



National Credit Union Administration

August 18, 2015

SENT BY CERTIFIED MAIL

Ms. Lucy Ito
President and CEO
National Association of State Chartered Credit Unions
1655 North Fort Myer Drive, Suite 650
Arlington, VA 22209

Dear Ms. Ito:

Re: Legal Analysis of Overhead Transfer Rate

This opinion letter discusses the legal analysis of NCUA's Office of General Counsel on whether notice and comment rulemaking processes under the Administrative Procedure Act ("APA") are required for NCUA's Overhead Transfer Rate ("OTR") methodologies and determinations. In addition, to fully respond to recent claims that NCUA is not APA compliant with respect to the OTR, this opinion reviews the arguments in a document titled "*Legal Analysis Of The Administrative Procedure Used By The National Credit Union Administration To Adopt The Overhead Transfer Rate*," dated June 17, 2015 and produced by the law firm Schwartz & Ballen LLP as a "*Report to the National Association of State Credit Union Supervisors*" (the "Report"). The Report, enclosed as Exhibit A to this letter, contends that the OTR is a rule under the APA that requires notice and comment rulemaking procedures because no APA exemption applies. The Report further alleges, among other things, that the OTR is a major rule for purposes of the APA.

Consistent with prior legal analyses, we conclude that the APA does not require either OTR calculations or processes to be developed under APA notice and comment requirements. Further, nothing in the Report provides a sound legal basis for requiring NCUA to change its long-held position. Finally, contrary to the Report's conclusion, we do not believe the OTR process could be designated a major rule under the Congressional Review Act ("CRA"), even if APA notice and comment procedures applied.

The conclusions and assertions in this opinion are based on public information that is available to NASCUS and any other interested parties. The cited statutes and cases, and the circumstances to which they apply, are a matter of public record. By providing this opinion to the public, NCUA does not waive the protections of 12 C.F.R. § 792.11(a)(5) or the general application of attorney/client privilege or attorney work product doctrines for any other legal analyses of the OTR or any other matter.

Further, application of privilege doctrines or other confidentiality protections do not make NCUA's legal conclusions intentionally secretive or unjustified, even if they are the subject of disagreement among reasonable persons. The job of the Office of General Counsel is not only to advocate, but to determine the relative strength of a legal position, in part by objectively examining and reviewing counterarguments. With respect to the APA, which is not specific to NCUA in its application and which is an intensely scrutinized and evaluated statute, the range of reasonable arguments on disputed issues is relatively accessible.

It appears to us that the Report was commissioned for advocacy, rather than advisory purposes, and we believe it should be viewed in that context. The Report's advocacy posture is demonstrated by, among other things, (i) repeated reference to events and circumstances that bear on policy, rather than legal, determinations; (ii) failure to discuss in any way the Federal Credit Union Act's ("FCU Act") discretionary language, which is the foundation for OTR processes; (iii) failure to accurately characterize the "major rule" concept; (iv) lack of transparency with respect to the citation of cases relying on tests and principles that have since been rejected; and (v) failure to acknowledge in any way the complications in applying APA standards and exemptions, which are chronicled by many of the courts and scholars engaged in such processes.¹

Our conclusion that notice and comment processes are not required does not lead to the conclusion that they may not be used as a legal matter. The NCUA Board Chair's recent commitment to formally solicit comments every three years demonstrates an alternative approach within the range of legally permissible methods by which NCUA can engage in OTR processes. Further, NCUA is able to receive and consider public input on its processes at any time, not only through formal solicitations or in the APA rulemaking context. These formal and informal interactions with parties affected by NCUA activities have occurred throughout the agency's history.

I. Background

NCUA charters and regulates federal credit unions and regulates and supervises state-chartered credit unions that have their shares insured through the National Credit Union Share Insurance Fund ("NCUSIF") in coordination with State Supervisory Authorities ("SSAs"). To cover expenses related to its tasks, the NCUA Board adopts an operating budget in the fall of each year (the "Operating Budget"). The FCU Act provides two primary sources to fund the Operating Budget: (1) requisitions from the NCUSIF; and (2) operating fees charged against federal credit

¹ See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) ("The distinction between legislative rules and interpretative rules or policy statements has been described at various times as 'tenuous,' *Chisholm v. FCC*, 538 F.2d 349, 393 (D.C. Cir.), *cert. denied*, 429 U.S. 890, 97 S. Ct. 247, 50 L. Ed. 2d 173 (1976), 'fuzzy,' *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), 'blurred,' Saunders, *Interpretative Rules With Legislative Effect: An Analysis and a Proposal For Public Participation*, 1986 Duke L.J. 346, 352, and, perhaps most picturesquely, 'enshrouded in considerable smog.' *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824, 96 S. Ct. 37, 46 L. Ed. 2d 40 (1975), *quoted in American Bus Association v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).").

unions. The Board uses an allocation formula, the OTR, to determine the amount of the Operating Budget that it will procure from the NCUSIF.

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. The OTR has, however, been explained, discussed, and reviewed in various public records, including in Board Action Memorandums related to budget matters and other documents available on NCUA's Web site.² Since the OTR's inception, NCUA has taken the position that the OTR is not a legislative rule under the APA and is exempt from notice and comment rulemaking processes.

II. The Administrative Procedure Act

Under the APA, a rule means

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing³

The APA's definition of a rule is very broad and applies to "nearly every statement an agency may make."⁴ However, determining whether the APA notice and comment requirements apply to a particular agency action or rule is a separate inquiry. Statutory exemptions from APA notice and comment requirements include matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" and "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"⁵

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") "has generally referred to the category of rules to which the notice and comment requirements apply as 'legislative rules' or, sometimes, 'substantive rules'", as opposed to "interpretive rules."⁶ "A rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy."⁷ Rules are interpretative, and exempt from notice and comment requirements, if they "clarify a statutory or

² Materials related to the OTR that appear on NCUA's Web site can be found at the following Web address: <http://www.ncua.gov/about/Pages/budget.aspx>.

³ § 551(4).

⁴ *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980).

⁵ 5 U.S.C. § 553(a)(2) & (b)(3)(A).

⁶ *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (citation omitted).

⁷ *Id.* But see *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203, 191 L. Ed. 2d 186 (2015) (Holding that, without more, an agency is not required to "use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from [an interpretation] the agency has previously adopted.").

regulatory term, remind parties of existing statutory or regulatory duties, or ‘merely track[]’ preexisting requirements and explain something the statute or regulation already required.”⁸ A substantial impact imposed by an interpretive rule “does not transform it into a legislative rule” requiring notice and comment.⁹

“An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy” that is exempt from notice and comment rulemaking.¹⁰ “The most important factor [in making the legislative/interpretive/policy determination] concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.”¹¹ Courts also consider how an agency characterizes an action, including any statements about intent to legally bind regulated entities.¹²

III. NCUA’s Analysis

Under the above authority, no part of the OTR process requires notice and comment rulemaking. First, the OTR tracks and interprets discretionary statutory language that makes the NCUSIF available to pay expenses the Board determines to be proper under Title II of the FCU Act. As such, the OTR is an interpretive rule or general statement of policy. Second, the OTR is part of NCUA’s budget processes, inextricable from agency management, procedure, and practice.

i) The OTR is an Interpretive Rule

There is no express provision in the FCU Act that requires a rulemaking to establish when or how the Board will requisition the NCUSIF to pay administrative expenses. In fact, the FCU Act’s language on this point is highly deferential, qualified by phrases like “as [the Board] may determine to be proper”¹³ and “as [the Board] may deem necessary or appropriate”.¹⁴ Under this language, NCUA’s OTR methodology and calculation is a means of explaining a function committed to agency discretion by the FCU Act.

In *New Jersey Department of Human Services v. U.S. Department of Health & Human Services*,¹⁵ the United States District Court for the District of New Jersey addressed whether the Health Care Financing Administration’s (“HCFA”) changes to a manual governing federal reimbursement rates for expenses incurred by states in administering Medicaid were legislative or interpretive rules. The court applied a test articulated by the D.C. Circuit in *Community*

⁸ *Mendoza*, 754 F.3d at 1021.

⁹ *Cent. Texas Tel. Co-op., Inc. v. F.C.C.*, 402 F.3d 205, 214 (D.C. Cir. 2005) (citing *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (quoting *Am. Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983))).

¹⁰ *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

¹¹ *Id.*

¹² *Id.*

¹³ 12 U.S.C. §1783(a).

¹⁴ § 1766(i).

¹⁵ 748 F. Supp. 1120 (D.N.J. 1990).

Nutrition Institute v. Young,¹⁶ which “provided two criteria for assisting in the determination of whether a rule is legislative or interpretative: (1) whether the rule establishes a binding norm, and (2) whether the rule allows the agency and its decision makers leave to exercise their discretion.”¹⁷ “If the rule acts prospectively and without binding effect, . . . it is said to be interpretative.”¹⁸

The court found that HCFA’s changes to the manual described rates at which certain costs were reimbursable but did not bind the State of New Jersey and did not “oblige the State to assume any obligations or duties.”¹⁹ Further, the court determined the manual acted prospectively and permitted the HCFA to exercise its discretion.²⁰ The court noted that the direct reduction in reimbursement rates to states did not transform the manual into a substantive rule.²¹

Similarly, the OTR has no direct binding legal effect on insured credit unions. It does not impose or require credit unions to take on new duties. There is no compliance component to the OTR and NCUA cannot use it as the basis for an enforcement action. In addition, documents describing OTR methodology permit NCUA employees and officers to exercise their discretion. The OTR process allows for elements of judgment in connection with what examination procedures to perform and in guidance on how examiners record their time.²² Allocation factors applied to the cost of NCUA resources and programs are reviewed annually, demonstrating NCUA’s view that OTR processes are not subject to notice and comment requirements.²³

With respect to substantial impact or legal effect, the correlation between the OTR and NCUSIF assessments or distributions is tenuous and diluted. In addition to the OTR, whether a FICU experiences an assessment or distribution is affected by (i) the amount of statutorily required insurance payments from the NCUSIF,²⁴ (ii) interest rates on NCUSIF investments,²⁵ (iii) special assistance payments from the NCUSIF,²⁶ (iv) adjustments to the NCUSIF’s normal operating level (which the Board sets anywhere from 1.2 percent to 1.5 percent),²⁷ (v) the NCUSIF’s available assets ratio,²⁸ (vi) the timing of assessments in the event of a restoration plan (which can extend out to eight years or more),²⁹ and (vii) NCUSIF borrowings from the United States

¹⁶ 818 F.2d 943 (D.C. Cir. 1987).

¹⁷ *N.J. Dep’t of Human Servs.*, 748 F. Supp. at 1127.

¹⁸ *Id.* (citing *Cnty. Nutrition Inst.*, 818 F.2d at 946 n.4).

¹⁹ *Id.* at 1127-28.

²⁰ *Id.* at 1128.

²¹ *Id.* at 1127.

