CENTER FOR CAPITAL MARKETS COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

August 7, 2017

Mr. Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Notice of Proposed Rulemaking: Bylaws; Bank Conversions and Mergers; and Voluntary Mergers of Federally Insured Credit Unions, RIN 3133–AE73

Dear Mr. Poliquin:

The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. We appreciate the opportunity to comment on the National Credit Union Administration ("NCUA") proposal to revise the procedures a federal credit union must follow to merge voluntarily with another credit union.

CCMC has long argued that federal regulations should be justified, well-reasoned, beneficial, and not unduly burdensome. CCMC believes that the entire agency rule-writing process–including the initial consideration and drafting of a rule–must be informed by rigorous economic analysis. For that reason, we have strong concerns about the proposed revisions to the voluntary mergers rule.

Specifically, our concerns are centered upon:

- **Failure to demonstrate a well-grounded need for federal regulatory action**;

- **Insufficient contemplation of the potential consequences of the regulation, and;**

- **Failure to consider impacts on Main Street businesses and the economy.**

Discussion

CCMC strongly believes that rigorous and transparent cost-benefit analysis is a fundamental and indispensable tool of the modern administrative state.[1] The best practices for conducting this analysis have been restated in executive orders (EO) and formal memoranda stretching across three decades of both Republican and Democratic administrations. Specifically, EO 12866, EO 13563, and implementing guidance in Office of Management and Budget (OMB) Circular A-4 contain detailed and well-reasoned policies to ensure that agencies–and the public–understand the consequences of regulatory action. These directives must be followed by executive departments, but not by independent agencies.

CCMC understands that as an independent agency of the executive branch, NCUA is not formally compelled to comply with EO 12866, EO 13563, or OMB Circular A-4. However, independent agencies, no less than the executive departments, *should* comply with these procedures as a matter of best practices and good governance. This principle is explicitly restated in EO 13579, and has been endorsed by the Government Accountability Office and the Administrative Conference of the United States.[2]

We are encouraged by indications that NCUA is willing to hold itself to a higher standard. For example, NCUA voluntarily participated in the decennial review

[1] For a detailed discussion of the Chamber and CCMC's position on the role of cost-benefit analysis in financial regulation, see PAUL ROSE AND CHRISTOPHER J. WALKER, THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION (2013), available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBA-Report-3.10.13.pdf.
[2] Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 12-151, IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION (Nov. 10, 2011); CURTIS W. COPELAND, ECONOMIC ANALYSIS AT INDEPENDENT REGULATORY AGENCIES (Apr. 30, 2013), *available at* https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf.

of regulations pursuant to the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA), although not required to do so under the statute.[3] We commend the NCUA Board and staff for their efforts with respect to this review.

Furthermore, in a statement issued upon his confirmation as a Member of the Board in 2014, Chairman J. Mark McWatters identified "Incorporating a robust, objective, transparent and fully accountable cost-benefit analysis into NCUA's rulemaking and vetting process" as a top priority.[4] During his tenure as a Member of the Board, Chairman McWatters strongly advocated for consistent, well-documented, and well-supported economic analysis.[5]

CCMC is deeply concerned that this proposal does not satisfy the expectations for rigorous economic analysis at independent agencies set by EO 13579.

1. The Proposal Does Not Justify the Need for Federal Regulatory Action

Pursuant to EO 12866 and OMB Circular A-4, before recommending regulation "an agency must demonstrate the proposed regulation is necessary." Such a demonstration requires the agency to:

a) Identify the problem the regulation is intended to address, such as a significant market failure or some other compelling public need;

b) Show that federal regulation is the best way to solve the problem; and

c) Overcome the presumption against certain economic regulations, including mandatory uniform standards for services.

This is meant to be a significant exercise, characterized by a methodical, rigorous, and, if possible, quantified assessment of the necessity. As further instructed by OMB Circular A-4:

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[3] FED. FIN. INST. EXAMINATION COUNCIL, JOINT REPORT TO CONGRESS: ECONOMIC GROWTH AND REGULATORY PAPERWORK REDUCTION ACT 1 n.1 (2017).
[4] J. Mark McWatters, McWatters Outlines NCUA Vision, Priorities (Aug. 27, 2014), *available at* https://www.ncua.gov/newsroom/Pages/NW20140827McWatters.aspx.
[5] *See, e.g.,* J. Mark McWatters, Board Member J. Mark McWatters Statement on the Proposed IRPS and Rule on the RFA Definition of a Small Entity, n.14 (Feb. 19, 2015), *available at* https://www.ncua.gov/newsroom/Pages/speeches/2015/february/SP20150219McWattersStatement.aspx.

> [Y]ou should try to explain whether the action is intended to address a significant market failure or to meet some other compelling public need such as improving governmental processes or promoting intangible values such as distributional fairness or privacy. If the regulation is designed to correct a significant market failure, you should describe the failure both qualitatively and (where feasible) quantitatively. You should show that a government intervention is likely to do more good than harm. For other interventions, you should also provide a demonstration of compelling social purpose and the likelihood of effective action. Although intangible rationales do not need to be quantified, the analysis should present and evaluate the strengths and limitations of the relevant arguments for these intangible values.[6]

The proposal does not meet these standards. While the preamble to the proposal does intermittently reference perceived problems, such references are alternately anecdotal, unsubstantiated, or are based on an analysis performed by NCUA that is not provided for public consideration and comment. In fact, the articulated basis for the rulemaking is limited to vaguely worded "suggestions" from "recent merger trends," two anecdotal observations regarding a potential conflict of interest in a merger vote and mailed notices that were delayed by a holiday, and unquantifiable claims that credit union members will benefit from the proposed revisions. These assertions do not satisfy the expectations for a rigorous and methodical demonstration of the need for federal regulatory action.

