IDAHO
DEPARTMENT OF FINANCE

C.L. "BUTCH" OTTER
Governor

GAVIN M. GEE
Director

April 26, 2016

Mr. Gerard Poliquin
Secretary to the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3418

Via Email to boardcomments@ncua.gov

Re: Comment on Overhead Transfer Rate Methodology

Dear Mr. Poliquin:

The Idaho Department of Finance (Department) appreciates the opportunity to comment on the methodology the National Credit Union Administration (NCUA) uses to determine the Overhead Transfer Rate (OTR). The Department regulates all state-chartered financial service providers in Idaho except for the insurance industry; this includes the regulation of 25 state-chartered credit unions, with total assets of $4.2 billion. The largest state-chartered financial institution in Idaho is a credit union: Idaho Central Credit Union with total assets of $2.4 billion.

The OTR is a matter of significant concern to the Department as its misapplication may disadvantage federally-insured state-chartered credit unions in real ways. As the OTR increases, the amount of NCUA's budget required to be funded by operating fees paid by federal credit unions (FCUs) decreases. If the methodology is inherently flawed, the result is an unfair competitive disadvantage to state credit unions and the state charter. In addition, an unnecessarily higher OTR reduces income of the National Credit Union Share Insurance Fund (NCUSIF) and reduces the amount of funds available for dividends to all federally-insured credit unions.

Contributing to and illustrating this concern is the increasing OTR and its impact on relative expenses borne by state credit unions and FCUs. The OTR was held steady at 50 percent from 1986 until 2000, but has increased since that time, to 71.8 percent in 2015. Most dramatically, the OTR increased from 59.1 percent in 2013, to 69.2 percent in 2014, and 71.8 percent in 2015. As a direct result, although NCUA operating expenses increased $37.7 million during that period, the operating fees paid by FCUs *decreased* $14.3 million.

The Department believes that the fundamental flaw in the OTR methodology is that it allows funding for NCUA's regulatory responsibilities for FCUs to be inappropriately borne by state

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credit unions. The NCUA's budget is funded by (1) fees and assessments levied on insured credit unions pursuant to Title I of the Federal Credit Union Act, including annual operating fees charged to FCUs, 12 U.S.C. § 1755, and (2) transfers from the NCUSIF for purposes of administering Title II "Share Insurance" of the Act, 12 U.S.C. § 1783(a). The "Title I" responsibilities, to charter and supervise FCUs, date back to the original Federal Credit Union Act, enacted in 1934; the responsibilities were initially given to the Farm Credit Administration, before transferring to other agencies and ultimately resting with the NCUA upon its creation in 1970. The "Title II" responsibilities, to administer the NCUSIF, were given to the NCUA in 1970.

Over time, the NCUA has determined that its oversight of the great majority of federal rules and regulations that relate to credit unions is for the purpose of protecting the NCUSIF – Title II responsibilities - and therefore should be funded by transfers from the NCUSIF pursuant to the OTR. This conclusion ignores the agency's initial obligation to charter and supervise FCUs – Title I responsibilities - and shifts those costs to state credit unions through the OTR.

The Department further believes that there are issues essential to the OTR that are legal questions that cannot be answered by a financial analysis of the OTR methodology. We appreciate that NCUA has invited comment on the definition it uses for "insurance-related activities." Even if one assumes that all NCUA regulations outside of those designed solely to protect consumers may be construed as insurance-related, broader legal issues are presented by the OTR. Questions remain regarding congressional intent in allocating oversight of these regulations between the NCUA and state supervisors, and allocating costs of the oversight to FCUs as part of safety and soundness supervision as opposed to review of risk to the NCUSIF. In other words: what are NCUA's Title I obligations and how did Congress intend NCUSIF funds to be used?

To arrive at the proper answer, we encourage NCUA to submit the OTR to the Administrative Procedures Act (APA) notice and comment process. The Department has studied the legal arguments on this issue published on behalf of the National Association of State Credit Union Supervisors (NASCUS)[1] and the NCUA[2]. We are persuaded that the NCUA's adoption of the OTR is a rule subject to the APA notice and comment requirements. However, regardless of which arguments would ultimately prevail before a court, the NCUA could choose to waive the statutory exemptions from the APA notice and comment requirements it relies upon, and voluntarily submit the OTR to the process. This would support the public policy of the APA, that agencies should first inform parties affected by agency actions and give them an opportunity to comment. It would also allow NCUA to receive valuable feedback from affected parties and lead to greater acceptance of the methodology.

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[1] Legal Analysis of the Administrative Procedure Used by the National Credit Union Administration to Adopt the Overhead Transfer Rate, Report to the National Association of State Credit Union Supervisors, Schwartz & Ballen LLP, June 17, 2015.

[2] Letter to Ms. Lucy Ito from Michael J. McKenna, General Counsel, NCUA, August 15, 2015.

The dual roles of NCUA as the chartering agency for FCUs and the insurer of both FCUs and state credit unions create an inherent conflict of interest and remain troubling. The Federal Credit Union Act § 211, 12 U.S.C. § 1790, makes clear that NCUA's Title II powers shall not be used to discriminate against state credit unions and in favor of FCUs. The results of the OTR methodology – increasingly shifting the cost of NCUA regulatory oversight of FCUs to state credit unions – create at least the appearance of discriminatory treatment. This is particularly true when the methodology and the ultimate underlying legal questions are not open to the sunlight of the APA notice and comment process.

We again express our appreciation for the invitation to comment on this important issue. We respectfully request that the OTR methodology be revised so that the full cost of FCU safety and soundness examinations be funded by FCU operating fees; that NCUA as administrator of the NCUSIF rely on examinations performed by state regulatory agencies to the maximum extent possible in order to reduce costs to the NCUSIF; and that the OTR methodology be subject to APA notice and comment procedures.

Sincerely,

Gavin M. Gee
Director of Finance

cc: Honorable C.L. "Butch" Otter
Honorable Mike Crapo, U.S. Senator
Honorable James E. Risch, U.S. Senator
Honorable Mike Simpson, U.S. Representative
Honorable Raul Labrador, U.S. Representative
Kathy Thomson, Idaho Credit Union League
Lucy Ito, NASCUS