²² See, e.g., NCUA Office of Examination and Insurance, *Introduction to the Overhead Transfer Rate*, http://www.ncua.gov/about/Documents/Budget/Misc%20Documents/IntrotoOTRPresentation_10_2014%20Final.pdf (last visited Apr. 22, 2015 and on file with author) & Board Action Memorandum on Overhead Transfer Rate 2015, p. 2 (Nov. 20, 2014), <http://www.ncua.gov/about/Documents/Agenda%20Items/AG20141120Item4.pdf>.

²³ See, e.g., Board Action Memorandum, *supra* note 22, at 1.

²⁴ 12 U.S.C. § 1787(d).

²⁵ § 1783(c).

²⁶ § 1788.

²⁷ § 1782(h)(4).

²⁸ § 1782(h)(1).

²⁹ § 1782(c)(2)(D).

Treasury (“Treasury”) or the Central Liquidity Facility (“CLF”).³⁰ A required assessment or distribution to insured credit unions is triggered only if the NCUSIF’s equity ratio deviates outside of the statutorily prescribed range (further subject to variables (iv), (v), (vi), and (vii), above). The OTR has a less significant and more indirect effect on third parties or regulated entities than the HCFA’s guidelines had on Medicaid reimbursements.

ii) The OTR is a General Statement of Policy

While a distinction between interpretive rules and policy statements is often ignored, the OTR also meets the characteristics of a general statement of policy. General statements of policy are, according to the Attorney General’s APA Manual, “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”³¹ The D.C. Circuit has explained that an agency policy statement “merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm.”³² The statement “simply lets the public know its current enforcement or adjudicatory approach” and “[t]he agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm.”³³

In *National Mining Association v. McCarthy*,³⁴ the D.C. Circuit found that the Environmental Protection Agency’s (“EPA”) Final Guidance that instructed EPA staff to recommend limitations on mining projects amounted to a statement of policy. According to the plaintiffs, the Final Guidance gave “permit applicants (and state permitting authorities) [] no choice when faced with EPA ‘recommendations’ except to fold.”³⁵ Despite this alleged effect, the D.C. Circuit reasoned as follows in support of its holding:

The Final Guidance does not tell regulated parties what they must do or may not do in order to avoid liability. The Final Guidance imposes no obligations or prohibitions on regulated entities. State permitting authorities “are free to ignore it.” The Final Guidance may not be the basis for an enforcement action against a regulated entity. Moreover, the Final Guidance may not be relied on by EPA as a defense in a proceeding challenging the denial of a permit. And the Final Guidance does not impose any requirements in order to obtain a permit or license. As a matter of law, state permitting authorities and permit applicants may ignore EPA’s Final Guidance without facing any legal consequences.³⁶

³⁰ § 1783(d) & (f).

³¹ Attorney General’s Manual on the Administrative Procedure Act 30 n.3 (1947).

³² *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

³³ *Id.*

³⁴ 758 F.3d 243, 252 (D.C. Cir. 2014).

³⁵ *Id.* at 253.

³⁶ *Id.* (citations omitted).

The court's view of the Final Guidance in *McCarthy* aligns remarkably with the effect and implications of the OTR with respect to FICUs. In fact, one could substitute the term "OTR" for "Final Guidance" in the court's language above and produce an apt description of the OTR.

As noted above, other than for statutorily required insurance payments, the FCU Act sets forth a discretionary standard for NCUSIF requisitions. The OTR bears out this discretion in its key components, such as the examiner time survey, filled out by principal examiners selected on a rotating basis. In connection with the time survey, NCUA has stated expressly that it created a rule matrix to assist examiners in properly classifying their time as related to regulatory or insurance matters.³⁷ Further, NCUA has made adjustments to the matrix and reviews allocation factors annually, demonstrating its view that the OTR is a policy, subject to alteration outside of rulemaking procedures.³⁸ This approach and language is consistent with the APA's and the D.C. Circuit's explanation of general policy statements.

- iii) The OTR is a Matter of Agency Management and Agency Organization, Procedure, or Practice

The APA expressly exempts from notice and comment requirements matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" and rules of agency organization, procedure, or practice.³⁹ The D.C. Circuit has construed the exemption for matters relating to agency management as cutting a "wide swath."⁴⁰ Within these exemptions, settled law provides NCUA with discretion to set its budget without a rulemaking.⁴¹ The OTR is a component of NCUA budget processes, allocating expenditures to a permissible source.

In *Lincoln v. Vigil*,⁴² the United States Supreme Court noted that "decisions to expend otherwise unrestricted funds are not, without more, subject to the notice-and-comment requirements of § 553." Further, distinctions between the purpose and function of various regulations and how resources are allocated to their oversight involves "a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise': whether its 'resources are best spent' on one program or another; whether it 'is likely to succeed' in fulfilling its statutory mandate; whether a particular program 'best fits the agency's overall policies'; and, 'indeed, whether the agency has enough resources' to fund a program 'at all.'"⁴³ Once again, these circumstances apply to the OTR.

³⁷ An example of this matrix is available on NCUA's Web site at the following address:
<http://www.ncua.gov/about/Documents/Budget/2013/2013ETSAnalysis.pdf>.

³⁸ See Introduction to the Overhead Transfer Rate, *supra* note 22, at 7 & Board Action Memorandum, *supra* note 22, at 2.

³⁹ 5 U.S.C. § 553(a)(2) & (b).

⁴⁰ *Humana of S. Carolina, Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978).

⁴¹ *Lincoln v. Vigil*, 508 U.S. 182, 198 (1993) ("[D]ecisions to expend otherwise unrestricted funds are not, without more, subject to the notice-and-comment requirements of § 553.").

⁴² 508 U.S. at 198.

⁴³ *Id.* at 193.

As a practical matter, the FCU Act in 12 U.S.C. § 1783(a) makes no material distinction between how the Board should requisition the NCUSIF for special assistance under § 1788 and for administrative and budget expenses. The FCU Act uses discretionary language with respect to both.⁴⁴ NCUA has no regulation governing requisitions for special assistance and would vigorously dispute that one is required. The OTR may be more amenable to APA regulatory processes, but this characteristic does not, in itself, impose APA notice and comment requirements.

IV. The Report

The following is a Section-by-Section analysis of the Report that NASCUS commissioned with respect to the OTR.

Section I.

In this section, the Report discusses the history of the OTR and alleges that changes to NCUA's OTR methodology have resulted in increasing charges to the NCUSIF and reduced operating fees charged to federal credit unions. We note, and the Report agrees, that NCUA has used an allocation process for the OTR since the early 1970s without employing notice and comment processes. This practice is consistent with NCUA's long-held position and characterization of the OTR. An agency's characterization is relevant to a determination of whether notice and comment processes apply.⁴⁵

Section I of the Report also cites a 1973 United States General Accounting Office ("GAO") report.⁴⁶ In this report, the GAO initially recommended that NCUA use a cost allocation process for funding its operations from the NCUSIF. Notably absent from this report is any recommendation from the GAO that NCUA use notice and comment rulemaking procedures to establish its resource allocation.

Section II.A.

In this Section, the Report discusses NCUA's implementation procedure for the OTR. The Report observes that NCUA has never formally requested comment by publishing a proposed OTR, OTR methodology, or changes to the OTR methodology in the *Federal Register*. This fact is consistent with NCUA's settled position that the APA does not require notice and comment processes for the OTR. An agency's characterization "is entitled to a significant degree of credence."⁴⁷

⁴⁴ With respect to administrative expenses, § 1783(a) uses the phrase "as [the Board] may determine to be proper." With respect to special assistance expenses, § 1788 uses "which the Board has determined," "in [the Board's] discretion," "in the opinion of the Board," "in the judgment of the Board," and "upon such terms and conditions as [the Board] may determine."

⁴⁵ *Nat'l Min. Ass'n*, 758 F.3d at 252.

⁴⁶ This GAO report can be viewed at the following Web address: <http://gao.gov/assets/210/203181.pdf>.

⁴⁷ *Cabais v. Egger*, 690 F.2d 234, 238 n.7 (D.C. Cir. 1982) (citing *British Caledonian Airways, Ltd. v. CAB*, 584 F.2d 982, 992 (D.C. Cir. 1978)).

The Report further alleges that NCUA has never provided a reasoned, comprehensive explanation of its OTR methodology. However, approximately 12 pages of the 31 page Report meticulously describe the history and evolution of NCUA's OTR and its processes, gleaned from public documents, studies, and reports. In any event, these contentions, which we believe multiple offices at NCUA would strenuously dispute, do not bear on whether notice and comment requirements apply under the APA. Similarly, the fact that the OTR has increased in recent years does not support the conclusion that notice and comment requirements apply.

We did not scrutinize the Report's assertions about the impact of the OTR on the competitive position of state-chartered credit unions. Unquestionably, the OTR has an impact on all insured credit unions, as do almost all actions NCUA undertakes. To the extent NASCUS relies on an impact to conclude that notice and comment processes are required, we disagree and the courts do as well. An impact, even substantial, "does not mean [an agency action] is subject to notice and comment if it is otherwise expressly exempt under the APA."⁴⁸

In addition, although the Office of General Counsel is only tangentially involved in OTR processes, we view with great skepticism the statements in the Report that imply that NCUA is manipulating the OTR to favor federal charters.⁴⁹ We have never seen any evidence to support this assertion. In two evaluations, procured for objective, internal, advisory purposes with respect to policy, PricewaterhouseCoopers ("PwC") made the following observations:

1. "Based on PwC's review, there was no reasonable basis to conclude that the OTR Methodology ex-ante and for reasons beyond the control of the credit unions, favours or disadvantages any one type of credit unions (i.e. federal versus state chartered) over another."⁵⁰
2. "The NCUA rules and regulations matrix aligns consistently with the insurance and regulatory activities and provides a documented bases supporting the allocation of examiner time between insurance and regulatory activities."⁵¹

Further, we do not believe NASCUS' characterization of the immediacy or nature of the impact is accurate. As stated above, the OTR's impact through the NCUSIF is affected and diluted by a variety of factors, including (i) the amount of statutorily required insurance payments, (ii) interest rates on investments, (iii) special assistance payments, (iv) adjustments to the normal operating level, (v) the available assets ratio, (vi) the timing of assessments in the event of a restoration plan, and (vii) borrowings from the Treasury or the CLF. Other external factors

⁴⁸ *Id.* at 237.

⁴⁹ *See, e.g.*, p. 10 of the Report ("By increasing the OTR, the NCUA Board was able to shift a substantial portion of NCUA expenses to the NCUSIF, thereby enabling it to reduce FCU Operating Fees for 2014.").

⁵⁰ PricewaterhouseCoopers, *Overhead Transfer Rate Review* 39 (Jan. 20, 2011), <http://www.ncua.gov/about/Documents/Budget/Misc%20Documents/2011PwCOTRReview.pdf> (emphases in original) (on file with author).

