Banking and Finance Law Daily Wrap Up, TOP STORY—D.C. Cir.: NCUA expansion of boundaries for community credit unions reinstated, (Aug. 21, 2019)

Banking and Finance Law Daily Wrap Up

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By Richard A. Roth, J.D.

The NCUA's rule expanding the areas that community credit unions can include has been largely reinstated. While one rule aspect that could result in redlining was rejected, the agency has a chance to explain before that part of the rule is vacated.

A U.S. district court judge's decision that vacated much of the National Credit Union Administration's 2016 rule on community credit union membership has been mostly overturned by the U.S. Court of Appeals for the District of Columbia. The rule changed the definitions of "local community" and "rural district" to enlarge the geographic areas that community credit unions can include. According to the D.C. Circuit, most of the rule acceptably interpreted the law. However, one change that would allow community credit unions to include suburbs while excluding central urban areas could not stand unless the NCUA could explain how it would avoid increasing the risk of racial discrimination (*American Bankers Assn. v. NCUA*, Aug. 20, 2019, Wilkins, R.).

There are two types of federal credit unions. Broadly, common-bond credit unions draw their members from individuals who are associated through a common occupation or association. Community credit union members all must come from the same neighborhood, community, or rural district. The NCUA's rule affects community credit unions.

According to the court, the NCUA responded to Federal Credit Union Act amendments by changing definitions relating to community credit unions to reflect two concepts developed by the Office of Management and Budget:

- Core Based Statistical Areas (CBSAs), which the opinion described as comprising at least one urban core with a population of 10,000 or more, plus any adjacent counties with substantial commuting ties to that core; and
- Combined Statistical Areas (CSAs), which the opinion described as two or more adjoining Core Based Statistical Areas that each have substantial commuting ties with another CBSA in the CSA.

More simply, the court said a CBSA was a city or town and its suburbs, while a CSA was a regional hub with urban centers that were linked by commuting patterns.

Rule definitions. The two concepts were used to amend the definitions of "local community" and "rural district," and it was these changed definitions to which American Bankers Association objected.

Under the rule, a local community could be a geographic area that includes all or part of a CSA but included no more than 2.5 million people. Alternatively, a local community could comprise a CBSA, which could exclude the urban core, and did not exceed the 2.5-million population cut-off.

The population cut-off for a rural district was increased from the previous 250,000 people to 1 million. The rule also said that the rural district's geographic limit could include all of any states that were adjacent to the credit union's headquarters state. It added a limitation that either most persons who were eligible to join the credit union had to live within Census Department-designated rural areas or that the population density of the rural district could be no more than 100 people per square mile.

Standards for review. The court noted that its review of the regulations was constrained by the Supreme Court's *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* decision (467 U.S. 837, 1984). Accordingly, as long

Congress made the NCUA responsible for interpreting the FCUA, the court would defer to any interpretation that was reasonable.

The court also first rejected the assertion that one aspect of the NCUA's appeal was moot. It was true that, while the appeal was pending, the NCUA had eliminated the aspect of the rule allowing CSAs to constitute local communities. However, since the agency had made clear that it acted only in response to the district court judge's decision and would reinstate the provision if that decision were reversed, the controversy remained live, the court said.

CSA as a local community. The appellate court rejected the district judge's belief that a local community could not be larger than a single county. The NCUA's choice to allow larger local communities was said not to be an unreasonable interpretation of the FCUA.

The court determined that the FCUA's language surrounding "local community" did not require a smaller size. Rather, the Act required a balance between the need for a community credit union to have ties among its members and the need for the institution to have a large enough customer base to be successful. It was up to the NCUA to strike that balance.

The agency used the CSA concept to strike that balance. Allowing larger credit unions promoted their economic viability, while the commuter relationship requirement maintained the necessary ties. The agency offered a rational explanation for its choice, the court added.

While dismissing many of the ABA's attacks as either forfeited or based on outdated definitions, the court did address the concern that the CSA-as-local-community definition could allow sprawling, "daily chain" institutions that had no end-to-end ties. It might well be illegal for the NCUA to approve a charter for such a credit union, the court conceded. However, a conjectural hypothetical case was inadequate to support a challenge to the entire rule before it was enforced.

CBSA-based local community. The NCUA's rule eliminated the previous requirement that a CBSA-based local community include the urban core. The court said the altered definition was rationally related to the FCUA's purpose of promoting credit union growth but that the agency had failed to explain how it ensured membership cohesion.

The court had no difficulty accepting that the members of such a credit union would have ties that would create a local community. However, excluding the urban core could result in creating an institution that excluded large numbers of lower-income or minority individuals who otherwise would be eligible for membership. Essentially, this could result in red-lining by gerrymandering, in the court's opinion.

The NCUA had not explained how it could avoid this result, the court continued. As a result, the appellate court directed the district judge to send the rule back to the NCUA for further action, but not to vacate the rule.

Rural districts. Increasing the size cap for rural districts was a reasonable interpretation of the FCUA, the court concluded. To begin with, neither "rural" nor "district" required particular population or geographic limits.

"Nothing about the 1-million-peron cap prevents the rural district from resembling the countryside," the court pointed out, and the population density criterion would help to preserve such a district's rural character. The other limitations would prevent "gigantic or straggly rural districts."

Moreover, increasing the cap was consistent with strengthening credit unions economically and serving members, the court added.

The case is No. 18-5154.

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