ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 5, 2001

No. 00-5195

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN BANKERS ASSOCIATION,

Plaintiff-Appellant,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE, NATIONAL CREDIT UNION ADMINISTRATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, appellee submits the following certifications:

PARTIES AND AMICI

The parties, intervenors and amici curiae that appeared below are as follows:

1. Plaintiff: American Bankers Association.

2. Defendant: National Credit Union Administration.

3. Intervenor-Plaintiffs: Independent Bankers Association of America and Irondequoit Federal Credit Union.

4. Intervenor-Defendants: National Association of Federal Credit Unions, Credit Union National Association, State Employees Federal Credit Union, Point Mugu Federal Credit Union, CBC Federal Credit Union, First Services Federal Credit Union, Wheatland Federal Credit Union and Network Federal Credit Union.

The parties, intervenors and amici curiae that are before this Court are as follows:

1. Plaintiff-Appellant: American Bankers Association.

2. Defendant-Appellee: National Credit Union Administration.

4. Intervenor-Defendants/Appellees: National Association of Federal Credit Unions, Credit Union National Association, State Employees Federal Credit Union.

RULINGS UNDER REVIEW

The ruling under review is the district order (Kollar-Kotelly, D.J.) dated March 30, 2000, which is reported at 93 F. Supp. 2d 35 (D.D.C. 2000). That order was made final and appealable on May 9, 2000, by voluntary dismissal of the sole remaining claim entered by the district court.

RELATED CASES

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

GLOSSARY

ABA	American Bankers Association
APA	Administrative Procedure Act
ATM	Automated Teller Machine
DOJ	Department of Justice
CUMAA	Credit Union Membership Access Act
CUNA	Credit Union National Association
FCUA	Federal Credit Union Act
IBAA	Independent Bankers Association of America
IRPS	Interpretive Ruling and Policy Statement
NAFCU	National Association of Federal Credit Unions
NCUA	National Credit Union Administration

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STATEMENT OF JURISDICTION

The district court's jurisdiction was based on 28 U.S.C. § 1331 and 5 U.S.C. § 706. On March 30, 2000, the district court ordered dismissal of all but one count alleged in the Complaint. (JA 154-55).[1] On May 9, 2000, the parties stipulated to the dismissal of

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[1/] "JA" refers to the Joint Appendix filed with Appellant's opening brief.

the remaining count. (JA 157). The district court entered final judgment on the same date. On May 24, 2000, the American Bankers Association ("ABA") filed a timely notice of appeal. (JA 161). This Court has jurisdiction over the ABA's appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court properly dismissed the ABA's claims that the final rule promulgated by the National Credit Union Administration ("NCUA") to implement the Credit Union Membership Access Act ("CUMAA") violated the Administrative Procedure Act ("APA") or the expressed intent of Congress.

STATEMENT OF THE CASE

A. Nature of the Case

This suit involves various challenges to the regulations promulgated by NCUA that govern the chartering and membership rules for federal credit unions. Under the Federal Credit Union Act ("FCUA"), 12 U.S.C. §§ 1751 *et seq.*, Congress limited federal credit union membership to groups having a "common bond" of occupation or association, or groups within a well-defined neighborhood, community or rural district. Beginning in 1982, NCUA allowed groups with different common bonds to join together in "multiple

common-bond credit unions"; but the Supreme Court struck down this policy in *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998). In August 1998, Congress enacted CUMAA to overturn the result in *First Nat'l Bank* and to authorize the chartering of multiple common-bond credit unions. NCUA implemented the statutory standards for such multiple common-bond credit unions in a Final Rule published in December 1998.

The ABA filed suit to challenge the final rule, seeking a preliminary injunction to enjoin seven aspects of the rule on substantive grounds and to enjoin the rule in its entirety on procedural grounds. The district court denied the ABA's petition for a preliminary injunction, *American Bankers Ass'n v. National Credit Union Admin.*, 38 F. Supp. 2d 114 (D.D.C. 1999) ("*American Bankers I*"), and subsequently dismissed all but one of the causes of action in the ABA's amended complaint for failure to state a claim, *American Bankers Ass'n v. National Credit Union Admin.*, 93 F. Supp. 2d 35, 39 (D.D.C. 2000) ("*American Bankers II*"). The parties stipulated to the dismissal of the last remaining cause of action, and this appeal followed.

B. Statutory and Regulatory Background

1. The Federal Credit Union Act

The FCUA provides for the establishment of federal credit unions and governs their operation. The FCUA defines a credit union as a "cooperative association organized in accordance with the provisions of [the Act] for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752.

The power to charter, examine and supervise federal credit unions is vested in the NCUA, an independent agency, which is generally authorized to "prescribe rules and regulations for the * * * administration [of the FCUA]." 12 U.S.C. § 1766(a); *see generally* 12 U.S.C. §§ 1753, 1754, 1756. Congress believed that, by establishing the NCUA as an independent agency, it would improve the agency's ability to "provide more flexible and innovative regulation." S. Rep. No. 91-518 at 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2479, 2481.

As originally enacted, § 1759 of the FCUA provided that:

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, * * * except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district * * * .

12 U.S.C. § 1759 (1989) (amended by later enactment). Beginning in 1982, NCUA adopted a policy permitting different employee groups to combine into one multiple common-bond credit union. Interpretative Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16775 (Apr. 20, 1982). In 1998, the Supreme Court in *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998), held that NCUA's 1982 rule, which permitted credit unions to be comprised of multiple, unrelated groups, was inconsistent with the underlying statute. *Id.* at 499-501. Shortly thereafter, Congress amended § 1759 to overturn the result in *First Nat'l Bank* to provide for the establishment of multiple common-bond credit unions. CUMAA, Pub. L. No. 105-219, 112 Stat. 913 (1998).

2. The Credit Union Membership Access Act

Congress enacted CUMAA to "ratify the longstanding policy of the [NCUA] with regard to [the] field of membership [in] Federal credit unions [by] specifically authoriz[ing] multiple common bond federal credit unions." H. Rep. No. 105-472, at 1 (1998), *reprinted in* 1998 U.S.C.C.A.N. 324, 324. Accord S. Rep. No. 105-193, at 6 (1998). Congress found that "[t]he American credit union movement began as a cooperative effort to serve the productive and provident credit needs of individuals of modest means" and that

"[c]redit unions continue to fulfill this public purpose." CUMAA, Pub. L. No. 105-219, § 2, 112 Stat. 913, 913 (1998). For this reason, Congress believed that "membership groups should not face divestiture from the financial services institution of their choice as a result of recent court action." *Ibid*.

CUMAA established three distinct types of credit unions: (1) single common-bond credit unions; (2) multiple common-bond credit unions; and (3) community credit unions. 12 U.S.C. §1759(b)(1)-(3); *American Bankers I,* 38 F. Supp. 2d at 119. Single common-bond credit unions are credit unions comprised of a single group having "a common bond of occupation or association." 12 U.S.C. § 1759(b)(1). A community credit union is comprised of "[p]ersons or organizations within a well-defined local community, neighborhood, or rural district." 12 U.S.C. § 1759(b)(3). CUMAA defines a "[m]ultiple common-bond credit union" as a credit union having "[m]ore than one group * * * each of which has (within the group) a common bond of occupation or association; and * * * the number of members, each of which (at the time the group is first included within the field of membership of a credit union described in this paragraph) does not exceed any numerical limitation applicable under section (d)." 12 U.S.C. § 1759(b)(2)(A)-(B).

Section (d) states that, except as provided in subsection (d)(2), "only a group with fewer than 3,000 members shall be eligible to be included in the field of membership" of a multiple common-bond credit union. *Id.* § 1759(d)(1). Although groups with more than 3,000 members presumptively may not join or form multiple common-bond credit unions, CUMAA recognizes certain exceptions to this general rule. First, the Act allows NCUA to except any group that "could not feasibly or reasonably establish a new single common-bond credit union." *Id.* § 1759(d)(2)(A). Second, the Act also excepts from the numerical limitation any group transferred from another credit union as a result of a merger or consolidation recommended by the Board or any appropriate State credit union supervisor based on safety and soundness concerns with respect to that other credit union, or recommended by the Board in the Board's capacity as conservator or liquidating agent of that other credit union. *Id.* §1759(d)(2)(B)(i)-(ii). Finally, the Act excepts any group transferred in connection with a voluntary merger approved by NCUA before, but not consummated by, October 25, 1996, so long as the merger is accomplished no later than 180 days after August 7, 1998. *Id.* §1759(d)(2)(C). Subsection (d)(3) directs NCUA to promulgate notice-and-comment regulations setting forth the criteria the agency will use to assess the merits of any application under subsection (d). *Id.* § 1759(d)(3).