⁵¹ PricewaterhouseCoopers, *Analysis of Examination Time Survey (ETS) Modifications* 2 (Oct. 2, 2013), <http://www.ncua.gov/about/Documents/Budget/2013/2013ETSAnalysis.pdf> (on file with author).

would likely have a significantly more immediate and substantial impact on a credit union's competitive position.

The Report references the studies of the OTR completed by PwC in 2011 and 2013 (the "PwC Studies"). The PwC Studies are not legal analyses. Nor are they documents NCUA has relied upon as legal support for not subjecting the OTR to notice and comment processes. Further, although one of the PwC Studies (i) notes "dissatisfaction within the industry with respect to the NCUA's efforts to communicate and explain the OTR methodology"; and (ii) recommends "providing more visibility on how [NCUA] characterizes its activities . . . and possibly solicit[ing] feedback with regards to the reasonableness and accuracy of the classification," such an observation bears on policy determinations, not legal conclusions.

We appreciate that credit unions care about the OTR and its impact. That fact demonstrates the strength of the system and a healthy engagement in governmental processes. We do not, however, believe the OTR's impact or industry criticisms lead to the conclusion that notice and comment processes are required.

Section II.B.

In this Section, the Report generally asserts that the OTR methodology constitutes a "rule making" for purposes of the APA. As noted above, whether agency action is a rule and whether notice and comment procedures apply are separate questions. The Report goes on to allege that none of the exemptions NCUA analyzed above could apply. The Report notably fails to discuss the relevant language of the FCU Act or its discretionary prose.

a. *Cases*

The Report discusses three cases for their application of law to facts in support of its conclusions. First, the Report cites *Minard Run Oil Company v. United States*.⁵² In *Minard*, the court found that a moratorium the United States Forest Service imposed on drilling represented "a 'sea change' in the Service's policy regarding mineral rights that directly prohibits mineral rights owners from engaging in new drilling, *under threat of criminal penalties*."⁵³ The court further observed that "[t]he burden imposed by the moratorium goes far beyond 'the expense and annoyance of litigation [that] is part of the social burden of living under government.'"⁵⁴ In contrast, the OTR does not prohibit activities or impose criminal penalties. Further, as discussed above, the effect of the OTR on regulated entities, including their competitive positions, is diluted and tempered by a variety of other circumstances.

To the extent *Minard* relied on what it described as "a 'sea change' in [] policy" to require notice and comment rulemaking, the Supreme Court's recent ruling in *Perez v. Mortgage*

⁵² 670 F.3d 236 (3d Cir. 2011), *as amended* (Mar. 7, 2012).

⁵³ *Id.* at 248 (citation omitted) (emphasis added).

⁵⁴ *Id.*

*Bankers Association*⁵⁵ puts its validity in doubt. In *Perez*, the Court held unequivocally that, without more, an agency need not “use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from [an interpretation] the agency has previously adopted.”⁵⁶ Further, other circuits have rejected the “substantive adverse impact” test, which the *Minard* court also proffered as one of the principal bases for its finding.⁵⁷

Second, the Report cites *Anderson v. Butz*,⁵⁸ which addressed the United States Department of Agriculture’s practices for food stamps. Noted as relevant to the district court’s decision in *Anderson* that APA notice and comment processes applied, the Department of Agriculture had previously waived a potentially applicable exemption to APA notice and comment rulemaking.⁵⁹ Further, the court found it “noteworthy that in the past the Secretary of Agriculture ha[d] followed the [APA’s] notice and comment procedure in connection with changes or clarification in agency practice regarding food stamp allotments.”⁶⁰

With respect to the OTR, NCUA has not waived any exemptions, nor has it used notice and comment processes in the past. In contrast, NCUA has consistently taken the position that notice and comment processes are not required for the OTR. The judge in *Anderson* also opined that the Department of Agriculture’s adjustment to how housing subsidies factored into food stamp determinations “substantially and directly affected” the rights of individuals outside the agency.⁶¹ In NCUA’s case, the OTR does not result in an immediate assessment or distribution to insured credit unions. Depending on a multitude of factors, OTR determinations might not affect an assessment or distribution for many years. Further, eight years after the district court’s decision in *Anderson*, the United States Court of Appeals for the Ninth Circuit expressly rejected the “substantial impact test” on which the *Anderson* court principally relied.⁶² The D.C. Circuit has also rejected this test as a basis for concluding that notice and comment processes are required.⁶³

The principal case cited in the Report is *Credit Union National Association v. National Credit Union Administration*.⁶⁴ In this case, the United States District Court for the District of Columbia invalidated an NCUA interpretive ruling and policy statement that eliminated “unsecured creditor priority over [credit union] members and [the] NCUSIF” in involuntary liquidations.⁶⁵ The court concluded that the Board’s intent to give operational meaning to the

⁵⁵ 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015).

⁵⁶ 135 S. Ct. at 1203.

⁵⁷ See *Rivera v. Becerra*, 714 F.2d 887, 891 (9th Cir. 1983) & *Cent. Texas Tel. Co-op., Inc.*, 402 F.3d at 214 (citing *Cabais*, 690 F.2d at 237–38).

⁵⁸ 428 F. Supp. 245 (E.D. Cal. 1975)

⁵⁹ *Id.* at 249.

⁶⁰ *Id.* at 251.

⁶¹ 428 F. Supp. at 250.

⁶² *Rivera*, 714 F.2d at 891.

⁶³ *Cent. Texas Tel. Co-op., Inc.*, 402 F.3d at 214 (citing *Cabais*, 690 F.2d at 237–38).

⁶⁴ 573 F. Supp. 586 (D.D.C. 1983)

⁶⁵ *Id.* at 589.

FCU Act where it was silent on payout priorities was an effort to make new law.⁶⁶ However, unlike its relative silence on the payout priorities in involuntary liquidation,⁶⁷ the FCU Act specifically makes the NCUSIF available “upon requisition by the Board, *without fiscal year limitation*, for making payments of insurance . . . , for providing assistance and making expenditures under section 1788 . . . , and for such administrative expenses incurred in carrying out the purposes of [Title II of the Act] *as it may determine to be proper.*”⁶⁸ The FCU Act expressly permits requisitions for NCUA operations and commits such requisitions, particularly for administrative expenses, to the Board’s discretion. The Report provides no discussion of this FCU Act language.

In addition, *Credit Union National Association* does not address a matter related to NCUA’s budget. With respect to the OTR, in addition to the exemption for interpretive rules and policy statements, APA exemptions related to agency organization, procedure, or practice and agency management apply. The court in *Credit Union National Association* did not address these exemptions. Finally, the court in *Credit Union National Association* again placed reliance on the “substantial impact test,” the proper application of which the D.C. Circuit has now put in grave doubt.⁶⁹ To wit: **“But we rejected such a test for determining whether an agency pronouncement was a legislative rule or an interpretive rule. Because both types of rules may ‘vitally affect private interests,’ the ‘substantial impact test has no utility in distinguishing between the two.”**⁷⁰

b. *The Good Cause Exemption*

The Report also discusses the “good cause” notice and comment exemption in Section II.B. To invoke it, an agency must incorporate into an issued rule a finding that the exemption applies, along with a brief statement supporting the reasons for asserting the exemption.⁷¹ NCUA has not included a statement justifying the good cause exemption in documents related to the OTR. Such a statement would be inconsistent with the basis for NCUA’s position that notice and comment processes do not apply and NCUA would not invoke this exemption.

c. *The Congressional Review Act: Major Rules*

Also in Section II.B., the Report contends that adoption of “the OTR should be deemed a major rule for purposes of the APA.” As an initial matter, “major rule” designations apply under the CRA, not the APA. The CRA provides procedures by which Congress can take steps to prevent a rule from taking effect and, if designated as major, prevents a rule from going into effect until

⁶⁶ *Id.* at 591-92.

⁶⁷ *See* 12 U.S.C. § 1787(b)(10), (11).

⁶⁸ § 1783(a) (emphasis added).

⁶⁹ *See Cent. Texas Tel. Co-op., Inc.*, 402 F.3d at 214 (citing *Cabais*, 690 F.2d at 237–38).

⁷⁰ *Id.* (emphases added).

⁷¹ 5 U.S.C. § 553(B)(3)(B).

at least 60 days from specified dates.⁷² “No determination, finding, action, or omission under [the CRA is] subject to judicial review.”⁷³

The CRA, in relevant part, defines a major rule as follows:

any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget [“OMB”] finds has resulted in or is likely to result in--

- (A) an annual effect on the economy of \$100,000,000 or more;
- (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.⁷⁴

Expressly excluded from the definition of “rule” is “any rule relating to agency management or personnel; or [] any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”⁷⁵ Since the OTR is a matter relating to agency management, we necessarily conclude that OMB would not designate it as a major rule under the CRA. In addition, the OTR is a rule of agency organization, procedure, or practice. As discussed above, the OTR has an indirect effect on credit unions, tempered by a variety of other contingent circumstances. Further, the OTR does not impose regulatory obligations on credit unions. NCUA can take no enforcement action based on the OTR.

The CRA also excludes from the definition of the term rule “any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing”⁷⁶ The Report’s assertion, at page 17, that this language applies for purposes of the APA’s definition of a rule is inconsistent with and undermines its later assertion that the OTR could be a major rule under the CRA.

Section II.C.

This Section of the Report states that “the [Office of the Comptroller of the Currency (“OCC”) follows an APA notice and comment process both for the methodology it uses for determining [] assessments and fees, as well as for its actual assessments and fees.” The Report also points out that “the [Federal Deposit Insurance Corporation (“FDIC”)] utilizes an APA notice and comment process for its assessment methodology.” The Report acknowledges that, “[w]hile the Federal Reserve Board [(“FRB”)] does not solicit public comment on the fees for Federal Reserve Bank

⁷² 5 U.S.C. § 801.

⁷³ § 805.

⁷⁴ § 804(2).

⁷⁵ § 804(3)(B), (C).

⁷⁶ § 804(3)(A)

priced services, it does provide APA-compliant notice and comment on the methodology it uses to develop these fees.” Finally, it points out that “the [FRB] followed an APA-compliant notice and comment process for imposing” new assessments under the Dodd Frank Act.

To the extent they bear at all on the legal analysis, we find the Report’s analogies unpersuasive. The FDIC, FRB, and OCC each have complex assessment authorities that differ substantially from NCUA’s.⁷⁷ The FRB and OCC do not administer insurance funds from which to requisition money for operations. To our knowledge, the FDIC funds its operating expenses entirely from the Deposit Insurance Fund (“DIF”). Further, the FDIC has complex risk-based assessment authority for the DIF, for which the Federal Deposit Insurance Act expressly requires implementing regulations. In contrast, the FCU Act severely restricts how NCUA can charge assessments and does not expressly require implementing regulations.

