

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

Overhead Transfer Rate Methodology

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Notice.

SUMMARY:

In June 2017, the NCUA Board (Board) published a notice and request for comment on proposed changes to its Overhead Transfer Rate (OTR) methodology and sought industry comments on the proposed changes.¹ This Final Notice discusses the comments received and provides the Board's response to the comments. This Final Notice also sets forth the new OTR methodology the Board has chosen to adopt after consideration of the public comments received.

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SUPPLEMENTARY INFORMATION

¹ Request for Comment Regarding Revised Overhead Transfer Rate Methodology, 82 FR 29935 (June 30, 2017).

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I. Background and Legal Authority

The NCUA administers the Federal Credit Union Act (the Act), which is comprised of three Titles: Title I - General Provisions, Title II – Share Insurance, and Title III – Central Liquidity Facility. Pursuant to the Act, the NCUA charters, regulates, and insures shares in federal credit unions and insures shares and deposits in federally insured state-chartered credit unions through the National Credit Union Share Insurance Fund (Share Insurance Fund). The NCUA is responsible for ensuring federally insured credit unions operate safely and soundly and comply with all applicable laws and regulations within the NCUA’s jurisdiction.² In so doing, the agency mitigates risk to the Share Insurance Fund and prevents taxpayer-funded bailouts. The agency’s mission is to “provide, through regulation and supervision, a safe and sound credit union system, which promotes confidence in the national system of cooperative credit.”³ This includes protecting member rights and deposits.

² In coordination with State Supervisory Authorities with respect to federally insured state-chartered credit unions.

³ <https://www.ncua.gov/About/Pages/Mission-and-Vision.aspx>.

To achieve its statutory mission, the agency incurs various expenses, including those involved in examining and supervising federally insured credit unions. The Board adopts an Operating Budget in the fall of each year to fund the vast majority of the costs of operating the agency.⁴ The Act authorizes two primary sources to fund the Operating Budget: (1) Requisitions from the Share Insurance Fund “for such administrative and other expenses incurred in carrying out the purposes of [Title II of the Act] as [the Board] may determine to be proper”;⁵ and (2) “fees and assessments (including income earned on insurance deposits) levied on insured credit unions under [the Act].”⁶ Among the fees levied under the Act are annual Operating Fees, which are required for federal credit unions under 12 U.S.C. 1755 “and may be expended by the Board to defray the expenses incurred in carrying out the provisions of [the Act,] including the examination and supervision of [federal credit unions].” Taken together, these dual primary funding authorities effectively require the Board to determine which expenses are appropriately paid from each source while giving the Board broad discretion in allocating these expenses.

To allocate agency expenses between these two primary funding sources, the NCUA uses the OTR. The OTR represents the formula the NCUA uses to allocate insurance-related expenses to the Share Insurance Fund under Title II. Almost all other operating expenses are collected through annual Operating Fees paid by federal credit unions.⁷ Two statutory provisions directly

⁴ Some costs are directly charged to the Share Insurance Fund when appropriate to do so. For example, costs for training and equipment provided to State Supervisory Authorities are directly charged to the Share Insurance Fund.

⁵ 12 U.S.C. 1783(a).

⁶ 12 U.S.C. 1766(j)(3). Other sources of income for the Operating Budget include interest income, funds from publication sales, parking fee income, and rental income.

⁷ Annual Operating Fees must “be determined according to a schedule, or schedules, or other method determined by the NCUA Board to be appropriate, which gives due consideration to the expenses of the [NCUA] in carrying out its responsibilities under the [Act] and to the ability of [FCUs] to pay the fee.” 1755(b). The Board’s methodology for determining the aggregate amount of Operating Fees was discussed in a separate *Federal Register* publication. 81 FR 4674 (Jan. 27, 2016).

limit the Board’s discretion with respect to Share Insurance Fund requisitions for the NCUA’s Operating Budget and, hence, the OTR. First, expenses funded from the Share Insurance Fund must carry out the purposes of Title II of the Act, which relate to share insurance.⁸ Second, the NCUA may not fund its entire Operating Budget through charges to the Share Insurance Fund.⁹ The NCUA has not imposed additional policy or regulatory limitations on its discretion for determining the OTR.

In 1972, the Government Accountability Office recommended the NCUA adopt a method for properly allocating Operating Budget costs – that is, the portion of the NCUA’s budget funded by requisitions from the Share Insurance Fund and the portion covered by Operating Fees paid by federal credit unions.¹⁰ The NCUA has since used an allocation methodology, known as the OTR, to determine how much of the Operating Budget to fund with a requisition from the Share Insurance Fund.

The NCUA has employed various allocation methods over the years, with the methodology adopted in 2003. For a chronological history of the OTR, refer to *Overhead Transfer Rate (OTR) – Timeline* at <https://www.ncua.gov/About/Documents/Budget/Misc%20Documents/overhead-transfer-rate-chronology.pdf>. For a detailed explanation of the prior methodology, refer to *Federal Register – NCUA Request for Comment Regarding Overhead Transfer Rate Methodology* at

⁸ 12 U.S.C. 1783(a).

⁹ The Act in 12 U.S.C. 1755(a) states, “[i]n accordance with rules prescribed by the Board, each [federal credit union] shall pay to the [NCUA] an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed.” See also 12 U.S.C. 1766(j)(3).

¹⁰ <http://www.gao.gov/assets/210/203181.pdf>.

<https://www.federalregister.gov/documents/2016/01/27/2016-01626/request-for-comment-regarding-overhead-transfer-rate-methodology>.

In January of 2016, the Board voluntarily published its OTR methodology in the *Federal Register* and invited industry comment.¹¹ In June 2017, the Board proposed changes to the OTR methodology in the *Federal Register* and requested comments on the proposed changes.¹²

Within the 60-day comment period, the NCUA received 26 comment letters on the OTR methodology. The commenters included federal credit unions, federally insured state-chartered credit unions, national credit union trade organizations, state leagues, state supervisory authorities, and a credit union service organization (CUSO).