CUMAA includes a general grandfather clause, which states that "any person or organization that is a member of any Federal credit union as of August 7, 1998 may remain a member of the credit union after August 7, 1998." 12 U.S.C. §1759(c)(1)(A)(i). The grandfather clause also excepts a member of any group whose members constituted a portion of the membership of any pre-existing credit union prior to August 7, 1998. *Id.* § 1759(c)(1)(A)(ii).

Finally, when NCUA determines that a group – whether it contains fewer or more than 3,000 members – cannot independently charter a single common-bond credit union consistent with reasonable standards for the safe and sound operation of a credit union, NCUA must, whenever practicable, in light of these same concerns, add the group to an existing credit union "that is within reasonable proximity to the location of the group." *Id.* § 1759(f)(1)(B).

In all other respects, Congress intended for the authority of NCUA to interpret and promulgate guidelines in accordance with the underlying statute to remain unfettered. See *id.* § 1759(d)(3). As Representative Kanjorski explained:

> I want to make it clear that in 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 authority [sic] under section 205 of

> the Federal Credit Union Act *to grant or withhold approval* for voluntary mergers of credit unions.
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> 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*.

144 Cong. Rec. H7045 (daily ed. Aug. 4, 1998) (statement of Rep. Kanjorski) (emphasis added). Representative Vento stated that, "[b]y creating a new mechanism for adding so-called select employee groups, basically allowing multiple common-bond credit unions, we are revamping and facilitating the federal credit union law and empowering credit unions to adapt to the 1990's market place. * * * [CUMAA] also affords the regulator with flexibility to accommodate groups that may not meet this test but that would find it difficult to form a single-bond credit union of their own." 144 Cong. Rec. H7051 (daily ed. Aug. 4, 1998) (statement of Rep. Vento). The Congressional Budget Office's cost estimate predicted that, "as a result of this act, such small groups of individuals sharing a common employer or occupation would be more likely to join together to form new credit unions, or to join existing ones, thereby forming credit unions with members having multiple common bonds. Thus, we expect the number of [sic] size of credit unions with

multiple common bonds to grow faster than under current law." 144 Cong. Rec. S9276 (daily ed. July 29, 1998).

3. Final Rule Implementing CUMAA

To implement CUMAA, NCUA issued a proposed rule for notice and comment on August 31, 1998. See 63 Fed. Reg. 49164 (Sept. 14, 1998). NCUA received 369 comments from a variety of individuals and organizations. The agency's final rule, IRPS 99-1, was published in the Federal Register on December 30, 1998. See *id.* at 71998 (incorporated by reference in 12 C.F.R. § 701.1). Invoking the good-cause exception set forth at 5 U.S.C. § 553(d)(3), NCUA bypassed the normal 30-day waiting period between a final rule's publication and its effective date and made IRPS 99-1 effective on January 1, 1999. See 63 Fed. Reg. 72017.

NCUA's Final Rule was designed to promote the safety and soundness of the entire federal credit union system. By permitting membership in a credit union "to consist of multiple common bonds, * * * credit unions that otherwise would have failed because of the loss of a sponsor or other financial or operational downturns [can now] diversify their membership and become less dependent on the financial success of one sponsoring company or group." *Id*. at 71998.

As required by CUMAA, NCUA must determine in writing that a request to add a new occupational or associational select group satisfies five criteria: (1) that "the credit union did not engage in any unsafe or unsound practice which is material during the one-year period preceding the filing of the application"; (2) that "the credit union is adequately capitalized"; (3) that "the credit union has the administrative capability and the financial resources to serve the proposed group"; (4) that "the credit union [can] demonstrate that any potential harm the expansion may have on any other credit union and its members is clearly outweighed by the probable beneficial effect of the expansion"; and (5) that "the formation of a separate credit union is not practical or does not meet the economic advisability criteria." *Id*. at 72009-10. Among the factors that NCUA will examine in considering a group's "economic advisability" are the "desire and intent of the group and the sponsor support." *Id*. at 72002.

In this regard, the Final Rule provides that groups with more than 3,000 members "must be able to demonstrate why they cannot satisfactorily form a separate credit union if they want to be added to another credit union." 63 Fed. Reg. 72001. On the other hand, groups with fewer than 3,000 members "must be able to demonstrate why they can successfully operate a credit union." *Ibid.*

As stated, CUMAA requires that if a group wishes to be added to an existing credit union the credit union must be "within reasonable proximity" to the location of the group. 12 U.S.C. § 1759(f)(1)(B). In its final rule, NCUA interpreted "reasonable proximity" to mean that "the group to be added must be within the service area of a service facility of the credit union." 63 Fed. Reg. 72002.

NCUA interpreted the grandfather provision of CUMAA to extend "not only to individuals who were group members as of the CUMAA's enactment but also to all persons who subsequently become members of the group." *American Bankers I*, 38 F. Supp. 2d at 133. Specifically, IRPS 99-1 "permits a member, or subsequent new member, of any group whose members constituted a portion of the membership of any federal credit union at the date of enactment, to continue to be eligible for membership in the credit union." 63 Fed. Reg. 72015.

C. Course of Proceedings and Disposition Below

1. On January 8, 1999, the American Bankers Association filed a complaint in district court seeking a declaratory judgment and a preliminary and permanent injunction prohibiting NCUA from taking any action in accordance with IRPS 99-1. At the preliminary injunction stage, the ABA, joined by intervenor Independent Bankers Association of America ("IBAA"),[2] challenged seven aspects of IRPS 99-1 as being facially inconsistent with CUMAA. Specifically, the ABA alleged that IRPS 99-1 violated CUMAA: (1) by impermissibly liberalizing the exceptions to CUMAA's 3,000 member limit on groups that can be added to multiple common-bond credit unions, *American Bankers I*, 38 F. Supp. 2d at 121; (2) by requiring a "hard look" at the ability of a group with fewer than 3,000 members to charter its own single common-bond credit union, *id.* at 124; (3) by excluding family and household members from the calculation of membership group size when trying to assess the total number of members for the purposes of the 3,000-member ceiling, *id.* at 127; (4) by interpreting CUMAA's "reasonable proximity" requirement in an impermissibly expansive manner, *id.* at 129; (5) by defining a single common-bond credit union too expansively, *id.* at 131; (6) by interpreting the Act's grandfather clause too permissively, *id.* at 132; and (7) by permitting the voluntary merger

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[2/] See *American Bankers I*, 38 F. Supp. 2d at 117 n.1.

of healthy multiple common-bond credit unions containing select employee groups of fewer than 3,000 primary potential members without regard to the statutory analysis required when non-affiliated groups of fewer than 3,000 members seek to join an existing credit union, *id*. at 135. The ABA also claimed that NCUA failed to adhere to the APA procedure for promulgating a final rule. *Id.* at 139.

On March 10, 1999, the district court denied the ABA's application for a preliminary injunction on all counts. *Id.* at 142. The court noted that six of the ABA's seven substantive claims for relief – all except the claim regarding NCUA's voluntary merger rule – were unlikely to succeed on the merits. *Id*. at 140. With regard to that remaining count, the district court held that the ABA had failed to make the required showing of irreparable harm. *Id.* at 142.

2. Following the district court's denial of the ABA's motion for a preliminary injunction, the ABA and the IBAA filed an amended complaint consisting of 17 counts. *American Banker II*, 93 F. Supp. 2d at 39. The 17 counts reflected many of the counts already adjudicated at the preliminary injunction stage. *Ibid*. However, the plaintiffs added one new facial claim: that NCUA adopted a definition of "local community" that contravenes Congress's intent in redefining the specifications for a community-based

credit union in 12 U.S.C. § 1759(b)(3). See 93 F. Supp. 2d at 46. Plaintiffs also brought a series of "as-applied" claims contesting particular chartering decisions made by NCUA. *Id.* at 48.

