Credit Unions: Who Should Be Able to Serve the Underserved

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Credit Unions: Who Should Be Able to Serve the Underserved?

I. INTRODUCTION

In November 2005, Utah became the most recent battleground in the continuing war between banks and credit unions when the American Bankers Association (ABA) filed a suit against the National Credit Union Administration (NCUA) in the United States District Court for the District of Utah. The ABA challenged the NCUA's decision to allow the America First Federal Credit Union, a community credit union, to expand into underserved areas. Prior to this suit, the NCUA had allowed all types of credit unions, not just multiple common-bond credit unions, to expand into underserved areas. Only days before the NCUA was required to respond to the lawsuit, it issued a moratorium that prohibited single common-bond and community credit unions from expanding into underserved areas. A month later, the NCUA proposed a new rule limiting "the addition of new underserved areas to only multiple common-bond credit unions." On June 28, 2006, after receiving forty-nine comment letters for and against the proposed rule, the NCUA approved the rule.


Although the new NCUA rule was appropriate under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Federal Credit Union Act (FCUA) should be amended to allow all types of credit unions to serve underserved areas, and there should be regulatory or statutory action to require accountability of those credit unions that do so. Part II of this Note discusses the Credit Union Membership Access Act (CUMAA) and its background. Part III explores the expansion of credit unions into underserved areas and the resulting litigation by the ABA. Part IV analyzes the new NCUA rule and its appropriateness under *Chevron*. Finally, Part V calls for the FCUA to be amended to allow all types of credit unions to serve underserved areas, and for accountability of those credit unions that do so.

II. BACKGROUND TO THE CUMAA

A. *Common Bond Requirement Prior to NCUA v. First National Bank & Trust*

Credit unions “are member-owned, democratically operated, not-for-profit institutions” with “the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means.” The first credit union in the United States was formed in Manchester, New Hampshire in 1909.

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9. *See infra* notes 84-115, 139-89 and accompanying text.
11. *See infra* notes 15-51 and accompanying text.
12. *See infra* notes 52-83 and accompanying text.
13. *See infra* notes 84-138 and accompanying text.
14. *See infra* 139-89 and accompanying text.
Massachusetts also passed the Massachusetts Credit Union Act later that year. In 1934, Congress passed the FCUA, which was based on the systems of the state credit unions, in response to the Great Depression and the havoc it caused among middle and low income workers.

Early credit unions were built around people who had "a commonality of needs," because "[p]eople working, or associating, or living together in compact communities knew each other and were usually aware of a colleague's ability or disposition to repay a loan." Building on this belief, section 109 of the FCUA stated that federal credit union membership was "limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, small community, or rural district." The NCUA, the federal agency created to regulate credit unions, interpreted the statute for nearly fifty years to mean that all of the members of a credit union must share a single common bond. However, the NCUA reversed this long-standing interpretation in 1982 by allowing multiple groups to form a single credit union.

Due to the NCUA's reversal, there are now three types of federal credit unions, each built around the idea of a common bond. The first type is the single common-bond credit union, which is formed by a group who shares either a common occupation or association. The second type is the community credit union, which is formed by "persons or organizations within a

18. See id.
23. See id.
25. Id. § 1759(b)(1).
well-defined local community, neighborhood, or rural district.\textsuperscript{26} The third and newest type of credit union is the multiple common-bond credit union.\textsuperscript{27} Multiple common-bond credit unions allow "select employee groups”—each with their own common bond—to join a single credit union.”\textsuperscript{28}

B. NCUA v. First National Bank & Trust\textsuperscript{29}

The expansion of the common bond requirement created a new type of credit union, one that "can grow to an almost staggering size, encompassing thousands of varieties of members.”\textsuperscript{30} Since credit unions are non-profit groups, they are not subject to income taxation and therefore can offer better loan interest rates and virtually indistinguishable services from those that banks offer.\textsuperscript{31} Naturally, banks perceived these new types of credit unions to be a competitive threat.\textsuperscript{32} One example of this new type of credit union was the AT&T Family Federal Credit Union (ATTF).\textsuperscript{33} After the NCUA allowed ATTF to add several

