NEW YORK creditunion ASSOCIATION

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August 27, 2015

National Credit Union Association
Gerard S. Poliquin,
Secretary of the Board, National Credit
Union Administration, 1775 Duke

12 CFR Parts 701, 723, and 741
RIN 3133–AE37
Member Business Loans; Commercial
Lending

Dear Mr. Poliquin,

On behalf of the New York Credit Union Association, I am writing this letter to express strong support for the proposed amendment to the Member Business Loans regulations. NCUA is proposing to shift the regulatory framework of MBL oversight from a prescriptive to a proscriptive system, under which credit unions will not be subject to many lending limitations and waiver requirements. While we are very supportive of the proposal in concept, its ultimate effectiveness will depend on how effectively and consistently guidance is used to inform both examiners and credit unions of their respective obligations.

Few of the regulations that have been proposed by NCUA during my tenure have been received as positively as this proposal. When the Association conducted a survey to gather credit union feedback on, one respondent commented:

> "Credit unions are risk managing institutions, and are owned and controlled by their respective members, who are generally grouped in very different and distinct communities. It should be up to any credit union's membership to decide what types of loans they need, how to assess their risk, and how much risk to take. That leaves each membership accountable to each other through their product and service offerings, and the resulting performance of the products and services and the success and viability of their institution. It is such basic cooperative capitalism that it shouldn't take explanation that NCUA should do all this for thousands of credit unions."

Moving to a principals-based regulatory framework will give credit unions flexibility to develop MBL programs that reflect the needs of their membership, while continuing to give NCUA the authority to ensure credit unions implement appropriate risk mitigation frameworks overseen by qualified professionals.

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Expanded Use of Guidance

As explained in the preamble, NCUA remains committed to "rigorous and prudential" MBL oversight, but this oversight will focus on the "effectiveness of the risk management process" and the aggregate risk profile of a given credit union. NCUA will utilize more detailed guidance to accomplish this goal.

Against this backdrop, the precise role of guidance in NCUA's regulatory framework has to be better explained. NCUA has never clarified whether guidance should be treated as a mandate that is as legally binding on a credit union as a regulation promulgated after notice and comment, or as a directive that should be considered by credit unions but is ultimately not binding on them. For example, in 2014 NCUA issued a Supervisory Guidance on MBL underwriting for taxi medallion loans urging credit unions "to review the attached letter to ensure your lending practices align with NCUA's risk management expectations." NCUA subsequently clarified that "criteria detailed in a supervisory letter are not strict requirements for credit unions, unless they are already required by law or regulation. Rather, the criteria are to be used by field staff to evaluate a credit union's condition based on the preponderance of relevant factors." Furthermore the Supreme Court sanctioned the broad use of agency interpretation in lieu of formal rulemaking. As Justice Antonin Scalia explained in concurrence, "Agencies may now use these [interpretive] rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law." (Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1212, 191 L. Ed. 2d 186 [2015])

Credit unions need to know how closely they must adhere to the regulatory guidance issued by NCUA. Similarly, examiners need to know how much flexibility they have in imposing specific practices on credit unions. If examiners are given too much flexibility, credit unions will long for the day when they can demonstrate compliance by referencing specific regulatory provisions. Conversely, if credit unions are not given additional flexibility then the principals-based approach will benefit no one. The balance is a difficult one to achieve and the Association suggests that individual guidance should be promulgated after a formal notice and comment period so that all parties can have a clear record of regulatory expectations.

Developing MBL policies and procedures

NCUA requests comment on whether credit unions with $200 million or more in assets should have to develop comprehensive MBL loan policies, regardless of how many MBL loans they provide. NCUA's suggested approach is inconsistent with the overall tenor of this proposal. NCUA needs authority to mandate that active MBL credit unions devote adequate due diligence to developing and implementing policies and procedures. Conversely it would be a waste of time and resources to mandate that credit unions without large MBL programs create and implement detailed MBL policies simply because they surpass $200 million in assets. After all, recent research suggests that some of the most active MBL credit unions are not unusually large. For instance, at the end of 2012, none of the 10 overall largest credit unions were lending as much as 3 percent of their assets to businesses. Furthermore, only 17 of the most active MBL credit unions have assets above $1 billion, and more than half of the institutions

have assets between $50 million and $500 million. (See David A. Walker, "Room to Grow: Credit Union Business Lending" Page 16 available at https://filene.org/research/report/room-to-grow-credit-union-business-lending)

Similarly, NCUA is proposing that all credit unions with substantial MBL loan activity must have a set of policies and procedures addressing generic areas of concern. Instead of taking this one size fits all approach, NCUA should give credit unions the right to determine precisely what aspects of their MBL programs need detailed policies and procedures and which areas do not. After all, the concerns of a credit union that provides floor plan loans to local retailers are vastly different than the concerns of a credit union that specializes in underwriting commercial real estate. To be clear, examiners would retain the right to insist that policies and procedures address areas of potential vulnerability.

Finally credit unions are very supportive of NCUA's willingness to consider categorizing some loans as commercial as opposed to MBL loans. At the same time credit unions have expressed confusion as to how this new category will be implemented. The Association urges any changes in this area to be consistent with whatever changes are eventually made to the Risk Based Capital framework . It should also provide a detailed explanation when this rule is finalized explaining the distinctions between commercial loans and traditional MBL loans.

Shifting to a principals-based approach is an exciting experiment that, if successful, should be applied to other areas of NCUA oversight. The Association looks forward to working with credit unions and with NCUA to promulgate and implement its new approach to MBL loans.

Sincerely,

William J. Mellin
President/CEO
New York Credit Union Association