Irondequoit Federal Credit Union ("Irondequoit") subsequently intervened as a plaintiff and set forth seven counts in its complaint, most of which reflected the same challenges as the other plaintiffs. *Id.* at 39. Two claims were different, however: (1) that NCUA had failed adequately to protect "'small credit unions from competition with larger, overlapping credit unions,'" *id*. at 49; and (2) that NCUA failed "'to enforce the restrictions on credit union membership established by the FCUA * * * in its own membership rule.'" *Ibid*.

NCUA and intervenors Credit Union National Association ("CUNA") and National Association of Federal Credit Unions ("NAFCU") subsequently filed motions to dismiss or for partial summary judgment, which the district court granted as to all counts except as to one "as-applied" challenge. *Ibid*.[3] In granting dismissal, the district court

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[3/] Count thirteen of plaintiffs' Amended Complaint states an as-applied challenge to IRPS 99-1. The count alleges that, by permitting certain entities to group in a single common-bond credit union, NCUA subjects plaintiffs to unlawful competition. This count was not subject to defendant's motion to dismiss and was reserved for future consideration by the district court's decision. *American Bankers II*, 93 F. Supp. 2d at 38 n.2.

held that the relevant provisions of CUMAA either were ambiguous or delegated interpretive authority to NCUA. It also determined that NCUA's interpretation of the statute was reasonable and consistent with the statutory scheme. Accordingly, it held that NCUA's interpretation was entitled to deference. *Id.* at 40-48, citing *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984). The court also dismissed the "as applied" counts for failure to state a cause of action. *American Bankers II*, 93 F. Supp. 2d at 48-49. The parties stipulated to dismissal of the lone remaining count on May 9, 2000, and this appeal followed.

SUMMARY OF THE ARGUMENT

I. The ABA asserts a wide assortment of challenges to the Final Rule. The first challenge asserts that NCUA failed to provide the court or opposing counsel with the rulemaking record, and that, without the administrative record, the district court erred in dismissing their claims. But there is no contention that NCUA failed to follow the APA procedures for rulemaking. Nor does the ABA's complaint present any factual allegations. Rather, the complaint alleged only that various provisions of the Final Rule violated the plain language of the statute or represented an unreasonable interpretation of an

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The plaintiffs voluntarily dismissed this claim.

ambiguity contained in the statute. The district court correctly recognized that it was fully competent to determine whether the Final Rule was consistent with the statute without resort to the administrative record.

II. The ABA's remaining challenges to NCUA's implementation of CUMAA specifically contend that IRPS 99-1: (1) misconstrues the Act's 3,000-member limitation on groups seeking to join a multiple common-bond credit union; (2) adopts an unreasonable approach to the voluntary merger of healthy multiple common-bond credit unions with fewer than 3,000 members; (3) misreads the Act's grandfather clause; (4) misinterprets the requirement that NCUA add groups to a credit union that is within "reasonable proximity" to the location of the group; and (5) defines local community credit unions in a way that violates the Act.

It is well settled that the reasonable interpretation of a federal statute by an agency charged with its administration, when embodied, as here, in duly promulgated regulations, is entitled to deference and may not be overturned unless it is shown that Congress had a clear and specific intent to the contrary. In this case, Congress both explicitly and implicitly delegated authority to NCUA to promulgate regulations necessary to implement CUMAA. With regard to each challenge, the Final Rule adopted

by NCUA is reasonable and comports with the language and intent of the statute and should be upheld under *Chevron*.

ARGUMENT

Standard of Review.

Under the APA, agency action may be set aside only if it was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or if the action failed to meet statutory, procedural or constitutional requirements. 5 U.S.C. § 706(2). Under these standards, the agency's decision is entitled to a presumption of regularity. See, *e.g.*, *Advanced Micro Devices v. CAB*, 742 F.2d 1520, 1546 (D.C. Cir. 1984). This standard of review also is highly deferential; the agency's action must be upheld if it is rationally based. See, *e.g.*, *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976). This Court reviews an agency's interpretation of a statute entrusted to its administration and contained in a regulation under the familiar standards outlined in *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984). See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Under *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. However, if "there has been an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," or if "the court determines Congress has not directly addressed the precise question at issue" – "if the statute is silent or

ambiguous" – then "the question for the court is whether the agency's answer is based on a permissible construction." *Id*. at 843-44. At this stage of *Chevron* analysis, a court must "afford substantial deference to the agency's interpretation of statutory language." *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 458 (D.C. Cir. 2000).

To uphold an agency's interpretation, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted * * * , or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. It need only be a "reasonable choice within a gap left open by Congress." *Id.* at 866. See also *United States v. Mead*, 121 S. Ct. 2164, 2172 (2001) (a court is "obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable"). Under these principles, NCUA's reading of CUMAA must be upheld so long as it permissibly resolves issues as to which the intent of Congress has not been clearly expressed. *Christensen v. Harris County*, 529 U.S. at 586-87 ("a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute").

I. THE ADMINISTRATIVE RECORD WAS UNNECESSARY TO THE DISTRICT COURT'S DECISION.

After suit was filed, NCUA moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Under this Rule, any complaint may be dismissed if it fails "to state a claim upon which relief can be granted." In assessing such a motion, the plaintiff enjoys the benefit of all reasonable inferences drawn from well-pleaded alleged facts. See, *e.g.*, *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979). The complaint must be dismissed if the plaintiff fails to allege a "set of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

The ABA contends that the district court erred in dismissing the complaint because NCUA failed to provide them or the district court with a copy of the administrative record. See Br. for Appellant at 15-19. The district court, however, acted properly in dismissing the complaint based on NCUA's motion to dismiss.

The ABA's complaint presented no factual allegations, but rather only legal arguments about the validity of NCUA's Final Rule in light of CUMAA. Specifically, the complaint alleged that various provisions of the Final Rule violated the plain language of the statute or represented an unreasonable interpretation of an ambiguity contained in the statute. Thus, the district court correctly recognized that it could fully resolve these

purely legal questions on a motion to dismiss and that, therefore, there was no inherent barrier to reaching the merits at the 12(b)(6) stage. *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). See also *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 440 n.37 (5th Cir. 2001) (on a facial challenge to agency's regulation, the court held that, "[a]lthough the administrative record for the regulation is not before this Court, that is of no moment. Our review is limited to interpreting the extent to which the regulation is consistent with the statute – a task which we are competent to perform without the administrative record") (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987)); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 695 (D.C. Cir. 1971) (where "the court is called upon to consider the validity of the [agency's] interpretation of [the underlying statute] [t]here is no 'record' to be studied or made, for the only record involved on this issue is that established by such materials as the law and its legislative history").

All of the cases cited by the ABA at pp. 16-17 of its brief involve challenges to agency action that differ significantly from the facial challenge in this case. For this reason, the type of review and record requirement involved in those cases also differ from the type of review and record requirement in this case. For example, many of the cases

cited by the ABA involve challenges to adjudications, in which case the court must review the entire record to ensure that the agency's decision was based on that record. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *American Bioscience, Inc. v. Thompson*, 243 F.3d 579, 580 (D.C. Cir. 2001); *IMS P.C. v. Alvarez*, 129 F.3d 618, 623-24 (D.C. Cir. 1997); *Reliance Elec. Co. v. Consumer Product Safety Comm'n*, 924 F.2d 274, 277 (D.C. Cir. 1991); *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). Other cases involve challenges to an agency's policy decision as arbitrary and capricious, in which case the court must review the administrative record to ensure that the agency made a reasonable choice between available alternatives. See *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984); *Natural Resources Defense Council v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975). By contrast, because *Chevron* review to determine whether an agency's regulations are facially consistent with a relevant statute "does not address the reasonableness of the decision-making process," a court "need not review the regulation under the [APA];" rather, it need simply consider the text of the statute and the legislative history to determine whether the agency acted either consistently with the plain language of the statute or reasonably in light of an ambiguous statute. *Sierra Club v. United States Fish & Wildlife Service*, 245 F.3d at 441 n.37.

