

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN: 3133-AF06

Chartering and Field of Membership

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its chartering and field of membership (FOM) rules with respect to applicants and existing federal credit unions (FCUs) seeking a community charter approval, expansion, or conversion, in response to an August 2019 opinion and order issued by the D.C. Circuit Court of Appeals. First, the Board is re-adopting a provision to allow an applicant to designate a Combined Statistical Area (CSA), or an individual, contiguous portion thereof, as a well-defined local community (WDLC), provided that the chosen area has a population of 2.5 million or less. Second, with respect to communities based on a Core-Based Statistical Area (CBSA), or a portion thereof, the Board is providing additional explanation to support its decision to eliminate the requirement to serve the CBSA's core area as provided for in its comprehensive 2016 FOM rulemaking known as FOM1. Third, the Board is

clarifying existing requirements and adding an explicit provision to its rules regarding potential discrimination in the FOM selection for CSAs and CBSAs.

DATES: This final rule is effective [INSERT DATE THAT IS 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For program issues: Martha Ninichuk, Director, or JeanMarie Komyathy, Deputy Director; Office of Credit Union Resources and Expansion, at 1775 Duke Street, Alexandria, VA 22314 or telephone (703) 518-1140. For legal issues: Ian Marenga, Associate General Counsel, or Marvin Shaw, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

In a notice of proposed rulemaking and supplemental statement published on November 7, 2019,¹ the Board: (1) proposed to re-adopt the presumptive WDLc option consisting of a CSA or an individual, contiguous portion of a CSA, provided that the chosen area, whether it is an entire CSA or a portion of one, is no more than 2.5 million;² (2) explained further, with

¹ 84 FR 59989.

² References to CSAs or portions thereof in this final rule should be understood to carry this 2.5 million population limit. As noted above, an applicant may select an entire CSA as its WDLc if its population is 2.5 million or below. Alternatively, if the CSA's population is greater than 2.5 million, the applicant may still base its WDLc on the CSA, but must select an individual, contiguous portion of the CSA that has a population no greater than 2.5 million. Applicants also have the option of requesting areas outside these parameters. However, because these types of areas are not presumptive WDLcs, applicants must submit a narrative and supporting documentation establishing how the residents interact or share common interests. Please refer to NCUA Letter to Federal Credit Unions 18-FCU-02

additional reasoning and factual support, the basis for eliminating the core area service requirement for FCUs that choose a CBSA as a WDLC; and (3) proposed to amend the NCUA's regulations regarding community FOM applications, amendments, and expansions for CSAs and CBSAs to require the applicant to explain why it selected its FOM and to demonstrate that its selection will serve low- and moderate-income segments of a community. The proposed rule also included express authority for the NCUA to review and evaluate the foregoing explanation and submission regarding low- and moderate-income individuals, and to reject an application if the agency determines that the FCU's selection reflects discrimination. The Board proposed to apply this provision to CSAs and CBSAs. As detailed further below, the Board is adopting and finalizing all aspects of the proposed rule without change. The following sections provide background on this rulemaking.

A. Overview

Under the Federal Credit Union Act (Act), seven or more individuals may create an FCU by presenting a proposed charter (referred to in the Act as the organization certificate) to the Board.³ These individuals, referred to as "subscribers," must pledge to deposit funds for shares in the FCU and describe the FCU's proposed FOM.⁴ An FOM consists of those persons and entities eligible for membership based on an FCU's type of charter. Before granting an FCU charter, the Board must complete an appropriate investigation and determine the character and fitness of the subscribers, the economic advisability of establishing the FCU, and the conformity

(<https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/requests-serve-well-defined-local-community-using-narrative-approach>) for additional background.

³ 12 U.S.C. 1753.

⁴ 12 U.S.C. 1753(5).

of the proposed charter with the Act.⁵ Under the Act, FCUs may choose from two general categories of FOM: common-bond and community.⁶

The NCUA's Chartering and Field of Membership Manual, incorporated as Appendix B to Part 701 of the NCUA regulations (Chartering Manual),⁷ implements the chartering and FOM requirements that the Act establishes for FCUs. The Chartering Manual provides that the NCUA will grant a charter if the FOM requirements are met, the subscribers are of good character and fit to represent the proposed FCU, and the establishment of the FCU is economically advisable.⁸ In addition, "[i]n unusual circumstances ... [the] NCUA may examine other factors, such as other federal law or public policy, in deciding if a charter should be approved."⁹

In adopting the Credit Union Membership Access Act of 1998 (CUMAA), which amended the Act, Congress reiterated its longstanding support for credit unions, noting their "specific mission of meeting the credit and savings needs of consumers, especially persons of modest means."¹⁰ As amended by CUMAA, the Act provides a choice among three charter types: a single group sharing a single occupational or associational common bond;¹¹ a multiple common bond consisting of groups each of which have a distinct occupational or associational

⁵ 12 U.S.C. 1754.

⁶ 12 U.S.C. 1759(b).

⁷ Appendix B to 12 CFR part 701 (Appendix B). The Chartering Manual is a single regulation that addresses all aspects of chartering FCUs. In that respect, it is similar to regulations of the Office of the Comptroller of the Currency (OCC) applicable to the chartering of national banks or federal savings associations. 12 CFR part 5.

⁸ Appendix B, Ch. 1, section I.

⁹ Id.

¹⁰ Pub. L. 105-219, §2, 112 Stat. 913 (Aug. 7, 1998).

¹¹ 12 U.S.C. 1759(b)(1).

common bond among members of the group;¹² and a community consisting of “persons or organizations within a well-defined local community, neighborhood, or rural district.”¹³

Congress expressly delegated to the Board substantial authority in the Act to define what constitutes a WDLC, neighborhood, or rural district for purposes of “making any determination” regarding a community FCU,¹⁴ and to establish applicable criteria for any such determination.¹⁵ To qualify as a WDLC, neighborhood, or rural district, the Board requires the proposed area to have “specific geographic boundaries,” such as those of “a city, township, county (single or multiple portions of a county) or a political equivalent, school districts or a clearly identifiable neighborhood.”¹⁶ The boundaries themselves may consist of political borders, streets, rivers, railroad tracks, or other static geographical features.¹⁷ The Board continues to emphasize that common interests or interaction among residents within those boundaries are essential features of a local community.

Until 2010, the Chartering Manual required FCUs seeking to establish an area as a WDLC to submit for NCUA approval a narrative, supported by documentation, that demonstrated indicia of common interests or interaction among residents of a proposed community (the “narrative model”) if the community extended beyond a single political jurisdiction (SPJ).¹⁸ A WDLC was (and still is) required to consist of a contiguous area, as

¹² Id. 1759(b)(2)(A).

¹³ Id. 1759(b)(3).

¹⁴ Id. 1759(g)(1)(A).

¹⁵ Id. 1759(g)(1)(B). The Circuit Court cited this express delegation in its August 2019 decision, which is discussed in detail below. Am. Bankers Ass’n v. Nat’l Credit Union Admin., 934 F.3d 649, 663 (D.C. Cir. 2019).

¹⁶ Appendix B, Ch. 2, section V.A.2.

¹⁷ Appendix B, Ch. 2, section V.A.5.

¹⁸ 75 FR 36257 (June 25, 2010).

reflected in the current text of the Chartering Manual.¹⁹ In 2010, the Board replaced the narrative model in favor of an objective model that provided FCUs a choice between two statistically based “presumptive communities” that each by definition qualifies as a WDLC (the “presumptive community model”).²⁰ Further, the Board carefully considered the expertise and reasoning of the agencies that devised the statistical areas in deciding to designate these areas as WDLCs. In particular, the Board noted its agreement with the Office of Management and Budget (OMB) that commuting patterns within statistical areas demonstrate a high degree of social and economic integration with the central county.²¹ Under the presumptive community model, approval is not automatic; rather, there is a multiple-step process. Once a presumptive WDLC is established, an FCU is still required to demonstrate its ability to serve its entire proposed community, as demonstrated by the required business and marketing plans. Then, the NCUA’s staff, including the Office of Credit Union Resources and Expansion (CURE), the Office of General Counsel (OGC), and Regional Offices, review the application to ensure the applicant has established that it can serve its entire proposed community.

¹⁹ Appendix B., Ch. 2., section V.A.2. The Chartering Manual also contained this requirement in 2003 under the narrative model. 68 FR 18334 (Apr. 15, 2003). “The well-defined local community, neighborhood, or rural district may be met if: The area to be served is multiple contiguous political jurisdictions, i.e., a city, county, or their political equivalent, or any contiguous portion thereof and if the population of the requested well-defined area does not exceed 500,000.” (emphasis added). While the specific wording of this provision has been revised since 2003, the NCUA has always required that a WDLC consist of a contiguous area, dating back to 1999.

²⁰ As explained in the 2010 final rule that discontinued the use of the narrative model, the Board “does not believe it is beneficial to continue the practice of permitting a community charter applicant to provide a narrative statement with documentation to support the credit union’s assertion that an area containing multiple political jurisdictions meets the standards for community interaction and/or common interests to qualify as a WDLC. As [the proposed rule] noted, the narrative approach is cumbersome, difficult for credit unions to fully understand, and time consuming. . . . While not every area will qualify as a WDLC under the statistical approach, NCUA stated it believes the consistency of this objective approach will enhance its chartering policy, assure the strength and viability of community charters, and greatly ease the burden for any community charter applicant.” 75 FR 36257, 36260 (June 25, 2010).

²¹ 75 FR 36257, 36259 (June 25, 2010).

One kind of presumptive community is an “[SPJ] . . . or any contiguous portion thereof,” regardless of population.²² The second is a single CBSA²³ (as defined above) as designated by the U.S. Census Bureau, or a well-defined portion thereof, which under the 2010 final rule was subject to a 2.5 million population limit.²⁴

B. 2015 and 2016 Rulemakings

On November 19, 2015, the Board approved a proposed rule to amend various provisions of the Chartering Manual, including the WDLC and rural district options for community FOMs (2015 Proposed Rule).²⁵ As relevant here, in the 2015 Proposed Rule, the Board proposed to amend the community FOM options by: (1) eliminating the requirement for an FCU serving a CBSA to serve its core area; (2) permitting FCUs to serve a portion of a CBSA up to a 2.5 million population limit, even if the CBSA’s total population is greater than 2.5 million;²⁶ (3) permitting FCUs to serve CSAs,²⁷ which combine contiguous CBSAs, or a portion of a CSA,

²² Appendix B, Ch. 2, section V.A.2 of the Chartering Manual defines “single political jurisdiction” as “a city, county, or their political equivalent, or any single portion thereof.”

²³ A CBSA is composed of the country’s Metropolitan Statistical Areas and Micropolitan Statistical Areas. “Metropolitan Statistical Areas” are defined by OMB as having “at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties.” “Micropolitan Statistical Areas” are identical to Metropolitan Statistical Areas except that their urbanized areas are smaller, i.e., the urbanized area contains at least 10,000 but fewer than 50,000 people. A “Metropolitan Division” is a subdivision of a large Metropolitan Statistical Area. Specifically, a Metropolitan Division is “a county or group of counties within a Metropolitan Statistical Area that has a population core of at least 2.5 million.” OMB Bulletin No. 15-01 (July 15, 2015).

²⁴ *Id.* “A total population cap of 2.5 million is appropriate in a multiple political jurisdiction context to demonstrate cohesion in the community.” 75 FR 36257, 36260 (June 25, 2010).

²⁵ 80 FR 76748 (Dec. 10, 2015).

²⁶ Similar to CSAs, as discussed in note 2, this provision allows an applicant to serve an entire CBSA if its population is no greater than 2.5 million. If the CBSA’s population exceeds 2.5 million, an applicant may still base its WDLC on the CBSA but must select an individual, contiguous area that has a population no greater than 2.5 million.