II. Legal Authority Comments and Responses

In response to its initial OTR notice in January 2016, the NCUA received a variety of comments related to the legal authority to requisition funds from the Share Insurance Fund to cover a portion of the Operating Budget. Several of the 2016 commenters stated the agency does not have authority or discretion to establish and determine the OTR. Some commenters asserted that the NCUA lacks the legal authority to use the Share Insurance Fund to cover costs of operating the agency. Other commenters claimed the NCUA has only very narrow authority to allocate

¹¹ Request for Comment Regarding Overhead Transfer Rate Methodology, 81 FR 4804 (Jan. 27, 2016).

¹² Request for Comment Regarding Revised Overhead Transfer Rate Methodology, 82 FR 29935 (June 30, 2017). The OTR does not require notice-and-comment procedures. The NCUA's legal analysis with respect to the OTR and Administrative Procedure Act processes is available at the following Web page: <https://www.ncua.gov/Legal/Documents/Opinion/OL2015-0818.pdf>.

costs, has too broadly interpreted its authority, and may assign to the Share Insurance Fund only those costs directly associated with share insurance payments for failed or troubled credit unions. Some commenters insisted the NCUA is required to fund the vast majority of the cost of operating the agency through Operating Fees charged to federal credit unions, claiming Congress intended that Operating Fees were to subsidize costs in managing risk to the Share Insurance Fund. Finally, some commenters insisted that the Board must use APA notice-and-comment processes to establish the OTR. To the extent commenters explained their positions, they read various limitations into the provisions the NCUA cites in Section I above and the response below and pointed to the Act's legislative history.

In response to the June 2017 Request for Comment the NCUA received a number of comments that reiterated the substance of or referenced points made in the comments received in response to the January 2016 Request for Comment. While helpful, the comments did not advocate materially new legal arguments or substantively expand on ones made in response to the January 2016 Request for Comment. Accordingly, the substance of the Board's responses to comments largely tracks those published in the June 2017 notice, with minor alterations. The Board believes this will be helpful to stakeholders in addressing questions they may have by once again fully explaining the NCUA's legal analysis set forth above.

Various commenters disagreed with the agency's legal analysis and argued that some combination of 12 U.S.C. 1781(b)(1), 1782(a)(5), and 1790 also limit the NCUA's requisition of funds from the Share Insurance Fund for the Operating Budget. Several commenters went further and argued that Title II's legislative history indicates the savings from the NCUA's

reliance on Title I and State Supervisory Authority examinations and reports should accrue to the benefit of the Share Insurance Fund. Having considered these comments, the NCUA maintains that a plain reading of the Act, as described in section I above and in both the January 2016 and June 2017 notices, supports the agency's legal authority and broad discretion in allocating operating costs. As the Board previously stated, the Act's plain language does not require an analysis of the legislative history.¹³ Even if legislative history was applicable in this case, the plain reading of the Act is consistent with the legislative history and does not support commenters' interpretation that Congress intended costs savings provisions to only accrue to the Share Insurance Fund as discussed below.

a. Allocation of the Cost Savings from the NCUA's Dual Roles

Multiple commenters stated that the plain language of the Act requires the Board to structure examinations and Call Reports originally required under Title I so they may be used for Title II share insurance purposes. These commenters similarly stated that the Act places requirements on the NCUA to use state regulator examinations and reports to the maximum extent feasible.

As the Board has previously explained, Title II of the Act, in 12 U.S.C. 1781(b)(2), authorizes examinations as needed for the protection of the Share Insurance Fund and other credit unions in addition to those permitted under Title I, recognizing that the scope and timing of Title I examinations does not necessarily satisfy share insurance needs under Title II. With respect to use of state regulator exams and reports, the Board is careful to build efficiencies wherever

¹³ See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 ((2002)).

reasonable in light of the NCUA’s dual roles as (1) charterer and prudential regulator of federal credit unions and (2) insurer of federal credit unions and federally insured state-chartered credit unions. This ensures the NCUA uses state regulator examinations and reports to the maximum extent feasible for purposes of insurance. Efficiencies gained from the NCUA’s dual role provide cost savings and help avoid subjecting credit unions to the burden of redundant examinations.

Further, the Act’s provisions on cost savings do not prohibit the NCUA from allocating insurance-related operating expenses to the Share Insurance Fund through the OTR under 12 U.S.C. 1783(a). Specifically, 12 U.S.C. 1781(b)(1) requires the NCUA to adjust the way it conducts examinations of federal credit unions so they may be “utilized for share insurance purposes.” This provision does result in cost savings. However, it does not preclude the NCUA from allocating the costs of the “share insurance purposes” portion of federal credit union examinations to the Share Insurance Fund.¹⁴ The Board thus disagrees with commenters that argued the Act requires the cost-savings of the NCUA’s dual roles to accrue specifically to the Share Insurance Fund.

b. 12 U.S.C. 1790—Prohibition of Discrimination Based on Charter Type

With respect to 12 U.S.C. 1790, the Board agrees with commenters stating that this provision should inform the NCUA’s interpretation of Title II so that it consciously avoids discrimination

¹⁴ With respect to call reports and other ongoing reports submitted by federally insured credit unions, 12 U.S.C. 1782(a)(5) is also a cost savings provision but does not preclude allocating insurance-related costs of the applicable data collections to the Share Insurance Fund.

against federally insured state-chartered credit unions to the benefit of federal credit unions.¹⁵

However, the Board does not believe that either the prior OTR process or the one adopted in this Final Notice discriminates against federally insured state-chartered credit unions or federal credit unions to the benefit of the other.

As background, all federally insured credit unions are subject to the same requirements for funding the Share Insurance Fund. Specifically, § 1782(c)(1)(A)(i) requires that “[e]ach insured credit union shall pay to and maintain with the [Share Insurance Fund] a deposit in an amount equaling 1 per centum of the credit union’s insured shares.” Section 1782(c)(2)(A) requires that “[e]ach insured credit union shall, at such times as the Board prescribes (but not more than twice in any calendar year), pay to the Fund a premium charge for insurance in an amount stated as a percentage of insured shares (which shall be the same for all insured credit unions).” Thus, in funding the Share Insurance Fund, federal credit unions and federally insured state-chartered credit unions are not treated any differently. Similarly, requisitions from the Share Insurance Fund used to fund the insurance-related expenses of the NCUA’s Operating Budget under § 1783(a) do not distinguish between federal credit unions and federally insured state-chartered credit unions.

