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Via Electronic Submission

February 10, 2021

Melane Conyers-Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

**RE: Comments on Proposed Rule: Field of Membership—Shared Facility Requirements;
RIN 3133–AF23**

Dear Ms. Conyers-Ausbrooks:

Regarding the National Credit Union Administration’s (“NCUA” or “Agency”) proposal to amend its chartering and field of membership (“FOM”) rules related to service facilities for multiple common bond (“MCB”) federal credit unions (“FCU”), the Independent Community Bankers of America (“ICBA”)¹ believes that the proposed amendments contravene the Federal Credit Union Act (“FCU Act”) and should be rescinded.

Apart from the impermissibility of such action, ICBA contends that the proposed changes would detract from Congressionally created incentives for FCUs to invest and build a local presence in communities, particularly underserved communities that are predominantly comprised of low-to-moderate income (“LMI”) individuals. If adopted, this rule would reward the largest, national-based credit unions with inroads to grow at the expense of community-based financial institutions, such as community banks or credit unions that still prioritize their communities over growth.

¹The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, over \$4.4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org.

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Background

Current NCUA regulations permit MCB FCUs to serve common bond-based FOMs, so long as the common bond groups are within reasonable geographic proximity of the credit union or within the service area of one of the credit union's "service facilities."² While typically limited to adding common bond-based FOMs to their charter, MCB FCUs may also add geographic areas to their FOMs, so long as the added area is underserved and the credit union establishes a "service facility" within that area.³

Though both activities require the creation of a "service facility," the definition differs based on the type of FOM added. For purposes of adding a common bond-based FOM, the current rule defines "service facility" as:

[A] place where shares are accepted for members' accounts, loan applications are accepted **or** loans are disbursed. This definition includes a credit union owned branch, a mobile branch, an office operated on a regularly scheduled weekly basis, **a credit union owned ATM**, or a credit union owned electronic facility that meets, at a minimum, these requirements. A service facility also includes a shared branch or a shared branch network if either: (1) The credit union has an ownership interest in the service facility either directly or through a CUSO or similar organization; or (2) **the service facility is local to the credit union and the credit union is an authorized participant in the service center**. This definition does not include the credit union's internet website.⁴

While this definition includes shared branches, the credit union must have an ownership interest in the "service facility" or be an authorized participant in "service facility" that is local to the credit union.

In contrast, a "service facility," when adding underserved area-based FOMs, is defined as:

[A] place where shares are accepted for members' accounts, loan applications are accepted **and** loans are disbursed. By definition, a service facility includes a credit union-owned branch, a shared branch, a mobile branch, or an office operated on a regularly scheduled weekly basis or a credit union owned electronic facility that meets, at a minimum, the above requirements. **This definition does not include an ATM** or the credit union's internet website.⁵

The definition of "service facility" when adding underserved area FOMs includes the conjunctive "and" when listing the activities that constitute a "service facility:" "A place where shares are accepted..., loan

² 12 CFR Part 701, Appendix B § 2.IV.A.

³ 12 CFR Part 701, Appendix B § 3.III.F.

⁴ 12 CFR Part 701, Appendix B § 2.IV.A (emphasis added).

⁵ 12 CFR Part 701, Appendix B § 3.III.F (emphasis added).

applications are accepted **AND** loans are disbursed.” It also excludes the authorized use of a non-owned, but local, shared branch or network to constitute a “service facility.” Finally, and most substantive, it explicitly disallows the use of ATMs to count toward the establishment of a “service facility.”

On December 17, 2020, the NCUA Board issued a proposed regulation that would amend its definitions of “service facility,” unifying the two distinct definitions of “service facility” by:

1. Removing the requirement to own an interest in a branch or ATM to meet the definition of “service facility” when adding common bond-based groups. Under the proposal, the credit union would only need to be an authorized user of the branch or ATM.
2. Replacing the conjunctive “and” with the disjunctive “or” in setting forth capabilities required to constitute a service facility when adding underserved area-based FOMs. Under the proposal, NCUA contends that merely accepting share deposits would meet the statutory mandate to establish and maintain an office or facility.⁶
3. Removing the explicit prohibition on ATMs constituting “service facilities” for the purposes of adding underserved area-based FOMs.

In addition to the proposed amendments, the Board also seeks comment on whether a website or mobile banking application should be included in the definition of “service facility,” thereby negating any need or requirement for a credit union to have a physical presence, even a token presence such as an ATM.

