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May 27, 2020

James Hagen  
Inspector General  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314

Re: Agency Compliance with APA Requirements of Notice-and-Comment Rulemaking

Dear Mr. Hagen,

On behalf of the Independent Community Bankers of America (“ICBA”),<sup>1</sup> I am writing to request an investigation into the National Credit Union Administration’s (“NCUA”) action on May 7, 2020, which amended the definition of low-income credit union (“LICU”).<sup>2</sup>

The action, announced by NCUA Board Chairman Rodney Hood and published on the agency’s website, appears to meet the definition of an agency rulemaking that is subject to notice-and-comment procedures under the Administrative Procedure Act (“APA”). However, the agency has yet to adhere to any of the requirements set forth in the APA, and ICBA is concerned that the agency has no plans to do so, which would be a violation of law.

**Public policy dictates federal agency transparency when promulgating regulation**

NCUA compliance with the APA is not only required by federal law, but it is sound public policy that facilitates public trust in federal institutions. Failure to adhere to basic protocol raises a host of concerns regarding the opaqueness of the NCUA’s recent actions.<sup>1</sup> The agency did not address any of the traditional public policy goals behind rulemaking, including the need for the rule, the effective date, the legal authority, or the impact on small entities. Most disturbing, the

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<sup>1</sup> The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, more than \$4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America.

<sup>2</sup> See “NCUA Changes Low-Income Designation to Include Military Personnel in Calculation,” Press Release, May 7, 2020, available at <https://www.ncua.gov/newsroom/press-release/2020/ncua-changes-low-income-designation-include-military-personnel-calculation> (hereinafter, “Press Release”)

agency did not even entertain the opportunity for the public to weigh-in and offer comment on the proposed rulemaking, which if found to be legal and permissible, would dramatically benefit the country's largest credit union at the expense of smaller credit unions and community banks.

Alone, the agency's action would raise din and discord. But taken with the extrajudicial nature of the agency's rulemaking, these actions raise the specter of collusion that pose serious doubt as to the agency's motivations and whether it acted in an improper manner that benefits the nation's largest credit unions at the expense of the smallest.

As such, ICBA requests that the Office of the Inspector General examine the agency's justification for not complying with APA notice-and-comment requirements and whether the agency will cure for the apparent violation of law by issuing a notice-and-comment rulemaking.

### **Background**

On May 7, 2020, Chairman Hood delivered remarks during a Credit Union National Association low-income credit union webinar.<sup>3</sup> In those remarks, Chairman Hood declared that the NCUA would expand the definition of LICU to include all military members. Soon after, the agency issued a press release that reaffirmed the Chairman's declaration.<sup>4</sup> Neither the Chairman nor the press release addressed substantive issues, such as the effective date of the declaration, the procedure for credit unions being newly designated as LICUs, how many credit unions would be affected, or whether this would create a new burden on the industry. But of most concern, it appears that the agency has undertaken an action that constitutes a rulemaking, yet failed to follow APA procedures in promulgating the rule.

### **Defined terms and requirements under APA**

The APA prescribes procedures for agency rulemakings, where a "rulemaking" is defined as an "agency process for formulating, amending, or repealing a rule,"<sup>5</sup> and "rule" is any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."<sup>6</sup>

When an agency promulgates a rule, the APA generally requires the agency to provide a "notice and comment" opportunity. First, the agency must provide the public with notice of a potential rule by publishing the rule in the Federal Register. The notice must include vital information for

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<sup>3</sup> NCUA Chairman Rodney E. Hood's Opening Remarks During CUNA's Low-Income Credit Union Webinar, May 7, 2020, *available at* <https://www.ncua.gov/newsroom/speech/2020/ncua-chairman-rodney-e-hoods-opening-remarks-during-cunas-low-income-credit-union-webinar>.

<sup>4</sup> See Press Release, *supra* note 2.

<sup>5</sup> 5 U.S.C. § 551(5).

<sup>6</sup> *Id.* At § 551(4).

the public's consideration, including: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

After providing notice of a potential rule, the agency must also provide the public with adequate time to comment on the rule. After the agency considers the "relevant matter presented" by the comments, the agency shall then "incorporate in the rules adopted a concise general statement of their basis and purpose."

### **NCUA's action is a rulemaking under APA**

As a federal agency, NCUA is subject to the APA and must adhere to its requirements for rulemaking. Here, the agency's statement on how it would change the calculation of LICU meets the threshold set above. Chairman Hood's statement, and the agency's publication of such statement, clearly meets this threshold as his remarks were a "statement" that substantively amended the NCUA's interpretation of 12 U.S.C. Section 1752(5). While the agency certainly has the legal responsibility to interpret terms set forth by Congress, it also has the duty to interpret such statutory terms in a manner that is in accordance with the APA, specifically, by issuing a notice-and-comment rulemaking.

### **NCUA rulemaking does not meet exceptions under APA**

While certain rulemakings are wholly or partially exempt from notice-and-comment requirements under APA, NCUA's action does not appear to meet any of the characteristics that would provide such exemptions. Generally, matters related to (1) a military or foreign affairs function of the United States; (2) agency management or personnel; or (3) public property, loans, grants, benefits, or contracts are wholly excluded from notice-and-comment requirements under section 533.

