



CONFERENCE OF STATE BANK SUPERVISORS

March 13th, 2020

Bethany J. Shana, Office of Credit Risk Management
Small Business Administration
409 3rd Street, SW
Washington, DC 20416
RIN 3245-AH04

Re: *SBA Supervised Lenders Application Process.*

Dear Sir or Madam,

The Conference of State Bank Supervisors (“CSBS”) appreciates the opportunity to comment on the notice of proposed rulemaking issued by the Small Business Administration (the “SBA”) titled “SBA Supervised Lenders Application Process”. The proposed rule would revise the regulations applicable to Non-Federally Regulated Lenders (“NFRLs”) seeking to participate in the SBA 7(a) loan program to limit an NFRL’s lending area for 7(a) loan originations to the state in which the NFRL’s “primary state regulator” is located and to establish minimum capital requirements and an application and review process for NFRLs.

CSBS is concerned that the proposed rule fails to account for the structure of state regulation, in certain circumstances, as well as the basic principles of federalism that underlie the state regulatory system. Accordingly, we have written this letter to highlight state regulatory schemes that conflict with the proposal as well as to emphasize the importance of the federalist underpinnings of state nonbank financial regulation. For background, CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS was formed in 1902 to support the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.

For many years, the state regulators that comprised CSBS membership were primarily limited to regulating commercial banks and thrifts (that is, institutions that are referred to in the proposal as depository institutions that have a primary Federal regulator). But, gradually, the jurisdiction of state regulators has expanded to cover a wide array of non-depository institutions, including money transmitters, mortgage companies, consumer finance companies, debt collectors, and commercial lenders such as those impacted by the proposal. So, as an initial matter, it is worth noting that aspects of the proposal as well as the SBA’s current regulations cannot be reconciled with the structure and operation of state nonbank financial regulation in certain circumstances.

For instance, the current rules seem to contemplate that NFRLs will be subject to regulation by a “state banking regulator”, but in many cases a distinct government agency outside of the state banking department is charged with regulating commercial lenders. Additionally, in some cases, commercial lending is regulated through licensing rather than through chartering business and industrial development companies (BIDCOs). But the notion of a “primary state regulator” put forth in the proposal has no

relevance in the context of a licensing scheme, rather the relevant question in limiting the lending area of NFRLs would seem to be whether or not a given state regulates commercial lending in the form of 7(a) loan originations. CSBS regularly collects information on what nondepository institutions its members supervise and the structure of nondepository regulation and we encourage the SBA to consult with CSBS to better inform its current and proposed regulations.

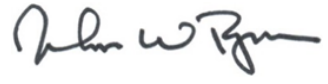
The proposal's irreconcilability with state nonbank financial regulation in certain circumstances also reflects a failure to appreciate the federalist underpinnings of the state regulatory system. State regulation of nonbank financial activities rests on the principle that consumer protection is traditionally a matter of local concern. Allowing states to regulate the terms and conditions of financial activities in their states enables consumers, as citizens, to maintain control over their economic lives through the medium of state regulation. The state officials charged with regulating financial services are accountable to the citizens of their states to a degree which is unmatched by any federal agency or official. Indeed, the wisdom in imbuing financial regulation in the United States with our federalist system of government is, as the Supreme Court has stated, that it enables states "to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times, without having to rely solely upon the political processes that control a remote central power."

The proposed rule, however, gives little to no regard to these federalist principles which is manifest both in the current lender participating criteria as well as the proposed application requirements. These rules limit eligibility to apply and participate in the 7(a) loan program to NFRLs subject to state regulation that is "satisfactory to the SBA". The proposal gives no indication or guidance as to what would or would not make state regulation "satisfactory" to the SBA other than that this determination will be made "in its sole discretion". States cannot be expected to tailor their laws or their regulatory approach to the satisfaction of the SBA when there is no indication as to what would be satisfactory, no indication that the SBA will explain its determination as to its satisfaction with state regulation, and no commitment to make this determination in a transparent or consistent manner. The statutory authority for the SBA to render eligibility contingent on its satisfaction with state regulation is not explained, so its not even clear that the SBA could be held accountable, at the federal level, in making this determination.

Given the significant federalism issues raised by the proposal, it is troubling that the SBA has determined, in a conclusory manner, that the proposal does not require a federalism assessment under Executive Order 13132 which governs proposed rules with federalism implications. The federalism implications of the proposal are manifestly clear and the failure to acknowledge this fact undermines the purpose of Executive Order 13132 and the requirements laid out therein, including the requirement in Section 6, that the SBA consult with state officials in developing the proposed regulations. It is worth noting that, had the SBA complied with Section 6 in developing the proposal, the various misconceptions underlying the current and proposed rules could have been remedied well before issuance. Accordingly, CSBS believes the SBA must comply with Executive Order 13132 and conduct the requisite consultation with CSBS and state regulators regarding the proposal.

CSBS appreciates the opportunity to comment on the proposed revisions to the 7(a) loan program regulations. We encourage the SBA to use CSBS as a mechanism for consulting with state regulators regarding the proposal as this should enable the SBA to gain a greater understanding in how state nonbank regulation works and why it works the way it does. Consultation may also enable some consensus to be reached regarding what factors the SBA is considering in determining whether state regulation is satisfactory to the SBA. CSBS looks forward to working with SBA as it proceeds with updating its 7(a) loan program regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "John Ryan". The signature is fluid and cursive, with the first name "John" and the last name "Ryan" clearly distinguishable.

John Ryan