Under the FCU Act, each insured credit union must maintain a one percent deposit (adjusted annually or semi-annually depending on asset size) and pay assessments based on its insured shares.⁷⁸ The Board’s discretion to charge insurance premiums is limited to circumstances when the NCUSIF’s equity ratio is at least 1.2 percent and less than 1.3 percent.⁷⁹ No insurance premium may cause the equity ratio to exceed 1.3 percent.⁸⁰ Premiums are required if the ratio is below 1.2 percent.⁸¹ Despite these statutory restrictions, NCUA has adopted regulations governing the methodology for insurance premiums and NCUSIF deposits that, among other things, establish (i) various definitions, (ii) an invoicing process, (iii) rules for conversion or termination of insurance, and (iv) administrative fees for late payment.⁸²

Because of (i) material differences between funding and assessment authorities; and (ii) the case-specific analysis required under the APA, the practices of other regulators provide anecdotal authority, relevant, if at all, to policy rather than legal determinations. Comparing assessment regulations that apply direct assessments on regulated entities to NCUA’s OTR is misleading. We found no evidence that the FDIC uses notice and comment processes for amounts that it transfers from the DIF for its operating expenses. Further, as recently as 2001, when the FDIC allocated budget expenses for specific work between the Savings Association Insurance Fund and the Bank Insurance Fund (the closest analogy we can discover to what NCUA does now with the OTR allocation), the FDIC did not treat its allocation as a rulemaking subject to notice and comment requirements.

⁷⁷ For FDIC provisions, see 12 U.S.C. § 1817(b) and 12 C.F.R. Part 327. For OCC provisions, see 12 U.S.C. §§ 16; 196; 481; 482 and 12 C.F.R. Part 8. For FRB provisions, see 12 U.S.C. §§ 243; 244; 248; 326; 338; 467; 483 and 12 C.F.R. Part 246.

⁷⁸ 12 U.S.C. §1782(c).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 12 C.F.R. § 741.4

In any event, NCUA is not privy to the APA legal analyses of other regulators. Nor do we need to be. Under a case-specific analysis of requirements that apply to OTR circumstances, formal notice and comment processes are not required.

Section II.D.

In Section II.D., the Report cites portions of a 2003 GAO report that “raised questions about NCUA’s process for determining the transfer rate.”⁸³ Once again, this GAO report does not assert that any aspect of the OTR is subject to notice and comment procedures under the APA. Nor does it recommend that NCUA use notice and comment processes to establish the OTR. Further, although this report notes that certain state officials “expressed concern over NCUA’s process for developing its overhead transfer rate, which they claimed was not transparent,” the GAO did not make an independent finding that the OTR process is not transparent. Although the report recommends that NCUA “continuously improve the process for and documentation of the overhead transfer rate,” it does so in the context of NCUA’s current processes.⁸⁴ This GAO report provides anecdotal evidence, relevant, if at all, to policy rather than legal determinations.

Section III.

The Report concludes that “adoption of the OTR [is] subject to notice and comment requirements.” Therefore, the Report alleges, NCUA’s established process for implementing the OTR violates the APA. Based on our review of the law and cases, set forth above, the Report does not provide a sound legal basis for requiring NCUA to change its long-held position that neither the OTR nor its methodology is subject to notice and comment requirements.

V. Conclusion

Consistent with our prior legal analysis of the issue, we conclude that the APA does not require either OTR calculations or processes to be developed under APA notice and comment procedures. Further, nothing in the Report provides a sound legal basis for requiring NCUA to change its position. The cases discussed in Section III of this opinion, including *Lincoln v. Vigil*,⁸⁵ *National Mining Association v. McCarthy*,⁸⁶ and *New Jersey Department of Human Services v. U.S. Department of Health & Human Services*,⁸⁷ among others, staunchly rebut the cases cited in the Report.

⁸³ This GAO report can be viewed at the following Web address: <http://www.gao.gov/new.items/d0491.pdf>.

⁸⁴ *Id.* at 83.

⁸⁵ 508 U.S. 182 (1993).

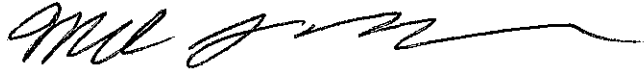
⁸⁶ 758 F.3d 243 (D.C. Cir. 2014).

⁸⁷ 748 F. Supp. 1120 (D.N.J. 1990).

Ms. Lucy Ito
August 18, 2015
Page 16

I hope this opinion letter clarifies NCUA's position on the permissible administrative procedure surrounding the OTR.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. McKenna", with a long horizontal flourish extending to the right.

Michael J. McKenna
General Counsel

GC/KST:BHS
SSIC 3000

Enclosure

Exhibit A

NASCUS REPORT

(See Attached)

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
1990 M Street N.W.
Washington D.C. 20036

June 17, 2015

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	2
I. HISTORY OF THE OTR.....	5
II. ANALYSIS OF ADMINISTRATIVE PROCEDURE USED BY THE NCUA TO IMPLEMENT THE OTR.....	13
A. NCUA BOARD’S IMPLEMENTATION PROCEDURE... 	13
B. THE ADMINISTRATIVE PROCEDURE ACT.....	16
C. PROCEDURES OF OTHER FEDERAL BANKING AGENCIES.....	28
D. GAO REVIEW.....	30
III. CONCLUSION.....	31

EXECUTIVE SUMMARY

Since 1971, the National Credit Union Administration (“NCUA” or “NCUA Board”) has used the resources of the National Credit Union Share Insurance Fund (“NCUSIF”) to cover the NCUA’s annual “insurance-related” expenses. The percentage of annual expenses the NCUA Board uses to determine the amount it will take from the NCUSIF to cover the NCUA’s annual expenses is referred to as the Overhead Transfer Rate (the “OTR”). The OTR percentage and the resulting dollar amount of NCUA total expenses covered by funds from the NCUSIF have increased significantly over time.

Primarily as a result of a change in OTR calculation methodology adopted by the NCUA Board for the 2014 OTR, the amount of NCUA expenses allocated to federally insured state-chartered credit unions (“FISCUs”) through the OTR increased 40.1% from \$67.0 million in 2013 to \$93.9 million (budgeted) for 2015. This significant increase has reduced the likelihood that FISCUs and federal credit unions (“FCUs”) (referred to collectively as “federally insured credit unions”) will receive a rebate from the NCUSIF. Although increases in the OTR for 2014 and 2015 also increased the amount of NCUA expenses allocated to FCUs through the NCUSIF, such increases in the OTR directly and materially benefitted FCUs by reducing the amount the NCUA assessed FCUs for NCUA expenses (the “FCU Operating Fees”). By shifting a portion of FCUs’ share of NCUA expenses to the NCUSIF, the OTR reduces out-of-pocket expenses incurred by FCUs. The resulting reduction in FCU Operating Fees provides a singular advantage to FCUs and adversely affects the competitive position of FISCUs relative to FCUs.

The NCUA Board has never published a proposed OTR in the *Federal Register* for public comment, nor has it ever requested in the *Federal Register* public comment on its methodology for calculating the OTR or any change to its methodology. The NCUA Board also has never provided a reasoned, comprehensive explanation of its OTR methodology, including how the activities it defines for this purpose as “insurance-related” are actually related to insurance, why it has changed its position over time as to what constitutes “insurance-related activities,” why it chooses to make an adjustment to the OTR rather than make a direct payment from the NCUSIF to the state supervisory authorities for their insurance-related supervision of FISCUs, nor has it provided an adequate explanation of the methodology it uses to determine this adjustment. In addition, we are not aware of any independent third party determination that the NCUA Board’s OTR methodology complies with the Federal Credit Union Act (“FCUA”) or other applicable law.

Our analysis concludes that the NCUA Board’s adoption of the OTR constitutes a rule subject to the Administrative Procedure Act (“APA”) notice and comment requirements. Based on applicable case law, including cases involving the NCUA Board, we do not believe that any of the exceptions provided in the APA to its notice and comment requirements apply to the OTR. Moreover, given its impact on federally insured credit unions generally and the adverse effect on the competitive position of FISCUs relative to FCUs, we believe the NCUA Board’s adoption of the OTR should be deemed a major rule for purposes of the APA, subject to the additional requirements that the NCUA Board provide: (i) a statement of purpose providing the underlying reason for the rule; (ii) monetized or quantified costs and benefits or a qualitative discussion of them; and (iii) a discussion of the alternatives.

The fact that other federal banking agencies, the Office of the Comptroller of the Currency (“OCC”), Federal Deposit Insurance Corporation (“FDIC”), and Federal Reserve Board, follow the APA notice and comment process for the methodology they employ in determining their assessments and fees and/or for the actual assessments and fees strongly supports the conclusion that the NCUA Board’s adoption of the OTR constitutes a rule subject to the APA notice and comment requirements. Finally, the GAO has recognized there are concerns with the procedures utilized by the NCUA Board to determine the OTR.

For the foregoing reasons, we believe the process the NCUA Board uses to implement the OTR violates the APA.¹ As courts have recognized:

Voiding the present regulations on what at first blush appears to be a technicality is not as pointless as it may seem. We believe that the 30-day notice rule serves an important interest, the right of the people to present their views to government agencies which increasingly permeate their lives. The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people, especially in cases such as this where Congress has only roughed in its program.

Anderson v. Butz, 428 F. Supp. 245, 251 (E.D.Cal. 1975) (quoting *Kelly v. U.S. Dep’t. of the Interior*, 339 F. Supp. 1095, 1102 (E.D.Cal. 1972)).

¹ This Report does not address, and accordingly we express no opinion on, whether the NCUA Board possesses statutory authority to implement the OTR in the manner described in Section I.

I. HISTORY OF THE OTR

The NCUA, an independent federal agency established by the FCUA, charters FCUs and supervises both FISCUs and FCUs insured by the NCUSIF. The NCUA Board administers the NCUSIF, which was created in 1970 as a revolving fund in the United States Treasury to insure the accounts of FCUs and FISCUs.² The FCUA provides that the NCUA's expenses incurred in carrying out the examination and supervision of FCUs may be covered by operating fees assessed on FCUs.³ The FCUA also provides that the NCUA Board may requisition funds from the NCUSIF to cover certain expenses.⁴

In 1972, the U.S. General Accounting Office⁵ recommended that "insurance-related" and regulatory related costs be allocated between the NCUA and NCUSIF. The GAO observed that, during 1971 and 1972, the NCUA Board tried several different methods in attempts to develop an equitable method to allocate costs to the NCUSIF. The GAO, however, was unable to determine if the operating expenses presented on the NCUSIF's statement of income and expenses for that period were fairly stated because different methods were used and the GAO was unable to verify the basis used to make certain allocations.⁶

² 12 U.S.C. § 1783.

³ 12 U.S.C. § 1755.

⁴ *See, e.g.*, 12 U.S.C. 1783(a). As noted in the Executive Summary, this Report does not address and accordingly we express no opinion on whether the NCUA Board possesses statutory authority to implement the OTR as described in this Section.

