areas

Dear Ms. Rupp:

On behalf of the Credit Union National Association, I am responding to the National Credit Union Administration Board's request for comments on its Notice of Proposed Rulemaking regarding the agency's policy on federal credit union service to underserved areas incorporated by reference in 12 CFR 701.1 of NCUA's regulations. By way of background, CUNA represents approximately 90% of our nation's 8,900 state and federal credit unions, which serve nearly 87 million members.

## **Background**

Service to the underserved is the latest victim in the banking system's cynical gambit to repress and restrain credit unions, frustrating the noblest of intentions of credit unions and NCUA in the process, as the agency's proposal to prohibit non-multiple group credit unions from including new underserved areas demonstrates.

CUNA views this proposal as one of the most significant ever issued by the agency in the area of field of membership, and we have expended considerable resources to deliberate on the proposal and frame our response appropriately. Our letter was developed under the auspices of CUNA's Federal Credit Union Subcommittee, which conducted telephone conference calls and convened an in-person to review the proposal.

Our deliberations were mindful of the input we received from other credit unions and leagues, including comments CUNA received during a telephone conference call with numerous affected community credit unions held specifically to discuss



the proposal with them. Additionally, CUNA's letter reflects responses we received from a survey we conducted of federal credit unions serving existing underserved areas that do not have multiple-group charters. A report summarizing the aggregate data we received is attached as Appendix A.

At the outset, we want to emphasize in the strongest terms possible that prohibiting single group and community credit unions from adding underserved areas is an abomination. It is only because banker groups have filed a lawsuit criticizing NCUA's policy that the credit union system is facing this unfortunate prospect.

Prior to the passage of the Credit Union Membership Access Act and beginning in 1994, all federal credit unions were permitted to include low-income areas in their fields of membership. Since then and until the bankers' suit, credit unions have worked with NCUA to bring service to low-income areas.

Such service was recognized throughout the development of HR 1151, the Credit Union Membership Access Act of 1998 (CUMAA), and one of the bill's authors, Rep. Paul Kanjorksi (D-PA), attempted to clarify during floor debate in the House that all federal credit unions should be allowed to serve underserved areas. 144 Cong. Rec. H7045 (1998).

Now, in yet another attempt to discredit NCUA, restrict credit unions and disadvantage credit union members, the banks have undertaken a new challenge that has made it necessary for NCUA to amend its field of membership policy on credit unions' service to underserved areas. The fact that members and potential members in underserved areas will pay the price for this challenge is apparently of no concern to the banking industry.

Banker groups have presented no statistics or other information to show that they will be harmed by NCUA's policy. The underserved population has never been a marketing priority for banker groups. In fact, underserved communities need credit unions because bank institutions often do not provide even basic services to low-income and underserved households.

There is absolutely no good public policy reason to change NCUA's current policy on service to underserved areas. Thus, we urge and support NCUA's efforts to mount every reasonable legal defense whenever possible as appropriate in order that all federal credit unions have the right, as they unquestionably should, to include underserved areas.

Despite our deep conviction regarding credit union service to the underserved, we must recognize the realities of the current situation, which our letter addresses, including a brief discussion of the development of the proposal; specific aspects of the proposal; CUNA's regulatory recommendations; and the

need for legislation to clarify the ability of all federal credit unions to include underserved areas outside of their fields of membership.

### **Mission of Credit Unions**

As discussed below, NCUA's policy regarding underserved areas facilitates the ability of federal credit unions to serve underserved areas and individuals of modest means. Such service is consistent with the mission of credit unions, although credit unions are not limited to serving just those of modest means, despite banker rhetoric to the contrary. Congress made this very clear in the findings of CUMAA, which state in relevant part:

The Congress finds the following:

Credit unions, unlike many other participants in the financial services market, are exempt from Federal and most State taxes because they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means. Pub. L. 105-219, 112 Stat. 914 (1998).

Thus, the language recognizes credit union service to all consumers, including those of modest means, but does not mandate that credit unions only serve such individuals. Even so, serving underserved areas is an important goal supported by the agency's current policy.