The APA requires three things for agency rulemaking. First, the agency must give public notice of the proposed rule through publication in the Federal Register of a statement containing, *inter alia*, "the legal authority under which the rule is proposed," and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). Second, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). Third, the agency is required, "[a]fter consideration of the relevant matter presented," to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

NCUA complied with each of these statutory requirements. The Proposed Rule was passed by the NCUA Board on August 31, 1998, and published in the Federal Register on September 14, 1998. See Proposed Rule, 63 Fed. Reg. 49164. This notice set forth the agency's authority and the substance of the proposed rule, and invited comments. During the comment period, NCUA received and considered comments from a variety of individuals and organizations. The preamble to the Final Rule contains an extensive discussion of these comments. The Final Rule was published on December 30,

1998. See Final Rule, 63 Fed. Reg. 71998. Significantly, these materials, as matters of public record, were available and properly considered by the district court as part of its 12(b)(6) review. See *Marshall County Health Care Auth. v. Shalala*, 988 F.2d at 1226 n. 6.

In considering NCUA's motion to dismiss, the district court had before it everything necessary to resolve the facial challenges brought by the ABA. The court accorded the ABA the benefit of all reasonable inferences drawn from their well-pleaded facts and properly followed the mandate articulated by the Supreme Court in *Chevron*. It exhaustively reviewed the statute and its legislative history as well as NCUA's Proposed and Final Rules as published in the Federal Register and concluded that NCUA's Rule was entirely consistent with the statutory scheme. There is no basis to conclude that the district court was required to review the certified rule-making record of the agency in order to resolve the facial challenges in this case.

II. NCUA's INTERPRETATION OF CUMAA IS REASONABLE AND CONSISTENT WITH THE STATUTORY SCHEME.

The ABA contends that a number of provisions of the Final Rule violate the APA because they allegedly are contrary to the Act, or arbitrary and capricious. The ABA bases these claims on mischaracterizations of the Act and misreadings of the Final Rule. Because the challenged provisions of the Final Rule are entirely reasonable and faithfully

implement Congress's intent, this Court should affirm the district court's dismissal of the ABA's claims.

A. The Final Rule's Provisions Relating To The 3,000-Member Numerical Limitation Are Reasonable And Consistent With CUMAA.

As stated, CUMAA generally forecloses groups with more than 3,000 members from joining the field of membership of an existing credit union. See 12 U.S.C. § 1759(d)(1). Where, however, a group of that size "could not feasibly or reasonably establish a new single common-bond credit union," Congress has authorized NCUA to add the group to a multiple common-bond credit union. See *id*. § 1759(d)(2)(A). CUMAA lists several factors for NCUA to consider in determining whether a group could not feasibly or reasonably establish a new single common-bond credit union: (i) whether "the group lacks sufficient volunteer and other resources to support the efficient and effective operation of a credit union"; (ii) whether the group "meet[s] the criteria the Board has determined to be important for the likelihood of success in establishing and managing a new credit union, including demographic characteristics such as geographical location of members, diversity of ages and income levels, and other factors that may affect

the financial viability and stability of a credit union"; or (iii) whether "the group would be unlikely to operate a safe and sound credit union." *Id*. § 1759(d)(2)(A)(i)-(iii).

The Act expressly authorizes NCUA to "prescribe[] * * * rules and regulations" regarding membership in a federal credit union. *Id*. § 1759(a). Moreover, the Act explicitly directs NCUA to "issue guidelines or regulations, after notice and opportunity for comment, setting forth the criteria that the [agency] will apply in determining * * * whether or not an additional group may be included within the field of membership category of an existing credit union." *Id*. § 1759(d)(3).

Pursuant to this authority, NCUA promulgated rules to implement the multiple common-bond provision of CUMAA. The ABA mounts three challenges to those provisions of IRPS 99-1 addressing the 3,000-member limitation. First, it contends that NCUA unlawfully fails to count family and household members and pensioners and annuitants when calculating the size of a group for purposes of the statute's numerical limitation on new group additions. See Br. for Appellants at 20. Second, the ABA argues that the Rule violates the Act "by making the applicant's mere 'desire' or 'wish[]' to form an independent credit union * * * the 'important' and 'key' considerations in making a section 1759(d) determination." See *id*. at 25. Finally, the ABA argues that the Rule

violates the Act by "by impos[ing] a special regulatory burden on groups with fewer than 3,000 primary members," which discourages, rather than encourages, such groups from forming independent credit unions. See *id*. at 27. These contentions are without merit.

1. IRPS 99-1 Does Not Violate CUMAA By Excluding Family And Household Members Or Pensioners And Annuitants For Purposes Of The 3,000-Member Limitation.

a. Under IRPS 99-1, NCUA counts only individuals designated as "primary potential members" – *i.e.*, the actual employees in an occupational common bond or the actual members of an associational common bond – for purposes of the 3,000 member limitation. See 63 Fed. Reg. 72000. The ABA contends that NCUA improperly excludes family and household members and certain other people when calculating the membership of a group inasmuch as it treats those same individuals as otherwise sharing the group's common bond. See Br. for Appellant at 19-20, 21. It also specifically argues that, had NCUA counted family members and other specified individuals as part of the common bond group consisting of employees of QVC, Inc., NCUA would have concluded that the QVC group numbered over 3,000 members and, accordingly, should not have been added to an existing multiple common-bond credit union, Franklin Mint Federal Credit Union. *Id*. at 20. The district court, however, properly determined that

NCUA's decision to count only primary potential members of a group for purposes of the 3,000-member benchmark was consistent with the plain language and purposes of the CUMAA. See *American Bankers II*, 93 F. Supp. 2d at 41; *American Bankers I*, 38 F. Supp.2d at 127-29.

First, § 1759(d)(1) states that "only a *group*" of fewer than 3,000 members is eligible for inclusion in a multiple common-bond credit union. (Emphasis added). The Act, moreover, requires that a group have a "common bond of occupation or association." 12 U.S.C. §§ 1759(b)(1) and (2). Only actual employees or association members possess this "common bond." See H.R. Rep. No. 105-472, at 12 (1998) ("[c]redit union members in the occupational category are employed by the same enterprise, or in the same trade. An associational common bond is available to groups of individuals who participate in activities that develop common loyalties, mutual benefits, and mutual interests"). Family and household members do not share a common bond of occupation or association with the group. For example, a homemaker does not share a physician spouse's common bond with other physicians.

By contrast, § 1759(e)(1) speaks not of a family or household member's common bond of occupation or association with members of a group, but of their *eligibility* for

membership in the credit union. That is, the language "*eligible* for membership in a credit union" makes clear that these individuals are not automatically entitled to join the credit union, but are eligible to become members based on their intimate connection to persons in the group who share the common bond. See *American Bankers II*, 93 F. Supp. 2d at 41.

The distinction drawn by NCUA between members of a common bond group and family and household members also is consistent with the principles animating use of the common bond in the formation of a credit union. From the earliest days of the credit union movement, it has been this common bond or commonality of interest that has been the basis for founding a credit union. See A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* 6 (2d ed. 1992) (Burger & Dacin); General Accounting Office, *Credit Unions: Reforms For Ensuring Future Soundness* 24 (July 1991) (GAO Report). It always has been assumed that a common bond of occupation or association "ma[kes] it cheaper for a credit committee to establish a borrower's credit worthiness, provide[s] added loan security through peer pressure, provide[s] a sense of cohesiveness and mutual support among members, and generally promote[s] the financial stability of credit unions." Burger &

Dacin at 8. Family and household members do not share this commonality of occupation or association but only have an association with those that do.[4]

Finally, it is not practicable to determine the number of eligible family and household members. In contrast, the actual number of employees sharing the common bond is determinable at the time the group makes its application to NCUA. It would be difficult, if not impossible, for NCUA to make chartering decisions based on an indeterminate number of eligible household or family members.

[4/] The ABA relies heavily on the fact that NCUA's regulations addressed family and household member eligibility under the heading "Other Persons Sharing a Common Bond." See Br. for Appellant at 20. But, as the district court correctly observed, the regulation itself is clear that these individuals are eligible not because they are part of a common-bond group, but rather because they maintain a close relationship to the group. See *American Bankers I*, 38 F. Supp. 2 at 128 n.8. Moreover, NCUA subsequently removed any possible confusion on this issue when it amended the regulatory heading to read "Other Persons Eligible for Credit Union Membership." See 65 Fed. Reg. 64538 (Oct. 27, 2000).