⁵ Now known as the U.S. Government Accountability Office ("GAO").

⁶ Comptroller General of the United States Report 74-0204, *Examination Of Financial Statements Of The National Credit Union Administration For The Periods Ended June 30, 1971 and 1972 Limited By Restriction On Access To Credit Union Examination Records*, pp. 14-15 (Sept. 1973).

In the following years until 1986, various cost allocation methodologies were implemented by the NCUA Board, including direct charges to the NCUSIF for insurance expenses (*e.g.*, cost of closing institutions and liquidation and merger costs), the cost of NCUSIF's full-time employees and the cost of the time NCUA's employees spent on NCUSIF examination and supervision activities.⁷

From 1986 through 1994, the NCUA's Office of Examination and Insurance conducted annual surveys of NCUA examiners to determine how much time examiners spent on insurance-related and non-insurance-related matters. The relative proportion of time spent by examiners on insurance-related matters was the principal factor that determined the OTR. During this ten year period, the survey results on the percent of "insurance-related" time spent by NCUA examiners varied between 50.1% and 60.4% of their total hours worked. Notwithstanding this range, the NCUA maintained the budgeted OTR at 50% of the NCUA's annual budget for the years 1986 through 1994.⁸

Based on a staff study conducted in 1994, the NCUA Board approved a 50% budgeted OTR for the three year period 1995-1997, and committed to re-evaluate the OTR in 1997. An in-depth study of examination time conducted in 1997 concluded that examiners spend approximately 50% of their time on insurance-related functions. As a result, in 1997, the NCUA Board approved a 50% budgeted OTR for the period 1998-2000.

⁷ In October 1985, the NCUA Board determined to eliminate the direct NCUSIF employee expense from the calculation of the OTR.

⁸ Starting in 1989, the NCUA tapped the NCUSIF for certain of its expenses by means other than through the OTR. These included expenses incurred in connection with operating the Asset Liquidation Management Center and costs associated with training state examiners. These additional expenditures were not included in the NCUA's calculation of the budgeted OTR. If these expenses, for example, had been added to the OTR in 1989 (approximately \$2 million), the OTR for that year would have increased to 53.6%. The OTR rates presented below do not include recoveries of NCUA expenses by means other than the OTR and FCU Operating Fees.

In 2000, the scope and methodology of the examiner survey was revised to include principal examiners, regional staff and central office staff. These revisions resulted in a dramatic increase in the budgeted OTR from 50% to 66.7% of the NCUA's annual budget for 2001 and 62% of the NCUA's annual budget for 2002 and 2003. During this 2000-2003 time period, the NCUA's annual budget increased 8.2% (from \$135.0 million to \$146.1 million) and its actual expenses increased 5% (from \$127.6 million to \$134.1 million). Importantly, however, the NCUA's expenses paid from the NCUSIF through the OTR increased 30.4% (from \$63.8 million to \$83.2 million) as a result of the increase in the OTR. In contrast, during the 1995-2000 time period during which the budgeted OTR remained constant at 50%, the percentage increase in NCUA expenses covered by the NCUSIF through the OTR (44.3%) corresponded to the percentage increases in the NCUA's annual budget (45.6%) and actual expenses (44.5%) during this time period.

In November 2003, the NCUA Board again revised the methodology for calculating and assessing the OTR. Key components of this new OTR calculation methodology included the results of the annual Examination Time Survey performed by a randomly selected group of principal examiners, NCUA's resource workload budget, NCUA's financial budget, the distribution of insured assets between FCUs and FISCUs, and an estimate of the "insurance-related" work conducted by state regulators.

Using this methodology, the OTR gradually declined between 2004 and 2008 as follows:

BUDGETED OTR AS A PERCENT OF NCUA ANNUAL BUDGET

<u>YEAR</u>	<u>OTR</u>
2004	59.8%
2005	57.0%
2006	57.0%
2007	53.3%
2008	52.0%

Attributed in part to increased NCUSIF-related activities due to macroeconomic developments, the budgeted OTR increased modestly between 2009 and 2013 as follows:

BUDGETED OTR AS A PERCENT OF NCUA ANNUAL BUDGET

<u>YEAR</u>	<u>OTR</u>
2009	53.8%
2010	57.2%
2011	58.9%
2012	59.3%
2013	59.1%

For the 2014 OTR, the NCUA Board adopted new mapping of NCUA regulations based on the extent to which, in the NCUA Board’s view, each statute and regulation administered by the NCUA is designed to protect the NCUSIF and is therefore “insurance-related.” Previously, for purposes of the Examination Time Survey, examiner activities were classified into two categories – “insurance-related” (*i.e.*, related to NCUA Board’s role as an insurer of federally insured credit unions) and “regulatory-related” (*i.e.*, related to NCUA’s role as a regulator and charterer of credit unions). For the 2014 OTR, “insurance-related” was separated into two categories: (1) “Insurance Related Examination” and (2) “Insurance Regulatory Related Examination.” The former “regulatory-related” category was re-defined as the third category, “Consumer Regulatory Related Examination.” Of the 252 rules and

regulations identified by the NCUA as examination related, approximately 161 (64%) are categorized as “Insurance Regulatory Related Examination” and presumably included in the OTR. Approximately 91 or (36%) are categorized as “Consumer Regulatory Related Examination” and presumably excluded from the OTR. Based on this new mapping, the NCUA Board now appears to consider virtually all activities related to safety and soundness regulations to be “insurance-related” and therefore included in the determination of the OTR. The only regulatory activities that appear not to be included in the OTR are generally those that relate to consumer regulations.⁹ Based on this new mapping, NCUA “insurance-related” examiner time increased from 67% for purposes of determining the 2013 OTR to 88% for the calculation of the 2014 OTR, with a resulting increase in the budgeted OTR from 59.1% in 2013 to 69.2% of NCUA budgeted total expenses in 2014,¹⁰ a 17.1% year-over-year increase in the budgeted OTR.

As a consequence of this increase in the 2014 budgeted OTR, the budgeted contribution of FISCUs through the 2014 OTR to the NCUA 2014 Operating Budget increased to \$85.6 million, which represents an \$18.6 million (27.8%) increase over their 2013 contribution of \$67.0 million.¹¹ The budgeted contribution of FCUs through the 2014 OTR to the NCUA 2014 Operating Budget increased to \$100.1 million compared to their 2013 contribution of \$79.0 million, which represents a \$21.1 million increase (26.7%), which at first

⁹ These statutes and regulations include: Equal Credit Opportunity Act (Regulation B); Bank Secrecy Act; Home Mortgage Disclosure Act (Regulation C); Expedited Funds Availability Act (Regulation CC); Children’s Online Privacy Protection Act; Reserve Requirements (Regulation D); Electronic Fund Transfer Act (Regulation E); Fair and Accurate Credit Transactions Act; Fair Credit Reporting Act (Part 717); Fair Debt Collection Practices Act; Flood Disaster Protection Act; Fair Housing Act; Gramm-Leach-Bliley Act; Home Ownership and Equity Protection Act; Home Owner’s Protection Act; Regulation M (Consumer Leasing); Office of Foreign Assets Control requirements; Privacy of Consumer Financial Information; Right to Financial Privacy Act; Service Members Civil Relief Act; Real Estate Settlement Procedures Act (Regulation X); Truth in Lending Act (Regulation Z); and Credit Practices (Part 706); and Truth in Savings Act (Part 707).

¹⁰ This Report uses budgeted percentages and budgeted amounts for 2014 because the NCUA has not as of the date of this Report issued operating and financial results for 2014.

¹¹ The NCUA total budget for 2014 was \$ 268.3 million, which represented a \$26.5 million (11%), increase over its 2013 actual expenses of \$241.8 million.

glance appears comparable to the percentage increase experienced by FISCUs. However, the increase of the OTR had a major impact on reducing FCU Operating Fees, which represent actual out-of-pocket expenditures for FCUs. By increasing the OTR, the NCUA Board was able to shift a substantial portion of NCUA expenses to the NCUSIF, thereby enabling it to reduce FCU Operating Fees for 2014. As a result, FCU Operating Fees in 2014 were budgeted to be \$82.6 million, versus \$93.1 million in 2013, a decrease of \$10.5 million, or an 11.3% reduction compared to 2013, despite a \$26.5 million (11%) increase in the NCUA Operating Budget for 2014.

The 2015 budgeted OTR not only continued this trend but, as applied, resulted in an even larger reduction in FCU Operating Fees than in 2014. Continuing to utilize this same mapping, NCUA “insurance-related” examiner time for purposes of determining the 2015 budgeted OTR was reported as 87.8%. The budgeted OTR for 2015 increased to 71.8% of NCUA budgeted total expenses. This represents a 21.5% increase in the 2015 budgeted OTR from 2013.

The budgeted contribution of FISCUs through the 2015 OTR to the NCUA 2015 Operating Budget increased to \$93.9 million, which represents a \$26.9 million (40.1%) increase over their 2013 contribution of \$67.0 million.¹² The budgeted contribution of FCUs through the 2015 OTR to the NCUA 2015 budget increased to \$106.8 million compared to their 2013 contribution of \$79.0 million, which represents a \$27.8 million (35.1%) increase.

As in 2014, the increase in the budgeted OTR will have a significant impact in reducing FCU Operating Fees in 2015. FCU Operating Fees in 2015 were budgeted to be \$78.8

¹² The NCUA total budget for 2015 was \$279.5 million, which represented a \$37.7 million (15.5%) increase over its 2013 actual expenses of \$241.8 million.

million, a \$3.8 million (4.8%) decrease from budgeted FCU Operating Fees for 2014. More telling is the comparison of FCU Operating Fees between 2013, the last year before the new mapping of NCUA regulations discussed above, and 2015. FCU Operating Fees in 2015 were budgeted to be \$78.8 million, versus \$93.1 million in 2013, a decrease of \$14.3 million, or an 18.1% reduction compared to 2013, despite a \$37.7 million (15.6%) increase in the NCUA expenses from 2013 to those expected in 2015.

The increase in the 2014 budgeted OTR and 2015 budgeted OTR resulting in large part from this new mapping of NCUA regulations discussed above, as compared to the budgeted OTR for 2013, the last year before this new mapping, is as follows:

BUDGETED OTR AS A PERCENT OF NCUA ANNUAL BUDGET

<u>YEAR</u>	<u>OTR</u>
2013	59.1%
2014	69.2%
2015	71.8%

As a result of the NCUA Board's increases in the OTR discussed in this Section, FCUs have enjoyed a significant reduction in the FCU Operating Fees they otherwise would have been required to pay directly to the NCUA.

The following chart summarizes the impact of the OTR on the amount of NCUA total expenses incurred by FISCUs and FCUs for the period 2009-2015.