\textsuperscript{26} Id. § 1759(b)(3).
\textsuperscript{27} Id. § 1759(b)(2). The overriding reason for this change was the recession of the early 1980s, "the most severe economic downturn since the Great Depression.” Letter from Norman E. D’Amours, \textit{supra} note 20. This recession caused the closing of many businesses, nearly 25,000 in 1982, up more than 13,000 from two years prior. \textit{See id.} Since fully eighty percent of credit unions at the time were based on business groups, widespread business failures led to the failure of many credit unions, 222 of which closed in 1981. \textit{See id.} However, following the change allowing credit unions to be formed around multiple common-bonds, the number of failed credit unions fell to 112 in 1982 and forty in 1983. \textit{See id.}
\textsuperscript{28} Letter from Norman E. D’Amours, \textit{supra} note 20. In arguing for the creation of this new form, the NCUA noted that many employees were being deprived of credit union services. \textit{See id.} Additionally, allowing multiple select employee groups (SEGs) to form a credit union decreased the risk that the failure of one of the SEGs would bring down the entire credit union. \textit{See Wendy Cassity, Note, The Case for a Credit Union Community Reinvestment Act, 100 COLUM. L. REV. 331, 339 (2000).}
\textsuperscript{29} Nat’l Credit Union Admin. v. First Nat’l Bank & Trust, 522 U.S. 479 (1998).
\textsuperscript{30} Cassity, \textit{supra} note 28, at 340. For example, Coastal Federal Credit Union, based in Raleigh, North Carolina, although originally a single common-bond credit union servicing employees of IBM Corporation, now has more than 1,000 SEGs as part of its membership. Coastal Federal Credit Union, Step 1. Verify Eligibility, \url{http://www.coastalfcu.org/verify_eligibility.htm} (last visited Jan. 3, 2007).
\textsuperscript{31} Cassity, \textit{supra} note 28, at 340.
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{See Nat’l Credit Union Admin.}, 522 U.S. at 484. At the time of \textit{NCUA v. First National Bank & Trust}, ATTF had around 100,000 members, of which only thirty-five percent had any relation to AT&T. \textit{See id.} at 484-85.
new groups to its charter in 1990, multiple members of the banking industry sued,\(^34\) including five banks from North Carolina and the ABA.\(^35\)

In *NCUA v. First National Bank & Trust*, the Supreme Court found for the banks and the ABA,\(^36\) holding that the interpretation by the NCUA allowing multiple common-bond credit unions was "contrary to the unambiguously expressed intent of Congress."\(^37\) According to the Court, the NCUA's construction of the statute violated "the established canon of construction that similar language contained within the statute must be accorded a consistent meaning,"\(^38\) and the NCUA interpretation had "the potential to read these words [membership in federal credit unions 'shall be limited'] out of the statute entirely."\(^39\)

C. **Congressional Response: The CUMAA**

Although, in *NCUA v. First National Bank & Trust* the bankers won a significant battle, the NCUA did not give up on the war.\(^40\) Indeed, even before the Supreme Court decided this case,\(^41\) Congress introduced the CUMAA to mitigate the effects of any Supreme Court decision adverse to the NCUA.\(^42\) Congress found that "current members and membership groups should not face divestiture from the financial services institution of their choice as a result of recent court action."\(^43\) Therefore, "Congress quickly responded and passed the CUMAA on August 4, 1998,"\(^44\) less than

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34. See id. at 485.
35. See id. at 483.
36. See id.
37. Id. at 503.
38. *Nat'l Credit Union Admin.*, 522 U.S. at 501. The language referenced by the court was that membership was "limited 'to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.'" Id. (quoting 12 U.S.C. § 1759 (1994) (emphasis added)).
39. Id. at 502.
40. See supra notes 36-39 and accompanying text; infra notes 41-46 and accompanying text.
41. See Masset, supra note 19, at 399.
42. See Cassity, supra note 28, at 344.
44. Masset, supra note 19, at 399.
seven months after the Supreme Court’s decision in *NCUA v. First National Bank and Trust*. The bill garnered nearly every vote in Congress, receiving ninety-two in the Senate and 411 in the House.

The CUMAA authorized multiple common-bond credit unions, requiring that each of the select employee groups (SEGs) have its own "common bond of occupation or association" and have less than 3,000 members. The Act also included a grandfather provision that protects those who would be affected by the Supreme Court decision, stating that anyone who was already a member of a federal credit union when the CUMAA was enacted may continue to be a member. Additionally, it allowed existing multiple common-bond credit unions to continue adding members under the SEGs they already had.

III. CREDIT UNION EXPANSION INTO UNDERSERVED AREAS

A. Statutory Authority in CUMAA

The most important provision in the CUMAA for the consideration of this Note is the provision in section 109 concerning underserved areas. Like the previously discussed grandfather provision, the underserved area provision in section 109 is an exception to the general rule requiring a common bond between members. It provides that "the Board may allow the membership of the credit union to include any person or...

46. Masset, supra note 19, at 399.
49. Credit Union Membership Access Act sec. 101, § 109(d)(1). The requirement to have less than 3,000 members is subject to certain exceptions listed under (d)(2), essentially ensuring that SEGs with more than 3,000 members but without the resources to start a credit union are able to do so. See Credit Union Membership Access Act sec. 101, § 109(d)(2).
52. See Credit Union Membership Access Act sec. 101, § 109(c)(2).
53. See id.
organization within a local community, neighborhood, or rural
district if – the Board determines that . . . [it] is underserved . . . by
other depository institutions.” However, the part of the statute
that has led to the recent rule by the NCUA is that which limits
the expansion into underserved areas to “the field of membership
category of which is described in subsection (b)(2).” That
subsection is the one that authorizes multiple common-bond credit
unions.