In response to the June 2017 Request for Comment one commenter stated that the primary goal of the proposed changes was to reduce the complexity of the OTR methodology. The commenter stated that the NCUA’s primary goal should be to ensure fair and equitable treatment

¹⁵ 12 U.S.C. 1790 (“It is not the purpose of this subchapter to discriminate in any manner against State-chartered credit unions and in favor of Federal credit unions, but it is the purpose of this subchapter to provide all credit unions with the same opportunity to obtain and enjoy the benefits of this subchapter.”).

of federal credit unions and federally insured state-chartered credit unions in the allocation of insurance-related activities. However, the Board has always approached the OTR with the goal that it be fair and equitable to both charter types. The Board believes the new method continues to provide a fair and equitable distribution of Title I and Title II costs while recognizing that somewhat less precision can make the process more cost effective and understandable. In other words, fairness and equity among charter types is more than a goal, they have been and continue to be fundamental to the OTR methodology.

c. Title II Operating Costs

The Act clearly permits expenses related to insurance to be funded by the Share Insurance Fund, regardless of charter. Specifically, 12 U.S.C. 1783(a) allows expenses “incurred in carrying out the purposes of [Title II]” to be allocated to the Share Insurance Fund. The costs the NCUA incurs in safeguarding the Share Insurance Fund relate to the risks in federal credit unions and federally insured state-chartered credit unions. The Act provides the Board with specific authorities that relate to costs the NCUA incurs in carrying out its obligations under Title II. For instance, Title II of the Act authorizes the Board “to appoint examiners who shall have the power, on its behalf, to examine any insured credit union...whenever in the judgment of the Board an examination is necessary to determine the condition of any such credit union for insurance purposes.”¹⁶ Further, Title II authorizes the Board to implement regulations applicable to all insured credit unions to address risk to the Share Insurance Fund. Title II states the Board may “prescribe such rules and regulations as it may deem necessary and appropriate to carry out

¹⁶12 U.S.C. 1784(a).

the provisions of this subchapter.”¹⁷ Title II also grants the Board the following authorities relevant to agency operating costs:

- “appoint such officers and employees as are not otherwise provided for in this chapter;”¹⁸
- “employ experts and consultants or organizations thereof;”¹⁹
- “prescribe the manner in which its general business may be conducted and the privileges granted to it by law may be exercised and enjoyed;”²⁰
- “exercise all powers specifically granted by the provisions of this subchapter and such incidental powers as shall be necessary to carry out the power so granted;”²¹ and
- “make examinations of and require information and reports from insured credit unions, as provided in this subchapter.”²²

The Board concludes that these authorities, taken together, provide the NCUA as insurer with broad discretion to impose regulations on and examine all insured credit unions. In addition, the cost of the agency activities associated with exercising these and other accompanying authorities can properly be considered costs of carrying out Title II of the Act.²³

¹⁷ 12 U.S.C. 1789(a)(11).

¹⁸ 12 U.S.C. 1789(a)(4).

¹⁹ 12 U.S.C. 1789(a)(5).

²⁰ 12 U.S.C. 1789(a)(6).

²¹ 12 U.S.C. 1789(a)(7).

²² 12 U.S.C. 1789(a)(8).

²³ For example, Title II specifically addresses a broad range of standards for all insured credit unions, including standards for insurance against burglary and defalcation, loss reserve requirements, investment limitations, ongoing reporting requirements (such as the Call Report), independent audits, accounting principles, national flood insurance program requirements, liquidity capacity, unsafe and unsound conditions or practices, security standards, recordkeeping, monetary transaction and recordkeeping and reporting, benefits to institution affiliated parties, capital standards, and approval of officials.

d. APA Requirements

The legal analysis of the NCUA's Office of General Counsel on the applicability of the notice and comment provisions of the Administrative Procedure Act (APA) to the OTR methodology is summarized in the January 2016 OTR notice²⁴ and articulated more fully in a legal opinion posted on the NCUA's website.²⁵ In soliciting comment on the OTR through the *Federal Register*, the NCUA has gone, and continues to go, beyond its APA obligations.

In response to the June 2017 notice, one commenter specifically cited the Board's characterization of the OTR methodology as a rule at the June 2017 Board meeting as support for notice and comment procedures being required. However, as articulated in the Office of General Counsel's analysis²⁶ cited above, the APA does not require notice-and-comment procedures for all rules. Instead, a broad variety of agency actions fall under the APA's definition of "rule," only some of which require notice and comment. As the Office of General Counsel's analysis states "The APA's definition of a rule is very broad and applies to 'nearly every statement an agency' may make. However, determining whether the APA notice and comment requirements apply to a particular agency action or rule is a separate inquiry." By referring to the OTR as a rule, the Board was not suggesting notice-and-comment procedures are required but was instead

²⁴ 81 FR 4804 (Jan. 27, 2016) ("Since its inception, NCUA has taken the position that the OTR is not a legislative rule under the Administrative Procedure Act (APA) and is, therefore, exempt from notice and comment rulemaking processes. As such, NCUA has never used notice and comment rulemaking to establish either an individual determination of the OTR or the general methodology used to calculate the OTR. However, the OTR has been explained, discussed, and reviewed in various public records, including in annual Board Action Memorandums related to budget matters, independent evaluations, and other documents available in public records and on NCUA's Web site." (footnotes omitted).

²⁵ The NCUA's legal analysis with respect to the OTR and APA process is available at the following Web page: <https://www.ncua.gov/Legal/Documents/Opinion/OL2015-0818.pdf>.

²⁶ *Id.*

calling the OTR what it is under the APA: a rule that does not require notice-and-comment procedures.