²⁷ CSAs are composed of adjacent CBSAs that share what OMB calls “substantial employment interchange.” OMB characterizes CSAs as “representing larger regions that reflect broader social and economic interactions, such as wholesaling, commodity distribution, and weekend recreational activities, and are likely to be of considerable interest to regional authorities and the private sector.” OMB Bulletin No. 15-01.

provided that the chosen area has a population no greater than 2.5 million; (4) permitting FCUs to apply to the NCUA to add adjacent areas to existing WDLCs consisting of SPJs, CBSAs, or CSAs, based on a showing of interaction by residents on both sides of the adjacent areas; and (5) increasing the population limit for rural district FOMs from the greater of 250,000 or 3 percent of the relevant state's population to 1 million, subject to a requirement that the rural district not expand beyond the states immediately contiguous to the state in which the FCU has its headquarters.

On October 27, 2016, the Board approved two rulemakings relating to the Chartering Manual. One was a final rule and the other a proposed rule. In the final rule,²⁸ the Board adopted the five provisions of the 2015 Proposed Rule that are set forth above (2016 Final Rule, which is also known as FOM1). In the proposed rule, the Board proposed additional changes to the community charter provisions (2016 Proposed Rule).²⁹ Specifically, the Board proposed permitting an applicant for a community charter to submit a narrative to establish the existence of a WDLC as an alternative to stand alongside the SPJ and presumptive statistical community options. According to the proposed rule, the proposed narrative model would serve the same purpose as in years prior to 2010, when the narrative model was used exclusively. Further, the Board proposed permitting an FCU to designate a portion of a statistical area as its community without regard to metropolitan division boundaries.

C. March 2018 Federal District Court Decision

²⁸ 81 FR 88412 (Dec. 7, 2016).

²⁹ 81 FR 78748 (Nov. 9, 2016).

The American Bankers Association (ABA) challenged several community FOM provisions adopted in the 2016 Final Rule under the Administrative Procedure Act (APA).³⁰ On March 29, 2018, the U.S. District Court for the District of Columbia (District Court) upheld, or left in place, three provisions and vacated two provisions of the 2016 Final Rule).³¹ The court held that Congress had delegated sufficient statutory authority to the Board to issue such regulations under Chevron v Natural Resource Defense Council.³² Specifically, the court upheld the provision allowing an FCU to serve areas within a CBSA that do not include the CBSA's core, holding that the definition was a reasonable interpretation of "local community" and that the elimination of the core area service requirement was supported by the administrative record. The court also upheld the provision allowing an FCU to add an adjacent area to a presumptive community, similarly holding that this provision was reasonable under the Act, and that the Board chose reasonable factors to evaluate whether adjacent areas are part of the same local community. Also, the court upheld the elimination of the requirement that a CBSA as a whole have a population of no more than 2.5 million in order for even a portion of the CBSA to qualify as a WDLC, holding that the plaintiff had waived this challenge by failing to raise it in the rulemaking.

The District Court vacated the provision defining any individual portion of a CSA, up to a population limit of 2.5 million, as a WDLC, holding that it was contrary to the Act. Finally, the District Court vacated the provision to increase the population limit to 1 million people for rural districts, also finding it contrary to the Act.

³⁰ 5 U.S.C. 702.

³¹ Am. Bankers Ass'n v. Nat'l Credit Union Admin., 306 F. Supp. 3d 44 (D.D.C. 2018).

³² 467 U.S. 837 (1984). Shortly after CUMAA's enactment, the D.C. Circuit determined that the Board acted within its delegated authority to issue rules for multiple common bond and community charters under Chevron in Am. Bankers Ass'n v. Nat'l Credit Union Admin., 271 F.3d 262 (D.C. Cir. 2001).

Both parties appealed this decision. The NCUA appealed the court's rulings on CSAs and rural districts. The ABA appealed only the ruling on the core area service requirement. The CSA and rural district provisions remained vacated while the appeal was pending. Accordingly, the NCUA rescinded approvals granted under those provisions and ceased approving new applications. The NCUA filed a notice with the court on April 19, 2018, stating that it did not interpret the court's March 29, 2018, order as mandating de-listing of members who joined FCUs under the vacated provisions. The notice also stated that the ABA did not intend to seek an order de-listing such members.

D. 2018 Final Rule

On June 21, 2018, while the appeal was pending, the Board adopted certain limited aspects of the 2016 Proposed Rule in a final rule (2018 Final Rule).³³ Specifically, the 2018 Final Rule amended the Chartering Manual to: (1) allow an FCU seeking to serve a community FOM to submit a narrative to support its chosen area, as an alternative to the presumptive community options; and (2) eliminate the requirement that a WDLC based on a CBSA must be confined to a single metropolitan division within a CBSA. For the narrative model for establishing a WDLC for a community FOM, the Board established a public hearing process for any such proposed community with a population greater than 2.5 million. Further, with regard to the change to CBSA limitations based on metropolitan division boundaries, no commenters objected to this technical change. In addition, in light of the March 2018 District Court Decision vacating the CSA option, the Board removed the CSA option from the Chartering Manual while

³³ 83 FR 30289 (June 28, 2018).

it amended the portions of the Chartering Manual that contained this option. The 2018 Final Rule contained no statement on the validity of the CSAs or any other indication that the Board had decided to abandon or re-visit this definition. Because the 2016 Proposed Rule did not propose any changes to the rural district definition, the Board did not amend or remove the rural district provision in the 2018 Final Rule.

E. August 2019 Circuit Court Decision

On August 20, 2019, a three-judge panel of the D.C. Circuit Court of Appeals (Circuit Court) issued a decision on the appeal.³⁴ The Circuit Court, in a unanimous decision, found that the Board acted within its statutory authority and thus reversed the District Court's rulings on CSAs and rural districts and directed the District Court to enter summary judgment for the NCUA on both issues. The Circuit Court also reversed the ruling on the core area service requirement for CBSAs, remanding the issue to the agency for further explanation without vacating the provision.

With respect to CSAs and rural districts up to 1 million people, the Circuit Court held that both provisions are consistent with the Act and were reasonably explained. First, the court found the CSA provision consistent with the "local community" provision of the Act.³⁵ Further, the Circuit Court found that the CSA definition, which is based on commuting relationships, rationally advances the statutory purpose of ensuring an affinity or common bond among

³⁴ Am. Bankers Ass'n v. Nat'l Credit Union Admin., 934 F.3d 649 (D.C. Cir. 2019).

³⁵ Id. at 664.

members.³⁶ The court also found that the definition rationally advances the Act’s safety and soundness purposes.³⁷ On this point, the court found that allowing for larger communities could promote the economic viability of community FCUs.³⁸ The court also held that the 2018 Final Rule’s removal of the CSA option from the Chartering Manual did not render that issue moot, citing evidence of the Board’s intention to re-promulgate this provision if the court upheld it.³⁹

Second, the court held that the expansion of the rural district definition to areas including 1 million people is consistent with the Act.⁴⁰ The court found that the term “rural district” does not connote specific population or geographic constraints.⁴¹ The court also found that the Board reasonably explained the expansion, including the 2016 Final Rule’s discussion of the agency’s experience with several larger rural districts under the pre-2016 rule.⁴²

On one limited issue, the Circuit Court asked for additional explanation in reversing the District Court’s ruling on the core area service requirement and directed the District Court to enter summary judgment for the plaintiff on this provision and remand, without vacating, this provision to the agency for further explanation.⁴³ The Circuit Court held that this provision is consistent with the Act, but that the 2016 Final Rule did not adequately explain it in light of the concern that commenters raised about the potential for FCUs to engage in redlining or gerrymandering of CBSAs to avoid serving minority or low-income individuals.⁴⁴ Accordingly,

³⁶ Id. at 665.

³⁷ Id. at 665–66.

³⁸ Id. at 666.

³⁹ Id. at 661–62.

⁴⁰ Id. at 672.

⁴¹ Id. at 672–73.

⁴² Id. at 673.

⁴³ Id. at 674.

⁴⁴ Id. at 670.

the Circuit Court directed the District Court to remand this provision without vacating it, and noted that it expected the Board to act “expeditiously.”⁴⁵ The Circuit Court did not prescribe a specific deadline or procedure for the Board to follow. Therefore, this provision and approvals that the agency has granted under it remain in effect.

Currently, the Chartering Manual does not contain CSAs or portions thereof as an option for a WDLC. As a result of the Circuit Court finding the Board acted within its authority, the Board proposed to re-adopt the provision allowing a CSA or an individual, contiguous portion of a CSA, to be a presumptive statistical-based WDLC, provided that the chosen area has a population of no more than 2.5 million. The 2016 Final Rule’s expanded definition of rural districts remained in the Chartering Manual and was upheld by the court’s decision. Accordingly, the Board did not address rural districts in the proposed rule.⁴⁶ Finally, the Board provided further explanation and support, and proposed to add a provision to the Chartering Manual with respect to potential discrimination to address the Circuit Court decision. The Board issued the proposed rule promptly after the decision in light of the Circuit Court’s expectation that the agency act expeditiously to provide further explanation on the CBSA core area service requirement.

⁴⁵ Id.

⁴⁶ On October 4, 2019, the ABA filed a petition for rehearing en banc with respect to the panel’s ruling on the CSA and rural district provisions. The NCUA responded to this petition, upon order of the court, on November 21, 2019. On December 12, 2019, the D.C. Circuit issued a per curiam (summary) order denying the petition. The Circuit Court issued its mandate to terminate the appeal on December 31, 2019, and the District Court entered summary judgment in accordance with the mandate on January 7, 2020. On March 11, 2020, the ABA filed a petition for a writ for certiorari requesting the U.S. Supreme Court review the Circuit Court decision. On June 29, 2020, the Supreme Court denied the ABA’s petition. 591 U.S. ____.

II. Summary of Proposed Rule and Further Explanation of Core Area Service Requirement

On November 7, 2019, the Board published a notice proposing to amend its FOM rules with respect to applicants for a community charter approval, expansion, or conversion, in response to the Circuit Court's August 2019 opinion and order. First, the Board proposed re-adopting a provision to allow an applicant to designate a CSA, or an individual, contiguous portion thereof, as a WDLC, provided that the chosen area has a population of 2.5 million or less. Second, with respect to communities based on a CBSA or a portion thereof, the Board provided additional explanation for its decision to eliminate the core service requirement in the 2016 Final Rule. Third, the Board clarified existing requirements and proposed to add an explicit provision to its rules regarding potential discrimination in the FOM selection for CSAs and CBSAs.

III. Summary of Comments on the Proposed Rule

The Board received approximately 128 comments, including from bank and credit union trade associations, state leagues and associations, credit unions, and banks. A number of banks submitted a form letter opposing the proposal, particularly with respect to the elimination of the core area service provision.

Credit union-affiliated commenters generally supported the proposal to reinstate the CSA provision and eliminate the CBSA core area service requirement for community charters. Several credit union-affiliated commenters opposed additional requirements for the marketing

and business plan to establish service to core areas or low- and moderate-income individuals, viewing such requirements as unnecessary and burdensome.

Banks and bank trade associations provided comments largely opposing the proposed rule and the Board's objectives. These comments focused on eliminating the core area service requirement. Approximately 113 banks submitted various form letters opposing the proposal to eliminate the core requirement. The form letters criticized the proposal, emphasizing their belief that "urban core areas deserve access to financial services" and that the proposal would result in redlining. These commenters advocated that the Board adopt provisions similar to those issued by bank regulatory agencies that implement the Community Reinvestment Act (CRA). Specifically, they requested community-chartered credit unions account for low-, moderate-, and middle-income census tracts being excluded from the FOM and whether financial services are adequately being provided to those areas. Further, these commenters requested that an FCU be required to explain how people in the excluded core can access credit facilities if the FCU does not include the core.

The ABA⁴⁷ stated that the CSA and CBSA core provisions were "seriously flawed" and should be withdrawn unless the Board made significant modifications. The ABA relied extensively on the District Court decision that was unanimously reversed by the Circuit Court. Details of the comments are provided below in the discussion of the final rule.

IV. Final Rule

⁴⁷ The ABA's submission included approximately 350 pages (14 pages were new comments, and the remainder consisted of attachments that included the ABA's legal filings and the District Court and Circuit Court decisions discussed above).