NCUA’s Proposed Amendments of “Service Facility” Contravene the Intent of Congress and the Federal Credit Union Act

NCUA FOM regulations rely, in part, on section 109(f)(1)(B) of the FCU Act, which permits MCB FCUs to expand their FOMs to include common bond associations, so long as the “credit union...is within **reasonable proximity** to the location of the group.”⁷ Similarly, the FCU Act permits MCB FCUs to expand their FOMs to include underserved areas, so long as “the credit union establishes and maintains an office or facility in the **local community, neighborhood, or rural district** at which credit union services are available.”⁸

Both these permissible activities include the restrictive requirement that depend on the credit union’s geographic location to the FOM (“proximity” for the case of adding common bond-based FOMs and “local community, neighborhood, or rural district” for the case of underserved area-based FOM). Yet NCUA’s proposed changes ignore statutory constrictions that emphasize a credit union’s location relevant to the FOM.

⁶ 12 U.S.C. § 1759 (c)(2)(B).

⁷ 12 U.S.C. § 1759(f)(1)(B).

⁸ 12 U.S.C. § 1759 (c)(2)(B).

The FCU Act requires NCUA to “strongly favor” local credit unions over national-based credit unions when adding a common bond-based FOM

Supplementing a clear reading of the statutory text, Congressional records of both the House and the Senate indicate the geographic proximity requirements set forth in the statute reflect Congress’s strong belief that “credit union members who live, work and interact in the same **geographic** area are likely to have more of a meaningful affinity and common bond than those who do not. The NCUA’s regulations shall strongly favor placing groups with **local** credit unions and document in writing their compliance with the **local** preference requirement.”⁹

NCUA traditionally interpreted this restrictive clause closely in line with Congressional intent. In fact, the preamble to the Board’s first rule on this matter came soon after passage of the Credit Union Membership Access Act (“CUMAA”), explaining that NCUA determined that the group being added must be within the expanding credit union’s geographic service area.¹⁰ At the time, NCUA respected Congress’s intent by excluding ATMs from constituting “service facilities” for adding common bond-based FOMs. The preamble stated, “the group to be added must be within the service area of a service facility of the credit union. As specified in the final rule, service facility does not include an ATM. **The legislative history of CUMAA is clear that NCUA should not treat ATMs as service facilities for select group expansions.**”¹¹

The preamble to a subsequent rule on the same matter cites the House Committee Report for CUMAA and how it addressed the reasonable proximity requirement, offering valuable guidance on how NCUA ultimately viewed the statutory language.¹² Quoting the House Report, the preamble states, “[o]n page 20 of the Report, it is stated that the statute ‘articulates a strong policy towards placing groups which cannot form their own credit unions with a **local** credit union.’”¹³

Unfortunately, over the course of several years, NCUA chipped away at Congressional intent. First, NCUA permitted ATMs to be considered “service facilities,” but required ownership of the ATMs. Then, NCUA diluted Congressional intent even further, first in 2000 when the Board promulgated a rule requiring a MCB FCU to have only a five percent interest in an ATM,¹⁴ then even further in 2003 when the Board removed the five percent ownership interest and merely required a de minimis ownership interest.¹⁵

Though it is unfortunate that NCUA diluted this statutory restriction over the years, the Board maintained the requirement that a credit union own at least an iota of interest in the ATM. This latest proposal, though, has lost any semblance of what Congress intended when drafting its

⁹ H.R. Rep. No. 105-472, 105th Cong., 2nd Sess. (1998) (emphasis added).

¹⁰ 63 FR 71998 (Dec. 1998).

¹¹ 63 FR 71998, 72002 (Dec. 1998) (emphasis added).

¹² 65 FR 64511 (Nov. 2000).

¹³ 65 FR 64511 (Nov. 2000) (emphasis added).

¹⁴ 65 FR 64512, 64513 (Oct. 2000).

¹⁵ 68 FR 18334, 18335 (Apr. 2003).

restriction that focused on “local” credit unions. It is difficult to fathom that a credit union with its headquarters and all of its branches in California would be considered “local” to New York simply because it has a contract with an ATM provider in that state.

Congress excluded ATMs from constituting “service facilities” when adding underserved area-based FOMs

Even clearer than Congress’s desire for additional common bond-based FOMs to be local to an existing credit union, the Congressional record is explicit in memorializing Congress’s understanding and intention that ATMs do not meet the proximity test when adding underserved area-based FOMs.

