Via electronic submission

August 13, 2019

The Honorable Chris Pilkerton
Acting Administrator
Small Business Administration
409 3rd Street, SW
Washington, DC 20416

Re: Memorandum of Understanding Between SBA and NCUA

Dear Acting Administrator Pilkerton:

The Independent Community Bankers of America ("ICBA")[1] writes to share our concern regarding the recent memorandum of understanding ("MOU") entered between the Small Business Administration ("SBA") and the National Credit Union Administration ("NCUA").[2] In particular, credit union participation in SBA loan programs frustrates the spirit of "free competitive enterprise" that is at the heart of the Small Business Act ("Act").[3] If, indeed, the

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $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. For more information, visit ICBA's website at www.icba.org.

[2] "NCUA/SBA Partnership Will Help Credit Unions Support Small Businesses," Apr. 20, 2019, NCUA Newsroom, available at: https://www.ncua.gov/newsroom/press-release/2019/ncuasba-partnership-will-help-credit-unions-support-small-businesses.

[3] *See* 15 U.S.C. 631(a), finding that, "[t]he essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and

"essence of the American economic system of private enterprise is free competition," then SBA should no longer encourage and enable credit unions to participate in SBA loan programs; credit unions do not exhibit the traits of "free competition" that underlie the Act.

Only Through Full and Free Competition Can Free Markets Be Assured

In passing the Act, Congress declared that the government should aid and assist the interests of small-business concerns to preserve free competitive enterprise.[4] Part of this assistance included the creation of several loan programs, such as section 7(a) of the Act. Section 7(a) empowers the SBA to make loans to small businesses, either directly or in cooperation with banks on a guaranteed basis. There are, however, several requirements and restrictions associated with the 7(a) loan program.

One such requirement is the "credit elsewhere test," which limits SBA assistance to those businesses that can demonstrate that the desired credit is not otherwise available on reasonable terms from non-Federal, conventional sources.[5] Congress placed this limitation in the Act so that federal government subsidies do not displace conventional, private enterprise. Since the essence of the Act is to promote private enterprise, it would be quite perverse if federal subsidies provided direct competition to private enterprise.

Another requirement in the 7(a) loan program is that loans can only be made to for-profit companies.[6] Recognizing that non-profit entities already receive a federal subsidy in the form of tax exemption, it is reasonable to conclude that the Congress did not want non-profit companies to "double-dip" federal subsidies: once, by receiving a tax exemption subsidy, then once again, by receiving a 7(a) loan subsidy.

Federally Subsidized Competition and "Double-Dipping" Does Not Represent Full and Free Competition

As you are likely aware, credit unions receive a federal subsidy through their tax exemption.[7] When credit unions compete with private enterprises, such as community banks, the subsidy

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services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation."

[4] *Id*.

[5] 15 U.S.C. 636(a) and 13 CFR 120.101.

[6] 13 CFR 120.100(b)

[7] Federal credit unions are tax exempt under section 501(c)(1) of the Internal Revenue Code and state-chartered credit unions are exempt under section 501(c)(14) of IRC.

bestows a competitive advantage over private enterprises, which is at odds with the contention that Congress does not want government subsidies to displace private, conventional lenders.

Likewise, credit unions that originate SBA loans are able to double-dip into federal subsidies, first, through their tax exemption, and second, by receiving a guarantee on a substantial portion of SBA loans, which itself is exempt from being included in credit unions' member business loan cap.[8] The Act attempts to limit this "doubling-up" of benefits on the recipient of loan proceeds; the same logic should hold for the originator of those loans, as well.

Given the Act's contemplation that federal subsidies should not compete with private enterprise nor unfairly confer twice the benefit on certain organizations, ICBA contends that the SBA should reconsider credit union participation in SBA loan programs, or at the very least, terminate its MOU with NCUA that encourages credit union participation. Not to do so would frustrate the purpose of the Act and inhibit free competition.

ICBA hopes these comments allow the SBA to view credit unions in a different light and reconsider their continued participation in SBA loan programs.

Sincerely,

/s/

Rebeca Romero Rainey
President and CEO
Independent Community Bankers of America

CC: The Honorable Marco Rubio
Chairman
Committee on Small Business & Entrepreneurship

The Honorable Nydia M. Velázquez
Chairwoman
Committee on Small Business

[8] Section 1757a of the Federal Credit Union Act places an aggregate limit on a federally insured credit union's net member business loan balances to the lesser of 1.75 times the actual net worth of the credit union, or 1.75 times the minimum net worth required under the Act. However, section 1757a(c)(1)(B)(iv) excludes government guaranteed loans from that general limit.