A. General

The Board has determined that it is appropriate and consistent with the Act to adopt the FOM chartering provisions described above, as proposed. Accordingly, the Board is amending its FOM rules with respect to applicants for a community charter approval, expansion, or conversion, in response to the 2019 opinion and order issued by the Circuit Court. First, the Board is re-adopting the provision to allow an applicant to designate a CSA, or an individual, contiguous portion thereof, as a WDLC, provided that the chosen area has a population of 2.5 million or less. Second, with respect to communities based on a CBSA or a portion thereof, the Board is providing additional explanation and support for its decision to eliminate the requirement to serve the CBSA's core area, as provided for in the 2016 Final Rule. In light of comments and consistent with the Circuit Court decision, the Board is clarifying existing requirements and adding an explicit provision to its rules regarding potential discrimination in the FOM selection for CSAs and CBSAs. Each of these three topics is discussed below.

B. Statutory Background and General Principles

Before responding to specific comments, the Board believes it is appropriate to explain the overall statutory basis for its FOM regulations applicable to chartering FCUs. In Section 2 of CUMAA, Congress set forth its "Findings" as follows:

The Congress finds the following:

- (1) The American credit union movement began as a cooperative effort to serve the productive and provident credit needs of individuals of modest means.
- (2) Credit unions continue to fulfill this public purpose, and current members and membership groups should not face divestiture from the financial services institutions of their choice as a result of recent court action.
- (3) To promote thrift and credit extension, a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared and related work experiences, interests, or activities, or the maintenance of an otherwise well understood sense of cohesion or identity is essential to fulfillment of credit unions' public mission.
- (4) Credit unions, unlike many other participants in the financial services market, are exempt from Federal and most State taxes because they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specific mission of meeting the credit and savings needs of consumers, especially persons of modest means.
- (5) Improved credit union safety and soundness provisions will enhance the public benefit that citizens receive from these cooperative financial service institutions.

These congressional findings—to encourage and improve financial access to credit to people of modest means, to enhance consumer choice, community affinity and common bonds, and to promote the safety and soundness of credit unions—are bolstered by specific provisions of CUMAA. For instance, Title 1 of that law addresses “credit union membership,” including the express provision in section 109 for the Board to establish regulations to encourage the

chartering of community and multiple common bond FCUs. This section includes provisions encouraging formation of FCUs to encourage providing financial services to underserved communities and people of modest means. Title II of CUMAA mandates that the Board protect the National Credit Union Share Insurance Fund (NCUSIF) by issuing stricter safety and soundness provisions, including enhanced accounting standards in section 201. Title III of CUMAA includes capitalization and net worth requirements to “resolve the problems of the insured credit unions at the least possible long-term loss to the [NCUSIF].” Title III also sets forth specific mandates, including issuing regulations for prompt corrective action; capitalization requirements (including the submission of net worth restoration plans; earnings retention requirements; and prior written approval requirements for credit unions that are not adequately capitalized); certification of NCUSIF equity ratios; increased share insurance premiums; and periodic evaluation of access to liquidity. Title IV of CUMAA includes assurances for independent decision making in connection with certain charter conversions. Congress patterned these safety and soundness provisions after provisions applicable to the Federal Deposit Insurance Corporation (FDIC) and other banking regulatory agencies to ensure the safety and soundness of banks and protect the FDIC’s insurance fund.

As CUMAA indicates, Congress directed the Board to consider multiple responsibilities, including encouraging access for financial services to people of modest means, encouraging competition among providers of financial services, and protecting taxpayers by enhancing the safety and soundness of the credit union system and protecting the NCUSIF. In contrast, banks have a more limited focus, including the interests of shareholders. This is illustrated in the ABA’s comment letter, which states that the organization “represents banks of all sizes and charters and is the voice of the nation’s \$18 trillion banking industry, which is composed of

small, regional, and large banks that together employ more than 2 million people, safeguard more than \$414 trillion in deposits, and extend \$10.4 trillion in loans.⁴⁸”

Although the ABA’s comment seems to oppose the Board’s authority to construe the statute and promulgate substantive FOM rules based on consideration of the purposes of the Act, the Circuit Court made clear that Congress entrusted the NCUA with an express delegation of authority to reasonably construe the statutory field of membership terms, and to promulgate appropriate rules.⁴⁹ The Board also wishes to clarify the record in light of inaccurate statements in parts of the ABA’s comments and litigation motions (which were appended to the ABA’s comment letter).⁵⁰ Examples of factual misstatements in the ABA’s “Petition for Rehearing *En Banc* for Appellee-Cross-Appellant,” which the ABA attached to its comment on this rulemaking, include the following. The Board wishes to clarify and correct these points, which pertain to the rulemaking generally:

- The ABA states that CSAs “automatically qualify as ‘local communities’”⁵¹ and “The agency retains no discretion to determine that any application of its ‘local community’ or ‘rural district’ rule is unreasonable.”⁵² In fact, such a CSA would be a “presumptive community” for which an applicant requests approval and provides a business and marketing plan to support an application. Then, NCUA staff in CURE reviews the application and in consultation with OGC for legal issues and the Office of Examination

⁴⁸ In contrast, Federal credit unions have \$803 billion in assets, employ roughly 160,000 people, safeguard \$670 billion in shares and deposits, and extended \$561 billion in loans.

⁴⁹ Am. Bankers Ass’n, 934 F.3d at 663.

⁵⁰ On a non-substantive point, the ABA in its petition for rehearing en banc incorrectly referred to the NCUA’s organic statute as the National Credit Union Act. Id. at 3.

⁵¹ Id. at 1.

⁵² Id. at 8.

and Insurance and the Regional Office for safety and soundness concerns, may grant, deny or seek additional information.

- The ABA incorrectly states that there were “hundreds of examples—and not a single counter-example—showing the agency’s definitions fall outside the reasonable range of ambiguity of those terms.”⁵³ In oral argument before the Circuit Court, on behalf of the Board, the Department of Justice provided several examples.⁵⁴
- The ABA incorrectly states Congress added the term “local” in the 1998 Act and then the Supreme Court “reversed one such effort which would have allowed credit unions to be comprised of multiple unrelated employer groups (NCUA v. First Nat’l Bank & Trust, 522 U.S. 479 (1998)).⁵⁵ In fact, the Supreme Court ruling came first on February 25, 1998, and then several months later Congress enacted CUMAA on August 7, 1998, including adding the term “local.” Also, the term “local” applies to community charters, while the Supreme Court decision focused on associational common bond.
- The ABA references “as applied” challenges in 2004 in Utah and 2008 in Pennsylvania.⁵⁶ In fact, these cases challenged the sufficiency of administrative determinations that the NCUA made under the narrative model to establishing a community charter; this is a regulatory framework which has not been in effect for over a decade and was superseded by the new presumptive community rules adopted by notice-and-comment rulemaking in 2010 and supplemented in 2016. Thus, these pre-

⁵³ Id. at 1-2.

⁵⁴ The DOJ brief noted that “people can readily refer to the Combined Statistical Areas of Midland-Odessa in Texas, Appleton-Oshkosh-Neenah in Wisconsin, El Paso-Las Cruces on the Texas-New Mexico border, or Joplin-Miami on the Missouri-Oklahoma border as being ‘local communities,’ as these towns clearly share strong economic and social ties.”

⁵⁵ Id. at 3.

⁵⁶ Id. at 4.

2010 cases are not relevant to the current challenge to presumptive communities set forth in the 2016 Final Rule.

The ABA also errs in stating: “The panel relied on a separate regulation that requires credit unions to submit a business plan showing how the credit union would serve the proposed ‘local community.’”⁵⁷ In fact, both the presumptive community provisions for CSAs and CBSAs and the business and marketing plan requirements are in the same regulation.⁵⁸ The ABA further argued that “[t]he rule leaves the agency with no discretion to determine that a particular application of its rule is unreasonable.”⁵⁹ In fact, for the reasons noted above, approval for a presumptive community is not automatic; an applicant must establish through its business and marketing plan that it can serve the community, as the Circuit Court observed.⁶⁰ All charter applications involve an iterative process between an applicant and the agency, with agency staff requiring the applicant to make modifications in approximately 95 percent of these applications. The NCUA chartering process is in this regard comparable to those that the federal banking agencies administer.⁶¹ For example the Federal Reserve Board’s application materials state: “Starting a bank involves a long organization process that could take a year or more, and permission from at least two regulatory authorities. Extensive information about the organizer(s), the business plan, senior management team, finances, capital adequacy, risk management infrastructure, and other relevant factors must be provided to the appropriate authorities.”⁶²

⁵⁷ *Id.* at 16.

⁵⁸ The Chartering Manual is all contained within Appendix B.

⁵⁹ ABA Petition for Rehearing at 16.

⁶⁰ 934 F.3d at 668.

⁶¹ See FDIC Deposit Insurance Handbook at

<https://www.fdic.gov/regulations/applications/depositinsurance/handbook.pdf>. For the OCC’s procedures, see 12 CFR part 5.

⁶² See the Federal Reserve Board’s procedures at https://www.federalreserve.gov/faqs/banking_12779.htm.

C. Proposal to Re-adopt the CSA Community Charter Option

The Board proposed allowing a CSA (or a single portion thereof) to be a presumptive WDLC, subject to a 2.5 million population limit. In the proposed rule, the Board proposed to re-adopt this option in light of the Circuit Court decision reversing the District Court and upholding this provision in the 2016 Final Rule. The Board observed that the factual record regarding CSAs is materially identical to what existed in 2016. The only change that the Board proposed from the CSA option adopted in the 2016 Final Rule is clarifying language in the text of the Chartering Manual on the requirement that an FCU select a single, contiguous portion of a CSA to meet the WDLC requirement. The Board sought comments on this proposed action generally and specifically requested comments beyond the many it considered when it first adopted the CSA provision in FOM1.

Commenters generally supported the proposal to readopt the CSA provision. The ABA was the only commenter opposing it; no other bank-affiliated commenter addressed this proposal. In contrast, credit union commenters stated that CSAs are “sufficiently compact to promote interaction and common interests among its residents” and thus qualify as a WDLC. Other commenters stated that re-proposing this provision is consistent with the evolution in servicing members, as technology, financial services, and communities change. One commenter stated that adopting the CSA option is consistent with OMB designations that establish that there

are sufficient interactions and common interests. Some commenters provided examples of CSAs, noting that cities in a CSA are “intrinsically linked through both recreation and work.”

In opposing the proposal, the ABA stated that defining a CSA as a “single local community” is unreasonable and unlawful. The ABA largely relied on the District Court opinion, which was unanimously reversed by the Circuit Court. The ABA provided examples of CSAs that it believes might not be a WDLC and contended that CSAs have a “daisy-chain nature” in which opposite ends have little connection. It then stated that the Circuit Court indicated that some CSAs might not be a WDLC and thus could be challenged on an “as applied” basis. The ABA further stated that the term “local community” should not automatically include a CSA. Rather, it stated that any presumption that a CSA is a local community should be rebuttable. The ABA further stated that the Board should not adopt these provisions while litigation remains pending, including the possibility of an appeal to the Supreme Court.