The Senate Report¹⁶ and House Report make similar findings that clearly prohibit the action that the NCUA is contemplating with this proposal. From the House Report:

“Any person or organization within an underserved local community, neighborhood, or rural district may be added to multiple common bond credit unions which establishes and maintains an office or facility in the underserved areas. The term “facility” in the Act is meant to be defined in the same way that the National Credit Union Administration (“NCUA” or “Board”) has defined “service facility,” that is, **an automatic teller machine or similar device would not qualify.**”¹⁷

These Congressional records leave no room for doubt that Congress did not intend for underserved areas to be relegated to the “services” of an ATM. Even through years of continued erosion of the credit union mission, common bond standards, and other creative interpretations of the FCU Act, the Agency has never acted so clearly against Congressional intent to propose something that is patently contrary to Congressional intent, until this current proposal.

NCUA’s proposal does not explain how its proposed definition of “service facility” is not contrary to clear Congressional intent. The fact is, NCUA cannot plausibly explain how its proposed interpretation would comport with Congressional intent.

NCUA’s proposed definition is impermissible and is not a reasonable nor responsible interpretation of the law. ICBA strongly urges the Agency to withdraw this proposed rule.

¹⁶ S. Rep. No. 105-193, 105th Cong., 2nd Sess., stating, “An additional exception exists for persons or organizations within a local community, neighborhood or rural district that is underserved by other depository institutions. These persons or organizations may join an existing credit union provided that the credit union establishes a service facility in that area. The term “facility” is meant as it is defined by the NCUA. **An automatic teller machine or similar device does not qualify as a service facility.**” (emphasis added).

¹⁷ H.R. Rep. No. 105-472, 105th Cong., 2nd Sess. (1998) (emphasis added).

Proposed Changes Detract from Congressionally Created Incentives to Invest in LMI Communities

Having physical branches is a way to ensure that financially underserved areas are provided meaningful assistance. Not only do underserved areas typically suffer from a dearth of financial services, but they also suffer from a lack of lasting investment, such as physical bank or credit union branches.

The physical presence of a financial institution can be transformative for a community, and conversely, the lack or loss of a physical branch can be disruptive.¹⁸ Numerous studies show that there is a high correlation of people that live in underserved areas and that have low/no credit scores,¹⁹ and that “personal and public benefits are still derived from proximity to a bank branch.”²⁰

Credit remediation cannot be fulfilled merely by interacting with an ATM. ATMs cannot build relationships with members of that community. ATMs cannot employ people of that community. And ATMs cannot discuss better options for a member that might be over-drafting for the third time that month. Members in underserved communities deserve better than ATMs as an indication of a credit union’s intention to meaningfully serve that community.²¹ A community rife with payday lenders, check cashers and other alternative financial services will not find solutions nor solace by the presence of an ATM.²²

If NCUA truly wants credit unions to serve underserved areas, then it should require meaningful, impactful and lasting investment – not token, bare minimum activities that confer enormous benefit to the nation’s largest credit unions. If serving underserved communities is in the statutory lifeblood of credit unions and the main justification for their tax exemption, then credit unions should offer more than an ATM. Their commitment should be reflected through a meaningful and lasting investment in the community that would give its members hope and a means to better their financial lives.

¹⁸ See Dahl, Drew and Franke, Michelle, “Banking Deserts’ Become a Concern as Branches Dry Up,” Federal Reserve Bank of St. Louis, Jul. 25, 2017, explaining, “In areas without branches—commonly referred to as “banking deserts”—costs and inconveniences of cashing checks, establishing deposit accounts, obtaining loans and maintaining banking relationships are exacerbated.

¹⁹ See ‘Building a Bridge to Credit Visibility,” A report on the CFPB’s September 2018 *Building a Bridge to Credit Visibility* Symposium, Jul. 2019, at page 16, explaining that “High-touch” relationships...are those in which lenders dialogue and engage frequently in ways that are accessible to consumers.” The report explains “how lenders that have successfully provided credit to credit invisible consumers report that dialogue and engagement with consumers who are transitioning to credit visibility are key.” Finally, the report summarizes a panel discussion that found providing financial education, coaching, and counseling are successful components of high-touch relationships between borrowers and lenders or servicers as they contribute to better outcomes.

²⁰ See Dahl, Drew and Franke, Michelle, “Banking Deserts’ Become a Concern as Branches Dry Up,” Federal Reserve Bank of St. Louis, Jul. 25, 2017; See also Hrushka, Anna, “Keeping the banking desert at bay in rural America,” Banking Dive, Feb 18, 2020, citing a University of California at Berkeley report, which found that when merging banks closed a branch, the number of small-business loans made in the area fell by 13% for more than eight years afterward.