### **Why NCUA Proposed the FOM Policy Changes**

The proposal, which regrettably would prohibit single group and community credit unions from adding new underserved areas, is the direct result of litigation filed November 1, 2005 by the American Bankers Association, the Utah Bankers Association, and four Utah banks against NCUA to overturn its field of membership policy that permits federal credit unions, regardless of their charter type, to reach out to underserved areas not encompassed in their current fields of membership.

The bankers' basic complaint is that because CUMAA limits federal credit unions to three charter types (single group, community, and multiple common bond) and identifies only one exception (adding underserved areas to multiple common bond credit unions) Congress meant to prohibit single group and community credit unions from adding undeserved areas. Thus, in the view of the bankers, any policy that allows those groups to include underserved areas is not permitted under the Act.

The filing of the litigation, timed to coincide with a hearing before the House Ways and Means Committee on the tax exempt status of credit unions that had been advocated by those and other banking groups, displays not only the lengths such groups will go to curtail credit union service, but also their total disregard for the impact of their actions on underserved communities.

In sharp contrast, NCUA's interpretation was designed to facilitate credit union service to underserved areas, consistent with the findings of CUMAA. The Board stated in explaining its field of membership changes adopted in December 1998:

The Board proposed ... special chartering policies for underserved areas. The Board's intent was to encourage the formation of new credit unions and the expansion of existing credit unions into underserved and low-income areas. *Organization and Operations of Federal Credit Unions*, final rule, 63 FR 71998, 72015 (Dec. 30, 1998).

Despite the agency's desire to help credit unions serve those of modest means, the current legal challenge casts a dark shadow of uncertainty on the authority of NCUA and non-multiple group credit unions to add underserved areas, particularly for new expansions. Concerned that credit unions adding new areas and their communities could face elimination of service if the banker groups prevailed, NCUA issued a moratorium on December 29, 2005. Under the moratorium, new underserved areas will not be permitted for single group and community credit unions, although existing underserved areas may continue to receive credit union service, regardless of the credit union's field of membership.

### **NCUA's Proposed Policy**

The proposal basically incorporates the moratorium into the agency's field of membership policy regarding service to underserved areas. Multiple-group credit unions, as they can now under the moratorium, may continue to serve existing underserved areas as well as add new ones.

The proposal would make other changes to NCUA's field of membership (FOM) policy not addressed in the litigation. Under NCUA's present FOM policy, a "service facility" for the underserved area must be established within two years and is defined as a "place where shares are accepted for members' accounts, loan applications are accepted and loans are disbursed" (71 Fed. Reg. 4530, 4532 (Jan. 27, 2006)).

The proposal would not change this but would modify the list of examples of a "service facility" to exclude a credit union-owned electronic facility. A credit union owned branch, a shared branch, a mobile branch and an office operated on a regularly scheduled, weekly basis would continue to meet the definition but it would not include an ATM or the credit union's Internet website.

The current NCUA FOM policy permits a credit union with a preexisting office within close proximity to the underserved area to use that office to provide services to the underserved area. The proposal would change that to require credit unions serving underserved areas to maintain a facility within the area.

## **CUNA's Regulatory Recommendations**

### **Agency's Rulemaking Process**

Before summarizing CUNA's views on the specific elements of the proposal, we want to address the agency's process in adopting new policy, particularly field of membership provisions that implement aspects of CUMAA.

As evidenced by our involvement in all of the numerous field of membership cases brought by the bankers against NCUA over the years, CUNA has participated in court and in other venues along with NCUA to help defend its efforts to maximize the ability of credit unions to serve their fields of membership, consistent with a reasonable interpretation of the Federal Credit Union Act.

As these challenges and other ongoing banker efforts demonstrate, NCUA is under constant scrutiny by the banking industry. In light of this situation and the agency's own goals of excellence in regulation, the intensive and proactive involvement of NCUA's legal department is required in developing the agency's record as well as in helping to provide rigorous analysis, consistent with the agency's legal authority. Going forward, CUNA urges the agency to continue its efforts to address these concerns.

### **CUNA Recognizes the Banker Litigation Limits NCUA's Options**

Regarding the specific provisions of the proposal, CUNA recognizes that as a result of current litigation, NCUA has little legal flexibility to pursue a different course of action at this time. Nonetheless, such reality should not obscure the inevitable result that the litigation initiated by the bankers in Utah will be tragic, both for credit unions as well as for underserved areas across the country, if the banker groups prevail.