After reviewing the comments in light of the unanimous Circuit Court decision to affirm the Board’s adoption of a CSA as a presumptive community, the Board has determined that it is appropriate and consistent with the Act to amend the Chartering Manual to allow a CSA to be re-established as a presumptive WDLC. Much of the ABA’s argument relied on the District Court decision that was unanimously rejected by the three-judge Circuit Court panel. In applying Chevron, the Circuit Court stated: “We appreciate the District Court’s conclusions, made after a thoughtful analysis of the Act. But we ultimately disagree with many of them. In this facial challenge, we review the rule not as armchair bankers or geographers, but rather as lay judges cognizant that Congress expressly delegated certain policy choices to the NCUA. After considering the Act’s text, purpose, and legislative history, we hold the agency’s policy choices

‘entirely appropriate’ for the most part. Chevron, 467 U.S. at 865.”⁶³ With respect to CSAs, the Circuit Court, in rejecting the District Court’s analysis, stated:

In addition to being consistent with the Act’s text, the Combined Statistical Area definition rationally advances the Act’s underlying purposes. In the 1998 amendments, Congress made two relevant findings about purpose. First, legislators found “essential” to the credit-union system a “meaningful affinity and bond among members, manifested by a commonality of routine interaction [;] shared and related work experiences, interests, or activities [;] or the maintenance of an otherwise well-understood sense of cohesion or identity.” § 2, 112 Stat. at 914. Second, Congress highlighted the importance of “credit union safety and soundness,” because a credit union on firm financial footing “will enhance the public benefit that citizens receive.”⁶⁴

The Circuit Court explicitly rejected the ABA’s assertion that CSAs have a “daisy chain” nature, linking multiple metropolitan areas that have nothing to do with those at opposite ends of the chain. As the court stated:

[T]he NCUA’s definition does not readily create general, widely dispersed regions. Cf. First Nat’l Bank III, 522 U.S. at 502 (indicating

⁶³Am. Bankers Ass’n, 934 F.3d at 656. See also with respect to CSAs: “The NCUA possesses vast discretion to define terms because Congress expressly has given it such power. But the authority is not boundless. The agency must craft a reasonable definition consistent with the Act’s text and purposes; that is central to the review we apply at Chevron’s second step. Here, the NCUA’s definition meets the standard.” Id. at 664.

⁶⁴Id. at 665–66.

that community credit unions may not be ‘composed of members from an unlimited number of unrelated geographical units’. Combined Statistical Areas are geographical units well-accepted within the government. See [81 FR at 88414]. Because they essentially are regional hubs, the Combined Statistical Areas concentrate around central locations. ... The NCUA rationally believed that such ‘real-world interconnections would qualify as the type of mutual bonds suggested by the term ‘local community.’ ... Thus, the agency reasonably determined that Combined Statistical Areas “simply unif[y], as a single community,” already connected neighboring regions. [See 81 Fed. Reg. at 88,415.]⁶⁵

The ABA’s misinterpretation of the Chevron doctrine was further repudiated by the entire Circuit Court, which rejected the ABA’s petition for a rehearing en banc. The Board emphasizes that the ABA repeatedly misstates the regulatory framework for approving a presumptive community, both in its court filings and in its comment letter on the proposed rule. Under the regulatory provisions in the Chartering Manual, established by notice-and-comment rulemaking, there is no automatic approval of an application based on a CSA. Rather, an applicant would have to establish in its application that it can serve the entire community, as documented in its business and marketing plan. A further constraint on any such CSA or portion thereof is that its population cannot exceed 2.5 million people. As the Circuit Court noted:

⁶⁵ Id. at 666–67.

We might well agree with the District Court that the approval of such a geographical area would contravene the Act. But even so, the Association would need much more to mount its facial pre-enforcement challenge in this case. As the Supreme Court repeatedly has held, “the fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule” facially invalid. Am. Hosp. Ass’n v. NLRB, 499 U.S. 606, 619 (1991); see also EPA v. EME Homer City Generation, L.P. (EME Homer), 572 U.S. 489, 524 (2014) (“The possibility that the rule, in uncommon particular applications, might exceed [the agency]’s statutory authority does not warrant judicial condemnation of the rule in its entirety.”); INS v. Nat’l Ctr. for Immigrants’ Rights, Inc., 502 U.S. 183, 188 (1991) (“That the regulation may be invalid as applied in s[ome] cases . . . does not mean that the regulation is facially invalid because it is without statutory authority.”); cf. Barnhart v. Thomas, 540 U.S. 20, 29 (2003) (“Virtually every legal (or other) rule has imperfect applications in particular circumstances.”).

Here, the Association’s complaint and the District Court’s accompanying worry strike us as too conjectural. The NCUA must assess the “economic advisability of establishing” the proposed credit union before approving it, [12 U.S.C. 1754], and as part of the assessment, the organizers must propose a “realistic” business plan showing how the institution and its branches would serve all members in the local community, see [12 CFR.

part 701, app. B, ch. 1 section IV.D.] The Association has failed to demonstrate the plausibility of a local community that is defined like the hypothetical narrow, multi-state strip and accompanies a realistic business plan. And if the agency were to receive and approve such an application, a petitioner can make an as-applied challenge. See, e.g., EME Homer, 572 U.S. at 523-24; Buongiorno, 912 F.2d at 510.⁶⁶

Thus, existing regulatory provisions guard against the extreme examples posited by the ABA, which claims incorrectly that the Board must approve them under the Chartering Manual. The Board agrees with the ABA and the Circuit Court that any application for a presumptive community, including one based on a CSA, can be challenged on an as applied, case-by-case basis. Given this regulatory framework, which is subject to judicial review, the Board agrees with the Circuit Court's reasoning in concluding that re-establishing the CSA as a presumptive community is entirely consistent with the express authority delegated to the Board by Congress. This provision also advances the Act's dual purposes of promoting common bonds while addressing safety and soundness considerations by ensuring that FCUs remain economically viable.

B. Proposal: Elimination of the Core Requirement for CBSA Community Charters

In the proposed rule, the Board addressed the Circuit Court's concern regarding the potential for discriminatory redlining or gerrymandering of FOMs based on a portion of a CBSA

⁶⁶ Id. at 668.

that excludes the core area. In accordance with the Circuit Court's order, the Board provided further explanation for the provision of the 2016 Final Rule that eliminated the requirement for an FCU to serve the core area when it chooses to base its FOM on a portion of a CBSA. As background and context for these considerations, the Board explained differences between the chartering processes for FCUs and other types of financial institutions, with particular reference to the CRA provisions that Congress has applied solely to banks and federal savings associations. The Board explained that Congress intentionally excluded credit unions from the CRA and established a different regulatory framework for how credit unions provide financial services to low- and moderate-income people. In addition to differences between banks and credit unions, the Board further explained that Congress established different regulatory incentives for government-sponsored enterprises, such as Fannie Mae and Freddie Mac.

In addition to these legislative differences, the proposal set forth additional reasons, including quantitative data, to support its decision to eliminate the core area service requirement. To this end, the Board reviewed the record from the 2016 Final Rule and observed that removing the core area service requirement would better allow FCUs flexibility to serve low- or moderate-income segments of communities in areas outside the cores. The Board noted that this consideration is consistent with a view that credit union-affiliated commenters expressed in response to the 2015 Proposed Rule. After reviewing the judicial decisions in this matter and comment letters from the 2015 and 2016 rulemaking, the Board determined that enhancing flexibility is consistent with its decision to eliminate the core area service requirement.

As an independent basis to support this decision, the Board presented and considered supplemental data relating to CBSAs to further support eliminating the core area service

requirement. The Board noted that the data showed that a substantial majority of core areas in CBSAs receive service from community FCUs. In addition, the Board identified several CBSAs in which low- or moderate-income individuals could receive greater access to financial services, if FCUs are permitted to serve an FOM consisting of the non-core areas of those CBSAs. Specifically, the Board observed that household income is sometimes higher in certain neighborhoods in a CBSA's core as compared to suburban areas in adjacent counties outside the core. Retaining the core area service requirement would often require an applicant to provide financial services to relatively wealthy individuals in high-income areas who have ample options for their financial needs. Thus, the Board reasoned that the requirement may result in a potential applicant for a community charter either not seeking a charter for the low- to moderate-income areas or expending resources on wealthier areas in the core that have less need for such new services and access to credit. Based on that analysis, the Board found that this requirement may decrease potential credit opportunities for low- and moderate-income segments of communities in some circumstances. By removing the core area service requirement provision, the Board anticipated that a potential FCU applicant could focus its limited resources to better serve such less affluent communities.

In addition to those examples and analysis, the Board considered data reflecting that community FCUs tend to serve most CBSA core areas across the country. The NCUA's data (which are publicly available) show that a substantial majority of CBSAs, including their core areas, are currently served by community-based FCUs. FCUs of various other charter types also serve core areas across the country. In addition, FCUs currently serve the entirety of several of the most populous SPJs in the country—Los Angeles County, California; Houston, Texas; Philadelphia, Pennsylvania; and San Antonio, Texas. If any of these pre-existing FCUs sought

to modify their FOM to exclude an urban core, such a request would be subject to scrutiny by the NCUA to determine whether the FCU was engaged in discriminatory practices or whether it might leave the urban core underserved.⁶⁷ Moreover, any member of these pre-existing FCUs could alert the NCUA of any potentially discriminatory practices, for which the NCUA could take appropriate action.⁶⁸ Because of this expansive coverage of core areas by pre-existing community FCUs, the Board found further support that it is reasonable to eliminate the core area service requirement.

Furthermore, the Board noted that approximately 700 community-based FCUs are currently designated as low-income credit unions (LICUs) pursuant to the Act and the NCUA's regulations.⁶⁹ These FCUs have the potential to serve over 10 million members across the country. As directed by Congress, the NCUA accords this designation to credit unions that predominantly serve low-income members. By obtaining this designation, credit unions gain greater flexibility in accepting nonmember deposits,⁷⁰ are exempt from the aggregate loan limit on business loans that otherwise applies to all federally insured credit unions,⁷¹ may offer secondary capital accounts to strengthen their capital base,⁷² and gain access to grants and loans from the Community Development Revolving Loan Program for Credit Unions.⁷³ Accordingly, the Board observed that community-based FCUs have both strong incentives and a strong record of providing service to low-income segments of communities.

⁶⁷ The new provisions in the Chartering Manual, discussed in detail below, would address this issue. App. 1, Ch. V.A.8.

⁶⁸ Id.

⁶⁹ 12 U.S.C. 1757(6); 12 CFR 701.34.

⁷⁰ 12 U.S.C. 1757(6).

⁷¹ 12 U.S.C. 1759a(b)(2)(A).

⁷² 12 CFR 701.34(b)-(d). Credit unions must submit a secondary capital plan under § 701.34(b)(1) before issuing secondary capital accounts.

⁷³ 12 CFR 705.2.

Separately, the Board cited the agency's experience in implementing this provision since 2016 as a further indication of the non-discriminatory bases that FCUs have for pursuing this option. For example, in applications granted by the agency between 2016 and 2019 under this provision, the agency identified no discrimination. The Board detailed the reasons that the three FCUs approved under this provision had for their FOM selection, which centered on limited capacity or the ability to serve areas outlying a heavily populated core area, such as New York City. In light of that actual record, in addition to the data and examples, the Board found that the risk of discrimination is minimal and that FCUs have invoked the subject provision to serve areas outside the core that would otherwise have been omitted if the core area service requirement had been in place.

Comments were mixed on whether it is appropriate to eliminate the core area service requirement. While every credit union-affiliated commenter that addressed this specific proposal supported it, bankers opposed the Board's decision to eliminate the core service requirement.

Credit union-affiliated commenters stated that eliminating the core service requirement will not encourage discriminatory lending practices, noting that FCUs have a history of providing financial services to the underserved, and unlike banks do not have a history of redlining. Additional reasons commenters provided for supporting the proposal include that it:

- Allows an FCU to request an FOM that more reasonably fits its ability to serve, thereby facilitating services to potential customers and that requiring service to the entire core may unreasonably stretch an applicant's resources;

- Provides FCUs added flexibility to serve low- and moderate-income communities in areas outside the core;
- Allows FCUs to focus on how best to allocate limited resources to allow service to low-income members and areas;
- Accommodates changing demographics in which core areas are wealthier, while suburbs are more diverse but poorer;
- Recognizes that FCUs have valid business reasons for choosing to serve or not to serve a CBSA's core; and
- Provides the NCUA added authority to reject applications that may be based on discriminatory intent.