III. Proposed OTR Methodology Comments and Responses

a. Allocate Examination and Supervision of Federal Credit Unions as 50 Percent Insurance Related

Approximately half of the comments received addressed the first principle that examination and supervision of federal credit unions should be treated as 50 percent insurance-related. Those that did address it were split. Commenters supporting the proposed principle argued that it appeared to be a rough approximation of the time the NCUA should spend between its prudential and insurance-related responsibilities with respect to federal credit unions. One commenter specifically opined that the NCUA's analysis appeared reasonable and that the principle would be simple to apply. Another commenter supported the proposed principle, but suggested that it may be "too modest" of an assessment of the time the NCUA devotes to prudential supervision of federal credit unions.

Commenters that opposed the proposed principle argued that the Board's policy rationale is not clearly set out in the notice and, therefore, the change in policy appears to be without "a reasoned basis." Some of these commenters also argued that the proposed principle is arbitrary, capricious, and not supported by substantial evidence. One commenter stated that it was not based on observable and measurable data inputs. The same commenter argued that the principle

reflects the NCUA's position of "how things should be" but not how things are in reality.

Another commenter argued that the principle ignores the Federal Deposit Insurance Corporation's (FDIC) actual practices, citing the following: 1) pronouncements from the FDIC asserting its primary focus and intention is to protect the insurance fund by ensuring the safety and soundness of its member institutions; 2) conducting annual joint examinations with state regulators in many cases rather than alternating examinations, suggesting the FDIC considers protection of the insurance fund through its own examinations as a critical responsibility; and 3) the FDIC conducts a substantial and increasing amount of offsite monitoring, examination and supervision on all its institutions for safety and soundness purposes on an ongoing basis. Several other commenters recommended that the Board take additional time to study this assumption to develop a more empirically supportable principle and that the Board continue to refine this principle in the future to be more accurate.

The Board believes the rationale for the first principle is supportable and easy to understand. It attributes equal weight to each of NCUA's dual roles as regulator and insurer of federal credit unions. It creates a cost sharing similar to what would result if NCUA conducted alternating examinations of federal credit unions, acting as the regulator during one exam cycle and the insurer the next. Additionally, joint examinations between the regulator and insurer are generally staffed equally, resulting in a 50 – 50 time split. Whether alternating examinations or participating in joint examinations, the examination and supervision time of the insurer still ends up approximately 50 percent. As noted in the request for comment, it is consistent with the alternating examinations the FDIC and state regulators conduct for insured state-chartered banks, as mandated by Congress.

As one commenter noted, the FDIC prominently asserts its primary focus is to protect its insurance fund by ensuring the safety and soundness of its member institutions, in many cases through annual joint examinations. Like the FDIC, the NCUA's primary focus in its role as insurer is to protect the Share Insurance Fund. However, unlike the FDIC, the NCUA also has chartering authority. Since the NCUA examination staff perform all examinations of federal credit unions,²⁷ the NCUA as insurer can fully rely on all federal credit union examination reports for insurance purposes where the FDIC deals with many different state regulators. The FDIC conducts annual/joint examinations where it perceives elevated risks. The NCUA also increases examination activity where it perceives elevated risk and may choose to increase supervision for federal credit unions or conduct joint examinations for federally insured state-chartered credit unions. Further, the NCUA conducts a substantial amount of offsite monitoring and supervision of both federal credit unions and federally insured state-chartered credit unions, increasing this oversight when risk warrants. All examination and supervision time, both onsite and offsite, for all credit unions, whether they are healthy or troubled, is covered by the methodology in the workload hours portion of the calculation. This is consistent with Principle 1 and the FDIC model.

Using a principle-based approach simplifies the OTR calculation and reduces the resources needed to administer it. Further, it reflects that the NCUA as insurer is responsible for managing risk to the Share Insurance Fund and therefore should not rely solely on examinations and supervision conducted by the prudential regulator.

²⁷ The Consumer Financial Protection Bureau also performs compliance examinations on credit unions with assets greater than the \$10 billion.

Importantly, the simplified assumption of equal sharing reflects the offsetting benefits for each role under a framework emulating an alternating examination program like the one used by FDIC. In other words, the insurer may evaluate compliance matters as part of a reciprocal arrangement with the prudential regulator in evaluating matters specific to insurance as part of the overall shared supervision of a credit union. It reflects an equal sharing of supervisory responsibilities between the NCUA's dual roles as charterer/prudential regulator and insurer given both roles have a vested interest in the safety and soundness of federal credit unions.

b. Allocate Examination and Supervision of All Others as 100 Percent Insurance Related

Few commenters addressed the second principle that all time and costs the NCUA spends supervising or evaluating the risks posed by federally insured state-chartered credit unions or other entities the NCUA does not charter or regulate (for example, third-party vendors and CUSOs) should be treated as 100 percent insurance related. The majority of responsive comments supported the proposed principle. One commenter recommended that the Board allocate the supervision of CUSOs as 50 percent prudential regulatory and 50 percent insurance related. Another commenter recommended that the Board allocate CUSOs and third-party supervision as 25 percent prudential regulatory and 75 percent as insured-related. The commenter reasoned that, since the safety and soundness of federal credit unions is partially allocated to Title I, it would follow that some hours for CUSOs and third-party reviews should reflect the NCUA's safety and soundness responsibility as charterer and prudential regulator.

Additionally, at least one commenter opposed the proposed second principle, arguing the Board has not explained its policy rationale clearly in the notice and, therefore, the change in policy is without a “reasoned basis.”

The Board disagrees that it has not explained its policy rationale. The NCUA has specifically defined its role with federally insured state-chartered credit unions and other entities the NCUA does not charter or regulate, including CUSOs. The NCUA does not charter, nor is it the prudential regulator of, federally insured state-chartered credit unions; therefore, the NCUA’s role is solely as the insurer. Further, the Board does not believe singling out CUSO activities is necessary or appropriate under the first or second proposed principle. Doing so would revert back to the prior approach of more particular designation of examination activities as insurance or regulatory based, which the proposed principles are designed to lessen for the reasons discussed above.

