NEW YORK creditunion ASSOCIATION

strength in members.

January 12, 2015

Alfred M. Pollard, General Counsel
Attention: Comments/RIN 2590-AA39
Federal Housing Finance Agency
400 Seventh Street S.W., Eighth Floor
Washington, DC 20024

Dear Mr. Pollard,

On behalf of the New York Credit Union Association, I would like to comment on the Federal Housing Finance Administration's (FHFA) proposed regulation requiring that Federal Home Loan Bank (FHLB) members satisfy minimum mortgage portfolio requirements on an ongoing basis. There are 64 credit unions in New York State that belong to an FHLB so this proposal could potentially have a substantial operational impact on a large cross section of New York State lending institutions. While the Association is sympathetic to the FHFA's desire to ensure that members of the FHLB system be committed to making residential mortgage loans, its suggested solution would impose additional mandates on credit unions that already have a record of providing low-cost mortgage loans.

Overview

Since its creation in 1932, the primary purpose of the FHLB system has been to put "long term funds in the hands of local institutions in order to alleviate the pressing need of homeowners for low cost" mortgages (See: Laurens Fed. Sav. & Loan Ass'n v. S. Carolina Tax Comm'n, 365 U.S. 517, 521-22, 81 S. Ct. 719, 721, 5 L. Ed. 2d 749 [U.S.S.C. 1961]). Its enabling statue extends membership to any bank, credit union, insurance company, community development financial institution or savings and loan association—organized under the laws of the U.S.—that makes long-term mortgage loans as defined by the FHFA, and is subject to the inspection and regulation of banking or similar regulators (12 USCA §1424). These general requirements were further augmented by Congress in 1989 when it passed legislation requiring that any institution that wishes to become a member have at least 10 percent of its total assets in residential mortgage loans (12 U.S.C.A. §1424).

This proposal includes three provisions upon which the Association wishes to comment:

(1) the requirement that members maintain at least 1 percent of their assets in long-term mortgage loans - distinct from residential mortgage loans - on an ongoing basis based on a three-year rolling average (See proposed 12 CFR 1263.9);
(2) the updates to the 10 percent requirement, which will make it an ongoing requirement and compliance based on a three-year rolling average; and
(3) the greater flexibility given to members meeting the 10 percent requirement by expanding the definition of a residential mortgage loan to include mortgage-backed securities.

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Credit Unions will be uniquely and negatively impacted

One of FHFA's goals, as stated in the rule's preamble, is to ensure that—whatever minimum level of home mortgage loans it decides to mandate—the level should "not be so high as to require a significant number of members to materially alter their business and investment practices in order to retain their bank membership." Unfortunately, credit unions would be uniquely and negatively impacted by this proposal. Most credit unions will be able to comply with the proposed thresholds, but should not be required to do so in light of the mandates already imposed on them and the track record of credit unions in making mortgage loans.

When Congress imposed a 10 percent requirement on financial institutions in 1989, it exempted FDIC-insured institutions with $1 billion or less in assets. Since credit unions are insured by their own Share Insurance Fund they are not eligible for this exemption. Consequently, FHFA's proposed 1 percent requirement would constitute an additional mandate on credit unions with less than $1 billion in assets as compared to the only ongoing membership mandate imposed on their similarly sized banking counterparts. When FHFA promulgates a final regulation, it should follow the example of the CFPB and exempt institutions with $2 billion or less in assets from the 1 percent requirement.

The imposition of a statistically-based, mandatory, on-going, long-term Mortgage Lending Requirement is of further concern to credit unions, since it is being proposed as the NCUA is considering imposing risk-based capital requirements designed to deter credit unions from having concentrations of long-term mortgage loans in their portfolios. For example, NCUA has proposed that current and non-delinquent first mortgage real estate loans greater than 35 percent of total assets; delinquent first mortgage real estate loans and other real estate-secured loans less than or equal to 10 percent of assets; be given a 100 percent capital risk weighting (See: Prompt Corrective Action—Risk-Based Capital, 79 FR 11184-01, 11194). Credit unions that must comply with NCUA's risk-based framework could very well be confronted with the need to scale back mortgage lending, while at the same time, attempting to comply with a mandate to make a certain number of mortgage loans on an ongoing basis. The NCUA is expected to shortly be issuing a new risk-based capital proposal. This is not the time to be giving credit unions less flexibility in balancing regulatory requirements against member needs.

