$$Ballast\ Luminous\ Efficiency = \frac{Total\ Lamp\ Arc\ Power}{Input\ Power} \times \beta$$

Where: Total Lamp Arc Power is the sum of the lamp arc powers for all lamps operated by the ballast as measured in section 2.5.5 of this appendix, Input Power is as determined by section 2.5.6 of this appendix, and β is equal to the frequency adjustment factor in Table 1 of this appendix.

2.6.2. Calculate Power Factor (PF) as follows (do not round values of input power, input voltage, and input current prior to calculation):

$$PF = \frac{Input\ Power}{Input\ Voltage\ \times Input\ Current}$$

Where: Input Power is measured in accordance with section 2.5.6 of this appendix, Input Voltage is measured in accordance with section 2.5.7 of this appendix, and Input Current is measured in accordance with section 2.5.8 of this appendix.

3. Standby Mode Procedure

3.1. The measurement of standby mode power is required to be performed only if a manufacturer makes any representations with respect to the standby mode power use of the fluorescent lamp ballast. When there is a conflict, the language of the test procedure in this appendix takes precedence over IEC 62301 (incorporated by reference; see § 430.3). Specifications in referenced standards that are not clearly mandatory are mandatory. Manufacturer's instructions, such as ''instructions for use'' referenced in IEC 62301 mean the manufacturer's instructions that come packaged with or appear on the unit, including on a label. It may include an online manual if specifically referenced (*e.g.,* by date or version number) either on a label or in the packaged instructions. Instructions that appear on the unit take precedence over instructions available electronically, such as through the internet.

3.2. Test Setup

3.2.1. Take all measurements with instruments as specified in section 2.2 of this appendix. Fluorescent lamp ballasts that are designed and marketed for connection to control devices must be tested with all commercially available compatible control devices connected in all possible configurations. For each configuration, a separate measurement of standby power must be made in accordance with section 3.4 of this appendix.

3.2.2. Connect each ballast to the maximum number of lamp(s) as specified in section 2.3 (specifications in 2.3.3.1 are optional) of this appendix. Note: ballast operation with reference lamp(s) is not required.

3.3. Test Conditions

3.3.1. Establish and maintain test conditions in accordance with section 2.4 of this appendix.

3.4. Test Method and Measurements

3.4.1. Turn on all of the lamps at full light output.

3.4.2. Send a signal to the ballast instructing it to have zero light output using the appropriate ballast communication protocol or system for the ballast being tested.

3.4.3. Stabilize the ballast prior to measurement using one of the methods as specified in section 5 of IEC 62301.

3.4.4. Measure the standby mode energy consumption in watts using one of the methods as specified in section 5 of IEC 62301.

[FR Doc. 2020–14646 Filed 9–11–20; 8:45 am]

BILLING CODE 6450–01–P

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 September 14, 2020.

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 Marenna, 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 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

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

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 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 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 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.

One kind of presumptive community is an ''[SPJ] . . . or any contiguous portion thereof,'' regardless of

[3] 12 U.S.C. 1753.

[4] 12 U.S.C. 1753(5).

[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] Public Law 105–219, 2, 112 Stat. 913 (Aug. 7, 1998).

[11] 12 U.S.C. 1759(b)(1).

[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).

[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).

population.[22] The second is a single CBSA [23] (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, 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

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.

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

[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.

[28] 81 FR 88412 (Dec. 7, 2016).

[29] 81 FR 78748 (Nov. 9, 2016).

[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 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).

[33] 83 FR 30289 (June 28, 2018).

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 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 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, 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.

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

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

[35] *Id.* at 664.

[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.

[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. 2020 WL 3492665.

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 ABA [47] 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

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]

[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).

[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.

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 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 bonds.
- 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-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]

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.''

[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.

[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.

[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.*

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 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 FR 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:

> 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.

[63] *Am. 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.

[64] *Id.* at 665–66.

[65] *Id.* at 666–67.

[66] *Id.* at 668.