A CUSO itself is at times subject to a limited review during the examination of a federally insured credit union. This review generally covers the documentation required by NCUA or state regulation that credit unions must execute prior to investing in or lending to a CUSO. Examiners may also assess the risk a CUSO’s activities pose to the credit union as part of the credit union examination. The CUSO related time within the scope of the examination and supervision of federally insured credit unions is captured under Principle 1 for federal credit unions and Principle 2 for federally insured state-chartered credit unions. The time designated for separate, stand-alone reviews of CUSOs and third-party vendors is accounted for separately in the NCUA’s workload budget and is covered by Principle 2 only. The Board has no direct

regulatory authority with respect to CUSOs and there is no support to allocate time specifically designated for CUSO and third-party vendor reviews as anything other than the NCUA's role as insurer.

c. Allocate Time and Costs Related to the NCUA's Role as Charterer and Enforcer of Consumer Protection and other Non-Insurance Based Laws Governing the Operations of Credit Unions as Zero Percent Insurance Related

Only a few commenters addressed the third proposed principle that all time and costs related to the NCUA's role as charterer and enforcer of consumer protection and other non-insurance based laws governing the operations of credit unions should be treated as not insurance related. Each commenter to address the proposed principle favored the Board's approach but did not offer substantive commentary.

d. Allocate Administration of the Share Insurance Fund as 100 Percent Insurance Related

Only a few commenters addressed the fourth principle that time and costs related to the NCUA's role in administering federal share insurance and the Share Insurance Fund should be treated as 100 percent insurance related. Each commenter to address the proposed principle favored the Board's approach but did not offer substantive commentary.

e. Soliciting Public Comment on the OTR Methodology

Less than half of the commenters addressed whether the Board should solicit public comment on the OTR methodology every three years and whenever the Board seeks to change the OTR methodology. All of those commenting favored soliciting public comment. One commenter recommended that the Board adopt a standardized five-year review period for the calculation. Another commenter recommended that the Board also solicit public comment on the OTR methodology for any year the OTR changes more than two percent. A third commenter recommended that the Board codify the OTR methodology as part of the NCUA's regulations, believing this would subject the OTR methodology to the notice-and-comment requirements of the APA. A fourth commenter recommended that the Board include the OTR methodology in the NCUA's rolling regulatory review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996. Finally, another commenter argued that the Board should subject the OTR methodology to periodic verification from an independent third party.

The Board is committed to seeking public comment on the OTR methodology every three years or when there are changes to the methodology. The Board reiterates that changes to the methodology means changes to the four principles or abandonment of the principles in favor of another methodology, not changes to the NCUA's organizational structure. The results of the calculation are not static and will change from year to year based on the contemporaneous information from the workload and financial budgets. The results are updated and reviewed annually and are applied to actual expenses. The Board does not agree that the OTR application should be submitted for public comment, regardless of whether it results in a material year-over-year change to the rate. Changes to the OTR output would be a result of the methodology's

application to organizational changes or internal resource allocations, not a result of changes to the methodology. Even if the Board wanted to subject output changes to notice-and-comment, the time required for such processes would almost certainly impede the Board's budget processes.

The Board acknowledges that application of the current methodology has resulted in material changes in the OTR from year to year. This was a factor the Board considered in simplifying the calculations and the Board expects that the proposed methodology should result in less volatility in OTR outputs going forward. As noted in the legal analysis contained in the Request for Comment, the NCUA's position remains that the OTR methodology is not subject to the APA's notice-and-comment requirements. The Board maintains that the same is true with respect to its application. Further, this conclusion does not depend on whether the OTR methodology is included in the NCUA regulations. Whether a Board action is codified does not determine whether it is subject to notice-and-comment processes.²⁸

Regarding subjecting the proposed methodology to periodic verification from an independent third-party, the Board will consider the cost versus the benefits of such a review. Given the greatly simplified methodology, such reviews may provide limited benefits.

f. Maintaining Current Staff Delegations

²⁸ Interested parties can review the NCUA's position on this in the opinion found on the NCUA's website at the following address: <https://www.ncua.gov/Legal/Documents/Opinion/OL2015-0818.pdf>.

Only a few commenters addressed whether the Board should maintain the current staff delegation to administer the OTR methodology but require public board briefings every year. Each commenter to address the proposal to maintain current staff delegations favored the Board's approach but did not offer substantive commentary.

g. Additional Comments

50/50 Split between OTR and Operating Fees

One commenter opposed the OTR methodology and recommended the NCUA's operating budget be funded 50 percent by requisition from the Share Insurance Fund via the OTR and 50 percent from federal credit union operating fees. This commenter suggested that this was the Board's long-standing approach to funding the NCUA's operating budget prior to the current OTR methodology. Another commenter, however, indicated that a majority of its member credit unions would not favor such an approach.

As stated in the Request for Comment, the Board does not believe it is transparent or appropriate to set the OTR at any level, such as 50 percent, without a reasoned basis to demonstrate that level of agency operating costs are properly allocated to Title II activities. Even if it was, the Board thinks such a rough justice approach is unnecessarily simple while providing negligible, if any, additional administrative ease. The Board believes the principles-based methodology adopted in this final notice provides a reasoned basis for the OTR and is fair and equitable. The proposed

new OTR methodology also provides a good balance between understandability, ease of administration, and precision.

Revise or Replace

At least one commenter strongly opposed the proposed OTR methodology in its entirety, arguing that the Board should revise and refine, not replace, the current methodology. Some refinements this commenter suggested included a clearer distinction between insurance and safety and soundness activities.

The Board does not agree that further distinction between insurance and safety and soundness is warranted. The proposed new OTR methodology revises the former OTR methodology and addresses concerns raised in the first request for comment as well as this one related to the distinction between insurance related and safety and soundness. The NCUA recognizes that safety and soundness is not the sole domain of the insurer. Rather, both the prudential regulator and insurer have responsibilities for safety and soundness. In the June 2017 Request for Comment, the NCUA acknowledged that safety and soundness is not the sole domain of the insurer; prudential regulators have various responsibilities with respect to the safety and soundness of institutions they oversee. To better reflect that the prudential regulator and insurer both have responsibilities for safety and soundness, the Board is adjusting the OTR methodology accordingly. This is reflected in the first principle of the proposed new methodology. Further, the old methodology also recognized this to some extent through the Imputed SSA Value component.