These commenters further stated that the ABA's lawsuit would limit access of some low-income people to financial services. Specifically, they argued that implementing outdated and burdensome CRA requirements would reduce flexibility to serve poorer communities because FCUs may be required to serve wealthier cores, while reducing service to poorer areas. Consistent with the proposed rule's discussion, a commenter cited a New York Times article identifying demographic changes in downtown populations in Raleigh, Brooklyn, Atlanta, Indianapolis, Philadelphia, Nashville, Houston, Denver, and Chicago.⁷⁴

⁷⁴ Badger. E., Bui Q. & Gebeloff R (Apr. 27, 2019), "The Neighborhood is Mostly Black. The Home Buyers Are Mostly White," The New York Times, available at: <https://www.nytimes.com/interactive/2019/04/27/upshot/diversity-housing-maps-raleigh-gentrification.html>.

Commenters noted that even without additional requirements, FCUs—like banks—are subject to numerous anti-discrimination laws, and the NCUA⁷⁵ already has authority to oversee compliance. In addition to the Equal Credit Opportunity Act of 1974 (ECOA)⁷⁶ and the Fair Housing Act of 1968,⁷⁷ the Home Mortgage Disclosure Act (HMDA)⁷⁸ mandates that FCUs provide extensive data on lending practices, thereby providing an additional mechanism to identify discriminatory lending trends. Further, compliance with fair lending laws is a core responsibility of an FCU’s board of directors. Also, similar to bank regulatory examiners, NCUA examiners, who are trained to identify fair lending violations, are empowered to take appropriate action against FCUs relating to lending activity.

In contrast, bank-affiliated commenters opposed eliminating the core requirement, stating:

- The NCUA did not address the Circuit Court’s concern that a community credit union can engage in redlining or gerrymandering to create a community of higher-income members;
- The NCUA should consider the effect on excluded portions of communities, without regard to the business needs of the credit union, in light of FCUs’ mission of serving those of modest means;

⁷⁵ The NCUA, along with the Consumer Financial Protection Bureau (CFPB), FDIC, Federal Reserve, and the OCC, is a member of the Federal Financial Institutions Examination Council (FFIEC), which coordinates the supervision of financial institutions,

⁷⁶ 15 U.S.C. 1691 *et. seq.*

⁷⁷ Pub. L. 90-284.

⁷⁸ Pub. L. 94-200.

- The NCUA needs to consider access to full-service branches, even though not statutorily mandated;⁷⁹
- The NCUA should substantiate the statement in the proposed rule regarding FCUs serving most CBSA core areas across the country;
- The proposed rule did not consider two Government Accountability Office (GAO) studies that conclude that credit unions serve a lower percentage of people of modest means than banks;
- The fact that some CBSAs have lower-income people outside the core does not justify a blanket rule permitting FCUs to exclude core areas;
- Credit unions should undergo examinations similar to the CRA reviews that bank regulators conduct;
- FCUs should demonstrate whether: (1) the revised geographic boundaries outside the core would result in more low- and moderate-income individual⁸⁰ populations being served, (2) financial services are provided to the excluded areas, and (3) the excluded area will have access to financial services;
- The NCUA's consumer compliance program is not sufficient to ensure compliance with consumer compliance laws;

⁷⁹ No bank-affiliated commenter directly addressed the proposed rule's discussion about how Congress established different regulatory structures to provide financial services for underserved people and communities for different financial institutions. Specifically, Congress mandated the CRA for banks and federal savings association. In contrast, Congress declined applying the CRA to credit unions; rather, understanding the differences among financial institutions, Congress tailored different incentives for credit unions and government sponsored enterprises to facilitate providing financial services to people in underserved communities.

⁸⁰ The commenters referred to these groups as "LMIs."

- The NCUA’s consumer compliance practices are not sufficient to safeguard against illegal discrimination, stating the NCUA conducted 25 fair lending exams in 2018 (less than 2013) even though credit unions have added 22 million members since 2013; and
- The NCUA’s complaint process does not address nonmembers seeking FOM expansions.

Accordingly, some of the bank-affiliated commenters requested that the NCUA withdraw the proposal because, as the ABA opined, “credit unions have a special mission of serving persons of modest means” and that it is “the Board’s responsibility to carry out this mission.” These commenters further requested that the NCUA require that FCUs demonstrate a compelling interest or need to exclude urban cores. They also requested that the NCUA provide for public input to allow community groups to weigh in on excluding the core area.

In response to supplemental information in the proposed rule regarding income distribution within and outside the core in several CBSAs, several commenters provided specific examples of credit unions serving wealthier communities while not adding branches in less affluent communities. The ABA specifically referenced Cleveland and Detroit to illustrate charters that may be approved by the NCUA under this provision where they contended lower-income and minority residents might be excluded from the FOM. Similarly, a Michigan banker referenced a state-chartered credit union’s activities in Michigan.⁸¹ In addition, the ABA questioned the proposed rule’s examples of CBSAs in which some portions—represented by ZIP

⁸¹ The Board notes that because the credit union referenced by the banker is state-chartered, it is not subject to the NCUA’s chartering rules.

codes—outside the core area have lower median income than the relevant core areas. The ABA questioned the use of ZIP codes because the NCUA’s chartering rules do not recognize ZIP codes as WDLCs. The ABA also stated that the fact that there may be relatively affluent parts of the urban core of some CBSAs, in which median incomes exceed those in some outlying suburbs, does not justify a blanket rule that credit unions may exclude all, or any part of, the urban core from their service area. According to the ABA, such a rule would permit FCUs to choose to serve only high-income areas of the CBSA, while excluding low-income areas.

Based on its review of the comments along with incorporating the rationale set forth in the proposed rule, the Board has determined that eliminating the core area service requirement is appropriate and consistent with the Act. In doing so, the Board reiterates its statement in the proposed rule that it sees each of the supporting points that it set forth as sufficient on its own to support eliminating this requirement. Considered together, these points cumulatively provide a reasoned basis for this action. As noted above, in establishing its FOM requirements, the Board must consider both providing increased access to consumers of modest means and enhancing safety and soundness and protecting the NCUSIF (and thus taxpayers). Based on its experience in analyzing community charters in light of the statutory provisions, the Board has determined that eliminating the core service requirement advances these congressional mandates. As discussed in the proposal, affording applicants for community charters the flexibility to match their financial resources with an underserved community will increase the likelihood that more low- to moderate-income consumers will be served, and enhances safety and soundness, because the applicant will be better able to serve a community without over-extending its resources. The inflexible regulatory requirement suggested by the bankers would likely result in not only

providing fewer underserved communities access to financial services, but may result in more credit union failures.

As discussed in the proposed rule, of the approximately 50 community charters reviewed by the agency since the 2016 Final Rule took effect, the Board has approved only three community charters in which the applicant requested a CBSA that excluded the core. As the following table reflects, these charters are primarily for FCUs with assets ranging from \$158 million to \$281 million.⁸² Thus, they illustrate the critical need for enhanced flexibility by not mandating service to the core area. Such flexibility may be crucial to the FCU's decision to seek a community in an area, especially near a major – and expensive – population center such as New York City, Boston, Washington, DC, or Cleveland.

Credit Union	City	State	Approx. Assets	Approved Community
Palisades FCU	Pearl River	NY	\$181 mil	Rockland County, NY and Bergen County, NJ (population 1.2 million) is a portion of larger New York-Jersey City-White Plains, NY-NJ Metropolitan Division (core under former rule would have been either New York City or New York County (Manhattan))
NYMEO FCU	Frederick	MD	\$281 mil	Montgomery, Washington, Carroll, and Howard Counties, Maryland and Jefferson and Berkley Counties, West Virginia

⁸² The Small Business Administration considers any financial institution with assets under \$600 million a small business. See 13 CFR 121.201, “Small Business Size Standards by NAICS.” This designation includes credit unions as well as banks.

LorMet Community FCU	Amherst	OH	\$158 mil	Expanded community charter to serve Lorain County, Ohio and the cities of Westlake, Bay Village and Rocky River, located in Cuyahoga County, Ohio
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For instance, the LorMet Community FCU provides a direct, real world, response to the ABA’s reference to the Cleveland CBSA. The Cleveland-Elyria Ohio MSA—centered in Cuyahoga County—has 980 census tracts⁸³ with a population of 2,057,009. It is comprised of the following counties with these populations: Cuyahoga County (Cleveland)—1,243,857, Geauga County—94,031, Lake County—230,514, Lorain County—309, 461, and Medina County—150,439.

LorMet Community FCU has 18,778 current members, three branches, and assets of \$158 million. It was originally a state chartered credit union that served employees of a single occupation. LorMet converted to a federal community charter in 2000 to better diversify due to downturns in domestic manufacturing activities. Specifically, Lorain County suffered automotive and other manufacturing plant closures. The FCU’s original community charter served people who live, work, worship, or attend school in and businesses and other legal entities located in Lorain County, Ohio, which is directly adjacent to Cuyahoga’s western border. LorMet sought to expand to three small towns in Cuyahoga: Westlake (population 32,293), Bay Village (population 15,328), and Rocky River (population 20,264). The combined populations of these three towns represent less than six percent of Cuyahoga’s total population. The agency approved the community charter request, which would allow the credit union to expand its

⁸³ Each census tract has approximately 3,200 residents, thus offering an opportunity for a wide disparity in incomes.

indirect loan program to attract new members. Management based the credit union's service area on the areas covered by two automobile dealers with longstanding involvement in the credit union's indirect loan program. The indirect loan program served as an important driver of the credit union's loan acquisition, growth, and income. Absent the Board's decision to eliminate the core area service requirement, it would be highly impracticable for LorMet to serve all of Cuyahoga County, which has a population approximately 400 percent larger than Lorain County and 20 times more than the proposed expansion, within existing resources.

Similarly, the Detroit-Warren-Dearborn CBSA—centered in Wayne County—has 1,594 census tracts with a population of 4,326,442. This CBSA also includes five other counties: Lapeer—population 88,028, Livingston—population 191,224, Macomb—population 874,759, Oakland—population 1,259,201, and St. Clair—population 159,337. With respect to the named counties, each of the core areas has census tracts with both lower-income residents and significant wealthy areas of gentrification. For instance, one of Detroit's most affluent neighborhoods, Gross Pointe, is in Wayne County. Ten miles away and on the border with Wayne County, both Oakland and Macomb counties have some of the poorest segments of the CBSA. Thus, relative wealth at times does not correlate with the county in which a resident lives, as distressed core areas often have affluent residents, and suburban counties adjacent to the core area have extremely poorer ones. Thus, similar to the proposal's examples of Washington, DC and Atlanta, the same situation holds true for Cleveland and Detroit.

Counties adjacent to Cleveland and Detroit have faced significant economic challenges due to the loss of manufacturing jobs. For instance, in Lorain County, both Ford and US Steel closed manufacturing plants; and in Macomb County, General Motors closed plants. Eliminating the core area service requirement makes it more likely that an FCU would seek a community charter in these economically distressed adjacent counties than if they were required to seek a charter for the entire CBSA. It would be economically far more difficult, and potentially impossible, for a smaller FCU to provide financial services to both the core county and adjacent areas.

While nothing in the Chartering Manual prohibits an applicant from pursuing a charter for an entire CBSA up to 2.5 million people, a mandate requiring such service may dangerously and needlessly increase risk by overextending the resources of an FCU, especially a smaller one.⁸⁴ As discussed above, mandating that a community charter applicant serve the named core communities such as Cuyahoga in Cleveland and Wayne in Detroit may result in two harmful outcomes. First, an overextended smaller FCU is more likely to fail. Second, a potential applicant faced with having to serve both the named core as well as an adjacent area might make the business decision not to pursue an application at all, thereby reducing access to financial services for some low- and moderate-income consumers. Therefore, providing FCUs with

⁸⁴As of March 31, 2020, 74 percent of all FCUs have total assets under \$100 million. Further, 60 percent of community-based FCUs have total assets under \$100 million.

limited resources more options will provide more low- and moderate-income people greater access to financial services.