The CUMAA states three requirements for an area to be
underserved. First, it must be “an ‘investment area’, as defined in
section 103(16) of the Community Development Banking and
Financial Institutions Act of 1994.” The Community
Development Banking and Financial Institutions Act provides that
a geographic area is an investment area if it meets one of three
criteria: it must either “meet[] objective criteria of economic
distress,” have “significant unmet needs for loans or equity
investments,” or encompass or be “located in an empowerment
zone or enterprise community designated under section 1391 of
the Internal Revenue Code of 1986.” Second, the NCUA makes
a determination, looking at data compiled by both the NCUA
Board and other agencies, whether the area is underserved by
other banks, credit unions, or similar institutions. Finally, the
credit union must “establish[] and maintain an office” in the area
where “credit union services are available.” If all three
requirements are met, the NCUA Board has the discretion to

54. Credit Union Membership Access Act sec. 101, § 109(c)(2)-(c)(2)(A),
(c)(2)(A)(ii).
55. Credit Union Membership Access Act sec. 101, § 109(c)(2).
60. Credit Union Membership Access Act sec. 101, § 109(c)(2)(A)(ii). The
NCUA Interpretive Ruling and Policy Statement 03-01 lists the criteria used to
determine whether an area is underserved, but its length prohibits listing all of
the criteria in this note. NATIONAL CREDIT UNION ADMINISTRATION, INTERPRETIVE
RULING AND POLICY STATEMENT 03-01, 3-4 TO -5 (2003), http://www.ncua.gov/
allow a credit union to expand its membership into that underserved area.\textsuperscript{62}

B. Initial NCUA Rule on Expansion into Underserved Areas

Following the passage of the CUMAA, the NCUA passed new regulations regarding the organization and field of membership of credit unions.\textsuperscript{63} The new regulations permitted all types of credit unions, not just multiple common-bond credit unions, in order to add underserved areas as they had been able to do in the past.\textsuperscript{64} The NCUA stated that “[a]lthough the new legislation specifically authorizes flexible policies regarding multiple common bond credit unions providing service to underserved areas, the Board has determined that previous agency policies allowing similar service to poor and disadvantaged areas should continue.”\textsuperscript{65} Additionally, the NCUA required the credit unions that added underserved areas to “establish and maintain an office or facility in the community within two years.”\textsuperscript{66} However, the regulations included an exception for those credit unions that already had a “preexisting office within close proximity to the underserved area.”\textsuperscript{67}

C. The ABA Files Suit

After the NCUA passed its new regulations, the ABA went on the offensive.\textsuperscript{68} The main battle occurred in Utah after the NCUA approved an application by the America First Federal Credit Union (AFCU),\textsuperscript{69} a community credit union,\textsuperscript{70} to expand

\textsuperscript{62} See Credit Union Membership Access Act sec. 101, § 109(c)(2).

\textsuperscript{63} See infra notes 64-67 and accompanying text.


\textsuperscript{65} Id.


\textsuperscript{67} Id.

\textsuperscript{68} See Reosti, supra note 2.

\textsuperscript{69} See id. The America First Federal Credit Union (AFCU) is a large credit union; indeed, as of December 2005, it had nearly 400,000 members and $3.2 billion in assets. America First Federal Credit Union, Facts and Financials (2005), http://
and serve a six county area containing more than 1.4 million residents around Salt Lake City. The ABA sued the NCUA in a federal court in Salt Lake City on grounds that the area did not constitute a community. The NCUA and the AFCU, however, argued that the "counties comprised a single community, in part because they have large numbers of Mormons." 

In the case, the court found that the failure of the NCUA "to address the existence of any undisputed factors demonstrating the absence of a 'local' community make it impossible to conclude the action was the product of reasoned decisionmaking." The court admonished the NCUA that it should not "act as a rubber stamp or cheerleader for any application brought before it." It therefore sent the issue back to the NCUA for further review. Undeterred by the court's decision, the AFCU filed a new request to expand into the counties around Salt Lake City, this time on the basis that the area was underserved. The NCUA approved this new application, and in November 2005, the ABA challenged the expansion a second time.

D. The NCUA Reversal, Moratorium, and Rulemaking

On December 29, 2005, the NCUA reversed its decision allowing the AFCU to expand into the underserved area, and placed a moratorium on allowing any expansion into underserved

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72. See Reosti, supra note 2.
76. Id. at 1070.
77. Id. at 1074.
78. See Wysocki, supra note 72.
79. See id. The ABA also sued the NCUA in Pennsylvania to block the expansion of three credit unions. See id.
areas by credit unions, other than multiple common-bond credit unions. On January 27, 2006, the NCUA issued a proposed amendment to its regulation allowing all credit unions to expand into underserved areas; the amended rule would allow only multiple common-bond credit unions to add new underserved areas. The ABA and the NCUA agreed that until the NCUA promulgated its final rule, the lawsuit would be stayed. On June 28, 2006, the NCUA issued the final rule, which mirrored the proposed rule, and went into effect on July 28, 2006.

