

August 18, 2008

Ms. Mary Rupp  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314-3428

Re: Comments on Proposed Rule Part 701.1, Underserved  
Areas (IRPS 08-02)

Dear Ms. Rupp:

On behalf of the Credit Union National Association, I am providing comments to the National Credit Union Administration on the Board's proposal that would dramatically alter the process for applying for and receiving approval of an underserved area, "Chartering and Field of Membership Manual for Federal Credit Unions," (Interpretive Ruling and Policy Statement (IRPS) 08-02). By way of background, CUNA is the largest credit union advocacy organization in this country, representing approximately 90% of our nation's 8,300 federal and state-chartered credit unions, which serve 91 million members.

### **Summary of CUNA's Views**

- CUNA does not support this proposal.
- In our view, the proposal misinterprets the requirements of the Federal Credit Union Act (Act) regarding underserved areas.
- In addition, the proposal adopts an application framework that is needlessly cumbersome and will restrict the ability of multiple group federal credit unions to add underserved areas to their fields of membership.
- In our view, Congress intended that NCUA would implement the provisions of the Act carefully but in a manner that will facilitate service to underserved areas. The proposal undermines both those objectives.
- CUNA urges NCUA to retain the current process and not to proceed with the proposal.
- We also believe that NCUA should be mindful that the Credit Union, Bank, and Thrift Regulatory Relief Act, HR 6312, remains pending in Congress and that this legislation would change the definition of "undeserved area." In light of this, NCUA should not proceed with this proposal until we know whether passage of CUBTRRA is possible this year.

### **Discussion of CUNA's Position**

The proposal would clarify the procedure for establishing that an "undeserved area" qualifies as a local community; address the application of economic

distress criteria; and clarify requirements for showing an area has “significant unmet needs,” including the use of data from NCUA and other agencies to analyze whether an area is “undeserved by other depository institutions.”

Since the adoption of the Credit Union Membership Access Act in 1998, NCUA has revised the FOM provisions on underserved areas three times (in 1999 to implement CUMAA; in 2002 to include underserved area criteria from the CDFI Fund; and in 2006 to prohibit community and single group credit unions from adding new underserved areas, as a result of a bankers' challenge).

Just when multiple group credit unions are starting to feel that the process is settled, the agency again seeks to change the underserved provisions in a manner that, if implemented, would be overly complex, burdensome, and as discussed below, inconsistent with the Federal Credit Union Act (FCU Act.)

### **CUNA Questions NCUA’s Basis for the Rule**

Before addressing concerns with various aspects of the proposal, CUNA has a fundamental disagreement with the basic rationale for the proposal and the analysis of the FCU Act’s provisions regarding underserved areas that underlie the proposal.

The agency provides very little explanation to the credit union system as to why the proposal is necessary. The scant discussion of the impetus for the proposal focuses on the agency’s intent to “update and clarify the existing process of approving credit union service to “underserved areas,” mentioned briefly in the Supplementary Information to the proposal.

While we appreciate efforts to clarify and update rules, we are not aware of problems with the current process that indicate that the FOM Manual provisions on underserved applications are not clear and which would justify a broad new regulation on underserved areas and the application process.

CUNA also seriously questions NCUA’s interpretation of the FCU Act that underpins the proposal’s wholesale reliance on geographic factors of the CDFI Fund’s “investment area” regulations to, in effect, determine the dimensions of a permissible undeserved area.

We believe that the FCU Act supports and directs a better interpretation -- as well as outcome -- in terms of how underserved areas are defined.

Under the Act, a federal credit union must have a field of membership that is a single common bond, multiple common bond, or encompasses a community FOM. The Act provides an exception for underserved areas. It states:

....[T]he Board may allow the membership of the credit union to include any person or organization, within a local community, neighborhood or rural district if—

(A) the Board determines that the local community, neighborhood, or rural district –

- (i) is an ‘investment area’ as defined in section 103(16) of the Community Development Banking and Financial Institutions Act of 1994, and meets such additional requirements as the Board may impose; and
- (ii) is underserved, based on data of the Board and the Federal banking agencies (as defined in section 3 of the Federal Deposit Insurance Act), by other depository institutions (as defined in Section 19(b)(1)(A) of the Federal Reserve Act; and

(B) the credit union establishes and maintains an office or facility in the local community, neighborhood or rural district at which credit union services are available.

As these provisions indicate, and as NCUA’s current FOM provisions recognize, Congress envisioned a process for approving undeserved areas that first starts with a determination that a recognizable geographic area – a local community, neighborhood or rural district (i.e., community) – exists. The legislative history to CUMAA reinforces this (H.R. Rep 105-472, at \*19 (1998)):

There is also an exception in this section for underserved areas. Any person or organization within an underserved local community, neighborhood, or rural district may be added to multiple common bond credit unions which establishes and maintains an office or facility in the underserved areas.

However, the proposal would, in effect, eliminate the community language as the geographic measurement for an underserved area and replace it with dimensions addressed by the CDFI’s investment area regulations.