IMPACT OF NCUA OTR

(\$ in millions)

Year	NCUA Expenses ¹³	NCUA Expenses Allocated to NCUSIF ¹⁴	Budgeted OTR ¹⁵	Actual OTR ¹⁶	FISCUs share of NCUA Expenses Allocated to NCUSIF ¹⁷	FCUs share of NCUA Expenses Allocated to NCUSIF ¹⁸	FCU Operating Fees ¹⁹
2009	\$167.7	\$ 90.2	53.8%	53.8%	\$40.9	\$49.3	\$81.7
2010	\$200.9	\$113.6	57.2%	56.5%	\$51.6	\$62.0	\$86.8
2011	\$216.1	\$130.0	58.9%	60.2%	\$59.3	\$70.7	\$86.2
2012	\$228.0	\$137.5	59.3%	60.3%	\$52.7	\$74.8	\$88.8
2013	\$241.8	\$146.0	59.1%	60.4%	\$67.0	\$79.0	\$93.1
2014 ²⁰	\$268.3	\$185.7	69.2%	--	\$85.6	\$100.1	\$82.6
2015 ²¹	\$279.5	\$200.7	71.8%	--	\$93.9	\$106.8	\$78.8

¹³ Source: NCUA Annual Report, except for 2014 and 2015.

¹⁴ The allocation to NCUSIF is 100% of the expenses of the Office of National Examinations and Supervision (Office of Corporate Credit Unions) to the extent that they exceed the actual operating fees paid by federal corporate credit unions (for the years where applicable), plus the OTR applied to all other expenses. Source: NCUA Annual Report, except for 2014 and 2015.

¹⁵ As approved by NCUA Board for the calendar year.

¹⁶ The Actual OTR is calculated by dividing the NCUA Expenses Allocated to NCUSIF column by the NCUA Expenses column. The Actual OTR can differ from the Budgeted OTR column because the actual NCUA Expenses and actual NCUA Expenses Allocated to NCUSIF for a given year may differ from the budgeted NCUA Expenses and budgeted NCUA Expenses Allocated to NCUSIF for that year. In addition, any recovery of NCUA expenses from the NCUSIF other than through the OTR are included in the Actual OTR calculation.

¹⁷ Based on FISCUs share of total NCUSIF insured shares, as reported by NCUA Board for the calendar year.

¹⁸ Based on FCUs share of total NCUSIF insured shares, as reported by NCUA Board for the calendar year.

¹⁹ Source: NCUA Annual Report, except for 2014 and 2015.

²⁰ Source: NCUA Board estimates for 2014 as reported in Board Action Memorandum, dated November 20, 2013, from Office of Examination and Insurance to NCUA Board, Re: Overhead Transfer Rate 2014.

²¹ Source: NCUA Board estimates for 2015 as reported in Board Action Memorandum, dated November 20, 2014, from Office of Examination and Insurance to NCUA Board, Re: Overhead Transfer Rate 2015.

II. ANALYSIS OF THE ADMINISTRATIVE PROCEDURE USED BY THE NCUA TO IMPLEMENT THE OTR

A. NCUA BOARD'S IMPLEMENTATION PROCEDURE

The NCUA Board in the past has held annual public briefings and forums on its Operating Budget, of which the OTR is a significant component. The last public briefing and forum was held by the NCUA Board in 2008. The NCUA Board has also received comment on the OTR outside of these public briefings and forums.²² However, the NCUA Board has never formally requested comment by publishing in the *Federal Register* a proposed OTR, a proposed methodology for calculating the OTR or proposed changes to its methodology for calculating the OTR.

The NCUA Board also in our view has never provided a reasoned, comprehensive explanation of its OTR methodology, including how the activities it defines for this purpose as “insurance-related” are actually related to insurance, and why it has changed its position over time as to what constitutes “insurance-related activities.” Since at least 2008, the NCUA Board has released an annual Board Action Memorandum prepared by the Office of Examination and Insurance which prescribes the Office of Examination and Insurance’s recommendation for the OTR for the following year. This 2-3 page memorandum (with an attachment that contains only tables without textual explanation) provides only a summary description of the methodology used to calculate the OTR, including during years in which that methodology changed. For example, in its November 20, 2013 memorandum recommending the OTR for 2014, which as discussed in Section I increased materially based on a revised OTR methodology, the Office of

²² As indicated below, the NCUA staff has stated that one of the reasons for its consideration of the OTR for 2012 was in part in response to industry comment, but did not mention that it considered the need for formal APA-compliant notice and comment.

Examination and Insurance provided only the following two paragraph explanation of the change to the OTR methodology:

In 2012, the Office of Examination and Insurance (E&I) clarified the application of the insurance-related and non-insurance related definitions in the ETS [Examiner Time Survey] in response to industry and examiner comments. This clarification involved how examiners record on the ETS time they spend examining for compliance with various regulations. Specifically, the NCUA rules and regulations were individually mapped to the proper ETS category based on the extent to which a regulation was designed to protect the NCUSIF (a new sub-category of insurance related labeled “insurance-regulatory”) or to govern commerce and/or provide consumer protection (labeled “non-insurance or consumer regulatory”).

This breakdown and mapping of regulations is consistent with the existing overall definitions of insurance-related and non-insurance related. The primary definitions have not changed; the regulations have merely been explicitly mapped based on the overarching definitions. While examiners continue to use their judgment as to what exam procedures to perform during an examination or supervision contact based on the risks and product-service mix of credit union, this clarification creates more consistency as to where examiners record the time on the ETS.²³

Notwithstanding this statement of the Office of Examination and Insurance that this mapping “is consistent with” the previously utilized definitions of insurance-related and non-insurance related, it appears that certain NCUA regulatory activity that was previously considered “regulatory-related” and therefore not included in the OTR was recast as a result of this mapping as “Insurance Regulatory Related Examination” for purposes of, and included in, the 2014 OTR. Although the Office of Examination and Insurance then references a 2013 PricewaterhouseCoopers review of the mapping of NCUA regulations to the categories on the ETS (discussed further below) which was attached to its memorandum, nowhere in that

²³ Office of Examination and Insurance Memorandum to NCUA Board, Overhead Transfer Rate 2014, p. 2 (November 20, 2013), available at <http://www.ncua.gov/about/Documents/Agenda%20Items/AG20131121Item5a.pdf>.

memorandum or in the attached PricewaterhouseCoopers review is an explanation provided as to why each particular regulation is considered “insurance-regulatory” or “non-insurance or consumer regulatory” for purposes of the OTR calculation.

The adjustment made by the NCUA Board to the OTR for the value to the NCUSIF of the insurance-related supervision provided by the state supervisory authorities and relied upon by the NCUA in managing the NCUSIF provides another example of the NCUA Board’s failure to provide a reasoned, comprehensive explanation of its OTR methodology. For the 2015 OTR, this adjustment, referred to by the NCUA Board as the “Imputed SSA Value,” was \$41.56 million, approximately 14.9% of the 2015 NCUA budgeted expenses. Although the annual Board Action Memorandum prepared by the Office of Examination and Insurance includes a 4-step worksheet for the Imputed SSA Value calculation, no textual explanation is provided describing the methodology used for the Imputed SSA Value calculation nor are the sources for certain of the calculation inputs explained. Notwithstanding the significance of this Imputed SSA Value to the OTR calculation, the NCUA Board has never explained why it has determined to make this adjustment rather than, for example, pay the state supervisory authorities directly from the NCUSIF or use alternative methodologies to make this adjustment.²⁴

In addition, we are not aware of any independent third party determination that the NCUA Board’s OTR methodology complies with the FCUA or other applicable law. In a report

²⁴ The NCUA Board has not explained, for purposes of the SSA Imputed Value: (i) why it uses the examination and supervision hours spent for FCUs by asset size and CAMEL rating and the NCUA Examination Time Survey, rather than the state supervisors’ actual FISCUs “insurance-related” examination and supervision hours; (ii) why it assumes a 50-50 allocation for the insurance-related work in current FISCUs joint examinations; (iii) why it uses the larger, rather than the smaller or an average of, the exam hour calculations (current budgeted state exam insurance hours and projected FISCUs exam insurance hours based on the Examination Time Survey); (iv) the basis for the adjustment increase for Budgeted Supervision Hours; and (v) the NCUA staffing models and productivity levels used to translate additional workload hours to staff positions and the imputed cost of these positions.

issued January 20, 2011, PricewaterhouseCoopers evaluated the reasonableness and soundness of the methodology adopted by the NCUA Board in the calculation and administration of the OTR. But PricewaterhouseCoopers indicates in this report that it “does not express an opinion related to any issues that may be perceived with regards to NCUA’s dual role as regulator and insurer, oversight or lack thereof of NCUA’s budget or an interpretation of Congressional intent behind Title II of the Federal Credit Union Act of 1970 which established NCUSIF.”²⁵ As discussed above, PricewaterhouseCoopers in 2013 analyzed the NCUA Board’s proposed mapping of its rules and regulations resulting in the 2014 OTR. However, PricewaterhouseCoopers states in that report that its review “does not constitute an audit or evaluation of the administration and execution of the [Examination Time Survey], the overhead transfer rate (OTR) methodology or resulting OTR calculation.”²⁶

B. THE ADMINISTRATIVE PROCEDURE ACT

Under the APA, an agency such as the NCUA must follow APA-specified notice and comment requirements for its “rule making.” “Rule making” is defined in the APA as an agency process for formulating, amending, or repealing a “rule.”²⁷ “Rule,” in turn, is defined as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of

²⁵ Overhead Transfer Rate Review For National Credit Union Administration, PricewaterhouseCoopers, p. 3 (January 20, 2011).

²⁶ National Credit Union Administration Analysis of Examination Time Survey (ETS) Modifications, PricewaterhouseCoopers, page 1 (October 2, 2013), available at <http://www.ncua.gov/about/Documents/Agenda%20Items/AG20131121Item5b.pdf>.

²⁷ 5 U.S.C. § 551(5).

valuations, costs, or accounting, or practices bearing on any of the foregoing.²⁸

When an agency is engaged in APA “rule making,” the agency must: (1) publish a general notice of proposed rule making in the *Federal Register* that includes “the terms or substance of the proposed rule or a description of the subjects and issues involved;” (2) give “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments;” and (3) “[a]fter consideration of the relevant matter presented . . . incorporate in the rules adopted a concise general statement of their basis and purpose.”²⁹

Courts are charged with ensuring that agencies comply with the procedural requirements of the APA. *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979).

The OTR, and the methodology used by the NCUA Board to calculate the OTR, is an NCUA Board statement of general applicability and future effect designed to implement and interpret the FCUA provisions addressing the OTR, as expressly contemplated by the APA definition of “rule.” Also, because the OTR affects the NCUSIF coverage ratio as well as FCU Operating Fees, it is an “approval or prescription for the future of rates, financial structure, facilities, appliances, services or allowances, costs and/or accounting or practices bearing on any of the foregoing,” as expressly contemplated by the APA’s definition of “rule.”