### **Non-Multiple Group CUs Should Be Allowed to Continue Serving Existing Areas and Adding New Members**

As part of the final rule, NCUA should permit service to existing underserved areas already approved by the agency to continue, regardless of the charter of the credit union. We also support allowing non-multiple group credit unions that already serve existing underserved areas to continue adding new members from those areas, based on the following analysis.

Under general principles of administrative law, regulations are prospective in nature. U.S. Supreme Court Justice Antonin Scalia discussed this matter in *Bowen v. Georgetown Hospital*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring). He first looked at the definition of a “rule” under the Administrative Procedure Act (APA):

The first part of the APA’s definition of ‘rule’ states that a rule:

means the whole or part of any agency statement of general or particular applicability *and future effect* designed to implement, interpret or prescribe law or policy or describing the organization, procedure or practice requirements of an agency.... 5 U.S.C. 551 (4) (emphasis added.)

Justice Scalia then concluded:

The only plausible reading of the italicized phrase is that rules have legal consequences only for the future.

Other federal courts have held that it is appropriate to consider the harm a new rule would inflict if given a retroactive application and whether affected parties relied on the former rule to their detriment. For example, the Federal District Court for the District of Columbia has developed an analysis that includes, among other factors, a review of the following:

- The extent to which the party against whom the new rule is applied relied on the former rule;
- The degree of burden which a retroactive order imposes on a party; and
- The statutory interest in applying a new rule despite the reliance of a party on the old standard.

*Southwestern Pub. Serv. Co. v. FERC*, 842 F.2d 1204, 1208 (10th Cir. 1988); *NLRB v. Niagara Machine & Tool Works*, 746 F.2d 143, 151 (2d Cir. 1984); *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1068 (2d Cir. 1980); *Retail Wholesale Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *In re SNE Industries*, 177 L.R.R.M. 1121, 1122, 344 NLRB No. 81, (May 17, 2005).

- In determining whether the retroactive application of an agency rule will cause manifest injustice, the agency should consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.

*See Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989); *Retail Wholesale Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

Further, based on sound principles of public policy and equity, which are appropriate and reasonable for this situation, NCUA should not apply its rule retroactively.

The public policy issues involved are no less than the rights of credit unions to bring financial service to undeserved areas, and the rights of such areas to have these important services available to them. The principles of equity pertain to the ability of credit unions to rely reasonably on duly promulgated regulations of NCUA, without suffering harm in the process.

NCUA has taken several actions to facilitate and encourage federal credit unions of all charter types to include underserved areas. In December 1998, NCUA adopted a final rule revising its field of membership policies to implement FOM provisions of CUMAA. The changes include provisions that authorize all federal credit unions to include underserved areas. As stated in the Supplementary Information accompanying the final rule:

Although the new legislation specifically authorizes flexible policies regarding multiple common bond credit unions providing service to underserved areas, the Board has determined that previous agency policies allowing similar service to poor and disadvantaged areas should continue. Accordingly, the Board stated that the criteria established for multiple common bond credit unions would also apply to single occupational, single associational and community credit unions desiring to served underserved areas. 63 FR 71998, 72015 (Dec. 30, 1998).

Also, through its Access Across America program and related public relations efforts, NCUA has widely encouraged federal credit unions to reach out to those of modest means through the addition of underserved areas. These efforts to facilitate service to those of modest means have generally been viewed as positive within the credit union system.

In January 2005, the agency's last release on the program states that NCUA does:

(E)ncourage credit unions to evaluate their long-term business plans to consider if adopting an underserved neighborhood or community can fulfill both their financial and philanthropic goals for the future.

Since the adoption of the FOM policy almost eight years ago, and through the promotion of Access Across America, credit unions have relied not only on the agency's policy but also on its encouragement to reach out to numerous underserved areas.

CUNA's survey of affected credit unions clearly shows that they have a large presence, substantial member activity levels, and significant financial outlays in underserved areas. (See pages A1-A2 of the survey summary results in Appendix A.).

