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December 18, 2018

ATTN: Comments/ RIN 3245-AG74

Ms. Kimberly Chuday
Office of Financial Assistance
U.S. Small Business Administration
409 3rd St., SW
Washington, DC 20416

Re: RIN 3245-AG74
Express Loan Programs; Affiliation Standards Proposed Rule

Dear Ms. Chuday:

As the largest credit union advocacy organization in this country, the Credit Union National Association's (CUNA) state and federal credit unions currently serve 115 million members. On behalf of credit unions, CUNA submits these comments on the U.S. Small Business Administration's (SBA) proposed rule entitled Express Loan Programs; Affiliation Standards (RIN: 3245-AG74). Specifically, while CUNA's members are committed to supporting guidelines that help protect the integrity of the SBA's loan programs and provide both lenders and borrowers with bright lines for compliance, we are concerned that some of the recently proposed changes are unduly burdensome and will have the unintended consequence of constraining credit unions' ability to responsibly provide businesses with the capital and credit that they need. Accordingly, we urge the SBA to reconsider three of its proposed changes:

- (1) the suggested reimplemention of the personal resources test;
- (2) the proposed cap on lender fees; and
- (3) the application of an "identity-of-interest" standard.

Credit Unions Play an Increasingly Important Role in Small Business Lending

Ever since 2003, when the SBA first expanded its loan guarantee programs to include originations by credit unions,¹ credit unions have become an increasingly important provider of

¹ U. S. Small Business Administration, "SBA Expands Opportunities for Small Business Through Credit Union," SBA News Release (Feb. 14, 2003), *available at* <http://www.sba.gov/content/press-release-archive-0>.

loans to America's small businesses. In fact, in the aftermath of the financial crisis, it was credit unions that significantly increased their small business lending to provide businesses with the necessary capital to sustain and grow their operations.² Between 2008 and 2016, credit unions' small business lending activity doubled to more than \$60 billion.³ Small business lending by banks decreased by \$100 billion during this same timeframe.⁴ This increase in credit unions' business lending activity was accomplished despite the very real impediment created by the member business lending cap and was, without question, greatly assisted by support from the SBA. Accordingly, the more than 5,000 credit unions currently operating in the United States have a vested interest in the continued efficiency of the SBA's loan programs. Given this interest, CUNA would like to highlight three areas of the proposed regulatory changes to SBA's programs that may be problematic for credit unions' SBA lending efforts.

The Choice to Reimplement the Personal Resources Test Raises Concerns.

In late 2013/early 2014, the SBA sought to implement "several changes intended to reinvigorate the business loan programs by eliminating unnecessary compliance burdens and loan eligibility restrictions."⁵ As part of that necessary overhaul, the Administration consciously eliminated the application of the personal resources test to both the 504 and 7(a) loan programs. At the time of that decision, the Administration specifically found that application of the test was both onerous and burdensome. Yet, approximately four years later and despite that determination, the SBA's proposed rule seeks to reimplement the personal resources test. In doing so, the Administration asserts merely that "SBA is now concerned that borrowers with large amounts of personal assets are receiving government-backed loans."

CUNA notes that, in addition to eliminating the personal resource test because of the determination that compliance with the regulation was onerous and burdensome, the SBA previously acknowledged that the availability of personal resources helps to limit the risk of default by borrowers. Accordingly, allowing principals of a business to retain personal resources makes it more likely that they will have funds available to grow and sustain their businesses in the event of an economic downturn. Additionally, CUNA is concerned that the personal resource test includes consideration of the assets of a child and spouse without providing any ability for a lender to consider whether those funds have been committed to other expenses, such as college tuition, etc. The absence of lenders' ability to consider whether the funds have been committed for other reasonable purposes makes it likely that application of the personal resources test will not provide an accurate picture of, or even inflate, the amount of resources that a principal actually has available to contribute as capital for the business. Accordingly, CUNA strongly urges the SBA to reconsider the proposed reimplementations of the personal resources test.

² Divya Raghavan, The Debate Over Small Business Lending at Credit Unions, Nerdwallet (Aug. 15, 2012).