For these reasons, NCUA's determination not to count family and household members for purposes of the 3,000-member limitation comports thoroughly with the statute and is entirely reasonable. Exclusion of family and household members is perfectly consistent with the fact that they are not members of the occupational or associational group and also is consistent with the long-established view that it is the shared occupational or associational common bond that provides the cohesiveness necessary to assure the financial stability of a credit union.

b. The ABA's argument with respect to pensioners and annuitants (see Br. for Appellant at 23-24) is not properly before this Court. See *American Bankers II*, 93 F. Supp. 2d. at 41 n.3 ("[t]he relevant count of Plaintiffs' Amended Complaint did not * * * target the NCUA's treatment of pensioners and annuitants, nor was it directed toward any other parties; rather, it focused solely on family and household members").[5] But, assuming the Court were to reach the question, the same analysis that applies to NCUA's policy of

[5/] The ABA contends (Br. for Appellant at 23-24) that its complaint did not focus solely on family and household members but challenged without limitation NCUA's policy of excluding "'certain' common-bond members" from its calculation of a group's size – including pensioners and annuitants. Although pensioners and annuitants are mentioned in the complaint, the district court correctly observed that the ABA's focus was almost exclusively on family and household members. See First Am. Compl. ¶¶ 23-28 (JA 23-26); ¶¶ 68-71 (Count One) (JA 48-49).

excluding family and household members from the preliminary group "also obtains," as the district court held, "with respect to pensioners and annuitants." *Ibid*. Pensioners and annuitants are persons who were employees of the group but who now have retired from the group. Like family members, this indeterminate number of persons (because of their retirement) does not share a common bond of occupation or association, they do not work for the employer or belong to the association. They are eligible because of their former connection with the group. Given the plain language of the statute, it is reasonable for NCUA to count only those persons in the occupational or associational group for purposes of determining group size and the applicability of the 3,000-member limitation.

2. The Final Rule's Field Of Membership Criteria Are Reasonable And Consistent With CUMAA.

Although the CUMAA generally prohibits groups with more than 3,000 members from joining the field of membership of an existing credit union, §1759(d)(2)(A) expressly excepts from the limitation "any group that the Board determines * * * could not feasibly or reasonably establish a new single common-bond credit union." Under IRPS 99-1, among the factors that NCUA will examine in considering a group's "economic advisability" are the "desire and intent of the group and the sponsor support." 63 Fed. Reg. 72002. Seizing upon this single sentence, the ABA argues that IRPS 99-1 violates §

1759(d)(2) because NCUA's determination whether to recognize an exception to the 3,000-member limitation allegedly would turn on whether the new group wants to form a separately chartered entity. See Br. for Appellant at 25 ("[e]ssentially, this 'great weight' allows the group itself to decide whether it will be allowed to join an existing credit union") (footnote omitted). The district court properly rejected this argument.

As the district court observed, "Congress has not spoken directly to the issue at hand." *American Bankers I*, 38 F. Supp. 2d at 122. Rather, CUMAA grants NCUA "explicit discretion" to establish the criteria it deems important for the likelihood of success in establishing and managing a new credit union. *American Bankers II*, 93 F. Supp. 2d at 41. See 12 U.S.C. § 1759(d)(2)(A)(ii). Beyond this express authorization, Congress implicitly delegates to NCUA authority to give content to various factors it is to consider in determining "the financial viability and stability of a credit union," like the meaning of "sufficient volunteer and other resources," "efficient and effective operation," and "unlikely to operate a safe and sound credit union." § 1759(d)(2)(A)(i)-(iii). As the district court held, "[s]tatutory terms such as these, bound by no fixed meaning, compel judicial deference to reasonable agency interpretations." *American Bankers I*, 38 F. Supp. 2d at 122. See also *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir.)

(Congress delegates its authority either "explicitly by authorizing the agency to adopt implementing regulations, or implicitly by enacting an ambiguously worded provision that the agency must interpret"), *cert. denied*, 484 U.S. 869 (1987). For these reasons, the first prong of *Chevron* is inapplicable, and NCUA's choice of criteria to use in determining which groups should be chartered separately or added to a multiple common-bond credit union may not be disturbed if that choice is a reasonable one. See *Chevron*, 467 U.S. at 866.

As the district court found, NCUA's field-of-membership criteria set forth in IRPS 99-1 are "eminently reasonable." *American Bankers I*, 38 F. Supp. 2d at 122. As the district court observed, "[f]ederal credit unions, since their inception in 1934, have been and remain cooperative enterprises." *Id*. at 123, citing 12 U.S.C. § 1752(1) (defining the term "Federal credit union" to mean "a cooperative association organized * * * for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes"). Cognizant of the cooperative and voluntary nature of credit unions and credit union management, Congress provided that a group with more than 3,000 members nonetheless could join an existing credit union if it "lack[ed] sufficient volunteer and other resources to support the efficient and effective operation of [a separate] credit

union." 12 U.S.C. § 1759(d)(2)(A)(i). It is plainly reasonable for NCUA to inquire into a group's desire, intent, and sponsor support in determining whether the group has "sufficient volunteer and other resources" to form its own credit union – particularly since a credit union's viability will depend, in part, on its ability to attract and maintain qualified directors and executive committee members who, for the most part, serve without remuneration but nonetheless may be held liable under state law for actions taken in their official capacity. See *American Bankers I*, 38 F. Supp. 2d at 123-24.

Congress also directed that NCUA "shall" consider whether, for any reason, "the group would be unlikely to operate a safe and sound credit union." 12 U.S.C. § 1759(d)(2)(A)(iii). As the district court observed, one such prominent reason is lack of interest on the part of a sponsor of a group in supporting a stand-alone credit union. Because the sponsor of a single bond credit union generally provides substantial support to its employees in connection with a credit union, NCUA cannot reasonably ignore a sponsor's lack of interest in forming a separate, single common-bond credit union. See, *e.g.*, 63 Fed. Reg. 72053 (listing, on NCUA's form, facilities and assistance that sponsor may agree to provide, including office space and supplies, making payroll deductions and payment of start up costs).

IRPS 99-1 also demonstrates – contrary to the ABA's contention – that a group's desire and intent are *not* the only factors NCUA uses to gauge the financial viability of the group. See 63 Fed. Reg. 72002 ("[w]hile the intent of the group and sponsor support cannot be ignored and will carry great weight, they are not the sole factors. The final decision must be based on an independent regulatory analysis in consideration of the remaining factors specified in the regulation"). Other factors NCUA considers are the size of the group, whether the group is geographically dispersed, whether the group meets the economic advisability criteria, and the demographics of the group. See *id*. at 72010. For these reasons, the district court properly held that NCUA's policy of assessing a group's intent and desire is "fully permissible under the CUMAA" and survives *Chevron* scrutiny. *American Bankers II*, 93 F. Supp. 2d at 41-42.[6]

[6/] To the extent the ABA may disagree with specific applications of the policy, it may pursue such claims against NCUA on a case-by-case basis, alleging arbitrary and capricious agency action. *American Bankers I*, 38 F. Supp. 2d at 123. As the district court stated, "'the parade of horribles that the [Plaintiffs] predict will result from implementation of [IRPS 99-1], if in fact it does result, will have to be dealt with in future litigation.'" *Ibid.* (quoting *Advanced Micro Devices v. CAB*, 742 F.2d 1520, 1546 (D.C. Cir. 1984)).

3. IRPS 99-1 Does Not Violate CUMAA Merely Because It Permits A Group With Fewer Than 3,000 Members To Join An Existing Credit Union Unless Such A Group Demonstrates That It Can Successfully Form Its Own Credit Union.

As stated, CUMAA provides that "only a group with fewer than 3,000 members shall be eligible to be included in the field of membership" of a multiple common-bond credit union. 12 U.S.C. § 1759(d)(1). Even for groups with fewer than 3,000 members, however, the Act directs NCUA to encourage separate 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." *Id.* § 1759(f)(1)(A).

