



August 10, 2015

SENT BY CERTIFIED MAIL AND EMAIL

Mr. Michael McKenna  
General Counsel  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314

Dear Mr. McKenna:

Thank you for your letter dated July 30, 2015 concerning the overhead transfer rate (“OTR”) and the release of NCUA’s legal analysis. While I truly appreciate your timely response to our requests for additional information, it is unfortunate that NCUA is choosing to shield its reasoning regarding its legal responsibilities under the Administrative Procedure Act (“APA”) from stakeholders.

Earlier this year, NASCUS released a detailed legal analysis from a respected Washington, D.C. law firm which concluded that the OTR is a “rule” under the APA definition and, therefore, properly subject to formal public notice and comment to the same extent as NCUA’s proposed RBC and MBL rules. We are asking for – and the credit union system deserves – a candid and transparent discussion of the administrative procedure surrounding the OTR.

When agency action has a substantial impact on industry stakeholders, as is the case with the OTR, the APA’s formal notice and comment procedure for rulemaking ensures intelligent, equitable, and deliberative decision making by prescribing specific requirements for the consideration of, and response to, industry concerns. Although NCUA has historically published some OTR materials on its website (and has recently expanded the scope of those documents dramatically in response to congressional oversight), mere public disclosure cannot replace the measured accountability that accompanies a formal rulemaking.

Likewise, while I appreciate Chairman Matz’ pledge to solicit and consider public comment on the OTR methodology every three years as part of NCUA’s strategic planning process, that approach does not allow stakeholders to comment before the OTR changes and does not obligate the NCUA to respond to the concerns raised. Furthermore, without an acknowledgement that formal rulemaking procedure applies, NCUA would not be compelled to maintain that procedural transparency going forward.

As you noted, NCUA has disclosed extensive data pertaining to the OTR. Some of this material, including a previously redacted report commissioned by NCUA from PriceWaterhouseCoopers (PwC), indicates a long history of confusion and frustration from stakeholders regarding the OTR, and raises serious questions about the transparency and methodology utilized by the NCUA in implementing it. The materials also demonstrate NCUA’s history of addressing some stakeholder

concerns but leaving others unanswered. (See 2003 Summary of Pre-Adoption OTR Stakeholder Meeting Comments which fails to respond to NASCUS concerns.) Formal rulemaking procedure would give all system stakeholders the opportunity to evaluate the OTR methodology before it is finalized, and would give NCUA the opportunity to incorporate that feedback into an OTR that serves the system in an equitable manner.

NASCUS is not advocating for a specific allocation between the OTR and operating fees, but for a refined methodology which reflects a reasoned evaluation of stakeholder concerns.

In your letter, you dismiss NASCUS' "continuing" requests, citing budgetary exemptions to the APA and the confidentiality of your work product in a manner that implies NASCUS' attempt to bring complete transparency to this important issue lacks good faith. To be clear, the OTR is no mere budgetary issue involving an agency's internal allocation of funds granted by Congress. The OTR is a cost allocation mechanism that takes credit union money from the insurance fund – money that could be available to cover losses, or to generate earnings to accelerate repayment of Treasury borrowings and hasten a return to dividends for credit unions. Furthermore, that NCUA is using those funds to fully subsidize the safety and soundness examination of federal credit unions rather than charging those examination costs in the form of an operating fee means state chartered credit unions are subsidizing the federal system. These are very real, and very significant issues, deserving of a thorough legal and policy explanation from NCUA.

As an organization that represents state regulatory agencies, we understand the important role of an agency's General Counsel and the confidentiality of its *advice*, and in some cases its work product. However, NCUA has a public duty to justify its actions to stakeholders - beyond a conclusory statement that the agency is not in violation of the APA. I accept that the 2003 legal opinion cited by NCUA may contain privileged information. If so, I merely ask that the agency draft and distribute an analysis of the legal issues that is suitable for public consumption.

In your letter, you suggest that the OTR falls within the APA exceptions for "Interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." The legal analysis commissioned by NASCUS addresses those exceptions in detail and concludes that they do not apply to the OTR because it substantially affects the rights of interested parties outside of the agency. If NCUA believes that analysis to be flawed, we encourage the agency to cite case law that supports an exemption for OTR and is controlling.

By disregarding the opportunity to clearly explain its legal reasoning, NCUA is removing any possibility that a meeting of the minds could occur. I respectfully disagree with the suggestion that complex legal issues should only be addressed in the courts. In my experience, litigation is a last resort after all avenues to reach a common agreement are exhausted. That stakeholders would have to shoulder the significant burden of suing a federal agency simply to receive a reasoned explanation of an agency action is disheartening, to say the least.

Our requests for additional information are intended to provide the credit union system with a holistic picture of the OTR debate. Although it may not resolve our differences of opinion on the subject, I believe it will enable a truly transparent evaluation of those differences. Given the direct impact of the OTR on the allocation of agency expenses across the industry, and the weaknesses

that have been identified with the current process during several independent reviews, I believe the credit union system deserves that much.

I strongly urge the agency to provide a detailed explanation justifying its refusal to submit the OTR to notice and comment rulemaking as soon as possible.

In closing, I genuinely thank you and the NCUA Board of Directors for your consideration and I look forward to a constructive dialogue that is driven by our shared objective for a fair, equitable, and robust dual charter credit union system.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lucy Ito".

Lucy Ito  
President & CEO

cc:

Steve Pleger, Chairman, NASCUS  
Debbie Matz, Chairman, NCUA  
Rick Metsger, Vice-Chairman, NCUA  
J. Mark McWatters, Board Member, NCUA