Separately, other rulemakings are partially exempt from notice-and-comment procedures. Agency rules that are interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice are not subject to notice-and-comment requirements. Additionally, agencies have an option to find "for good cause" why a rulemaking should not undergo notice and comment. The good cause must explain why notice and comment is "impracticable, unnecessary, or contrary to the public interest."

Here, NCUA's action cannot reasonably be considered a military or foreign affairs function of the United States. Nor is the agency's action a matter related to management or personnel, as

it has a substantial effect on persons outside the agency, namely, small credit unions and community banks that are disadvantaged by the rule-change.<sup>7</sup>

Looking to partial exemption, the agency could argue that its action meets the characteristics of an interpretive rule or general statement of policy and is therefore exempt from notice-and-comment requirements. That is, the agency could argue that this rule is non-legislative. However, that argument should fail for three reasons.

First and foremost, Congress provided significant benefits to low-income credit unions in multiple sections of the Federal Credit Union Act. Given the affirmative benefits conferred by Congress on LICUs, how the agency interprets the term has significant import. The agency's interpretation of the term is not merely a general statement.

Nor is the definition of LICU merely an interpretive rule. It is a substantive rule issued pursuant to statutory authority.<sup>8</sup> An interpretive rule is generally characterized as a rule in which an agency announces its interpretation of a statute in a way that "only reminds affected parties of existing duties."<sup>9</sup> Here, the agency is not merely reminding affected parties of existing duties. It is actually creating a completely new class of credit unions that are exempt from limitations and mandates explicitly placed by Congress.

Finally, and perhaps most compelling, the agency has followed APA protocol in previous interpretations of "low-income credit union" and the methodology for determining the status. In April 2008, NCUA proposed revising the definition of "low-income members" in §§ 701.34(a)(2) and 705.3(a)(1) to base the determination on median family income or median earnings for individuals instead of median household income.<sup>10</sup> The fact that the agency has issued multiple notice-and-comment rulemakings for previous iterations should indicate that the NCUA already determined that agency interpretation of LICU is subject to APA procedures.

### **Troubling trend that warrants investigation**

Aside from the arguments based on merit above, ICBA is concerned about the wider implications of the agency ignoring APA procedure and the trends that this portends. Indeed, in the few short weeks since this agency action, Chairman Hood similarly tried to subvert APA procedure during the NCUA May 21, 2020 Board meeting where he made a motion to issue an

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<sup>7</sup> See *Stewart v. Smith*, 673 F.2d 485, 498 (D.C. Cir. 1982) ("[A] rule may not be characterized as one of 'management' or 'personnel' if it has a substantial effect on persons outside the agency.").

<sup>8</sup> Tom C. Clark, Attorney General, "Attorney General's Manual on the Administrative Procedure Act," at 30 (1947).

<sup>9</sup> *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)).

<sup>10</sup> 73 FR 22836 (April 28, 2008).

interim final rule with no opportunity for prior notice and comment.<sup>11</sup> Thankfully, the other two members of the Board declined to second his motion to issue the rule, with Vice Chairman McWatters stating there was no justification “to skirt the procedural safeguards afforded the public to comment on our [NCUA’s] regulatory action in a timely and transparent manner as prescribed under the Administrative Procedure Act.”<sup>12</sup> He went on further to say that the agency should “welcome and encourage” comments from all interested parties before declaring the rule as final.<sup>13</sup>

**Controversial rules must receive a vigorous round of comments from all interested parties**

All federal agencies should welcome and encourage comments from all interested parties, even for rules that are controversial. Indeed, given their controversial nature, it is those very rulemakings that stand the most to gain from fully public, transparent and compliant due process procedure. Unfortunately, NCUA seems to have taken the easy way out and has not even attempted to proffer any legal justification for avoiding APA requirements. Though reasonable minds may differ on interpretations of APA and what is subject to notice-and-comment, the fact that the agency did not even take pro forma steps of justifying its actions is troubling. As such, there is no argument being proffered as to why NCUA is not complying with APA.

In conclusion, ICBA respectfully reiterates our earlier request, to investigate the agency’s justification for not complying with APA notice-and-comment requirements and whether the agency will cure for the apparent violation of law by issuing a notice-and-comment rulemaking.

Sincerely,

/s/

Rebeca Romero Rainey  
President & CEO

CC: The Honorable Mike Crapo                      The Honorable Sherrod Brown  
The Honorable Maxine Waters                  The Honorable Patrick McHenry

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<sup>11</sup> See “NCUA Overdraft Proposal is Tabled After 2 Board Members Oppose It; Harper Calls Process ‘Sketchy,’” CUToday, May 21, 2020, *available at* <https://www.cutoday.info/Fresh-Today/NCUA-Overdraft-Proposal-is-Tabled-After-2-Board-Members-Oppose-It-Harper-Calls-Process-Sketchy>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*