The ABA also questioned why the NCUA had not addressed two GAO studies regarding the credit union industry. The first study (GAO-07-29) from 2006 indicated that 31 percent of credit union customers are of “modest means” as compared to 41 percent of bank customers.⁸⁵ The second GAO study (GAO-04-91) from 2003 concluded that credit unions provide a “slightly lower” percentage of their mortgage loans to low- and moderate-income households than banks.⁸⁶ The age of the studies as well as data limitations cast significant doubt on their usefulness to this rulemaking.⁸⁷ GAO-07-29 was issued in 2006 and relied on two-year old (2004) data from the Survey of Consumer Finances (SCF). GAO-04-91 was issued in 2003 and based its analysis on 2001 mortgage data from the HMDA database. Further, as the GAO itself acknowledged in both studies, the limitations inherent to the data require caution in their interpretation. In the case of GAO-07-29, the study noted that “as an approximation of income levels, SCF data have certain limitations for measuring the income characteristics of credit union members.”⁸⁸ GAO-04-91 provided that “relying on HMDA data to evaluate credit union service to low- and moderate-income households has limitations” due to the smaller size of credit unions and the fact they generally make more consumer loans than residential mortgage loans.⁸⁹ Also,

⁸⁵ Gov’t Accountability Office, Greater Transparency Needed on Who Credit Unions Serve and on Senior Executive Compensation Arrangements, GAO-07-29 (Nov. 2006).

⁸⁶ Gov’t Accountability Office, Financial Condition Has Improved, but Opportunities Exist to Enhance Oversight and Share Insurance Management, GAO-04-91 (Oct. 2003).

⁸⁷ By comparison, if Congress relied on data that was 16 to 19 years out of date when it enacted CUMAA, the data would reflect the 9 to 18 percent mortgage rate environment of the late 1970s and early 1980s.
http://www.fedprimerate.com/mortgage_rates.htm.

⁸⁸ Supra note 85, at 5.

⁸⁹ Supra note 86, at 5.

the two studies inconsistently distinguished between FCUs and state-chartered credit unions⁹⁰ in presenting the statistics that the ABA cites. Given the questionable utility of these outdated studies which relied on data that preceded the Subprime Mortgage Crisis and the Great Recession, the Board believes that its actual experience with implementing the rule along with the more timely data presented in the November 7, 2019, proposed rule, as well as in the earlier FOM rules, better reflect the relevant policy and legal considerations.

The Board also notes that the ABA contended that the small number of approvals under this provision since 2016 suggests that the Board lacks sufficient experience to support what it terms a “sweeping conclusion” that FCUs have legitimate, nondiscriminatory purposes for using this provision. To the contrary, the Board finds that these limited approvals confirm the Board’s conclusion. As noted in the proposed rule, eliminating the core area service requirement may benefit FCUs with more limited resources. The fact that FCUs have not used this provision extensively, but rather more selectively, tends to dispel the ABA’s stated concern that FCUs will use the provision to avoid serving low- and moderate-income people. Instead, the Board’s experience in analyzing community charter applications, regardless of the volume of applications and approvals, tends to show that FCUs have used the provision as the Board expected.

Further, as noted in the proposed rule, in light of changes in demographics and population trends, many core areas have residents with higher incomes compared to proximately close areas

⁹⁰ State chartered credit unions are not subject to NCUA’s Chartering regulations. Further, some states provide more expansive chartering opportunities.

outside the core. In the proposed rule, the Board provided examples of this phenomenon of CBSAs, including Washington, DC and Atlanta. Commenters provided support for this phenomenon of many other gentrifying CBSAs, including the New York Times story discussed above. This phenomenon is further reflected by the demographics in Detroit and Cleveland.⁹¹ No commenter provided convincing arguments or information to counter this factual consideration.

Regarding the ABA's comment concerning the Washington, DC and Atlanta examples in the proposed rule and questioning the use of ZIP codes to delineate portions of these CBSAs, the Board notes that the ABA does not dispute the income figures or provide evidence that in such CBSAs, an FCU could use the CBSA provision without the core area service requirement to compose an FOM that would likely contain more low-income individuals than if the FCU served the core area to the exclusion of outlying areas. Regarding the use of ZIP codes, the Board agrees that these designations do not constitute WDLCs under the Chartering Manual. Rather, the different ZIP codes correlate with areas within these CBSAs and were used to illustrate varying median income levels within well-recognized segments of these communities. Further, ZIP codes are more readily understood by the general public than other geographic designations such as census tracts. Accordingly, the Board continues to believe that such examples illustrate the potential benefits of eliminating the core area service requirement for CBSAs.

⁹¹ For example, Shaker Heights in Cuyahoga is one of Cleveland's most affluent neighborhoods.

Similarly, with respect to the ABA's contention that a blanket rule permitting omission of the core area is not justified by the fact that more affluent people reside inside the core areas (and less affluent ones live outside the core) in some CBSAs, the Board believes that the real life examples more appropriately reflect current demographic and corresponding housing and income trends. The Board acknowledges, as it did in the proposed rule, that the phenomenon of outlying areas outside the cores having higher incomes is not universal. It is true in some instances, and the Board finds that eliminating the core area service requirement will make it more likely that FCUs with limited resources can select FOMs with more low- and moderate-income people in a safe and sound manner. The ABA's unsubstantiated concern that FCUs may use this provision to exclude low- and moderate-income people in other instances does not override this significant benefit to the rule. Also, this concern is independently addressed by the new provision that the Board is adopting in the Chartering Manual, discussed below, to provide the agency more explicit authority to address the ABA's concern, if FCUs do attempt to use the provision in order to exclude low- and moderate-income people from their FOMs.

In addition, the Board considered the recommendation by many banks that FCUs should be subject to the same CRA reviews that the banks undergo. The Board finds this recommendation misplaced because it addresses community service and lending activity after an FCU selects its FOM. As the Board noted in the proposed rule and discussed in detail in the 2016 Final Rule, under the Chartering Manual, the agency conducts periodic reviews of FCUs to determine whether they are serving their communities as stated in their initial FOM applications. These periodic reviews are conducted in addition to fair lending and safety and soundness examinations. The bank commenters did not explain why these existing procedures are

insufficient in their view and also did not explain how the strength of reviews that the agency conducts after FOM selection is relevant to the validity of the provisions addressing how FCUs may designate their FOMs in the first instance. As the Circuit Court observed, FOM selection and post-selection community service are distinct,⁹² and the agency will continue to conduct these periodic reviews for their intended purpose. Accordingly, the Board has established two sets of requirements. The Chartering Manual's requirement for an applicant to submit a business and marketing plan is prospective in nature and requires an applicant for a new or expanded charter to provide information about how it intends to serve the new community. The business and marketing plan requirement is supplemented by the periodic review requirement, which specifies that agency staff will evaluate how well a credit union has served its new community.

The ABA also indicated that eliminating the core area service requirement would result in disparate treatment for minorities, stating that "NCUA must consider whether approval of a proposed service area that excludes the urban core of the community will have a discriminatory effect."⁹³ Throughout the ABA's comments, it refers many times to "low income or minority individuals."⁹⁴ The Board finds that this rule addresses potential disparate impact on low-income or minority individuals in several significant ways.

⁹² 934 F.3d at 670.

⁹³ Emphasis in original.

⁹⁴ The Board acknowledges that there may be overlap between low-income and minority groups. Nevertheless, the ABA should be aware that in applying statutes and the ensuing regulatory regime, the threshold issue is always whether Congress applied the provisions to that entity. In its comment, the ABA conflates the CRA's purpose of providing financial services to underserved areas with "disparate impact" considerations that affect minority borrowers. By contrast, in the ABA's extensive comments to an advance notice of proposed rulemaking issued by the OCC and FDIC, the ABA made no mention of disparate impact, suggesting it views these concepts as distinct. ABA Comment Letter, Reforming the Community Reinvestment Act Regulatory Framework, Docket ID OCC-2018-0008, available at <https://www.aba.com/-/media/documents/comment-letter/cl-cra20181115.pdf?rev=a8d598e9460341e78a4d76aa004dd244>.

First, as detailed in the preceding section, based on the Board's consideration of the evidence and public comments, the Board finds that eliminating the core area service requirement is likely to enhance service to areas outlying the cores, which may allow FCUs to respond to the trend of low-income and minority individuals moving to suburbs in greater numbers than in the past. Thus, the Board is not persuaded that maintaining this chartering option and the flexibility it provides will by its nature have a disparate impact on low-income or minority people.

Second, as detailed in this rulemaking, in the 2016 Final Rule, and in the Circuit Court's August 2019 opinion,⁹⁵ many pre-existing FCUs serve core areas where low-income and minority residents live. The Board found in the 2016 Final Rule that its periodic reviews of community service and enforcement of applicable anti-discrimination laws effectively address discriminatory practices that might occur separate from the initial chartering process, and the Circuit Court found that these measures could address such discrimination. This established process and the agency's experience in its administration indicate that the agency is well-equipped to address discrimination in the chartering process as it has in the post-chartering phase without the need to adopt a disparate impact or effects-based standard.

⁹⁵ Am. Bankers Ass'n, 934 F.3d at 970.

Third, as a complement to the post-chartering review and regulation, the Board is adopting the new provisions in the Chartering Manual detailed in the section below to provide explicit authority for the Board to address intentional discrimination in the chartering process. These provisions also directly address the ABA's concern.

For each of these individual reasons, the Board concludes that this final rule addresses the ABA's concern. As noted in the Circuit Court's opinion, this final rule would not bar the ABA from challenging such approved applications on an as-applied basis. But, the ABA's concerns are unfounded and do not provide persuasive reasons not to adopt this final rule, which is consistent with the Act.

The Board also notes that the ABA's statement about LICUs not serving all people of modest means in the country is misplaced. The ABA contends that the proposed rule's discussion of LICUs is not persuasive because LICUs have potential to serve only 3 percent of the United States population and that 11 percent of the population is below the poverty line. The Board did not state that LICUs have the potential or do serve all people of modest means in the United States. Instead, the Board enumerated the benefits of low-income designation as further, independent support for its finding that FCUs are unlikely to engage in redlining or gerrymandering because there is a strong incentive to compose FOMs that have larger percentages of low-income people in order to attain this designation, as set forth in detail above and in the proposed rule.

Similarly, the Board observes that the ABA does not factually dispute the statement in the proposed rule that FCUs serve the majority of CBSA core areas in the country. The ABA, which has access to public data on FOMs across the country, did not adduce or provide any contrary information or specifically question the conclusion. This information, like the information about LICUs, constitutes further, independent support for affirming this provision. As amply illustrated in the proposed rule and in this final rule, it is not the sole basis for support, and nor is it necessary to sustain the provision given the other strong reasons detailed in the proposed rule. Nevertheless, the Board continues to find this fact compelling because it confirms that FCUs provide services to a broad range of areas across the country, including CBSA core areas. In addition, in response to the ABA's supposition that the Board noted this fact to suggest that other institutions are doing the work of serving those of modest means, the Board emphasizes that the agency does and will continue to evaluate each individual application on its own merits. The fact that FCUs already provide services to many low- and moderate-income individuals reinforces that FCUs have a strong history of doing so.

Based on its experience with community chartering, as bolstered by this legal analysis of the statutes that address providing financial services to people of modest means, the Board has determined that its decision to eliminate the core service requirement is appropriate and consistent with the legislation. Not only does the flexibility afforded by this regulatory decision incentivize the chartering of more community-based FCUs to serve people of modest means, but allowing an applicant to tailor its community to its residents and particular circumstances will increase economic viability. Thus, FCUs will likely have fewer safety and soundness concerns and will be less likely to fail. The Board further notes that nothing in the rule precludes an FCU

from serving an entire CBSA up to the 2.5 million population limit, just that such an FCU is not mandated to do so. Statistics provided in the proposed rule indicated that FCUs already provide financial services to the vast majority of CBSA core areas. Thus, the bankers' proffered concerns that many low- and moderate-income people will not obtain such access is without merit.

