

August 26, 2002

The Honorable Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

Re: Size Standard for Small Credit Unions

Dear Ms. Baker:

By way of introduction, Congress established the Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is also required by Section 612 of the Regulatory Flexibility Act (RFA) (5 USC §§ 601-612) to monitor agency compliance with the RFA. In 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act which made a number of significant changes to the RFA. The most significant change was to allow judicial review of agencies' regulatory flexibility analyses.

On August 13, 2002 the President signed Executive Order 13272 entitled "Proper Consideration of Small Entities in Agency Rulemaking." The Executive Order provides that:

- ? Agencies will establish policies on how to measure their impact on small entities and will vet those procedures through the Office of Advocacy.
- ? The Office of Advocacy will train agencies on how to properly account for small business impact when agencies draft regulations.
- ? Agencies will submit proposed rules to the Office of Advocacy prior to publication and are required to consider the Office of Advocacy's comments when the rule is finalized.
- ? The Office of Advocacy will report annually on whether agencies are complying with this Executive Order.

A copy of Executive Order 13272 is enclosed for your reference.

NCUA's Definition of Small Credit Union

Recently, the Office of Advocacy reviewed the National Credit Union Administration's (NCUA) proposed rule on *Prompt Corrective Action* in the Federal Register, Vol. 67, p.

38431. During that review, the Office of Advocacy learned that NCUA does not use the SBA size standard for credit unions in preparing RFA compliance documents. Instead of using the SBA size standard of \$150 million in annual receipts, NCUA uses its own size standard of \$1 million in assets.

Although the Office of Advocacy was pleased that NCUA established its size standard pursuant to the requirements set forth in 5 USC §601(a) (4)¹, from what Advocacy can ascertain, NCUA has not reviewed its definition of a small credit union since 1987. Advocacy is concerned that the definition used by NCUA may not reflect the current state of the industry.

As stated previously, the SBA size standard for a small credit union is \$150 million, which is significantly higher than the NCUA size standard. Advocacy asserts that the difference between the NCUA size standard and the SBA size standard may be indicative of the need for NCUA to develop a new size standard that reflects the current status of credit unions. By failing to use a size standard that reflects current economic conditions, NCUA may be significantly underestimating the potential impact that its proposed rules may have on small businesses.

NCUA Should Review Its Size Standard Pursuant to Section 610 of the RFA

Section 610 of the RFA requires agencies to perform periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities within ten years of the publication of such rules as the final rule.² The Office of Advocacy has been unable to find any indication that the size standard has been reviewed since its implementation in 1987. In order to comply with the requirements of the RFA, Advocacy recommends that NCUA perform a Section 610 review of its size standard to determine whether it is appropriate under the current state of the credit union industry. Without reviewing the size standard, NCUA has no means of assuring that it is using a standard that accurately reflects the industry when it is determining if its actions will have a significant impact on a substantial number of small

¹ 5 USC § 601(a)(4) allows an agency to establish its own definition of the term "small organization" provided that the agency publishes the proposed definition in the Federal Register for public comment.

² Advocacy asserts that NCUA's "interpretive ruling and policy statement" would qualify as a rule under 5 USC § 601(2), which defines a "rule" as being any rule for which the agency publishes a proposed rulemaking pursuant to section 553(b) of the Administrative Procedure Act (APA) or any other law. Although the APA specifically states that interpretive rulemakings are not rules under 553(b), NCUA's size standard definition was published pursuant to the requirements of another law-- Section 601(4) of the RFA. Thus, it is a rule as defined by the RFA and is therefore subject to the requirements of Section 610.

entities. If the standard is too low, NCUA cannot accurately determine if an action will impact a substantial number of credit unions.

NCUA Must Review the Size Standard to Comply with the New Executive Order

Section 3 of Executive Order 13272 requires agencies to issue written procedures and policies, consistent with the Act, to ensure that the potential impacts of agencies' draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process, within 180 days of the issuance of the order. These written procedures should include information on determining the size of a small business as described in section 601 of the RFA. Advocacy asserts that NCUA must review and develop a new size standard policy if NCUA plans to ensure that the potential impacts of its draft rules on small credit unions are properly considered as required by the RFA and the Executive Order.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule and provide the information to the public for comment. Providing the public with information based on an appropriate size standard enables the agency and the public an opportunity to determine fully the effect of the proposal on small entities. The Office of Advocacy respectfully recommends that NCUA review and develop a size standard that is consistent with the current state of the industry.

If you have any questions, please feel free to contact the Office of Advocacy at (202) 205-6533. Thank you.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation

cc: Paul Peterson, Staff Attorney, National Credit Union Administration

Dr. John Graham, Administrator, Office of Information and Regulatory Affairs