Depending on whether a group's membership is greater or fewer than 3,000 members, IRPS 99-1 establishes different standards for assessing whether to add the group to a multiple common-bond credit union. Groups with more than 3,000 members "must be able to demonstrate why they cannot satisfactorily form a separate credit union if they want to be added to another credit union." 63 Fed. Reg. 72001. On the other hand, groups with fewer than 3,000 members "must be able to demonstrate why they can successfully operate a credit union." *Ibid*. According to the ABA, the Final Rule violates

the CUMAA by imposing a special regulatory burden on groups with fewer than 3,000 members that discourages, rather than encourages, the formation of separate credit unions. See Br. for Appellant at 27-28. This complaint is unfounded.

a. As the district court stated, "Congress clearly perceived some difference between groups with more than 3000 members and those with fewer than 3000 members," but its intent regarding the chartering of groups with fewer than 3,000 primary potential members "is by no means 'express' or 'clear.'" *American Bankers I*, 38 F. Supp. 2d at 125. First, "Congress said very little in the CUMAA about groups with fewer than 3000 members." *Ibid*. Unlike their larger counterparts, groups with fewer than 3,000 members need not demonstrate that they fit within one of the exceptions set forth at § 1759(d)(2)(A)(i)-(iii) before they can be added to the field of membership of an existing credit union. Rather, the only restriction that Congress imposed was a general requirement that NCUA encourage the formation of separately chartered credit unions "whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). Yet, precisely how NCUA is to implement this aspiration "is a matter Congress never addressed." *American Bankers I*, 38 F. Supp. 2d at 125. Therefore, the "necessary policy choices that the NCUA must make"

to assure the safety and soundness of a credit union "warrant judicial deference * * * under *Chevron* step two." *Ibid*.

b. In this regard, the Act's two-tiered approach "reflects [Congress's] understanding that, in contrast to larger groups, those with fewer than 3000 members are generally less likely to be able to meet the demands of chartering their own credit union." *Ibid*. See also *ibid*. ("[t]reating groups differently based on whether their membership rolls eclipse 3000 * * * finds support in the structure of the [Act]"). Based on its own experience, NCUA has found that new, smaller separately chartered credit unions well may not flourish, or even survive, in today's competitive financial services environment. As the Final Rule states, of the 29 credit unions chartered between 1996 and December 1999, only one had a primary potential membership base of fewer than 3,000 members. 63 Fed. Reg. 72001. Furthermore, while some extant credit unions were small when originally separately chartered, "economic conditions and the financial service expectations of the credit union members were different" then, and the chance that a new small single bond credit union will succeed is far lower. *Ibid*. Therefore, "[i]t would be remiss simply to say that, since a lower threshold number worked in the past, there is no

need to change the economic advisability number requirement today." *Ibid*. For these reasons, NCUA rationally concluded that:

> a charter applicant with a proposed field of membership of fewer than 3,000 primary potential members may have to provide more support than a proposed credit union with a larger field of membership in order to demonstrate that it is economically advisable and that it will have a reasonable chance to succeed.

Id. at 72000.

As the district court held, "[f]or the NCUA to acknowledge this reality by taking a harder look at the economic advisability of smaller groups is hardly unreasonable ." *American Bankers I*, 38 F. Supp. 2d at 125. "Congress obviously did not intend that the NCUA would turn a blind eye to market conditions, consumer expectations, and systemic barriers to entry when making its chartering decisions." *Id*. at 126. To the contrary, "Congress designated safety and soundness concerns as the lodestars that should ultimately guide the NCUA's chartering decisions." *Ibid.*

The approach taken by NCUA in IRPS 99-1 also comports with the agency's responsibility for the National Credit Union Share Insurance Fund (NCUSIF). As the Final Rule explains, in evaluating a new charter applicant, NCUA "must not only encourage new charters, but also ensure to the fullest extent possible that those groups

receiving a separate charter will have a reasonable basis for success and thereby avoid unnecessary risks to the NCUSIF." 63 Fed. Reg. 72001.

c. Finally, as IRPS 99-1 explains, NCUA's greater scrutiny of new charter applications by groups under 3,000 "is not intended to undermine the statutory requirement to encourage the formation of new credit unions. * * * Any group desiring to form its own credit union will be given every opportunity to demonstrate it has met the economic advisability requirements." 63 Fed. Reg. 72001. See also *id*. at 72002 (NCUA "recognizes that newly chartered credit unions in today's financial marketplace have unique challenges. Those groups that can or should be able to meet those challenges, regardless of size, will be required to form a separate credit union").

In sum, the duty to encourage separate credit unions "is not absolute." *American Bankers I*, 38 F. Supp. 2d at 126. As the district court recognized, it cannot be divorced from NCUA's obligation to make sure that a separate charter would be "practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). Therefore, as the district court stated, the proper question "is not whether IRPS 99-1 has the effect of discouraging the formation of separate credit unions, but whether it discourages the formation of *financially safe and sound*

separate credit unions." *American Bankers I*, 38 F. Supp. 2d at 126. If NCUA determines that a group cannot operate a fiscally sound and financially stable single common-bond credit union, it is under no duty to "encourage" the group to pursue this doomed path. Because the Final Rule appropriately and reasonably provides that the NCUA will carefully examine whether small groups can successfully operate a single common-bond credit union but does not preclude chartering of such institutions, it should be upheld.

B. IRPS 99-1's Approach To The Voluntary Merger Of Multiple Common-Bond Credit Unions Is Reasonable.

The Final Rule "permits the voluntary merger of healthy multiple common bond credit unions containing select employee groups of less than 3,000 primary potential members without regard to the statutory analysis that is required when non-affiliated groups of less than 3,000 members seek to join an existing credit union." 63 Fed. Reg. 72003. The ABA contends that NCUA violates CUMAA by failing to apply § 1759(f) to mergers. See Br. for Appellant at 29-34. As stated, in the context of approving credit union expansions, § 1759(f) requires NCUA to "encourage the formation of separately chartered credit unions * * * whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). NCUA, however, reasonably has interpreted § 1759(f) as not applying to

mergers and the district court properly determined that the agency's interpretation, not the ABA's, is entitled to deference.

1. The ABA admits that, if § 1759(f) applies to voluntary mergers of multiple common-bond credit unions, then all voluntary mergers are effectively foreclosed. See Br. for Appellant at 33. This reading, however, is inconsistent with § 205(b)(3) of the Federal Credit Union Act, 12 U.S.C. § 1785(b)(3), which permits voluntary mergers of insured credit unions with the prior approval of the NCUA Board. Furthermore, the FCUA itself provides the criteria the Board shall consider in granting or withholding approval of voluntary merger applications under (b)(3). See 12 U.S.C. § 1785(c).

By contrast, there is no mention of mergers in § 1759(f). Indeed, the section is titled "Criteria for Approval of Expansion of Multiple Common Bond Credit Unions" and encourages the "formation" of separately chartered credit unions as an alternative to "approving an application to include an additional group within the field of membership of an existing credit union." It is perfectly reasonable to read this language as applying only to the situation where an unserved occupational or associational group is seeking credit union service, and not to the merger of two existing credit unions.

2. Again, § 1759(f) refers to "the formation of a separate credit union *by the group*" and requires, when that is not practicable or consistent with NCUA's standards, that the group be included "in the field of membership of a credit union within reasonable proximity to the location of the group." *Id*. § 1759(f)(1)(B) (emphasis added). If this requirement were applied to mergers, it would have the incongruous result of forcing NCUA, as a condition of any merger, to first consider whether each group in the merging credit union could form its own credit union (notwithstanding the fact that the group is already properly a part of a multiple group credit union), and then consider whether each group should, instead of being included in the merger, be "spun off" into another credit union "within reasonable proximity" to the group.

3. Section 1759(f)(2) requires, in connection with expansions covered by subsection (f), that the Board make various determinations, including a determination that "the credit union has not engaged in any unsafe or unsound practice," that "the credit union is adequately capitalized," and that "the credit union has the administrative capability * * * and the financial resources * * * to serve the new membership group." These and the other criteria of subsection (f)(2) are clearly directed at the addition of a

new group to a single credit union, not the combination through merger of two existing credit unions.

4. Finally, § 1759(d), which establishes special requirements for groups over 3,000 members, refers to eligibility of a group "to be included" in a multiple common bond credit union, and can be read to cover groups transferred through either an expansion or a merger. This section establishes a general rule that these larger groups should form their own credit union, and then establishes exceptions – including an exception where the group could not "feasibly or reasonably establish a new single common bond credit union," and an exception for a group "transferred from another credit union * * * in connection with a merger or consolidation recommended by the [NCUA] Board * * * based on safety and soundness concerns." *Id*. § 1759(d)(2)(B)(i). Based on the implications of the latter exception, NCUA decided, for mergers that are voluntary and not based on safety and soundness considerations, that groups over 3,000 should be reviewed to consider the possibility of formation of a separate credit union. See 63 Fed. Reg. 72034. It is clear from subsection (d), read together with NCUA's general authority to approve mergers under § 1785(b)(3), that NCUA has the authority to approve

mergers involving groups over 3,000 if one of the subsection (d) exceptions is met. Thus, if a merger is recommended by NCUA for safety and soundness reasons, it may be completed without consideration of whether groups over 3,000 should be required to establish a new credit union. If § 1759(f) also applied to mergers, however, NCUA would have to apply all of the criteria of (f), including first "encouraging" a separate credit union and then considering whether the group should be included in another credit union in "reasonable proximity" to the group. If Congress had intended these requirements to apply to mergers, it logically would have included in subsection (f) an exception for mergers recommended for safety and soundness reasons. Because subsection (f) does not contain a safety and soundness exception, the only way to reconcile the two subsections is by reading (f) not to apply to mergers.