There are several problems with this. First, NCUA is not authorized to ignore the language in the Act that directs it to use the community as the geographic basis for determining whether an underserved area exists. While NCUA is required to consider whether a community meets the “distress criteria” for a CDFI investment area as a means to determine it is underserved, it is not required to utilize the CDFI’s geographic limitations on investment areas as the mechanism to measure and delineate the area to be served.

The FCU Act directs NCUA to determine whether the area is an “investment area” within the meaning of Section 103(16) of the Community Development Banking and Financial Institutions Act of 1994. The regulations which most appropriately correspond to how Congress intended this section to be implemented are found at 12 C.F. R § 1805.201(b)(3)(ii)(D) and deal with “Distress Criteria.” These criteria address economic but not geographic components.

For example, these rules provide that the area must have at least 20% of its population living in poverty; the median family income is at or below 80% of the median for a particular area; the unemployment rate is at least 1.5 times the national average or meets similar economic distress criteria. It is CUNA’s view that these economic factors are the “investment area” criteria that Congress intended should be applied to the total area of the community on an aggregate basis and not the geographic elements of investment areas that NCUA’s proposal would apply.

Also, using the CDFI’s geographic factors and relying on the “My CDFI Fund” website to identify underserved areas as directed by the proposal, portions of Washington, DC, for example, that are indeed undeserved, would no longer qualify as such. Much more affluent neighborhoods, however, such as portions of Georgetown, would apparently meet the underserved criteria. We believe this result was not intended by the NCUA Board or by Congress. A map of Washington, DC illustrating these anomalies, showing “distressed areas” as found on the “My CDFI Fund” website, and showing possible Washington, DC “undeserved areas” is attached.

### **Investment Area - Distress Criteria**

As discussed above, for all areas that are not Empowerment Zones or Enterprise Communities (which the proposal notes are largely obsolete categories) , the proposal would require the credit union to apply CDFI distress criteria to CDFI-determined geographic units, such as census tracts in the case of metropolitan areas. In addition to the concerns addressed above regarding the misinterpretation of the FCU Act, CUNA has practical concerns about the impact of the proposal.

Based on our analysis, the proposed shift in policy regarding how to define an underserved area will **actually result in smaller and fewer underserved areas being approved**. This is an outcome that we find objectionable in the face of the need in this country for credit union service, and one that is absolutely unnecessary.

Currently, NCUA follows a “single unified entity approach” to determine whether an area meets distress criteria as an investment area. Under this methodology, NCUA looks at the entire proposed area, and if the total area sufficiently meets

NCUA's definition, it can be approved. The proposal, deferring to the approach used by the CDFI, would replace the unified area review with one that focuses on smaller "geographic units," such as a census tract. While the proposal would ostensibly permit contiguous geographic units, it would impose a new requirement that 85% of the undeserved area's population must live in the distressed census tracts. Coming from an agency tasked with encouraging underserved service, this proposed approach is very poor public policy that will translate into real barriers to credit union service in certain areas.

Also, the proposal dictates that fractional geographical units are not permitted. However, if underserved individuals or organizations are located in those "fractional" areas, they ought to be included

As mentioned above, for multiple contiguous "metro" or "non-metro" units there would be the additional requirement that at least 85% of the area's total population reside within the units that meet the distress criteria. However, consistent with NCUA's policy on community fields of membership that are not in an underserved area, we see no reason why individuals who work, worship, or go to school in the area should not be included in the calculation.

In addition, whether an area is a single metro or non-metro area, it must, as a whole, meet one of the following distress criteria:

- An unemployment rate at least 1.5 times the national average; or
- At least 20 percent of the population lives in poverty.

These factors are considered now under NCUA's FOM rules and are part of the distress criteria established by the CDFI Fund. The proposal states that additional criteria, such as median family income, or in the case of a single "non-metro" county, population loss or migration loss, may also be considered. However, under the CDFI rules, the criteria NCUA treats as "additional" have the same value as the factors of unemployment and poverty. We question why the "additional" criteria should not be treated as primary factors, one of which the credit union would be required to meet.

In short, we think that the current provisions in the FOM Manual regarding undeserved areas are wholly consistent with the Act and with NCUA's authority to regulate underserved areas. In our view, there is absolutely nothing in the FCU Act that requires NCUA to abandon the present regulations and adopt the proposed approach, which we view as inconsistent with the Act and contrary to good public policy.

## **Requirements to Determine a “Local Community”**

Under the current FOM requirements, the requirements for a “local community” determination for a standard field of membership application are somewhat different from the requirements for determining “local community” for purposes of determining an “underserved area.”

To address this, the proposal would require that applicants for a presumptive community (multiple political jurisdictions with a total population of 500,000 or less or an area within a Metropolitan Statistical Area with one million or less population) for an undeserved area would have to submit a letter to the agency describing how the area meets the standards for community interaction and/or common interests, as is required for FOM applications not involving an underserved area. When the letter supporting a presumptive community does not provide sufficient evidence of community interaction, NCUA may require the credit union to provide additional information regarding the community. NCUA seeks comments on these proposed requirements.

We believe there is no higher priority in dealing with FOM applications than for the agency to build a solid record that demonstrates the agency’s rational basis for making FOM decisions. Consistent with that, we believe credit unions should be encouraged to provide whatever documentation they feel will best substantiate their applications.