IV. THE NCUA FINAL RULE LIMITS EXPANSION INTO UNDERSERVED AREAS

A. The New Rule is Consistent with Chevron

Nearly all of the credit union commenters believed that the NCUA "ha[d] the authority to allow all three charter types to add underserved areas." Although the NCUA recognized that the language of the CUMAA did "not expressly provide that authority to the other two charter types," it cited legislative history suggesting that Congress’ intent was to allow "all types of federal credit unions [to] be able to add underserved areas." However, the NCUA felt that the "absence of specific statutory language, when considered together with the specific authorization for multiple common-bond credit unions, creates uncertainty about the continued authority of non-multiple common-bond credit unions to serve underserved areas." This uncertainty, when combined with the litigation initiated by the ABA, persuaded the NCUA to limit expansion into underserved areas to multiple common-bond credit unions only.

80. See Reosti, supra note 4.
82. Mullins, supra note 70.
84. Id. at 36,668.
85. Id.
86. Id.
87. Id.
The suit filed by the ABA in Utah put the NCUA in a difficult position.\textsuperscript{88} Credit unions began with the purpose of serving people of modest means, and are still charged with that role today.\textsuperscript{89} However, as already discussed, the ambiguity in the statute and the litigation filed in Utah persuaded the NCUA that it had to end its practice of allowing non-multiple common-bond credit unions to serve underserved areas.\textsuperscript{90} On the other hand, many credit unions wrote in comments to the proposed rule and argued that regardless of the ambiguity of the statute, the NCUA nevertheless had the authority to allow all credit unions to expand into underserved areas.\textsuperscript{91}

In deciding whether a regulatory action is appropriate, courts use the two-step analysis articulated in \textit{Chevron}.\textsuperscript{92} First, the court must look at whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."\textsuperscript{93} The second prong only applies if the statute is not clear: "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."\textsuperscript{94}

In applying the first prong of \textit{Chevron}, it is clear that while the CUMAA allowed multiple common-bond credit unions to expand into underserved areas, the absence of statutory language

\textsuperscript{88} See infra notes 89-91 and accompanying text.
\textsuperscript{90} See Organization and Operations of Federal Credit Unions, 71 Fed. Reg. at 36,668.
\textsuperscript{91} See generally Letter from Donna LoStocco, Vice President, Member Dev. & Political Affairs, Affinity Fed. Credit Union, to Mary Rupp, Sec'y of the Bd., Nat'l Credit Union Admin. 1 (Mar. 30, 2006), http://www.ncua.gov/RegulationsOpinionsLaws/Comments/IRPS06-01/3-30-06-DonnaLoStocco-AffinityFCU.pdf ("The spirit of the CUMAA intended underserved areas to obtain more access to affordable financial services, not less."); Letter from Roger Heacock, President/CEO, Black Hills Fed. Credit Union, to Mary Rupp, Sec'y of the Bd., Nat'l Credit Union Admin. 2 (Mar 29, 2006), http://www.ncua.gov/RegulationsOpinionsLaws/Comments/IRPS06-01/3-29-06-RogerHeacock-BlackHillsFCU.pdf (arguing that the NCUA should have allowed the ABA case to continue in court to clarify the statute).
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 843.
that would allow non-multiple common-bond credit unions to do
the same does not specifically prohibit those credit unions from
doing so.\footnote{95} Since the statutory language provides no clear answer,
the court will then look "to the legislative history for a possible
resolution of this ambiguity."\footnote{96} It can be argued that the legislative
history of the CUMAA supports allowing the NCUA to permit all
types of credit unions to expand into underserved areas.\footnote{97} It
certainly seems likely that Congress knew that prior to the passage
of the CUMAA, the NCUA allowed all types of credit unions to
expand into underserved areas.\footnote{98} Representative Paul Kanjorski
(D-PA), one of the co-sponsors of the CUMAA, stated in a debate that

[b]y including explicit language authorizing multiple
group credit unions to include underserved areas in
their field of membership, we are not in any way
restricting the ability of the National Credit Union
Administration to allow community and single
group credit unions to include underserved areas in
their fields of membership.\footnote{99}

This seems to be a strong argument for the case that the
NCUA did not need to enact this new rule.\footnote{100} On the other hand,
the Senate report on the matter contains language explicitly stating
that the underserved area exception applies to multiple common-
bond credit unions, but is silent as to whether the CUMAA
precludes other types of credit unions from doing so.\footnote{101} Therefore,
because the legislative history is ambiguous as to whether the

\footnote{95} Credit Union Membership Access Act, Pub. L. No. 105-219, sec. 101, §
\footnote{96} First Nat'l Bank v. Nat'l Credit Union Admin., 863 F. Supp. 9, 12 (D.D.C.
1994).
\footnote{97} See Letter from Roger Heacock, supra note 91, at 3.
\footnote{98} See id.
Kanjorski).
\footnote{100} See supra notes 95-99 and accompanying text.
NCUA has the authority to allow all types of credit unions to expand into underserved areas, the analysis must move to the second prong of *Chevron*.\textsuperscript{102}