Another commenter also recommended retaining the old methodology, stating it is an objective, formula-based model that uses measurable data inputs, which prioritizes fairness, accuracy, and equity. Instead of replacing the old methodology, the commenter suggested the Board refine the examiner time survey and reevaluate the Imputed SSA Value. The Board disagrees with this recommendation and favors the proposed new methodology.

The proposed new methodology, though simpler, is still objective and formula driven. The examiner time study and the assignment of time as insurance, insurance regulatory, and consumer regulatory has been an area of great debate and the Board does not believe any amount of refining of these categories will alleviate the criticism and confusion around the process. The same criticism and confusion pertains to the “Imputed SSA Value.” Without 100 percent cooperation from the state supervisory authorities in providing detailed time studies and budget information, the NCUA cannot calculate a more accurate estimate. There is also stakeholder confusion regarding the hypothetical “as if” scenario that assumes the NCUA would have to do all the examination and supervision work. The proposed new methodology eliminates the examiner time study and the “Imputed SSA Value” to eliminate the confusion caused by each. Therefore, further refinements or changes to either are unnecessary at this time.

One commenter recommended establishing a Credit Union Advisory Council that would discuss, among other topics, the OTR. This request goes beyond the scope of the Request for Comment on the OTR.

Consistency with OCC, Segregating Functions

At least one commenter recommended that the Board adopt a methodology that more closely resembles the national banking model. The commenter suggested that the budget of the Office of the Comptroller of the Currency (OCC) for supervising national banks is entirely separate from the FDIC's budget for insuring bank deposits and recommended that the Board adopt a similar approach for the supervision of federal credit unions. Similarly, another commenter indicated that a majority of its member credit unions favor the Board separating the NCUA's charting and supervision of federal credit unions from its insurance-related supervisory functions.

The Board thinks using this approach would undermine the efficiencies Congress intended to create. The NCUA is both a regulator and insurer under the organization of a single federal agency with one budget. As noted in the January 2016 Request for Comment, in Title II of the Act, Congress established the Share Insurance Fund and housed it within the NCUA for administration by the Board. Congress envisioned efficiencies from this arrangement, as well as the NCUA's partnership with state regulators. While the NCUA does not have two distinctly separate budgets, it strives to allocate the appropriate amount to each activity through the OTR. In contrast, the OCC has no authority regarding the Deposit Insurance Fund, which is managed by the FDIC. The FDIC manages the Deposit Insurance Fund and has no primary regulatory responsibility for federally chartered banks. They have completely separate budgets because they are distinct federal agencies.

The NCUA also notes that the funding of the banking regulatory system has also been the subject of criticism. For example, in its July 2001 Report, *Reforming the Funding of Bank Supervision*, the Comptroller of the Currency concluded the funding system was not fair. The report states:

Under the present system, national banks pay the full costs of their supervision, through assessments levied on them by the Office of the Comptroller of the Currency (OCC), the federal agency that charters and supervises national banks. State-chartered banks, by contrast, pay only for that small fraction of their supervision that is provided by state supervisory agencies. The predominant part of state bank supervision actually comes from two federal agencies, the Federal Reserve System (FRS) and the Federal Deposit Insurance Corporation (FDIC). These federal agencies perform exactly the same supervisory functions for state banks as the OCC performs for national banks. The main difference is that the FRS and the FDIC do not assess state banks for the costs of their supervisory services.²⁹

The NCUA Board seeks to be as fair as possible in the funding of its Operating Budget and does not believe the banking industry model is appropriate for credit unions.

Cost Savings Measures

One commenter recommended that the Board adopt cost saving measures to further reduce the OTR. Those measures included accepting the results of validated Asset Liability Management models of credit unions subject to supervision by the Office of National Examinations and Supervision (ONES) for supervisory stress testing purposes.

Suggestions regarding cost saving measures are aimed at the NCUA's overall budget, not at the OTR methodology. The budgeted amount is beyond the scope of the Request for Comment.

While a lower budget may reduce the amount charged to the Share Insurance Fund through the

²⁹ COMPTROLLER OF THE CURRENCY, REFORMING THE FUNDING OF BANK SUPERVISION (2001), available at <https://www.occ.gov/static/news-issuances/news-releases/2001/nr-occ-2001-67-paper.pdf>.

OTR, this effect would not be a function of changes to the OTR methodology, which was the focus of the request for comment.

This commenter also recommended that the Board investigate options to improve the financial performance of the Share Insurance Fund in order to use investment gains to generate additional earnings. This comment also goes beyond the scope of the OTR methodology. Further, Title II of the Act explicitly limits the permissible investment vehicles for the Share Insurance Fund.³⁰ Consistent with its role as a steward of public insurance funds, the NCUA adheres to the strict investment objectives of “safety, liquidity, and yield (i.e., income)” and in that order of priority. Only *after* ensuring safety of principal and establishing that maturities coincide with the timing of planned and contingent funding needs are the income objectives of the portfolio considered. In accordance with the U.S. Treasury’s policy for *Government Investment Accounts*, the schedule of portfolio maturities coincides with the Agency’s anticipated disbursement estimates (that is, our projected funding needs) and all purchases are intended to be held to maturity. The NCUA is bound by U.S. Treasury Operating Circular requirements, which states in section 4060:

A Program Agency for a Government Investment Account shall not engage in investment practices that result in windfall gains and losses, including but not limited to security day-trading and large restructuring of investment portfolios to take advantage of short-term Interest Rate fluctuations.

One commenter recommended that the Board explore ways to work more closely with state supervisory authorities to increase efficiencies and reduce costs. The Board agrees that working with state supervisory authorities reduces costs and increases efficiencies for both the NCUA and

³⁰ 12 U.S.C. 1783(c).

state supervisory authorities. Therefore, as stated in the Request for Comment, the Board is careful to build efficiencies related to the NCUA's dual role as charterer and prudential regulator of federal credit unions and insurer of federal credit unions and federally insured state-chartered credit unions wherever possible. As part of the Examination Flexibility Initiative, the Board established a joint NCUA-State Regulator working group that has been active in 2017 in exploring ways to further improve coordination and cooperation.