- The 182 affected credit unions serve a total of 813 underserved areas throughout the nation.
- The total costs affected credit unions have incurred in bringing service to underserved areas is \$1.3 billion.
- Affected credit unions have an estimated total of:
  - 315 branches within underserved areas and 153 branches near underserved areas;
  - 107 shared service centers in underserved areas; and
  - 35 shared service centers near underserved areas
- Affected credit unions have a total of 19 million potential members in the underserved areas. They have added, thus far, a total of 1.6 million actual members in those areas.
- Affected credit unions have substantial financial activity in the underserved areas that they have added: At year-end 2005, they have an estimated total of \$4.0 billion in outstanding loans and an estimated total of \$3.4 billion savings deposits in their underserved areas.
- Survey respondents report a total of \$431 million in total costs incurred in establishing service to underserved areas. The average total dollar amount of costs incurred is \$8.3 million per responding credit union, while the median total dollar amount of loans outstanding is \$225,000.
- On a per-member basis the \$431 million in total costs incurred translates to approximately \$799 per underserved area member. This high level of per-member costs reflects substantial, largely sunk, start-up costs associated with developing new business in these areas. As new members in these areas join, the per-member costs will decrease.

As CUNA's survey indicates on page A-4, activities and services undertaken for underserved areas include:

- The construction or purchase of branch offices;



- The maintenance of such offices, including providing appropriate personnel;
- Developing services specifically tailored to such areas;
- Developing marketing and educational materials directed to their underserved areas; and
- Using funds that would otherwise have been used for other aspects of the credit union's operation to finance service to underserved areas.

Also as our survey shows, credit unions reaching out to underserved areas have demonstrated a real commitment to providing important services to those areas and have expended considerable resources in the process.

In addition the overall results of our survey support the conclusion that credit unions relied heavily on NCUA's rule and guidance to reach out to underserved areas. As a result, there will be a significant negative impact if NCUA does not permit non-multiple group credit unions to continue serving underserved areas, including adding new members in such areas. The harm would affect credit unions and their communities and would not be limited to financial injury alone. It would include the following:

- Non-multiple group credit unions could lose the millions they have spent to open facilities to serve the underserved.
- Substantial share deposits from underserved areas that credit unions now receive, along with significant numbers and amounts of loans would no longer be permitted.
- There would be significant costs to non-multiple group credit unions just to unwind their services and discontinue accounts and other activities in underserved areas.
- Individual credit unions would suffer reputational risk in that their underserved communities, as well as others in the community, would likely no longer feel they could rely on the credit union for service.
- The credit union system as a whole could be viewed as unreliable if consumers are concerned about continued service.
- Individuals would face the disruption of their credit union accounts and account relationships with their credit unions.
- Underserved areas now served by credit unions may not have access to other mainstream financial institution service.
- Individuals in such areas could be subject to predatory financial practices from nontraditional financial institutions.

Because of credit unions' justified reliance on NCUA's rule and in recognition of public policy that supports financial services for the underserved, permitting service to continue for existing underserved areas would withstand future legal challenges, in our view.

Such principles of equity and fair dealing ensure justice is served when an aggrieved party has 'clean hands' and a satisfactory outcome is not otherwise readily available. That is certainly the case here where non-multiple group credit unions relied on the agency's rule and its prompting to undertake underserved areas.

Thus, NCUA should not issue a final rule that prohibits non-multiple groups from continuing to serve undeserved areas, including adding new members, because those credit unions relied on NCUA's rule as well as its encouragement to expend substantial efforts and funds to serve underserved areas.

We urge NCUA to consider the harm that would befall underserved communities and affected credit unions and permit continued service for existing areas and allow the addition of new members in existing areas.

### **Service Facilities**

Where a facility is located is very important for credit unions and the areas they serve. NCUA's current policy requires that a facility must be established within an underserved area within two years of the agency's approval.

However, a facility that is in reasonable proximity to an underserved area may be used to provide service to the area, under certain conditions. The current policy recognizes that there may be practical considerations, such as the fact that a credit union already has a viable branch located just outside an underserved area and that by using the existing branch, rather than having to construct a new one, the credit union can make more loan funds and other services available to the service area. It also recognizes that some credit unions may serve multiple, contiguous underserved areas.

We believe NCUA, as other regulators do in their rulemaking, has reasonable authority to take such practical considerations into account, and that this action is within NCUA's purview.