²¹ See Silver, Josh and Pradhan, Archana, “Why Branch Closures are Bad for Communities,” Issue Brief, National Community Reinvestment Coalition, Apr. 2012.

²² See Friedline, Terri and Despard, Mathieu, “Life in a Banking Desert,” The Atlantic, Mar. 13, 2016. Just as “[a] neighborhood saturated with fast-food restaurants and bodegas but lacking a grocery store would make it difficult to stick to a healthy diet[...] it would be similarly hard to manage finances and build wealth without a bank branch nearby.”

National-based Credit Unions Stand the Most to Gain; Smaller Community-based FIs Have Most to Lose

While it is admirable to periodically revisit regulations to ensure that consumers have access to credit, NCUA's proposal does not "modernize." Rather, it seems to misplace its focus on enabling and growing the reach of growth-oriented, national-based credit unions. Instead, NCUA should focus on empowering local communities by requiring larger credit unions to invest in the communities that they intend to serve, underserved or otherwise. This proposal moves in the wrong direction and removes even the barest shred of a requirement to invest in a community.

Continuing to confer expanded authorities and power to large, growth-oriented credit unions detracts from credit unions and communities that need help. If special advantages and powers meant only for mission-oriented credit unions are freely and widely given to growth-oriented credit unions, then that "advantage" is in name, only. Mission-oriented credit unions will no longer have powers available only to them.

Soon after passage of the Credit Union Membership Access Act, NCUA properly analyzed the issue: Can it be reasonably determined that a service facility constitutes a credit union in the context of the statute, if the expanding credit union has little or no ownership interest in the service facility? In other words, can a credit union that is simply linked to the service facility through a state or national network use that linkage, without ownership, to expand its field of membership by adding groups within the service area of the service facility?²³

NCUA's answer, at one time, was "no," a credit union that is "simply linked...without ownership" is NOT a service facility within the context of a statute.²⁴ NCUA fails to elaborate why its position has changed. The only justification the Board seems to give is, "[i]n light of the changes to the ways consumers access financial services since CUMAA's enactment, the Board believes its former policies were needlessly restrictive."²⁵ Absent from this justification is an analysis of how consumers use ATMs any differently today than they did in the early 2000s. Consumers in the early 2000s were able to deposit cash, deposit checks, withdraw cash, and check balances,²⁶ just as they can today.

Additional Request for Comment

The Board is also requesting comment on another possible evolution in the definition of service facility, specifically, whether a credit union's transactional website and mobile banking applications should be included in the definition of service facility. In light of the inexorably increasing use of digital financial

²³65 FR 64512 (Oct. 2000).

²⁴ 65 FR 64512 (Oct. 2000).

²⁵ 86 FR 1826, 1827 (Jan 2021).

²⁶ See Rodriguez McRobbie, Linda, "The ATM is Dead. Long Live the ATM!," Smithsonian Magazine, Jan. 8, 2015, finding, "American Luther George Simjian's invention of the Bankograph in 1960, machine that would allow bank customers to deposit checks and cash into a machine and that spent a short time in the lobby of a New York bank."

services, the Board believes it is now appropriate to reconsider including transactional websites and mobile banking applications in the definition of service facilities.

The Board previously proposed to amend the definition of “service facility” for group additions to MCB FCUs to include online financial services, including computer-based and mobile phone channels meeting certain criteria for access.

The Agency claims that circumstances have changed because so many credit union customers are now using mobile and internet banking. In other words, “reasonable proximity” should now mean access to a computer or a mobile phone. Essentially, this would allow creation of nationwide, online credit unions. Such a move would circumvent the law, totally disregarding the statute’s clear preference for separately chartered credit unions and making a mockery of the common bond requirements.

This concept exceeds the Board’s statutory authority and is inconsistent with Congressional intent, in that an online internet channel would effectively remove the statutory requirement that a multiple common bond FCU be in a reasonable proximity to the location of the group.

In conclusion, ICBA believes that the Board’s focus on extending additional powers to the nation’s largest credit unions is misplaced at this time and directly contrary to Congressional intent and statute. ICBA urges NCUA to rescind this proposal and focus on regulations that would empower local communities and low- and moderate-income populations.

If you would like to discuss this further, please do not hesitate to contact me at Michael.Emancipator@icba.org or 202-821-4469.

Sincerely,

/s/

Michael Emancipator
Vice President and Regulatory Counsel