The OTR apportions to FISCUs through the NCUSIF assessment a significant percentage of NCUA total costs (33.6% or \$93.9 million of NCUA budgeted costs for 2015). In addition, although FCUs also pay a significant percentage of NCUA costs through the OTR (38.2% or \$106.8 million of NCUA budgeted costs for 2015), increases in the OTR have the

²⁸ 5 U.S.C. § 551(4).

²⁹ 5 U.S.C. §§ 553 (b), (c).

effect of substantially reducing FCU Operating Fees because of the shift of NCUA expenses from FCUs to the NCUSIF, which is funded by all federally insured credit unions. For example, FCU Operating Fees budgeted for 2015 dropped \$14.3 million (18.1%) as compared to the 2013 FCU Operating Fees, notwithstanding a \$37.7 million (15.6%) increase in the NCUA Operating Budget from 2013 to 2015. This was due to the increase in the budgeted OTR from 59.1% in 2013 to 71.8% in 2015, which resulted in large part from the change in the OTR calculation methodology for the 2014 and 2015 budgeted OTR discussed in Section I.

As a result, the competitive position of FISCUs relative to FCUs was adversely impacted by the change in OTR methodology for the 2014 and 2015 budgeted OTR and the resultant increase in the budgeted OTR for 2014 and 2015 relative to 2013. That is, during this two year time period, FISCUs have borne an increasing percentage of NCUA expenses, whereas FCUs enjoyed a substantial reduction of \$10.5 million (11.3%) in their out-of-pocket FCU Operating Fees between 2013 and 2014 and an additional budgeted reduction of \$3.8 million (4.8%) between 2014 and 2015, for a total budgeted reduction between 2013 and 2015 of \$14.3 million (18.1%) from 2013 to 2015. Further, an increase in the OTR combined with the same or increased NCUA expenses decreases the likelihood and amount of any *pro rata* distribution to federally insured credit unions provided for in 12 U.S.C. § 1782(c)(3). Accordingly, barring the applicability of one of the APA exceptions discussed later in this Section, based upon the effect on FISCUs and FCUs, we believe the NCUA Board calculation of the OTR is a “rule” subject to APA notice and comment requirements.

Indeed, given its impact on federally insured credit unions generally and the adverse effect on the competitive position of FISCUs relative to FCUs, we believe the NCUA Board’s

adoption of the OTR should be deemed a major rule for purposes of the APA.³⁰ In addition to the APA requirements discussed above, major rules should contain: (i) a statement of purpose providing the underlying reason for the rule; (ii) monetized or quantified costs and benefits or a qualitative discussion of them; and (iii) a discussion of the alternatives.³¹

The APA contains certain exceptions to its notice and comment requirements.³² As a general matter, “[t]he legislative history of the [APA] demonstrates that Congress intended the exceptions in § 553(b)(B) to be narrow ones.” *Nat’l Nutritional Foods Ass’n v. Kennedy*, 572 F.2d 377, 384 (2d Cir. 1978). “Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced.” *N.J. Dep’t of Env’tl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

The first exception from the APA notice and comment requirements is for “rules of agency organization, procedure or practice.”³³ The general approach that courts have followed in determining the applicability of this exception is whether the rule in question has a substantive impact of broad applicability. In *Minard Run Oil Company v. United States*, 670 F.3d 236 (3d Cir. 2011), the Third Circuit Court of Appeals rejected the government’s contention that the Forest Service’s new requirement that companies proposing to drill on federal land complete a forest-wide environmental impact statement was a rule of agency organization, procedure or

³⁰ Major rules are defined by the Congressional Review Act as rules that will likely result in: (i) an annual effect on the economy of \$100 million or more; (ii) major increases in cost or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions, or (iii) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. § 804(2). The Office of Management and Budget’s Office of Information and Regulatory Affairs is responsible for making major rule designations for independent regulatory agencies such as the NCUA. 5 U.S.C. § 804(2).

³¹ See, United States General Accounting Office Report 14-714, *Federal Rulemaking* (Sept. 2014).

³² 5 U.S.C. § 553(b).

³³ 5 U.S.C. § 553(b)(3)(A).

practice because the purpose and effect of this rule was to prevent new drilling by mineral rights owners during the course of the multi-year environmental impact statement. Additionally, the court also considered whether the rule in question would “have a substantial adverse impact on the challenging party.” The court, citing *SBC, Inc. v. FCC*, 414 F.3d 486, 497-98 (3d Cir. 2005), explained that “rules of agency organization, procedure or practice” do not themselves shift the rights or interests of the parties, although they may change the way in which parties present themselves to the agency. The court concluded that, in contrast, rules that work substantive changes in prior regulations, or create new law, rights, or duties, are subject to the notice and comment requirements of the APA.

Similarly, in *Anderson*, the U.S. District Court for the Eastern District of California rejected the government’s argument that an instruction of the Secretary of Agriculture that the calculation of household income for food stamp users was to include the amount of government rent subsidies paid directly to a low income housing tenant’s landlord was not subject to APA notice and comment because it was a rule of agency organization, practice or procedure. The court explained that “a significant difference exists between interpretive rules and general statements of policy which affect only the internal operations or actions of an agency and those rules which affect the substantive rights of others outside of the agency. Requiring publication of notice of proposed rule making with invitation to comment makes little sense if only internal operations or management of the agency are involved since agency actions on these matters would have no direct effect upon the substantive rights of persons outside the agency.” The court concluded that APA notice and comment was required for this rule change because substantive rights of persons outside the agency who are receiving rent subsidies are directly affected by the instruction because it raises the cost of their allocated food stamps. The

Secretary's instruction, according to the court, was therefore not a mere matter of agency management. The court cited several cases that have held that agency rulemaking is subject to APA notice and comment if it substantially affects the rights of persons subject to agency regulations, including *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1972); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972); *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740 (3d Cir. 1969). The court explained why it is "important and proper that before an agency undertakes to promulgate rules affecting substantive rights of others outside the agency, there should be an opportunity afforded for an exchange between those whose rights are affected and the government." Quoting *Kelly*, the court stated:

Voiding the present regulations on what at first blush appears to be a technicality is not as pointless as it may seem. We believe that the 30-day notice rule serves an important interest, the right of the people to present their views to government agencies which increasingly permeate their lives. The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people, especially in cases such as this where Congress has only roughed in its program.

Anderson, 428 F. Supp. at 251 (quoting *Kelly*, 399 F.Supp. at 1102).

Given the widespread effect of the OTR on federally insured credit unions generally and FISCUs particularly, we do not believe that the NCUA could justify its failure to follow APA notice and comment procedures on the grounds that the OTR comes within the APA exception for a rule of "agency organization, procedure or practice" under 5 U.S.C. § 553(b)(3)(A).

The APA also provides that publication of notice and opportunity for comment are not required for “interpretative rules” or “general statements of policy.”³⁴ As the courts often have analyzed these two exceptions in the same manner and sometimes use these exceptions interchangeably, we consider them together. The courts generally draw a distinction between “interpretive rules” or “general statements of policy” on the one hand for which no notice or comments is required under the APA, and “substantive rules” or “legislative rules” on the other hand for which APA notice and comment is required.

Substantive rules affect individual rights and are binding on the courts, whereas interpretive rules leave the agency free to exercise discretion. *Williams v. Van Buren*, 117 F. App'x 985, 986 (5th Cir. 2004) (*per curiam*). The critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers; interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015). An example of an interpretive rule would be where the agency intends merely to publish a policy guideline that is subject to attack when it is finally applied in future cases. *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 39 (D.C. Cir. 1974); *see also, Doe v. Hampton*, 566 F.2d 265, 280-81 (D.C. Cir. 1977).

The D.C. Circuit Court of Appeals has described the distinction between legislative rules, interpretive rules and policy statements as follows:

An agency action that purports to impose legally binding obligations or prohibitions on regulated parties -- and that would be the basis for an enforcement action for violations of those obligations or requirements -- is a legislative rule... (As to interpretive rules, an agency action that merely

³⁴ 5 U.S.C. § 553(b)(3)(A).

interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.) An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule -- is a general statement of policy.

Nat'l Mining Ass'n v. EPA, 758 F.3d 243, 251-52 (D.C. Cir. 2014).

In distinguishing between legislative rules and general statements of policy, the D.C. Circuit has long been guided by two important factors: “the actual legal effect (or lack thereof) of the agency action in question on regulated entities,” and the “agency’s characterization” of the agency action. *Nat'l Mining Ass'n*, 758 F.3d at 252. The first factor “focuses on the effects of the agency action” asking whether the agency has “(1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion.” *Wilderness Soc’y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (quoting *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003)). The second factor looks to the agency’s expressed intentions: “(1) the [a]gency’s own characterization of the action; (2) whether the action was published in the *Federal Register* or Code of Federal Regulations; and (3) whether the action has binding effects on private parties or the agency.” *Wilderness Soc’y*, 434 F.3d at 595 (quoting *Molycorp v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)).

To determine whether a rule is a substantive or legislative rule rather than an interpretive rule, the D.C. Circuit applies a four-factor test that considers: (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties; (2) whether the agency has published the rule in the Code of Federal Regulations; (3) whether the agency has explicitly invoked its general legislative authority, and (4) whether the rule effectively amends a prior legislative rule. Generally, if any one of these prongs is satisfied, the rule is legislative

rather than interpretive. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

Credit Union Nat'l Ass'n v. Nat'l Credit Union Admin., 573 F. Supp. 586 (D.D.C. 1983) is particularly instructive as to whether a court would view the OTR as an “interpretive rule” or “general statement of policy” exempt from APA notice and comment requirements. This case involved the NCUA Board’s adoption of new payout priorities for involuntary liquidating FCUs under Subchapter II of the FCUA without APA notice or comment. NASCUS and the Credit Union National Association (“CUNA”) challenged on the basis that the NCUA Board’s adoption of new payout priorities constituted a rule which required the NCUA Board to comply with APA notice and comment requirements. The U.S. District Court for the District of Columbia determined the new payout priorities were substantive or legislative rules, rather than interpretative rules as contended by the NCUA Board, and therefore subject to APA notice and comment requirements. The court explained that the proper analysis for this purpose was articulated in *Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952):

In applying the Gibson Wine test, however, “there is no 'reason to doubt the continuing vitality of the substantial impact test as . . . one of several criteria for evaluating claims of exemption from [the APA].’” *Cabais*, 690 F.2d at 237, quoting *Batterton*, 648 F.2d at 709 n.83.

Under this analysis, it is inescapable that [the NCUA Board’s rule in question] is a legislative rather than an interpretive rule, despite NCUA's own characterization. Such agency labels, although “entitled to a significant degree of credence,” *Cabais*, 690 F.2d at 238 n.7; *British Caledonian*, 584 F.2d at 992, are not dispositive. Here, the [NCUA] Board clearly issued [the NCUA Board’s rule in question] to implement its mandate to make payments as liquidating agent for closed federal credit unions pursuant to 12 U.S.C. § 1787(a)(2). The agency's “intent” -- a factor the Court must take into account -- is revealed by the rule's effect and not only by its characterization. *Chamber of Commerce of the United States v. OSHA*, 204 U.S. App. D.C. 192, 636 F.2d 464, 468 (D.C. Cir. 1980), quoting *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416, 86 L. Ed. 1563, 62 S. Ct.