³ U.S. Small Business Administration Report, "How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?," January 2018, summary available at <https://www.sba.gov/sites/default/files/rs439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf>.

⁴ Id.

⁵ See 78 FR 12633, Issue 37 (Feb. 25, 2013).

The Proposed Cap on Lenders Fees May Unintentionally Constrain Small Dollar Credit.

As part of its proposal, the SBA has suggested the adoption of a rule that would change the permissibility of fees charged by 7(a) lenders. Under current regulations, a Lender may charge an Applicant reasonable fees (fees customary for similar Lenders in the geographic area where the loan is being made) for packaging and other services.⁶ Under the new proposal, however, the SBA would cap the fees that a Lender would be permitted to collect from the Applicant at no more than \$2,500 for a loan up to and including \$350,000 and no more than \$5,000 for a loan over \$350,000.

While lowering fees for small business loans may seem ideal at first glance, it is important to also consider the impact that decreased fees may have on the profitability of small dollar business loans for lenders and, as a result, the availability of small-dollar business credit. As a practical matter, small-dollar business loans—usually defined as business loans below \$1 million—are already considerably less profitable than larger business loans. This is true because small-business lending is riskier, assessing the creditworthiness of small businesses is often more difficult due to information asymmetry, the costs of underwriting are higher due to the heterogeneity of small businesses and the lack of a secondary market for the loans, and the transaction costs are often comparable to those associated with a loan in excess of one million dollars. These realities already make the profit margin on small dollar business loans thin. If implemented, the caps proposed by the SBA will further impair the profitability of small dollar business loans. Yet, the proposed rule fails to mention any discussion or assessment of why the SBA has chosen to supplant the “reasonable fee standard” with its geographic considerations in favor of the flat \$2,500 and \$5,000 fee caps. Instead, the proposal merely contains the following statement:

“SBA considers these fees to be reasonable for the services provided by a Lender to an Applicant for assistance with obtaining an SBA-guaranteed loan.”

The SBA’s conclusory statement provides no meaningful insight into the reasoning behind the proposed change and fails to demonstrate that the administration has undertaken any analysis of the profitability of loans for lenders under the proposed fee constraints. CUNA strongly urges the SBA to conduct this analysis and publish the result for public comment prior to implementing any proposed fee constraints.

The Suggested Identity-in-Interest Standard Will Likely Deprive a Significant Portion of the Agricultural Industry of Access to SBA Loan Programs.

Finally, CUNA notes that many in the agricultural industry have suggested that the SBA’s proposed “identity-in-interest standard” is so broad that it threatens to render many businesses in the agriculture sector ineligible for loans based on their contractual relationships with the buyers and distributors of their products. This concern is based on the SBA’s statement that “identity-in-interest” would include common investments or economic dependence (contractual or other relationships) among other parties beyond close relatives without any additional explanation. The

⁶ 13 CFR 120.221(a).

absence of a more detailed definition of the identity-in-interest standard will pose problems for credit unions seeking to comply with the SBA's affiliation requirements and vetting of prospective borrowers. Accordingly, CUNA urges the SBA to analyze the impact of imposing the identity-in-interest standard given the concerns raised about its impact on the agricultural sector and ambiguity in application.

Conclusion

The SBA remains a critical partner for credit unions as they seek to meet members' needs for business capital and credit. Accordingly, CUNA applauds the SBA's efforts to streamline its rules by incorporating the SBA's Standard Operating Procedures into the Administration's regulations and undertaking a series of technical corrections that will help clarify the requirements of the affected SBA loan programs. CUNA, however, has serious concerns regarding some aspects of the proposed regulation—including the reimplementation of the personal resources test, the flat cap on lenders fees, and the identity-in-interest standard. On each of these issues, we urge the SBA to conduct additional analysis and work with credit unions to resolve concerns prior to incorporating any changes into a final rule. On behalf of credit unions and the more than 110 million members they serve, thank you for considering our comments.

Sincerely,

Mitria Wilson
Sr. Director of Advocacy and Counsel