Budget Allocations

Two commenters requested clarification on how the NCUA's proposed reorganization will impact budget allocations. One commenter specifically noted that 13 percent of the Office of Consumer Financial Protection and Access' budget is allocated from the Share Insurance Fund and that the proposed reorganization could have a substantial impact on that assumption.

The NCUA's reorganization affects the OTR's application, not the OTR methodology. The Board is approving the allocation principles for the OTR methodology. These principles are then dynamically applied to the activities and related costs of the agency – they are not necessarily specific to individual offices or the agency's organization. For example, costs associated with federal credit union examinations and supervision are aggregated. Therefore, a reduction from five regions to three regions will not affect the budget allocation.

Similarly, the Office of Small Credit Union Initiatives' transition to the new Office of Credit Union Resources and Expansion and the assumption of the NCUA's chartering function,

formerly in the Office of Consumer Financial Protection and Access, does not materially impact budget allocation. The majority of the Economic Development Specialists from the old Office of Small Credit Union Initiatives are being converted to Consumer Access Analysts in the new Office of Credit Union Resources and Expansion. The Consumer Access Analysts from the Office of Consumer Financial Protection and Access will also be transferred to the new Office of Credit Union Resources and Expansion. The change in the composition of the work of the reorganized offices will affect their allocation calculation but not how the underlying costs are allocated based on the Board approved principles. The net result is a reallocation of the agency resources from the Office of Consumer Financial Protection and Financial Access to the new Office of Credit Union Resources and Expansion. The same principles will apply to the resources transferring to the new office based on their roles.

One commenter also recommended a number of changes to the Board's proposed budget allocations. The commenter recommended that the Board use a 50 percent allocation from the Share Insurance Fund for human resources and Board functions. For all other program offices, the commenter suggested using the 60 percent allocation from the Share Insurance Fund generated by the hypothetical application of the proposed OTR methodology in the June 2017 notice.

The Board does not agree that a 50 percent allocation should be applied to its budget and the human resources budget. As noted in the Request for Comment, the NCUA's remaining offices do not have a specific allocation calculation because they design and oversee the agency's mission and its related offices or provide necessary support to mission offices or the entire

agency. As such, the proportion of insurance-related activities for these offices corresponds to that of the mission offices. Further, it would be administratively burdensome to attempt to account for any variation in activity levels from the mission functions and would not result in a material difference in outcomes. Therefore, these offices' costs are allocated based on the weighted average of insurance-related activities calculated in the subtotal of agency costs for the offices above that have a distinct allocation calculation. The Board also notes the 60 percent allocation, referred to by the commenter, was illustrative based on 2017 budget information and is therefore a methodology output, not a principle in itself. It is not a fixed allocation and will change from year to year based on contemporary data and the applicable calculation in the proposed new OTR methodology.

Another commenter recommended that the Board explore how other insurance industries allocate expenses and adopt a 5-year rolling average of actual costs when assessing future fees.

However, share/deposit insurance is unique from other insurance industries as it only insures member/customer deposits in financial institutions. In the United States, there are three deposit insurers, the NCUA, the FDIC, and American Share Insurance. Both the NCUA and FDIC are backed by the full faith and credit of the United States while American Share Insurance is a private insurer. Additionally, neither the FDIC nor American Share Insurance have NCUA's chartering authority.

The NCUA is responsible for both regulating and insuring credit unions and has different accounting/cost allocation needs. NCUA share insurance is not risk-based. There are numerous other risk-based types of insurance companies operating in the United States, covering such

things as real estate, automobiles, and health care. Some insurance companies offer some or all these business lines. Costs are generally allocated by business line or operating company. The NCUA's cost allocation approach incorporates sound cost accounting principles and commercial practices. However, additional analysis of insurance companies will not provide meaningful information given the unique role of the NCUA as regulator and insurer and other differences between private sector insurance models and the NCUA as a government agency.

Further, using a 5-year rolling average of actual costs to set expenses would add a layer of complexity to the OTR calculation. Adding complexity is not consistent with the Board's goal of simplifying the calculation to improve transparency. Additionally, a 5-year rolling average would not support contemporary needs based on contemporary data because it would be affected by past events, either increasing or decreasing costs, over a period of five years. The Board believes using the proposed new methodology is more fair and stable.

Negative Impact on Federal Credit Unions

Several commenters stated the proposed new methodology would have a negative impact on federal credit unions. One commenter particularly concerned with the impact on small federal credit unions. While another commenter suggested a three-year phase-in period if adopted to mitigate the impact this change will have on federal credit unions.

The NCUA staff analyzed the impact the change in methodology would have on federal credit union Operating Fees using data from the 2017 budget as discussed in the 2017 Request for

Comment. The results of the analysis indicate the Operating Fee for federal credit unions with asset size \$1 million and above, the increase would be less than one basis point of average assets. Additionally, credit unions under \$1 million in assets do not pay an Operating Fee. While the Operating Fee will increase when the OTR decreases, this has been true during the OTR's entire existence.

Simplicity over Accuracy and Equity

Several commenters stated the proposed new methodology favors simplicity over accuracy and equity. However, the Board believes the proposed method strikes the correct balance. The results of the proposed new methodology, using 2017 budget data, fall well within the historical range of the OTR under the old method. The average OTR since the Board adopted the old methodology is 60.7 percent, very similar to the results of the proposed new methodology applied to 2017 budget numbers. Table 1 illustrates the historical OTR trend.

Table 1	
OTR Year	OTR
2004	59.8%
2005	57.0%
2006	57.0%
2007	53.3%
2008	52.0%
2009	53.8%
2010	57.2%

2011	58.9%
2012	59.3%
2013	59.1%
2014	69.2%
2015	71.8%
2016	73.1%
2017	67.7%

One of the main criticisms of the old OTR methodology is that it is not transparent. This stems from the complexity of the calculation and was discussed in the Request for Comment.