Under the second prong of *Chevron*, the courts “defer to the agency’s interpretation if it is a reasonable one.”\textsuperscript{103} Several commenters to the new rule argued that there would be a “negative impact on both credit unions and consumers” if expansion was limited only to multiple common bond credit unions.\textsuperscript{104} The commenters argued that “low-income individuals and those who most need credit union service will receive less service,” less expansion will lead to “less competition,” and “some federal credit unions will convert to state charters.”\textsuperscript{105} Although the NCUA agreed with those commenters, it decided that “there are many opportunities for continued growth and expanded service to consumers within existing fields of membership even with [the] change.”\textsuperscript{106} Its conclusion was that the possible harm to credit unions and members was outweighed by the ABA litigation and the uncertainty and ambiguity created by the CUMAA.\textsuperscript{107}

The NCUA, in passing the rule, sought to “ensure continued reliable and efficient service to federal credit union members located in underserved areas.”\textsuperscript{108} It likely felt that the uncertainty created by the litigation called into question a credit union’s ability to ensure that reliable and efficient service.\textsuperscript{109} Thus, as already discussed, the NCUA determined that it should limit the extension of underserved areas to multiple common-bond credit unions only.\textsuperscript{110} Along with the NCUA, the Credit Union

\textsuperscript{102} Cf. First Nat’l Bank v. Nat’l Credit Union Admin., 863 F. Supp. 9, 13 (D.D.C. 1994) (“In the face of such ambiguity [in the congressional record] we cannot conclude that Congress precluded the NCUA’s interpretation of the common bond provision. Therefore, it is necessary to determine whether this interpretation is reasonable.”).

\textsuperscript{103} Id. at 13-14.


\textsuperscript{105} Id.

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id. at 36,667.

\textsuperscript{109} See id.

\textsuperscript{110} Organization and Operations of Federal Credit Unions, 71 Fed. Reg. at 36,668.
National Association (CUNA), which "represents approximately 90% of our nation's . . . state and federal credit unions," recognized that the "NCUA has little legal flexibility to pursue a different course of action at this time" due to the ABA's suit. The Navy Federal Credit Union, because of questions over whether the "plain language" of the CUMAA allowed credit unions other than multiple common-bonds to expand into underserved areas, "believe[d] that NCUA had appropriately declared a moratorium on the granting of underserved areas to non-multiple common-bond federal credit unions." The concerns over the litigation and uncertainty are legitimate practical considerations; in passing the rule, the NCUA appropriately addressed these considerations to avoid providing "persons of limited means with needed financial services where the possibility exists that they could suddenly be deprived of those services." Therefore, the NCUA's interpretation is reasonable and the rule is a permissible action under Chevron.

B. Application of the New Rule

1. Credit Unions that Change Charter Types May Not Keep Their Underserved Areas but May Keep Current Members

As would be expected, most credit union commenters supported allowing credit unions that change charter types to keep their underserved areas, while the banking groups argued against it. The NCUA decided that because the final rule only allows

112. Id. at 5.
115. See supra notes 103-14 and accompanying text.
multiple common-bond credit unions to serve underserved areas, any credit union that converts to another charter type may continue to serve the members that it has obtained through the underserved areas, but may not add new ones.\textsuperscript{117} The NCUA did consider the fact that reasons beyond a credit union’s control may lead to a conversion of charter type.\textsuperscript{118} However, it felt that a credit union had to take this into account when deciding upon a charter type, since the credit union would know that any conversion would mean a loss of its underserved areas, but not its current members.\textsuperscript{119}

2. Non-Multiple Common-Bond Credit Unions May Keep Their Underserved Areas

The NCUA final rule is prospective in that it allows non-multiple common-bond credit unions to keep the underserved areas they are already serving and to continue expanding within those underserved areas, because without continued growth, “credit unions will be unable to sustain the current level of services provided in these areas . . . [which] would cause substantial harm.”\textsuperscript{120} In determining whether to make the new rule prospective or retroactive, the NCUA asked for information about the investment that non-multiple common-bond credit unions had made in underserved areas.\textsuperscript{121} The NCUA also asked what the impact would be on “members of underserved areas, and non-multiple common-bond credit unions,” if their credit union was restricted from adding new members from the underserved areas that it already served.\textsuperscript{122} Citing a study conducted by the CUNA, the NCUA stated that more than 400 million dollars had been invested into more than 800 underserved areas, including hundreds

\begin{thebibliography}{99}
\bibitem{117} Id.
\bibitem{118} Id.
\bibitem{119} Id.
\bibitem{120} Id. at 36,669.
\bibitem{121} Id.
\bibitem{122} Organization and Operations of Federal Credit Unions, 71 Fed. Reg. at 36,669.
\end{thebibliography}
of branches and billions of dollars in share deposits made by members and loans given out to those members.\textsuperscript{123}

The NCUA asserted that regulations are generally prospective in nature.\textsuperscript{124} To decide whether to make a regulation retroactive, one should look at “such factors as the degree of hardship parties would experience, whether reliance on past regulation was justifiable and any statutory interest in retroactive application of the new rule.”\textsuperscript{125} The NCUA found that, as a whole, the equities required prospective application of the new rule.\textsuperscript{126} Non-multiple common-bond credit unions had made significant investment in underserved areas, as seen in the CUNA study, and “[e]xisting members would also suffer as a result of the diminished services that would result if further membership growth was prohibited.”\textsuperscript{127} Additionally, because the NCUA not only allowed but also encouraged credit unions to expand into underserved areas, the credit unions’ reliance on the NCUA’s regulations was reasonable.\textsuperscript{128}