Further, the bankers' dismissive response to the various fair lending laws, such as ECOA, HMDA, and the Fair Housing Act to which FCUs are subject is without merit, particularly because banks are subject to the same statutes and regulations. The NCUA—along with the CFPB, FDIC, Federal Reserve, and OCC—is a member of the Federal Financial Institutions Examination Council (known as the FFIEC) and thus extensively coordinates with those agencies on consumer compliance programs. Like bank consumer compliance examiners, NCUA examiners seek to ensure compliance with these consumer protection statutes and regulations. Further, the boards of directors of both banks and credit unions are on notice and fully aware that compliance with such consumer safeguards is essential and that non-compliance with fair lending statutes expose them to reputational risk, legal risk, and compliance risk, including enforcement actions and fines.⁹⁶

These safeguards provide further support for the Board's determination that it is appropriate to eliminate the core area service mandate. The Board notes that the core area

⁹⁶ "Wells Fargo, Philadelphia reach settlement in redlining lawsuit," The American Banker, available at <https://www.americanbanker.com/news/wells-fargo-philadelphia-reach-settlement-in-redlining-lawsuit>.

service requirement is a regulatory provision adopted in 2010 by a notice-and-comment rulemaking and is not required by the Act. After several years of experience with the provision, the Board determined that this provision was not necessary to further the Act's purposes. Further, the Board notes that the ABA's request that the Board demonstrate a "compelling interest or need" to exclude the core misunderstands the applicable law. A fundamental principle of administrative law under the APA is that an agency is required to provide a rational basis that the rule is not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."⁹⁷ As described above and consistent with the Circuit Court's decision, the agency's decision to eliminate the core requirement is fully consistent with and advances the statutory mandate as described in the "Findings" section and various provisions in CUMAA. Eliminating the provision not only furthers financial access to people of modest means, but enhances the safety and soundness of credit unions and the share insurance fund.

The bankers' additional request to allow for public input from community groups to weigh in on excluding core areas is neither necessary nor appropriate. By approving new FCU charters, the Board is expanding choices for consumers, including those of modest means, and providing additional competition to other financial institutions. Such expanded choice and competition is in the interest of all consumers. Nothing in the approval of a new FCU requires an individual or community group to do anything other than potentially benefit from expanded alternatives.

⁹⁷ 5 U.S.C. 706.

D. Added Provision in Chartering Manual Addressing Service to Low- and Moderate-Income Individuals

The Board proposed amending the Chartering Manual to clarify and bolster the NCUA's authority to review applications to serve community-based FOMs consisting of CSAs or CBSAs to ensure that the FCU's requested community is not selected in order to exclude low- or moderate-income individuals. Under current provisions in the Chartering Manual, an applicant must detail how it will implement its business and marketing plan; the unique needs of various demographic groups in the proposed community; how the FCU will market to each group, particularly underserved groups; which community based organizations the FCU will target for outreach efforts; the FCU's marketing and budget projections dedicating resources to reach new members; and the FCU's timetable for implementation. Under the proposed rule, an FCU would be required to demonstrate that its choice of FOM, including choosing not to serve the core, is based on sound legal and business judgment and not an attempt to redline or discriminate on an illegal basis. This provision was proposed to supplement existing requirements for applicants to submit acceptable business plans, which applies to all community-based FOM applications.

Separately, and to complement this proposed requirement, the Board proposed to amend the Chartering Manual to clarify and bolster the NCUA's authority to reject applications to serve community-based FOMs consisting of CSAs or CBSAs, if the agency determines that the FCU's application is based on discriminatory intent or a desire to exclude low- or moderate-income individuals. The Board stated that this provision, if adopted, would serve as an additional means to address the issue that the Circuit Court raised regarding redlining and other forms of illegal

discrimination. This provision was proposed to add to the existing provisions under which applicants must submit acceptable business plans, which applies to all community-based FOM applications.

Further, to make certain that the agency has explicit discretion to ensure that the FCU applicant will not seek to exclude service to low- and moderate-income segments of communities, the Board proposed to amend the Chartering Manual to provide that the NCUA may require additional information on how the FCU's business needs support its selection, conduct any further inquiry that it deems appropriate, and reject either an initial charter application or an expansion or amendment request if the NCUA determines that a community-based FCU has chosen its specific geographic area in order to exclude low- or moderate-income or underserved people.

The Board further discussed how it would expect CURE, in consultation with other agency offices, to implement this provision if it were adopted. Specifically, without proposing to require applicants to submit extensive information that might slow down the overall application process, the Board stated that CURE might consider other information in determining whether further review is needed, including, but not limited to, inclusion or exclusion of predominantly low- or moderate-income census tracts within a statistical area, the statements and supporting information from the applicant FCU regarding how it intends to serve low- and moderate-income individuals, and, if applicable, the FCU's record of consumer compliance or fair lending violations.

The Board found that this approach is appropriate because it expands on the existing principle and provision in Chapter 1 of the Chartering Manual that the NCUA may examine other factors in unusual cases when deciding whether to grant a charter, including other federal laws and public policy.⁹⁸ Further, the Board observed that it would also be consistent with the purposes animating the NCUA’s organic Act, which recognizes that FCUs “have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means.”⁹⁹

Banks and a few credit union-affiliated commenters generally supported or did not address such additional requirements. One commenter stated that the NCUA needs to require heightened documentation and explanations for FCUs seeking to exclude the core and how low-income residents will be served. Thus, the commenter believed that it is appropriate for the NCUA to request additional information on how an FCU’s business needs would support its selection. This commenter viewed such a provision as not unreasonably burdensome, given that the NCUA may request such information only as warranted. Those favoring what they termed “reasonable” requirements stated that the current policy provides that the NCUA will review FCUs’ plans to ensure service to such people. One commenter stated the proposed additional requirements were consistent with the Circuit Court decision, which indicated the requirement should be more explicit in terms of demonstrating service to underserved individuals.

⁹⁸ Appendix B, Ch. 1, Section I.

⁹⁹ 12 U.S.C. 1751 note.

In addition to their general support of additional requirements (subject to recommendations to strengthen the requirements), bankers also requested they have advance notice and the opportunity to participate in administrative proceedings, which they viewed as necessary to prevent the Board from “acting as a rubber stamp.” The ABA suggested strengthening the new proposed factor by requiring FCUs to show that their chosen service area will advance the mission of serving low- and moderate-income persons and reiterated its assertion that an FCU’s business needs should not justify excluding such persons. The ABA also reiterated that the NCUA should look at the effect on excluded parts of communities, and not just at discriminatory intent. Other bank-affiliated comments made similar recommendations for increasing the NCUA’s scrutiny of such applications, including by allowing FCU members to vote on any proposal for an FCU to leave its portion of the community.

In contrast, several of the credit-union affiliated commenters opposed the proposed regulatory provisions, which they characterized as requiring an applicant to demonstrate nondiscrimination in service area selections that show an FCU’s ability to serve underserved individuals. These commenters were concerned that the proposed procedures were unreasonably vague and that it was not clear what type of additional information FCUs need to submit to demonstrate service to people of modest means. Specifically, some commenters requested that the NCUA should expressly include examples of evidence like income distribution or other statistical evidence in the Chartering Manual and not just in the preamble. They also expressed concern that these requirements would unnecessarily complicate and delay the application process. Several commenters requested that the NCUA define what this section in the business plan should include (including through the issuance of model form or guidance) and requested

that the section not be so overly complicated or lengthy that it will entail additional cost or significant time.

Commenters made several additional observations about the new requirements. Several commenters stated that certain information should not be required in the marketing and business plan submission. The inclusion or exclusion of certain census tracts should not raise negative inferences, provided that an FCU has stated a rational explanation, using sound business judgment for the area selected. Similarly, one commenter questioned the use of an FCU's record of consumer compliance or fair lending violations. The commenter stated the NCUA should clarify the basis for this criterion. Commenters identified other concerns, including the difficulty in determining whether an applicant was not choosing a service area based on discriminatory factors. One commenter stated that it should be NCUA's responsibility to prove discriminatory intent rather than the applicant's responsibility to disprove it. Another commenter expressed concern about the potential to increase safety and soundness risk by focusing on service to low-income areas.

After reviewing the comments, the Board has decided to adopt the modifications to the Chartering Manual's provisions addressing an FCU's ability to provide financial services to people of modest means, as proposed. The Board notes that some commenters characterized the requirement as placing the burden on applicants to establish conclusively that the requested community charter would not discriminate against people of modest means. This is not the case; the applicant will be required to provide a narrative in the business and marketing plan

establishing that the requested community will provide financial services to people of modest means. CURE, along with other divisions in the agency, will review the plan to ensure that the applicant's requested community will in fact provide such services to people of modest means. CURE staff has the option of approving the application, requesting additional information, or rejecting the application. The final rule further clarifies the Chartering Manual by stating in the new provision that illegal discrimination will form a basis for rejection, consistent with the discussion in the proposed rule preamble¹⁰⁰ and building on the existing principle in Chapter 1 of the Chartering Manual that permits the agency to consider other federal laws in deciding on an application.

The Board emphasizes that these changes essentially make explicit what had been required with respect to providing communities with financial services. Specifically, an applicant's business and marketing plan for a community charter has been required and will continue to be required to establish that it can provide financial services to people of modest means by providing demographic information such as income, race, gender, and financial resources. In addition, an applicant will continue to provide in the business and marketing plan its near-term and longer-term plans with respect to types of financial products and services that may appeal to people of modest means. Such products include various savings accounts and loan programs (including first-time car-buying loans, 125 percent automobile financing, PALs and similar programs). Additionally, specific information continues to be required about advertising and marketing activities and potential branching considerations. Thus, the Board agrees with the ABA's comment that "FCUs [should] show that their chosen service area will

¹⁰⁰ 84 FR 59998 (Nov. 7, 2019).

advance the mission of serving low- and moderate-income persons.” The Board has determined that this provision will advance that mission.

The Board finds no utility or justification for the suggestion that it provide advance notice and the opportunity to participate in administrative proceedings. The new, excessively burdensome procedures suggested by the bankers would impose additional administrative and economic burdens on both the applicants—many of which are small entities—and agency staff. These burdens are unnecessary and counterproductive because, as noted elsewhere in this final rule, FOM and chartering determinations may already be challenged on an as applied, case-by-case basis. Further, the resulting delays and possible introduction of superfluous information in the charter approval process would defeat the purposes of the presumptive community model. As the Board noted in the preamble to the proposed rule, the model was adopted to expedite charter approvals through the use of objectively verifiable statistical data.¹⁰¹

In addition, the Board finds that the proposal to add express authority for the NCUA to reject an application in appropriate circumstances is reasonable. As discussed in the proposed rule, this proposed provision builds on the existing principle in the Chartering Manual that the NCUA may consider other laws and public policy in reviewing a charter application. Far from creating a vague standard, the proposed provision establishes a more concrete implementation of this principle in the specific context of service to low- and moderate-income segments of communities. Accordingly, the Board adopts this provision as proposed. The Board declines to

¹⁰¹ See 84 FR 59989, 59991 (Nov. 7, 2019).

introduce further prescriptive details or requirements into the Chartering Manual, or to establish specific deadlines for agency action, in order to maintain flexibility for the agency and applicants. Specifically, the Board has determined that it is neither necessary nor appropriate to establish a model form; however, the Board emphasizes that the Chartering Manual provides significant guidance on the preparation of charter applications. Providing a model form would reduce flexibility without any significant corresponding benefit. As the agency and FCUs gain experience with the new provision, which is closely tied to the existing provisions, the agency can consider the need for any additional guidance.

At the same time, the Board has considered the comments by the ABA and other bank-affiliated commenters recommending that the Board consider the effects of discrimination against low- and moderate-income people, as well as intent or purpose. Conversely, some credit union-affiliated commenters opined that the Board should not consider discriminatory effects or impact and sought clarification of the standard. After carefully considering these comments, the Board clarifies that under the new provision in the Chartering Manual, it will focus on evidence of discriminatory intent or purpose. This standard is consistent with the text of the provision, as proposed, which states that the Board will consider whether the FOM was selected “in order to exclude” low- and moderate-income people. Similarly, this standard is responsive to the concern that the Circuit Court raised about FCUs potentially engaging in gerrymandering or redlining, both of which signify intentional exclusion. Contrary to the suggestions of some of the bank-affiliated commenters, there is no legal requirement applicable to FCUs that would mandate imposing an effects-based standard.