FHFA seeks feedback on the extent to which the 1 percent requirement should be amended to account for institutions that sell the mortgages they originate to the secondary market. Many credit unions, particularly smaller ones, sell most of their mortgages to the secondary market. These institutions are committed to providing mortgage loan products to their members but may not have the volume or field of membership necessary to ensure ongoing compliance with numerical targets of the kind being proposed in this regulation. A final regulation should base compliance with membership requirements on how many loans a lender originates, not on how many loans it holds. Such information is provided on call reports. As long as an institution is providing mortgage loans, the purpose of the FHLB system is being advanced, regardless of whether or not a loan is subsequently sold to the secondary market.

Similarly, few of the provisions in the proposal intended to alleviate the potential compliance burden would help most credit unions. For example, the FHFA is proposing that mortgage- backed securities be considered mortgages for purposes of complying with the 10 percent requirement. Most credit unions are not eligible to invest in these instruments.

The primary impetus for this proposal is the FHFA's concern that existing membership requirements are too easily circumvented. According to the agency, captive insurance companies are being created by Real Estate Investment Trusts primarily so that they can qualify for FHLB membership. Subsequently, the insurance companies transfer FHLB advances to their parent REITs. The Association is not in a position to independently ascertain how justified these concerns are; however, regulations could easily be drafted to address the specific issues raised by FHFA with regard to insurance captives without subjecting credit unions (and banks for that matter) to enhanced regulatory oversight. From a policy standpoint, there is a clear distinction that can and should be drawn between credit unions, which are created in part to provide mortgage loans to their members, and institutions that do not specialize in making loans to consumers.

FHFA Regulation is based on a flawed legal analysis

The FHFA is basing its authority to impose a continuing mortgage requirement on the assumption that the statute delineating FHLB membership qualifications is silent as to whether or not members are to be subject to ongoing obligations (See: Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 [1984]). Where a statute is clear and unambiguous with respect to the question presented, an agency must give effect to the unambiguously expressed intent of Congress (See: Garcia-Carias v. Holder, 697 F.3d 257, 263 [5th Cir. 2012]).

The FHFA argues that the statute is silent as to whether or not requirements are to be judged on an ongoing basis. However, this is a classic example of an agency reading ambiguity into a statue where there is none to justify a more favorable interpretation. The law provides that an institution "shall be eligible to *become* a member of a Federal Home Loan Bank if such institution" satisfies specified conditions at the time of application (12 U.S.C.A. § 1424 [West]). These include a requirement that an institution "*has* at least 10 percent of its total assets in residential mortgage loans."

"Become" is a very specific present tense verb which denotes that membership is to be judged solely at the time an institution applies for membership (http://www.merriam-webster.com/dictionary/become). "Has" is the present tense third person singular of have. Congress could have specified that depository institutions *may be members only if…*but it chose to limit explicit requirements to institutions applying to become members. Congressional intent in creating the FHLB system was to assist institutions to make affordable long-term loans. To the extent that institutions are gaining access to the system that don't provide mortgage loans, such institutions can and should be excluded from membership; it does not follow that Congress intended members to be subject to inflexible benchmarks.

Few depository institutions are going to make mortgage loans to meet FHLB eligibility requirements only to intentionally stop making such loans once they become members. The FHLB can and should use its powers to ensure that only institutions with a commitment to originating or holding mortgages be accorded the privilege of membership. In contrast, if even only a handful of credit unions that make mortgage loans are no longer eligible to do so because of a change in the lending environment, or an unwillingness to comply with the increased compliance burden, that is too many.

Sincerely,

William J. Mellin
President/CEO