The ABA disagreed, to no avail, with the NCUA’s argument for only prospective application of the rule, asserting that prospective application would only further the “illegal addition of members by non-multiple common-bond credit unions.”\textsuperscript{129} After the NCUA adopted the new rule, the ABA issued a press release stating that it was “pleased to see the agency bring its membership rules closer to the law.”\textsuperscript{130} However, the ABA believed that in allowing non-multiple common-bond credit unions to continue adding members from their underserved areas, the NCUA had “locked the door but left the windows open.”\textsuperscript{131}

\textsuperscript{123} See id.
\textsuperscript{124} Id. (citing Bowen v. Georgetown Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring)).
\textsuperscript{125} Id. (citing Consolidated Freightways v. Nat’l Labor Relations Bd., 892 F.2d 1052, 1058 (D.C. Cir. 1989)).
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Organization and Operations of Federal Credit Unions, 71 Fed. Reg. at 36,669.
\textsuperscript{129} Letter from Keith Leggett, supra note 1, at 7.
\textsuperscript{131} Id.
3. Credit Unions Must Have a Physical Presence in the Underserved Area

The new rule continues to require a credit union to have a physical presence in the underserved area within two years, thereby removing the close proximity exception discussed earlier. Although many commenters disagreed with this part of the proposed rule, the NCUA felt that requiring a physical presence would enable a credit union to "build a better relationship and understanding of the needs of the community." On the other hand, the ABA argued that a credit union should be required to have a physical location in the underserved area before beginning to serve it, and that providing a two-year grace period "honors neither the spirit nor the letter of the law."

C. Practical Results of the New Rule

As previously discussed, one of the reasons that the NCUA made the new rule was to "ensure continued reliable and efficient service" because of the uncertainty that arose from the ABA suit. The NCUA achieved this consideration on July 20, 2006, when the ABA dropped its suit against the NCUA because the ABA felt that the changes made were satisfactory. The ABA said that it would "closely monitor NCUA's and the credit union industry's compliance with the newly revised underserved rules." Additionally, without the uncertainty created by the ABA litigation, the NCUA is free to advocate for statutory change, as it stated that it would do.

133. Id. at 36,670.
134. Letter from Keith Leggett, supra note 1, at 9.
136. See Alan Kline, NCUA Alters Rules; ABA Drops Suit, AM. BANKER, July 21, 2006, at 3.
137. Id.
A. All Credit Unions Should Be Able to Serve Underserved Areas

Although the rule was appropriate under Chevron, the NCUA agreed with most of the credit union commenters that the FCUA should be amended to allow all types of credit unions to expand into underserved areas.\textsuperscript{139} One of the main arguments made by the ABA against this, or any type of expansion by credit unions, is that credit unions are not really serving people of modest means, the mission with which they are charged by Congress.\textsuperscript{140} In arguing this, the ABA cited a 2003 report by the General Accounting Office (GAO) "[finding] that credit unions were less likely to serve low- and moderate-income households than were banks."\textsuperscript{141}

In 2002, the Woodstock Institute, based in Chicago, Illinois, released a study of credit unions in the Chicago area that refuted the claims by the credit union industry that credit unions served low-income people.\textsuperscript{142} In the study, the Institute found that credit unions in Chicago were more likely to serve middle- and upper-income people than lower-income people.\textsuperscript{143} However, the Institute still argued that all types of credit unions should be able to serve underserved areas, and that there should be fewer restrictions on moving into these areas.\textsuperscript{144} Because the end goal is to provide people in underserved areas with access to financial services, the Institute believes that the NCUA should focus on

\textsuperscript{139} See id.
\textsuperscript{140} See Letter from Keith Leggett, supra note 1, at 10.
\textsuperscript{141} Id. In 2004, the General Accounting Office changed its name to the Government Accountability Office, so GAO will be used in this note to mean either title. U.S. Government Accountability Office, GAO's Name Change and Other Provisions of the GAO Human Capital Reform Act of 2004, http://www.gao.gov/about/namechange.html (last visited Jan. 18, 2006).
\textsuperscript{142} Letter from Marva Williams, Senior Vice President, Woodstock Inst., to Mary Rupp, Sec'y of the Bd., Nat'l Credit Union Admin. 2 (Mar. 28, 2006), http://www.ncua.gov/RegulationsOpinionsLaws/Comments/IRPS06-01/3-29-06-MarvaWilliams-WoodstockInstitute.pdf.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
providing accountability when a credit union moves into underserved areas, not on limiting credit unions' access.\textsuperscript{145}