The proposed policy changes raise issues regarding the definition of a facility that may be used in an underserved area. CUNA has concerns about the elimination of the word "electronic" from the examples the policy provides for the types of permissible facilities in an underserved areas.

In our view, NCUA should not, unless expressly required by law, prescribe how services are delivered and any facility that meets NCUA's requirements (accepts shares, etc.) should be permitted. (We recognize that the policy precludes the use of ATMs and Internet web sites to serve underserved areas, reflecting the legislative history of CUMAA, even though the language of the Act does not direct this result.)

## **Support for Legislation**

In light of the litigation and to allow all federal credit unions to add underserved areas consistent with their tradition, purpose and mission as articulated by Congress, CUNA supports an amendment to the Federal Credit Union Act that would make it clear even to the bankers that such service is permissible, regardless of a federal credit union's charter.

We also support an amendment to the Federal Credit Union Act that would clarify that credit unions seeking approval to include new underserved areas may also use existing facilities within reasonable proximity of the underserved area.

The amendments are attached as Appendix B.

## **Specific Questions From NCUA**

NCUA has asked for comments on five issues which are addressed below.

- NCUA's authority to permit expansion into underserved areas for all charter types of federal credit unions.

We have already discussed this issue above. To summarize, it is fully consistent with the tradition, role and mission of all federal credit unions to be able to add underserved areas. Given the litigation, CUNA supports legislation that would make it clear such service is permissible, regardless of a federal credit union's charter type.

- The impact of limiting expansions to only multiple group common bond credit unions.

We discuss this issue above. Also, CUNA's survey as summarized in Appendix A provides information on the impact that the limitation will have if existing underserved areas are not continued.

- Whether multiple group credit unions that convert to another charter type should be permitted to retain their underserved areas.

CUNA's view is that they should be able to retain such areas. As the only group NCUA is authorizing to include underserved areas, multiple group credit unions have and undoubtedly will continue to rely on that authority to develop and market specific programs for the underserved. Not only would it be inequitable to force them to abandon such areas, it would also be unfair and harsh for the communities they are serving.

If NCUA adopts a policy that would not permit converting multiple group credit unions to continue serving underserved areas, some multiple credit unions may forego including underserved areas out of the fear that they might need to convert to other types of credit union charter and then would have to terminate service to their underserved areas. NCUA should allow multiple group credit unions that later convert to a community or single group charter to continue serving their underserved areas after the conversion.

- The type and extent of existing investments by non-multiple group credit unions.

This information is addressed in Appendix A which summarizes the data that responding non-multiple credit union provided to CUNA regarding their service to underserved areas.

- The impact on members in underserved areas of restrictions on the addition of new members in underserved areas they are currently serving.

We address this issue above. CUNA supports including a provision in the final rule that will permit non-multiple group federal credit unions to continue adding new members to underserved areas, despite the general rule that only multiple group federal credit unions are permitted to include underserved areas.

## **Conclusion**

It is truly regrettable that banker groups have undertaken litigation that if successful, will disadvantage underserved areas by prohibiting non-multiple group credit unions to include them within their fields of membership. Greed is boundless and willfully ignores the consequences of its actions on its victims.

The litigation has caused NCUA to revisit its policy on serving the underserved and, while its proposed policy is abhorrent, CUNA recognizes that NCUA has little, if any, flexibility to pursue any other course of action.

We urge NCUA to include provisions in the final rule that will permit:

- Non-multiple group credit unions to continue serving existing underserved areas;
- Non-multiple group credit unions to add new members to existing underserved areas;
- Existing facilities within a reasonable proximity of an underserved areas to continue serving those areas;
- Any type of facility that meets NCUA's requirements to be utilized to serve underserved areas.

We also urge NCUA to work with Congress on an expedited basis to pursue legislative amendments such as those in Appendix B that will leave no doubt that all federal credit unions may add underserved areas.

If you have questions about our letter, please do not hesitate to give me a call at 202-508-6736.

Sincerely,

A handwritten signature in cursive script that reads "Mary Mitchell Dunn". The signature is written in black ink and is positioned to the left of a vertical red line.

Mary Mitchell Dunn  
CUNA SVP and Associate General Counsel

cc: NCUA Board Members  
NCUA General Counsel  
CUNA's GAC  
CUNA's Federal CU Subcommittee