However, we do not think that credit unions should be required to supply a letter regarding how a presumptive local community meets the agency’s criteria as a routine part of the application. The purpose of establishing “presumptive” criteria is to minimize the burden of having to show a community exists when the area meets predetermined criteria.

Rather than an additional letter from the applicant, which would be an additional burden and could be costly to produce, we think the regional offices that have knowledge of the area through their examination force, should have the responsibility for documenting whether a particular area meets NCUA’s local-community criteria. This analysis should include any factors that are inconsistent with the agency’s indicia of community and a full analysis by NCUA of such factors.

Certainly a letter regarding a presumptive community should not be required from an applicant credit union when the area has already been approved as a local community.

## **Underserved by Other Depository Institutions.**

Until now, the agency has encouraged credit unions to serve underserved areas by streamlining the application process for an area that has already been approved. We believe NCUA's proposed requirements regarding assessing whether an area is underserved by other depository institutions will wholly reverse that approach.

Under the proposal, another layer of analysis would be added by requiring the applicant credit union to demonstrate that an area is underserved by other depository institutions, including credit unions. To determine this, the credit union would look at the ratio of institutions to the population in the surrounding non-distressed area and compare it to the ratio of institutions to the population in the proposed area. If the ratio for the proposed area is below the ratio for the non-distressed area, it would be underserved.

By relying on this formulaic approach, NCUA will predetermine that credit unions seeking to serve an area that has already been granted will have a much harder time in obtaining approval. This seems to be a back-door return to exclusive FOMs, a concept abandoned a number of years ago.

Further, while service from other institutions in the area may be a factor in determining whether an area is underserved, the number of institutions in a community does not necessarily mean that individuals' financial needs are being met -- as the banking industry has repeatedly demonstrated,

Rather than focusing on the math and a separate analysis regarding how many institutions are in or out of the proposed area, we recommend NCUA clarify that the number of institutions in proposed area may be one of several factors to be considered as part of the application process. This would allow credit unions to provide information they deem relevant and important for their application, on a case-by-case basis.

## **Significant Unmet Needs**

A credit union seeking to add an underserved area would also have to determine if the area has "significant unmet (financial) needs."

Under the proposal, a credit union would be required to provide a one-page Narrative Statement demonstrating a pattern of such unmet needs. The statement must be "supported by relevant, objective statistical data reflecting, among other things, loan and financial services activity in the proposed area - much of which is now publicly available over the Internet."

We think credit unions should be permitted to provide such a statement but question whether it should be a requirement, particularly since some of the information in the statement will undoubtedly be duplicated elsewhere in the application.

We also question why the responsibility of showing an area has significant unmet needs should fall principally on the applying credit unions. We believe the application process could be improved for both credit unions and the agency if NCUA, rather than the credit unions, is chiefly responsible for documenting that an area has significant unmet needs. Credit unions would benefit because they would not have to undertake the expenses and burdens of assembling data and analyzing the financial activity of a proposed area. NCUA would benefit because it would set the parameters for the information and develop its own reliable resources to analyze the needs of the area.

### **Resources for Determining if an Area is Distressed**

To help credit unions determine whether an area is distressed, the proposal directs them to the U.S. Department of the Treasury's Community Development Financial Institutions Fund website, "My CDFI Fund."

As discussed previously in this letter, CUNA is concerned that the Fund's maps exclude areas that, under the FCU Act, a federal credit union ought to be able to include as an undeserved area. However, even if there were no definitional issues regarding the website, based on our own efforts and those of credit unions to utilize the site, we do not believe the CDFI Fund site will be useful to credit unions for purposes of their undeserved applications.

In that connection, we ask that all three NCUA Board Members make their own efforts to utilize it and assess its practicality before adopting requirements that might necessitate its use.

### **Pending Applications Are Being Deferred Until The Rulemaking Process Is Completed**

As the proposal states, NCUA is deferring approval of any new applications under the current regulations until the agency determines whether additional requirements will be imposed on the underserved application process.. This is not the only time that the agency has deferred consideration of applications pending changes in a final rule.

We oppose this practice, which in effect, voids Board policy and disadvantages credit unions that in good faith relied on the current rule to provide their applications. We encourage NCUA to discontinue this practice and, as it relates



to underserved areas, allow pending, well-documented applications to be fully considered now.

### **Conclusion**

CUNA strongly opposes NCUA's proposal on underserved areas. We find it to be inconsistent with the FCU Act and, if adopted, would translate into very poor public policy that would limit, not enhance, service to underserved areas. Given the state of our economy and the imperative for credit union services in underserved areas, we urge the Board to reconsider this proposal and eliminate it.

Thank you for consideration of our views, and I would welcome the opportunity to discuss our concerns.

Sincerely,

Mary Mitchell Dunn  
CUNA Deputy General and Senior Vice President

Cc: NCUA Board Chairman Michael Fryzel  
NCUA Board Vice Chairman Rodney Hood  
NCUA Board Member Gigi Hyland  
NCUA General Counsel Robert Fenner