1194 (1942). The Board stated that its intent was “to make . . . a change to the payout priority,” in accordance with the GAO's recommendation. Although the statute itself is silent on the matter of payout priorities, the Board relied on its own authority to ‘establish[]’ priorities. Such legislative action by an agency cannot be disguised by the simple semantic maneuver of claiming it ‘explains’ or ‘clarifies 12 U.S.C. §§ 1787(a)(2) and 1787(d). See e.g., *Chamber of Commerce*, 204 U.S. App. D.C. 192, 636 F.2d 464; *American Bus Association v. United States*, 201 U.S. App. D.C. 66, 627 F.2d 525 (D.C. Cir. 1980). Defendant implicitly recognizes the true character of [the NCUA Board’s rule in question] by describing the rule as giving ‘operational meaning’ to the statute. (Defendant's memorandum in support of its motion at p. 15.) The Board's decision to apply the new priority scheme prospectively only is a further indication that its effect is to create new law and not merely to interpret existing law.

Because [the NCUA Board’s rule in question] is not an ‘interpretive rule,’ it must be vacated for failure to comply with the APA's notice and comment requirements.

Credit Union Nat’l Ass’n, 573 F. Supp. at 591.

As with the NCUA Board’s payout priorities for involuntary liquidating FCUs at issue in *Credit Union Nat’l Ass’n*, we believe that the NCUA Board’s OTR similarly should be found to be a substantive rule subject to APA notice and comment. As with the NCUA Board’s payout priorities for involuntary liquidating FCUs, the OTR creates new law by implementing the provisions of the FCUA addressing the OTR with substantial effect without further NCUA action on federally insured credit unions in general and FISCUs in particular. Applying the test developed by the D.C. Circuit confirms that the OTR is a substantive or legislative rule subject to the notice and comment requirements of the APA. In the absence of the OTR, there would not be an adequate legislative basis for the NCUA to shift its expenses to federally insured credit unions by requisitioning funds from the NCUSIF to cover expenses, nor has the NCUA published the OTR in the *Federal Register* or in the Code of Federal Regulations. Moreover, the NCUA has stated that it is relying on its authority under the FCU Act to establish the OTR.

Finally, by continuing to alter the methodology for computing the OTR, the NCUA has effectively amended its prior OTR rules.

The final exception to the APA notice and comment requirements is the so-called “good cause” exception. The APA provides that notice and comment requirements do not apply “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”³⁵

There is currently a conflict among the Circuits regarding the appropriate standard of review for an agency’s assertion of good cause under 5 U.S.C. § 553(b)(3)(B). The Eighth Circuit defers to the agency’s determination and reviews only whether the agency’s determination of good cause complies with Congressional intent. *United States v. Gavrilovic*, 551 F.2d 1099 (8th Cir. 1977). This deferential standard appears similar to the approach taken by the Fifth and Eleventh Circuits, which each use an arbitrary and capricious standard. *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010). The Fourth and Sixth Circuits; however, apply *de novo* review, which generally affords less deference to the determination of the agency in question. *United States v. Gould*, 568 F.3d 459, 469-70 (4th Cir. 2009); *United States v. Cain*, 583 F.3d 408, 420-21 (6th Cir. 2009).

Several Circuits have considered the Attorney General’s finding that good cause existed to waive notice and comment for its regulations implementing the Sex Offender and Registration Notification Act. The Attorney General offered two rationales for waiving these

³⁵ 5 U.S.C. § 553(b)(3)(B).

requirements: (1) the need to eliminate “any possible uncertainty” about the applicability of the Act; and (2) concern that delay would endanger the public through the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had the local authorities and communities been aware of the presence of the sexual predators, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided in the Act.³⁶ Two Circuits, the Fourth and Eleventh, found good cause to exist to bypass notice and comment. *Gould*, 568 F.3d at 469-70 (interim rule necessary to provide “legal certainty about [the Act’s] ‘retroactive’ application”); *Dean*, 604 F.3d at 1281 (public safety exception to notice and comment applied not only to true “emergency situations” but also to situations “where delay results in serious harm.”). However, the Third, Fifth, Sixth, Eighth and Ninth Circuits found that the Attorney General’s stated reasons for finding good cause to bypass notice and comment were insufficient. *United States v. Reynolds*, 710 F.3d 498, 509 (3rd Cir. 2013); *Johnson*, 632 F.3d at 928; *Cain*, 583 F.3d at 421-24; *United States v. Brewer*, 2014 U.S. App. LEXIS 17454 (8th Cir. 2014); *United States v. Valverde*, 628 F.3d 1159, 1168 (9th Cir. 2010). For example, the Eighth Circuit determined that some uncertainty follows the enactment of any law that provides an agency with administrative responsibility, so that rationale if accepted by the court would justify an exception to notice and comment in all cases. The Eighth Circuit also found that the Attorney General’s public safety rationale is nothing more than a rewording of the statutory purpose Congress provided in the text of the Act and delay in implementing a statute always will cause additional danger from the same harm the statute seeks to avoid. The Eighth Circuit then observed, although the risk of future harm may under some circumstances justify a finding of good cause, that risk must be more substantial than a mere possibility. Accordingly, the Eighth Circuit determined that, even under an arbitrary and

³⁶ 72 *Fed. Reg.* 8894, 8896-97 (February 28, 2007).

capricious standard of review, there was an insufficient showing of good cause for bypassing the APA's requirement of notice and comment. *Brewer*, 2014 U.S. App. LEXIS at *5.

Based on the above judicial articulations of the good cause exception, the NCUA Board should not be able to rely upon this exception to justify its failure to provide for APA notice and comment for the OTR, regardless of the standard of review applied to the NCUA Board's assertion of good cause. If protection from sexual assaults and child sexual abuse or exploitation by sex offenders does not justify the good cause exception from APA notice and comment, it seems unlikely that any uncertainty or delay in applying the OTR would justify such an exception.

C. PROCEDURES OF OTHER FEDERAL BANKING AGENCIES

The procedures other federal banking agencies utilize to establish their fees and charges also is instructive of the APA procedural requirements for the OTR. The OCC establishes assessments and other fees for its examination and supervision of national banks and federal savings banks. The OCC follows an APA notice and comment process both for the methodology it uses for determining these assessments and fees, as well as for its actual assessments and fees.³⁷ The FDIC is less analogous to the NCUA than the OCC because the FDIC (unlike the NCUA and OCC) recovers all of its costs from insurance assessments, except for liquidation costs recovered from the estate of failed FDIC-insured banks. However, the FDIC utilizes an APA notice and comment process for its assessment methodology.³⁸ The

³⁷ See, 12 C.F.R. pt. 8, proposed for public comment at 76 *Fed. Reg.* 30557 (May 26, 2011); and 2014 OCC fees proposed for public comment at 79 *Fed. Reg.* 23297 (April 28, 2014).

³⁸ See, 12 C.F.R. pt. 327, proposed for public comment at 75 *Fed. Reg.* 66262 (October 27, 2010) (Notice of Proposed Rulemaking on Assessment Dividends, Assessment Rates and Designated Reserve Ratio). See also, Notices of Proposed Rulemaking on the Assessment System Applicable to Large Depository Institutions; 73 *Fed. Reg.* 15459 (March 24, 2008); 71 *Fed. Reg.* 28808 (May 18, 2006).

Federal Reserve Board, like the NCUA, has concurrent regulatory and other responsibilities and, for purposes of calculating Reserve Bank fees for priced services, allocates expenses between priced services and these other responsibilities. While the Federal Reserve Board does not solicit public comment on the fees for Federal Reserve Bank priced services, it does provide APA-compliant notice and comment on the methodology it uses to develop these fees.³⁹ In addition, as required under the Dodd-Frank Act, the Federal Reserve Board recently begun imposing assessments for bank holding companies and savings and loan holding companies with total consolidated assets of \$50 billion or more and nonbank financial companies designated for Federal Reserve Board supervision by the Financial Stability Oversight Council equal to the total expenses the Federal Reserve Board estimates are necessary or appropriate to carry out its supervisory and regulatory responsibilities for these entities; and the Federal Reserve Board followed an APA-compliant notice and comment process for these new assessment fees.⁴⁰ The fact that these other federal banking agencies follow the APA notice and comment process for the methodology they employ in determining their assessments and fees and/or for the actual assessments and fees strongly supports the conclusion that the NCUA Board's adoption of the OTR constitutes a rule subject to the APA notice and comment requirements.

³⁹ See e.g., 65 *Fed. Reg.* 82360 (December 28, 2000); 74 *Fed. Reg.* 15481 (April 6, 2009).

⁴⁰ 78 *Fed. Reg.* 23162 (April 18, 2013).

D. *GAO REVIEW*

The GAO previously has recognized there are concerns with the procedures utilized by the NCUA Board to determine the OTR. After the NCUA Board abandoned its then long-standing policy of a 50% OTR and increased the budgeted OTR to 66.7% for 2001 and 62% for 2002 and 2003 as discussed in Section I, the GAO studied the methodology used by the NCUA Board for the 2001-2003 OTR. In explaining the importance of the OTR, the GAO stated that “[t]he sharp increase in the overhead transfer rate and its negative impact on NCUSIF’s net income have raised questions about NCUA’s process for determining the transfer rate.”⁴¹ The GAO noted in this study that the NCUA Board did not implement the GAO’s recommendation in its 1991 report that the NCUA should establish separate supervision and insurance offices.⁴² The GAO then concluded that “[a]s currently determined by the NCUA, the overhead transfer rate may not have accurately reflected the actual time spent by NCUA staff on insurance-related activities.”⁴³ Following this 2003 GAO report, the NCUA Board revised its OTR methodology, which resulted in lower OTRs than during the 2001-2003 time period, until the NCUA Board again revised its methodology for the 2014 and 2015 OTR.

⁴¹ United States General Accounting Office Report 04-91, *Credit Unions Financial Condition Has Improved, but Opportunities Exist to Enhance Oversight and Share Insurance Management*, p. 59 (Oct. 2003).

⁴² *Id.*, at p. 61. See also, United States General Accounting Office Report 91-85, *Credit Union Reforms for Ensuring Future Soundness*, pp. 11-12, 186-192, 197 (July 1991).

⁴³ *Id.*, at pp. 81-82.

III. CONCLUSION

For the reasons discussed above, we believe that the NCUA Board's adoption of the OTR would be deemed to constitute a "rule" subject to APA notice and comment requirements. Because the NCUA Board has never followed this APA notice and comment process for the OTR, we believe the process utilized by the NCUA Board to implement the OTR violates the APA.