It seems counterintuitive to the ABA's argument that credit unions are not serving low-income people to limit the expansion into underserved areas to multiple common-bond credit unions only.\textsuperscript{146} The term "underserved areas" implies that those who live there lack the same access to services as those who do not live in underserved areas.\textsuperscript{147} Limiting the expansion to multiple common-bond credit unions will only serve to exacerbate the problem.\textsuperscript{148} The Member Service Assessment Pilot Program, a recent study conducted by the NCUA and released in November 2006, found that fifty percent of the membership of credit unions that added underserved areas had incomes below the median income of credit union members.\textsuperscript{149} On the other hand, of the membership of federal credit unions as a whole, only forty-four percent had incomes below the median.\textsuperscript{150} Therefore, credit unions that serve underserved areas have more low-income members than other types of credit unions, and allowing only multiple common-bond credit unions to serve underserved areas will lead to less economically diverse credit unions as a system.\textsuperscript{151}

Additionally, there is little reason to stop other types of credit unions from being able to expand into underserved areas.\textsuperscript{152} As to community chartered credit unions, it would be "contrary to their reason for existence" to stop them from expanding into underserved areas.\textsuperscript{153} In regards to single common-bond credit

\textsuperscript{145} Id. at 1.

\textsuperscript{146} See infra notes 147-56 and accompanying text.

\textsuperscript{147} Letter from Marva Williams, supra note 142, at 2.

\textsuperscript{148} See infra notes 149-51 and accompanying text.


\textsuperscript{150} Id.

\textsuperscript{151} See supra notes 149-50 and accompanying text.

\textsuperscript{152} See infra notes 153-55 and accompanying text.

unions, Rep. Kanjorski argued that it “makes no sense” to limit them as they could simply add another employer group and become a multiple common-bond credit union.\textsuperscript{154} Thus, stopping them from expanding simply “add[s] paperwork and regulatory burden.”\textsuperscript{155} Therefore, the FCUA should be amended to allow all types of credit unions to expand into underserved areas.\textsuperscript{156}

\textbf{B. An Amendment Must Require Accountability of Credit Unions}

As part of its argument about the accountability of credit unions, the ABA asserts that even under the new rule, “a multiple-group credit union could claim the entire city of Washington, D.C., as an ‘underserved’ area and then only open a branch in affluent Georgetown.”\textsuperscript{157} This, of course, would defeat the purpose of credit unions to serve people of modest means.\textsuperscript{158} Indeed, the GAO report cited by the ABA found that the NCUA had “not developed indicators to evaluate credit union progress in reaching the underserved.”\textsuperscript{159}

A more recent report by the GAO, released in November 2006, found that while forty-one percent of “households that only and primarily used banks” were of “modest means,” only thirty-one percent of “households that only and primarily used credit

\textsuperscript{154} See supra notes 139-55 and accompanying text. In an appendix to its comments, the CUNA offers a proposed change to section 109 of the FCUA by striking the language which limits the exception to subsection (b)(2), multiple common-bond credit unions. Letter from Mary Mitchell Dunn, Senior Vice President and Assoc. Gen. Counsel, Credit Union Nat'l Ass'n, Inc., Appendix B, to Mary Rupp, Sec'y of the Bd., Nat'l Credit Union Admin. 1 (Mar. 28, 2006), http://www.ncua.gov/RegulationsOpinionsLaws/Comments/IRPS06-01/3-29-06-MaryDunn-CUNA-3.pdf.

\textsuperscript{155} See \textit{id.}

\textsuperscript{156} See \textit{id.}

unions” were of modest means. These findings led the GAO to recommend that the NCUA “systematically obtain information on the income levels of federal credit union members to allow NCUA to track and monitor the progress of credit unions in serving low- and moderate-income populations.” Because of this, there should be provisions made, whether regulatory or statutory, to increase the accountability of those credit unions, which expand into underserved areas.

C. Accountability: The Community Reinvestment Act or Further Action?

One way that the original GAO report cited by the ABA advocates that this could be done is by adopting the type of disclosures required by the Community Reinvestment Act (CRA). These disclosures include “information on the distribution of loans made by the income levels of households receiving mortgage and consumer loans” and “comprehensive information on how credit unions have utilized opportunities to extend their services to underserved areas, including low- and moderate-income households.” Bankers, however, would like the entire CRA to apply to credit unions, not just the reporting requirements. These other requirements include how the federal banking agencies use their evaluations of the performance of the institution in serving “low- and moderate-income areas” to create a CRA rating. That rating is used by the federal banking agencies in deciding whether to allow the institution to do such things as open a new branch, merge with another institution, or

161. Id. at 41.
162. See, e.g., Letter from Marva Williams, supra note 142, at 2 (“[R]egulatory action should focus on accountability of credit unions which choose to expand . . . .”)
164. Id. at 39.
relocate a branch.\textsuperscript{167} If credit unions were forced to comply with the various CRA requirements, it would force them to evaluate their decisions in light of how well they were serving the underserved and require a commitment to those who truly were underserved.\textsuperscript{168} It would also show the NCUA and the public how well that credit union was doing in serving the underserved, thereby increasing the transparency of the process.\textsuperscript{169}