C. NCUA's Interpretation Of The Grandfather Clause Is Reasonable.

When Congress sought to overturn the result in *First Nat'l Bank* and to specifically authorize the chartering of multiple common-bond credit unions, it also sought to preserve the credit unions that had been chartered under the NCUA regulations disapproved by the Supreme Court. See CUMAA, Pub. L. No. 105-219, § 2(2), 112 Stat. 913, 913 (1998) ("current members and membership groups should not face divestiture from the financial services institution of their choice as a result of recent court action"). Accordingly, Congress enacted a grandfather clause, which provides that "a member of any group whose members constituted a portion of the membership of any Federal credit union as of [the] date of enactment 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." 12 U.S.C. § 1759(c)(1)(A)(ii).

NCUA interpreted the grandfather clause to include, in addition to the individuals who were actual group members as of the date of the enactment of CUMAA, those "subsequent new member[s] of any group whose members constituted a portion of the membership of any federal credit union at the date of enactment." 63 Fed. Reg. 72015. The ABA contends that NCUA's interpretation of the grandfather clause is inconsistent

with the plain language of the statute. Specifically, the ABA argues, because only someone who was a "member of any group" as of the date of enactment can "continue to be eligible to become a member of that credit union," § 1759(c)(1)(A)(ii), NCUA may not read the grandfather clause to cover persons who later become members of a group. See Br. for Appellant at 35. As the district court held, however, NCUA's interpretation of the grandfather clause is a plausible reading of the statute and more consistent with the legislative purposes of the provision than the ABA's proposed reading. For these reasons, NCUA's interpretation should be upheld.

As the district court observed, it is possible to read the grandfather clause in the manner suggested by the ABA. See *American Bankers I*, 38 F. Supp. 2d at 133. But it is also possible to read the phrase "member of any group" as referring not to an individual in the group but to the general characteristics of group membership, *e.g.*, employees of Company A. Read in this manner, the grandfather clause extends to "all persons who currently share or will come to share the bond that unites that particular group." *Ibid*. In other words, if employees of Company A comprise a group that is "grandfathered" by the Act, any new employee who joins Company A after the date of enactment also would be eligible to join the same credit union that existing employees are eligible to join. This

reading is far more consistent with the structure of the Act and with expressions of legislative intent than the ABA's reading.

First, this section must be read in light of the immediately preceding provision, § 1759(c)(1)(A)(i). That section explicitly "grandfathers" individuals and organizations that already are members of a credit union: "any person or organization that is a member of any Federal credit union as of the date of enactment of the [Act] may remain a member of the credit union after that date of enactment." Because this section addresses existing credit union members, the next section, § 1759(c)(1)(A)(ii), must mean something more – that is, it must refer to members of a group who have not yet joined the credit union – or it would be merely redundant. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (courts are to "avoid a reading [of a statute] which renders some words altogether redundant"). Read in tandem, then, the first provision ensures continuing membership in a credit union, while the second ensures continuing eligibility for a group's members to join a credit union. This latter protection would be of little value if it applied only to those individuals who were eligible to join a credit union on the date of enactment because of their membership in a group, but had not yet done so, and did not extend to individuals who joined the group sometime later.

As the district court held, barring new group members from joining a credit union would mean that "[the] credit union's membership base would slowly erode" as employees retired or otherwise left their present jobs, jeopardizing the long term stability of the grandfathered credit union. *American Bankers I*, 38 F. Supp. 2d at 135. Not only would this be inconsistent with the safety and soundness concerns expressed in the Act, but it would effectively restore the outcome in *First Nat'l Bank*, directly contrary to Congress's expressed intent. See S. Rep. No. 105-193, at 3 (1998) (Congress enacted the grandfather clause to protect "all persons and organizations who could be forced out of credit unions as a result of the February 25, 1998 Supreme Court decision"). That is, the ABA's interpretation would mean that credit unions approved under the regulatory regime invalidated in *First Nat'l Bank* would have little chance of surviving because they could not continue to derive new members from the group that NCUA authorized to become a part of the multiple common-bond credit union before enactment of CUMAA.

As the ABA concedes, the legislative history, moreover, confirms NCUA's reading. As the district court commented, "Congress explicitly declared its intention that section 1759(c)(1)(A) 'cover[] all persons or organizations or successors who were members of a federal credit union on the date of enactment of this Act, as well as anyone who is *or*

becomes a member of a group representing a portion of the credit union's membership.'" *American Bankers II*, 93 F. Supp.2d at 43 (quoting H.R. Rep. No. 105-472, at 19) (emphasis added by the court). See also *id*. at 11 (CUMAA "also grandfathers all current members as well as current groups contained within the membership of a credit union as of the date of enactment of this legislation. The grandfather will permit such groups to continue accepting new members"); S. Rep. No. 105-193, at 7 (1998) ("any individual member of a group that is part of a credit union shall continue to be eligible to become a member of that credit union and any new member of such group is also eligible"). This Court repeatedly has stated that "even where the language of a statute is 'superficially clear, legislative history may call such apparent clarity into question.'" *American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1180 (D.C. Cir. 1995) (quoting *Tataranowicz v. Sullivan*, 959 F.2d 268, 277-78 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993)). In fact, the Court has held that a court "may consider a provision's legislative history in the first step of *Chevron* analysis to determine whether Congress' intent is clear from the plain language of a statute." *City of Cleveland v. NRC*, 68 F.3d 1361, 1366 n.4 (D.C. Cir. 1995).

For these reasons, and as the district court held, "pellucid legislative history, coupled with statutory design and effect, insulate IRPS 99-1 from attack." *American Bankers I*, 38 F. Supp. 2d at 134. See also *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995) ("[r]eference to statutory design and pertinent legislative history may often shed new light on congressional intent, notwithstanding statutory language that appears 'superficially clear'").

D. The Final Rule's Interpretation Of "Reasonable Proximity" Is Permissible.

As stated, where NCUA determines that a group with fewer than 3,000 members cannot safely charter a separate credit union or that a group with more than 3,000 members satisfies an exception in § 1759(d)(2)(A), the agency may incorporate that group into an existing multiple common-bond credit union. However, the CUMAA requires NCUA to "inclu[de] * * * the group in the field of membership of a credit union that is within reasonable proximity to the location of the group whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(B). Congress imposed the "reasonable proximity" requirement because it believed that "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." H.R. Rep. No. 105-472, at 20 (1998).

In the Final Rule, NCUA sought to define the term "reasonable proximity" more concretely. Thus, IRPS 99-1 states that "the group to be added must be within reasonable proximity geographically to the credit union." 63 Fed. Reg. 72002. NCUA rejected as "overly restrictive," however, a requirement that the location of the group be "within reasonable proximity to the main credit union office only." *Ibid*. Instead, IRPS 99-1

provides only that "the group to be added must be within the service area of a service facility of the credit union." *Ibid*. The Final Rule defines "service facility" as including "a credit union owned branch, a shared branch, a mobile branch that goes to the same location on a weekly basis, or a credit union owned electronic facility," but expressly "excludes an ATM as a service facility." *Ibid*.

The ABA contends that NCUA's interpretation of the "reasonable proximity" requirement is impermissibly expansive. Despite the language that expressly excludes an ATM as a service facility, the ABA argues that IRPS 99-1 violates Congress's understanding that devices similar to an automated teller machine would not qualify as a service facility. See Br. for Appellant at 36-37. The district court properly rejected this challenge.