Further, as an independent basis to decline to adopt this suggestion, the Board concludes that an effects-based standard would be inappropriate. First, there is no clear or easily applicable test for what would constitute an acceptable or unacceptable disparate effect. Second, the commenters provide no evidence to suggest that an effects test, rather than an intent or purpose test, would necessarily result in different approvals or disapprovals of prospective FCU charters or expansions or amendments to existing FCU charters. The Board believes it is appropriate to adopt an intent or purpose test initially, so that both FCUs and the agency can develop familiarity with the process. After developing that experience, it might be appropriate in the future for the Board to revisit the standard and determine whether an effect test would be desirable, manageable, or result in materially different outcomes.

Likewise, the Board disagrees with the ABA and some of the other bank-affiliated commenters that asserted that an FCU's limited resources should not, by itself, justify excluding portions of a CBSA or CSA. As the Board details in the section above, in some instances, this flexibility may enable FCUs to serve more low- and moderate-income people safely and soundly. No other legal standard applies that would require additional explanation. In any event, the Board does agree with the ABA and other bank-affiliated commenters that the explanation should be consistent with FCUs' mission of meeting the needs of people of modest means, as well as the statutory purpose of ensuring the safety and soundness of FCUs.

Accordingly, the Board has determined that it is appropriate to avoid overly prescriptive provisions that would mandate certain types of quantitative or other information (in addition to the substantial, detailed information that applicants already provide under the Chartering Manual's requirements). Specifically, the Board has determined that there is no need to require

an applicant to provide specific income distribution data or census tract information in addition to the extensive information that applicants provide under existing provisions in the Chartering Manual. Requiring such additional information would be unreasonably burdensome and costly without corresponding benefits.

D. Miscellaneous Comments

With respect to timing, some credit unions stated the NCUA should act quickly and not delay finalizing the provisions. In contrast, bank trade associations commented that the rule was not “ripe” because neither the full Circuit Court¹⁰² nor the Supreme Court had adjudicated the rule. Thus, in their opinion, the proposal was premature until “all current legal challenges have been exhausted.” They stated that such a final agency action could harm or confuse consumers. The Board is issuing this final rule after the Supreme Court’s June 29, 2020 denial of the ABA’s petition for a writ of certiorari. Therefore, this concern is rendered moot.

Commenters also raised a few issues that are outside the scope of this rulemaking. For instance, a few commenters stated that the NCUA should align the federal chartering rules with state rules, because several states have more liberal rules, resulting in conversions from federal to state charters. The Board is aware that under the dual chartering system, state laws may differ from federal ones. The Board sought to enhance the federal charter through FOM1 and the other

¹⁰² Subsequent to the comment period closing date, the full D.C. Circuit denied the ABA’s petition to review the decision en banc.

recent rulemakings, within the constraints of the Act. Given that state chartering laws are often more permissive than the Act, the Board sought to allow more expansive chartering opportunities at the federal level. This serves to foster parity between state and federal laws and is in the interest of providing access to more financial services and furthering safety and soundness.

Another commenter requested that the NCUA should issue guidance on use of the narrative in applications and best practices. The Board notes that further discussion of the narrative approach is beyond the scope of this rulemaking proposal.

One commenter stated its support for a provision in the proposal to allow an FCU to designate a portion of a CBSA as a WDLC without regard to metropolitan division boundaries. The Board notes that this issue was resolved in the Board's June 2018 final rule (referred to as FOM2).¹⁰³

V. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires the NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.¹⁰⁴

¹⁰³ 83 FR 30289 (June 28, 2018).

¹⁰⁴ 5 U.S.C. 603(a).

For purposes of this analysis, the NCUA considers small credit unions to be those having under \$100 million in assets.¹⁰⁵ Although this final rule is anticipated to economically benefit FCUs that choose to charter, expand, or convert to a community charter, the NCUA certifies that it would not have a significant economic impact on a substantial number of small credit unions.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number.

In accordance with the PRA, the information collection requirements included in this final rule has been submitted to OMB for approval under control number 3133–0015.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. Primarily because this final rule applies to FCUs exclusively, it will not have a substantial direct effect on the states, on the connection between

¹⁰⁵ 80 FR 57512 (Sept. 24, 2015).

the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this final rule would not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.¹⁰⁶

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) generally provides for congressional review of agency rules.¹⁰⁷ A reporting requirement is triggered in instances where the NCUA issues a final rule as defined in the APA.¹⁰⁸ An agency rule, in addition to being subject to congressional oversight, may also be subject to a delayed effective date if the rule is a “major rule.”¹⁰⁹ As required by SBREFA, the NCUA submitted this final rule to the OMB for it to determine if the final rule is a “major rule” for purposes of SBREFA. OMB determined that this final rule is not a major rule. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

¹⁰⁶ Pub. L. No. 105-277, 112 Stat. 2681 (1998).

¹⁰⁷ 5 U.S.C. 801-804.

¹⁰⁸ 5 U.S.C. 551.

¹⁰⁹ 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 701

Credit, Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on July 30, 2020.

Gerard Poliquin

Secretary of the Board

For the reasons stated above, the Board is amending 12 CFR part 701, Appendix B as follows:

PART 701 — ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

1. The authority for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, and 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Section V.A.2 of Chapter 2 of Appendix B to part 701 is revised to read as follows:

APPENDIX B TO PART 701—CHARTERING AND FIELD OF MEMBERSHIP MANUAL

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V.A.2—Definition of Well-Defined Local Community and Rural District

In addition to the documentation requirements in Chapter 1 to charter a credit union, a community credit union applicant must provide additional documentation addressing the proposed area to be served and community service policies, as well as the business plan requirements set forth in this Chapter. An applicant must meet all of these requirements to obtain NCUA approval.

An applicant has the burden of demonstrating to NCUA that the proposed community area meets the statutory requirements of being: (1) well-defined, and (2) a local community or rural district. The applicant also has the burden of demonstrating that with respect to the proposed community, it has the capacity to provide financial services to low- and moderate-income areas of the community. The agency will reject any application that fails to establish the criteria set forth above.

For an applicant seeking a community charter for a Statistical Area with multiple political jurisdictions with a population of 2.5 million people or more, the Office of Credit Union Resources and Expansion (CURE) shall: (1) Publish a notice in the FEDERAL REGISTER seeking comment from interested parties about the proposed community and (2) conduct a public hearing about this application.

“Well-defined” means the proposed area has specific geographic boundaries. Geographic boundaries may include a city, township, county (single, multiple, or portions of a county) or a political equivalent, school districts, or a clearly identifiable neighborhood.

The well-defined local community requirement is met if:

- Single Political Jurisdiction—the area to be served is a recognized Single Political Jurisdiction, *i.e.*, a city, county, or their political equivalent, or any single portion thereof.
- Statistical Area—A statistical area is all or an individual portion of a Combined Statistical Area (CSA) or a Core-Based Statistical Area (CBSA) designated by the U.S. Census

Bureau, including a Metropolitan Statistical Area. To meet the well-defined local community requirement, the CSA or CBSA or a portion thereof, must be contiguous and have a population of 2.5 million or less people. An individual portion of a statistical area need not conform to internal boundaries within the area, such as metropolitan division boundaries within a Core-Based Statistical Area.

- **Compelling Evidence of Common Interests or Interaction**—In lieu of a statistical area as defined above, this option is available when a credit union seeks to initially charter a community credit union; to expand an existing community; or to convert to a community charter. Under this option, the credit union must demonstrate that the areas in question are contiguous and further demonstrate a sufficient level of common interests or interaction among area residents to qualify the area as a local community. For that purpose, an applicant must submit for NCUA approval a narrative, supported by appropriate documentation, establishing that the area's residents meet the requirements of a local community.

To assist a credit union in developing its narrative, Appendix 6 of this Manual identifies criteria a narrative should address, and which NCUA will consider in deciding a credit union's application to: initially charter a community credit union; to expand an existing community, including by an adjacent area addition; or to convert to a community charter. In any case, the credit union must demonstrate, through its business and marketing plans, its ability and commitment to serve the entire community for which it seeks NCUA approval.

An area of any geographic size qualifies as a Rural District if:

- The proposed district has well-defined, contiguous geographic boundaries;
- The total population of the proposed district does not exceed 1,000,000;
- Either more than 50% of the proposed district's population resides in census blocks or other geographic units that are designated as rural by either the Consumer Financial Protection

Bureau or the United States Census Bureau, OR the district has a population density of 100 persons or fewer per square mile; and

- The boundaries of the well-defined rural district do not exceed the outer boundaries of the states that are *immediately contiguous* to the state in which the credit union maintains its headquarters (*i.e.*, not to exceed the outer perimeter of the layer of states immediately surrounding the headquarters state).

The common bond affinity groups that apply to well-defined local communities also apply to Rural Districts.

The requirements in Chapter 2, Sections V.A.4 through V.G also apply to a credit union that serves a rural district.

3. Amend Chapter 2 of Appendix B to part 701 by adding Section V.A.8 to read as follows:

V.A.8–Community Selection Requirements and Review

The NCUA will not approve an application for a community charter consisting of all or a portion of a CSA or a CBSA, including an initial application, amendment, or expansion, unless the applicant demonstrates in its business and marketing plan that 1) the credit union will serve a community that is contiguous and 2) the credit union will provide financial services to low- and moderate-income and underserved people, and that the credit union has not selected its service area in order to exclude low- and moderate-income and underserved people or to engage in illegal discrimination. Upon receipt of this material, the NCUA will evaluate the business and marketing plan to ensure that low- and moderate-income and underserved people will be served and that the credit union has not selected the service area in order to exclude such people or to

engage in illegal discrimination. This requirement is in addition to the requirement to document in the business and marketing plan the realistic assumptions that support the credit union's viability and its plan to serve its entire FOM.

The NCUA may conduct such further inquiry or evaluation as it deems appropriate, as authorized by 12 U.S.C. 1754 and consistent with the principles of this Manual, other federal laws, and public policy. If the NCUA determines that the credit union's submission is inaccurate or unsupported, it may deny that application on those grounds, regardless of whether the application satisfies the other criteria for initial chartering, amendment, or expansion.

4. Section V.B of Chapter 2 of Appendix B to part 701 is revised to read as follows:

V.B Field of Membership Amendments

A community credit union may amend its field of membership by adding additional affinities or removing exclusionary clauses. This can be accomplished with a housekeeping amendment.

A community credit union also may expand its geographic boundaries. Persons who live, work, worship, or attend school within the proposed well-defined local community, neighborhood or rural district must have common interests and/or interact. The credit union must follow the requirements of Section V.A.4 and Section V.A.8 of this chapter.

A community credit union that is based on a Single Political Jurisdiction, a Statistical Area (*e.g.*, Core Based Statistical Area or Combined Statistical Area) or a rural district may expand its geographic boundaries to add a bordering area, provided the area is well defined and the credit union demonstrates that persons who live, work, worship, or attend school within the proposed expanded community (*i.e.*, on both sides of the boundary separating the existing community and the bordering area) have common interests and/or interact. Such a credit union

applying to expand its geographic boundaries to add a bordering area must follow a streamlined version of the business plan requirements of Section V.A.4 of this chapter and the expanded community would be subject to the corresponding population limit - 2.5 million in the case of a Single Political Jurisdiction, or a Statistical Area and 1 million in the case of a rural district. The streamlined business plan requirements for adding a bordering area are:

- Anticipated marginal financial impact on the credit union of adding the proposed bordering area, including the need for additional employees and fixed assets, and the associated costs;
- A description of the current and, if applicable, proposed office/branch structure specific to serving the proposed bordering area;
- A marketing plan addressing how the new community will be served for the 24-month period after the proposed expansion of a community charter, including detailing how the credit union will address the unique needs of any demographic groups in the proposed bordering community not presently served by the credit union and how the credit union will market to any new groups; and
- Details, terms and conditions of any new financial products, programs, and services to be introduced as part of this expansion.