Currently, credit unions are exempt from the CRA requirements, and this non-applicability is a contentious issue between banks and credit unions.\textsuperscript{170} Credit unions argue that they should continue to be exempt because they serve any who meet their membership requirements.\textsuperscript{171} On the other hand, bankers argue that being exempt from CRA requirements gives credit unions an unfair advantage over banks.\textsuperscript{172} Also, banker groups are using the recent GAO report showing that credit unions serve a lower percentage of people of "modest means" than banks to argue that the CRA should be applied to credit unions.\textsuperscript{173} However, as credit union industry members have pointed out, the GAO report did not suggest that the CRA be applied to credit unions.\textsuperscript{174}

Some have argued that the requirements imposed by the CRA on financial institutions are too burdensome, which cuts against applying the CRA to credit unions.\textsuperscript{175} However, recent

\textsuperscript{167} Id. at 161.
\textsuperscript{168} Cf. U.S. GOV'T ACCOUNTABILITY OFFICE, GREATER TRANSPARENCY NEEDED ON WHO CREDIT UNIONS SERVE AND ON SENIOR EXECUTIVE COMPENSATION ARRANGEMENTS 39-40 (2006), http://www.gao.gov/new.items/d0729.pdf ("Obtaining more detailed information on credit union member income and the financial services they used . . . would provide Congress and the public with clear evidence that, as CUMAA notes, credit unions were accomplishing their 'specified mission' of 'meeting the credit and savings needs of consumers, especially persons of modest means.'").
\textsuperscript{169} See supra notes 163-68 and accompanying text.
\textsuperscript{171} See Ed Roberts, NCUA Board Clear: No CRA For Credit Unions, CREDIT UNION J., Mar. 6, 2006, at 10.
\textsuperscript{172} See Clifford, supra note 170, at 610.
\textsuperscript{173} See Mullins, supra note 165, at 1.
\textsuperscript{174} Marcia Kass, GAO Raises Questions on Rationale for Tax Exemption for Credit Unions, 87 THRIFT & GSE NEWS 866, 866 (2006).
\textsuperscript{175} See Betz, supra note 166, at 158.
changes to the regulations based on the CRA have decreased the costs imposed on financial institutions in complying with the rules. The decreased costs apply to financial institutions with less than $1 billion in assets. As of 2004, only eighty-eight credit unions had more than $1 billion in assets, and the assets of those large credit unions represented only 30.3% of the assets of all credit unions. Therefore, the most costly CRA requirements would not apply to the majority of credit unions, but only to the largest ones, which can most easily afford to meet the requirements. Along with this, although credit unions argue that they do not discriminate against low-income people, the study by the Woodstock Institute and the two GAO reports show that credit unions are not serving those low-income people well. Both of these issues suggest some type of accountability to be applied to credit unions who wish to expand into underserved areas.

Along with the CRA, another possible solution to increase the accountability of those credit unions expanding into underserved areas is new regulation, such as that suggested by former NCUA Chairman Norman D'Amours. D'Amours' proposal consisted of three elements: first, it would have required all but the smallest credit unions to create a business plan on how they would serve their potential low-income members. Second, it would have required NCUA oversight of the implementation of those business plans. Third, it would have required the NCUA to take into account how well the credit union did in effectuating its business plan in deciding whether to let a credit union change its charter. Although the proposal was defeated two to one by

176. See id. at 184.
177. See id. at 170-71.
179. See supra notes 176-78 and accompanying text.
180. See supra notes 139-62 and accompanying text.
181. See supra notes 175-80 and accompanying text.
182. See Clifford, supra note 170, at 615.
183. Id.
184. Id.
185. Id.
the NCUA Board in 1999, a similar proposal would be a positive step towards ensuring that low-income members in underserved areas would be served properly. Further, it would increase the transparency of the process of awarding underserved areas without requiring a full application of the CRA. Whether a regulation like it should be passed or whether the CRA, or a more limited version of it such as only the disclosure requirements, should be applied to credit unions is something that should be explored more fully in the future.

VI. CONCLUSION

After the ABA sued to stop the AFCU from expanding under the NCUA's policy allowing all types of credit unions to expand into underserved areas, the NCUA adopted a new rule limiting expansion to multiple common-bond credit unions in June 2006. Applying the Chevron analysis, the NCUA's new rule is appropriate. However, the rule undercuts the ability of credit unions to serve people in underserved area by limiting what types of credit unions may expand into underserved areas.

Therefore, the FCUA should be amended to allow all types of credit unions to serve underserved areas. There should also be statutory or regulatory action to require accountability of those credit unions that do expand into underserved areas. Indeed, it may be better for the NCUA and the credit union industry to impose such requirements upon themselves rather than risk having them imposed by Congress. In the end, requiring accountability of those credit unions that do expand into underserved areas will

186. See id. at 622.
187. See supra notes 182-86 and accompanying text.
188. See id.
189. See supra notes 163-89 and accompanying text.
191. See supra notes 84-155 and accompanying text.
193. See id.
194. See, e.g., Letter from Marva Williams, supra note 142, at 2.
ensure that credit unions properly serve their members and fulfill their charge to serve people of modest means.196

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196. See Letter from Marva Williams, supra note 142, at 2 ("[A]ccountability . . . is necessary to ensure credit unions are meeting the financial services needs of their adopted underserved areas.").