Although all information related to the old OTR calculation is publicly available, the Board acknowledged that an obstacle to transparency was the complexity of the methodology. In an effort to address the transparency concern, the Board is adopting the simplified OTR methodology. While still formula driven, the proposed new methodology provides for a simpler approach that remains comprehensive, fair, and equitable. The Board believes the proposed new methodology, though simplified, continues to provide an accurate allocation of agency costs.

IV. Final Action

Based on the comments and the NCUA's internal assessment, the Board is adopting the new OTR methodology as proposed in the June 2017 notice. These changes will reduce both the complexity of the OTR methodology and the resources needed to administer it, while remaining

fair and equitable to both federal credit unions and federally insured state-chartered credit unions. The final OTR methodology is fully described below.

V. Details of the OTR Methodology

a. Methodology

The OTR methodology incorporates the following underlying principles for allocating agency operating costs:

1. Time spent examining and supervising federal credit unions is allocated as 50 percent insurance related.³¹
2. All time and costs the NCUA spends supervising or evaluating the risks posed by federally insured state-chartered credit unions or other entities the NCUA does not charter or regulate (for example, third-party vendors and CUSOs) is allocated as 100 percent insurance related.³²

³¹ The 50 percent allocation mathematically emulates an examination and supervision program design where the NCUA would alternate examinations, and/or conduct joint examinations, between its insurance function and its prudential regulator function if they were separate units within the NCUA. It reflects an equal sharing of supervisory responsibilities between the NCUA's dual roles as charterer/prudential regulator and insurer, given both roles have a vested interest in the safety and soundness of federal credit unions. It is consistent with the alternating examinations the FDIC and state regulators conduct for insured state-chartered banks as mandated by Congress. Further, it reflects that the NCUA is responsible for managing risk to the Share Insurance Fund and therefore should not rely solely on examinations and supervision conducted by the prudential regulator.

³² The NCUA does not charter state-chartered credit unions nor serve as their prudential regulator. The NCUA's role with respect to federally insured state-chartered credit unions is as insurer. Therefore, all examination and supervision work and other agency costs attributable to insured state-chartered credit unions are allocated as 100 percent insurance related.

3. Time and costs related to the NCUA's role as charterer and enforcer of consumer protection and other non-insurance based laws governing the operation of credit unions (like field of membership requirements) are allocated as zero percent insurance related.³³
4. Time and costs related to the NCUA's role in administering federal share insurance and the Share Insurance Fund are allocated as 100 percent insurance related.³⁴

These four principles represent the principles the Board has committed to subject to public comment every three years and in the event it proposes a change to one or more of the principles. The principles are applied to the activities and costs of the agency to arrive at the portion of the agency's Operating Budget to be charged to the Share Insurance Fund as detailed below. The NCUA will not submit the methodology's applications or outputs for public comment.

b. Application

The Steps below describe how the four principles above are applied. Unlike the principles themselves, the Board will not subject the application of the principles or the OTR outputs to notice-and-comment processes.

³³ As the federal agency with the responsibility to charter federal credit unions and enforce non-insurance related laws governing how credit unions operate in the marketplace, the NCUA resources allocated to these functions are properly assigned to its role as charterer and prudential regulator. This includes any reviews of credit unions focused solely on compliance, such as a fair lending exam. It does not include the more broadly based examinations and supervision contacts of federal credit unions covered by principle 1. It also does not include enforcing laws, like Prompt Corrective Action, that are part of share insurance under Title II as covered by principle 4.

³⁴ The NCUA conducts liquidations of credit unions, insured share payouts, and other resolution activities in its role as insurer. Also, activities related to share insurance, such as answering consumer inquiries about insurance coverage, are a function of the NCUA's role as insurer.

Step 1 – Workload Program

Annually, the NCUA develops a workload budget based on the NCUA’s examination and supervision program to carry out the agency’s core mission. The workload budget reflects the time necessary to examine and supervise federally insured credit unions, along with other related activities, and therefore the level of field staff needed to implement the exam program. Applying principles 1, 2, and 3 (those relevant to the workload budget) to the applicable elements of the workload budget results in a composite rate that reflects the portion of the agency’s overall insurance related mission program activities.

Step 2 – Operating Budget

The Operating Budget represents the costs of the activities associated with achieving the strategic goals and objectives set forth in the NCUA’s Strategic Plan. The Operating Budget is based on agency priorities and initiatives that drive resulting resource needs and allocations. Information related to the NCUA’s budget process, including details on the Board-approved Operating Budgets, is available on the agency’s website.³⁵

The agency achieves its primary mission through the examination and supervision program. The percentage of insurance-related workload hours derived from Step 1 represents the main allocation factor used in Step 2 and is applied to the total operating budget for the examination and supervision programs to calculate the insurance-related costs of the offices conducting field

³⁵ <https://www.ncua.gov/About/Pages/budget-strategic-planning/supplementary-materials.aspx>.

work (currently the Regions and ONES). A few agency offices have roles distinct enough to warrant their own allocation factors, which are developed by applying the four factors described above to their respective activities. Each of these offices tracks their activities annually to determine their factors. These factors are then applied to the respective offices' operating budgets to determine their insurance-related costs.

A weighted average allocation factor, calculated by dividing the aggregate insurance-related costs for the field offices conducting the examination and supervision program and the agency offices with their own unique allocation factors by their aggregate total operating budgets, is applied to the central offices that design or oversee the examination and supervision program or support the agency's overall operations. This factor is then applied to the aggregate operating budgets for the remaining offices. As such, the proportion of insurance-related activities for these offices corresponds to that of the mission offices. The NCUA's total insurance related costs are calculated by summing the insurance cost calculated for the field offices, the offices with unique allocations factors, and the insurance cost for all other remaining NCUA offices.

Step 3 – Calculate the OTR

The OTR represents the percentage of the NCUA Operating Budget funded by a transfer from the Share Insurance Fund.³⁶ The OTR is calculated by dividing the total insurance-related costs determined in Step 2 by the NCUA's total operating budget.

³⁶ The percentage of actual expenses funded by the Share Insurance Fund as they are incurred each month.

By the National Credit Union Administration Board on November 16, 2017.

Gerard Poliquin

Secretary of the Board

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