Again, as the district court observed, "CUMAA does not expressly define the phrase 'reasonable proximity.'" Therefore, the question is whether NCUA's interpretation of the phrase is reasonable under *Chevron* step two. See *American Bankers I*, 38 F. Supp. 2d at 129. Plainly, based on the Act and on the legislative history, it was reasonable for NCUA to conclude that "reasonable proximity" embodies a geographical limitation. See 63 Fed. Reg. 72002.

The next question, then, is what kind of facility must physically be near the group. Again, it was reasonable for NCUA to conclude that proximity should not be limited to geographical closeness to the credit union's main or principal office if the organization has other convenient, multi-service facilities near the group. NCUA's approach, which permits a group to be added to a credit union if it is within the service area of a service facility of the credit union, makes it possible for the group to benefit from the "advantages acquired from advancing technologies" while it "enhance[s] the development of credit union services in low income and underserved areas." *Id*. at 72002-03.

The suggestion that the Final Rule somehow interprets the language "a credit union that is within reasonable proximity to the location of the group" to include credit union owned electronic facilities indistinguishable from ATMs is simply incorrect. IRPS 99-1 makes clear that to qualify as a "service facility" a credit union owned electronic facility must, at a minimum, provide certain services to members: "the member must be able to deposit funds, apply for a loan, and obtain funds on approved loans." *Id*. at 72003. Indeed, IRPS 99-1 expressly states that "the final rule excludes an ATM as a service facility," because ATMs cannot offer these services. *Id*. at 72002.

In any event, the final rule's use of the term "service facility" in the context of adding groups to multiple common bond credit unions, and the definition assigned to the term, are both reasonable exercises of NCUA's rulemaking discretion. Nothing in CUMAA or its legislative history requires the use of the term service facility in this context. Nothing in CUMAA or its legislative history requires, if the term is used in this context, that it be defined to exclude ATM's. In fact, "service facility" is not used at all in CUMAA; and, as the district court correctly observed, "[t]he only section of the CUMAA in which Congress used the word 'facility' was § 1759(c)(2)(A)(ii)'s exception for underserved areas; never does the word 'facility' appear in the reasonable proximity provision of the CUMAA." *American Bankers I*, 38 F. Supp. 2d at 130.

For these reasons, NCUA has reasonably interpreted a term that Congress did not define in a manner consistent with the statute and Congress's desire to ensure that groups joining a multiple common-bond credit union will be adequately served.

E. IRPS 99-1's Definition Of "Local Community, Neighborhood Or Rural District" Does Not Violate The Provisions Of CUMAA.

CUMAA permits NCUA to charter community credit unions comprised of members who live in "a well-defined local community, neighborhood, or rural district." *See* 12 U.S.C. § 1759(b)(3). Prior versions of the provision did not include the word "local."

CUMAA explicitly authorizes NCUA to "prescribe, by regulation, a definition for the term 'well-defined local community, neighborhood, or rural district'" for purposes of "making any determination with regard to the field of membership of a [community] credit union." *Id.* § 1759(g)(1)(A). Congress further commanded the agency to "establish[] the criteria applicable with respect to any such determination." *Id.* § 1759(g)(1)(B).

NCUA promulgated three charter requirements for a community based credit union: (i) "[t]he geographic area's boundaries must be clearly defined"; (ii) "[t]he charter applicant must establish that the area is a well-defined 'local community, neighborhood, or rural district;'" and (iii) "[t]he residents must have common interests or interact." 63 Fed. Reg. 72011, 72037. The Final Rule also provides examples of factors that an

applicant might offer as probative of area residents' common interests and interaction: "the existence of a single major trade area, shared governmental or civic facilities, [and] area newspaper." *Ibid*.

In addition, NCUA has adopted a streamlined approach for approval of certain community based charters by assigning presumptions in favor of applicants based on the area's population and status as a single political jurisdiction or as contiguous political subdivisions. Specifically, the Final Rule considers a "presumptive community" any "recognized political jurisdiction, not greater than a county or its equivalent, [if] the population of the requested well-defined area does not exceed 300,000." *Id.* at 72013; see also *id*. at 72037-38. "Multiple contiguous smaller political subdivisions within a county or its equivalent, such as a city, township or a school district, would also qualify," because its residents share the requisite common community bond of political and social interests. *Id.* at 72013; see also *id*. at 72037-38. Similarly, NCUA concluded that "multiple contiguous counties, or multiple political subdivisions thereof" with populations of 200,000 or less presumptively qualify for a community credit union charter. *Id*. at 72013; see also *id*. at 72038.

If an area does not meet the political jurisdiction(s) and population requirements for streamlined approval, the area's application must include documentation to support that it is a well-defined local community, neighborhood, or rural district. Among the eight different examples of acceptable documentation set out in the Final Rule was evidence of "[c]ommon characteristics and background of residents (for example, income, religious beliefs, primary ethnic groups, similarity of occupations, household types, primary age group, etc.)." *Id*. at 72038.

The ABA challenges the Final Rule's provisions relating to community credit unions on two grounds. First, it argues that the Rule, including the new "presumptive community" standard, violates CUMAA by establishing an impermissibly liberal standard for the formation of community credit unions. See Br. for Appellant at 38-41. Second, it claims that the agency improperly considers race and ethnicity in evaluating whether a designated area constitutes a "community" in violation of federal law. See *id.* at 42-44. The first argument lacks merit; and the second argument is now moot.

1. Here again, as the district court concluded, because Congress expressly delegated the authority to define the parameters of the phrase "well-defined local community, neighborhood or rural district," the NCUA's rule implementing this directive

is reviewed under *Chevron* step two. The district court correctly held that NCUA's interpretation of the phrase "well-defined local community, neighborhood, or rural district" was permissible and "in no way arbitrary, capricious or manifestly contrary to the statute." *American Bankers II*, 93 F. Supp. 2d at 48 (internal quotations omitted).

NCUA has devised a policy for chartering community credit unions that reasonably focuses on a clearly defined geographical area and the residents' common interests and interaction. The Final Rule also provides eight examples of factors an applicant might proffer as probative of the requisite commonality of interests or interaction. See 63 Fed. Reg. 72038.[7] Moreover, NCUA has indicated that "population and geographic size are also significant factors in determining whether the area is local." *Id*. at 72037. NCUA has acknowledged its responsibility to give meaning to the "local" standard, and ABA has not alleged any actions that are contrary to this responsibility. Finally, IRPS 99-1's criteria for "presumptive communities" derives, as the district court found, from NCUA's "extensive experience and expertise in chartering community credit unions." *American*

[7/] The Final Rule lists as examples of acceptable documentation: (1) the defined political jurisdictions; (2) major trade areas; (3) shared/common facilities; (4) organizations and clubs within the community area; (5) newspapers and other periodicals published for and about the area; (6) maps designating the area to be served; (7) common characteristics and background of residents; and (8) other documentation that demonstrates that the area is a

Bankers II, 93 F. Supp. 2d at 47. Given the broad discretion Congress granted NCUA in devising regulations and criteria for the establishment of community credit unions, the agency's response was more than reasonable and must be upheld under *Chevron*.

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community where individuals have common interests or interact.

2. The district court dismissed – for lack of standing and on the merits – the ABA's contention that NCUA's consideration of ethnicity in assessing whether residents of a particular area share common interests or interaction amounts to impermissible "redlining." See *American Bankers II*, 93 F. Supp. 2d at 48.[8] Although the district court was correct, the issue is now moot and warrants dismissal for that reason.

As stated, IRPS 99-1 provided eight different examples of "acceptable documentation" that applicants could use to support a request for a community charter. One example was "[c]ommon characteristics and background of residents (for example, income, religious beliefs, primary ethnic groups, similarity of occupations, household types, primary age, group, etc.)." 63 Fed. Reg. 72038. NCUA ultimately concluded that this example "has proven to be of limited relevance in determining whether the area meets the community requirements." 66 Fed. Reg. 15619, 15620. Accordingly, on March

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[8/] The district court found that the plantiffs' lacked standing because they were unable to assert an injury to themselves or their constituents from the practice; and it concluded that the allegation that NCUA was engaged in "redlining" failed logically because NCUA was not dictating who could take part in a credit transaction, but was evaluating whether an area constituted a "local community." *American Bankers II*, 93 F.Supp. 2d at 48.

20, 2001, NCUA issued an Interim Final Rule that deleted the example from the list examples of acceptable documentation. *Id*. at 15619. Because NCUA's chartering rule no longer contains this example of documentation, the ABA's objection is moot.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

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