2. The Proposal Does Not Consider the Potential Costs and Benefits of the Regulation

The preamble to the proposed rule acknowledges the context for the rulemaking is to address the ongoing consolidation within the U.S. credit union system. CCMC does not take a position on such consolidation. However, there are creditable arguments that consolidation may, in fact, promote the overall health, resilience, and dynamism of the credit union system.[7] There may also be arguments that consolidation adversely impacts competition and is inconsistent with credit unions' longstanding orientation towards local communities. The purpose behind an economic analysis is to use empirical data to lead to the right answer.

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[6] Office of Mgmt. and Budget, Circular A-4: Regulatory Analysis (Sept. 17, 2003).
[7] *See, e.g.,* Christine Blake, *Credit union consolidation could be a blessing disguise*, CRAIN'S CLEVELAND BUSINESS, June 20, 2017.

Notwithstanding these important considerations, the proposal makes no effort to evaluate how the proposed changes to the voluntary mergers rule will impact credit union consolidation. It is likely that the new requirements governing the disclosure of merger-related financial arrangements, the submission of materials to NCUA, and the approval of mergers proposals by members, will inhibit or discourage consolidation. In fact, this may be the policy goal underlying the proposed revisions. However, regardless of intention, the potential impacts on the credit union system deserve a comprehensive, transparent, and accountable analysis.

The perfunctory economic impact statement, included pursuant to Regulatory Flexibility Act (RFA) requirements, fails to satisfy the standards for rigorous economic analysis. The RFA analysis is limited solely to the immediate compliance burden–*e.g.*, time, paperwork, and the cost of new member-to-member communication requirements. However, as described in OMB Circular A-4, truly rigorous economic analysis requires one to "look beyond the direct benefits and direct costs of your rulemaking and consider any important ancillary benefits and countervailing risks."[8] Furthermore, "Analytic priority should be given to those ancillary benefits and countervailing risks that are important enough to potentially change the rank ordering of the main alternatives in the analysis."

3. The Proposal Does Not Consider Impacts on Main Street businesses and the economy.

The credit union system is a vital source of financing for America's small businesses. According to the Federal Reserve System's 2016 Small Business Credit Survey, more than 1 in 10 small businesses sought financing from a credit union.[9] Moreover, among successful applicants, credit unions had one of the highest satisfaction rates compared to other sources of credit (e.g., large banks, community development financial institutions, and online lenders).[10]

NCUA call report data further reflects the critical role credit unions play in providing needed capital for start-ups and existing small businesses.[11] Credit unions granted $26.9 billion in member business loans in the first quarter of 2017–more than

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[8] Office of Mgmt. and Budget, Circular A-4: Regulatory Analysis (Sept. 17, 2003).
[9] FED. RESERVE SYS., 2016 SMALL BUSINESS CREDIT SURVEY: REPORT ON EMPLOYER FIRMS (Apr. 2017), *available at* https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-EmployerFirms-2016.pdf.
[10] *Id.* at 17.
[11] Summary of Federally Insured Credit Union Call Report Data: 2017 Q1, *available a t* https://www.ncua.gov/analysis/Pages/call-report-data/Reports/PACA-Facts/paca-facts-2017-Q1.pdf.

double the amount granted in the fourth quarter of 2011.[12] CCMC appreciates that small business lending is a primary concern for NCUA, and commends the Board for its multi-year initiative to promote small business lending through webinars, examiner training on Small Business Administration programs, data resources, and media outreach.[13]

Unfortunately, the proposal fails to consider how the new requirements for voluntary mergers will affect credit union consolidation, and in turn, the generation of member business loans on a system-wide level. Small businesses are the engine of American innovation and economic competitiveness: they create two-thirds of new jobs and secure 13 times more patents per employee than larger firms.[14] As a matter of good governance and well-reasoned decision-making, NCUA should rigorously analyze the proposal's potential impacts on credit unions' member business lending.

Conclusion

CCMC understands that there may be a specific policy goal underlying the proposed rulemaking–namely, slowing the pace of consolidation in the credit union industry. However, we cannot take a position on this underlying goal, since a factual analysis has not been provided for public review and commentary. This analysis is necessary to determine the impacts of this proposal upon Main Street businesses. We urge the NCUA to follow longstanding recommendations for such economic analysis, consistent with key principles for good government.

Sincerely,

Tom Quaadman

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[12] *Id.*

[13] Press Release, Nat'l Credit Union Admin., Credit Unions, Small Businesses Will Benefit from NCUA-SBA Partnership (Feb. 6, 2015).

[14] *See generally* Karen G. Mills and Brayden McCarthy, *The State of Small Business Lending* (Harvard Business Sch., Working Paper No. 15-004, July 22, 2014).