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B. Dan Berger
Senior Vice President
Government Affairs

January 15, 2009

The Honorable Richard Durbin
United States Senate
309 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Durbin:

I am writing on behalf of the National Association of Federal Credit Unions (NAFCU), the only national trade association that exclusively represents the interests of our nation's federal credit unions, to share our comments regarding S. 61, the "Helping Families Save Their Homes in Bankruptcy Act of 2009," and the areas where we believe the legislation can be improved.

NAFCU recognizes the well-intentioned efforts of S. 61 to deal with issues related to the continued fall-out from the subprime crisis and the need to mitigate foreclosures. As you know, credit unions did not cause the turmoil in the housing market, which has led to this deepening crisis. The mortgage practices that caused the subprime crisis stand in stark contrast to the credit union guiding principle of "people helping people." Nevertheless, our members recognize that it is important to be part of the solution. Credit unions are inherently invested in their communities and recognize the importance of addressing the critical issue of helping families save their homes.

However, as we have indicated before, NAFCU remains concerned about any legislation that includes broad cram-downs of all credit union mortgages in bankruptcy. We believe that a more targeted approach is better suited to address the issue. Limiting the legislation to loans made by for-profit entities and exempting member-owned not-for-profit financial cooperatives would still apply this legislation to those that created the problem and provide relief to those who need the help. The member-owner cooperative relationship at credit unions is a unique one and there is precedent in the current bankruptcy code recognizing the ability of credit unions to work with their members in bankruptcy and through financial distress to rebuild their financial lives.

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We believe that there are a series of changes to the legislation that can be made to improve the bill from a credit union perspective:

Targeted Approach

At the very least, we believe that this bill should be limited in scope to apply to subprime and Alt-A (or non-traditional) mortgage loans, and any loans (including prime and traditional loans) that were originated by a financial institution or its subsidiary that received cash infusions from the Emergency Economic Stabilization Act of 2008 (EESA) as part of the Capital Purchase Program (CPP). NAFCU believes that this would still address the legislative intent of the bill - assisting homeowners that are experiencing difficulty in the current housing market, but would also work to not adversely impact the financial institutions, such as credit unions, that did not engage in the practices that caused this financial crisis.

Credit unions, as mutual not-for-profit cooperative institutions, and their 90 million members are adversely impacted by cram-downs. Credit unions do not have stockholders to suffer losses and cannot turn to capital markets to raise capital, as all credit union capital must come from members. Consequently, any amounts crammed-down are losses to the credit union that ultimately lead to increased loan rates and decreased dividends offered to members of the credit union.

Furthermore, we recognize there has been a sentiment of public dissatisfaction that none of the first installment of the bailout funds from the EESA was used toward helping homeowners and foreclosure mitigation. NAFCU believes that the targeted approach outlined above would encourage modifications from those institutions that have received taxpayer dollars and provide an avenue for recipients of funds under EESA to help their customers who are experiencing difficulty and face foreclosure, receive some of the benefit that the institutions received from EESA.

Recovery/Recapture

In addition, in order to prevent abuses of the bankruptcy code by borrowers who may seek to cram-down their loans in a down market and then turn around and sell their property in an up market, we believe that there should be a clause included in the legislation that would allow the lender to recover the net proceeds of the sale up to the amount of the cram-down in addition to the outstanding amount of the modified mortgage if the mortgage is sold within seven years of the cram-down. Such a provision would serve to mitigate lender losses while allowing borrowers to remain in their homes and also would discourage flipping, a behavior which we do not believe should be afforded an equal or similar safeguard via bankruptcy protection as those borrowers who seek to stay in their homes.

Sunrise/Sunset

We also urge that a sunset provision be included in the legislation. A five-year sunset provision would allow relief to homeowners in the current crisis without threatening long term models and creating uncertain planning for financial institutions many years into the future, potentially creating future predicaments after this current crisis has subsided. Another provision that would limit this proposal to loans made within the last 10 years, could help reduce uncertainty in mortgage portfolios held by financial institutions while providing relief to those who truly need it.

Protection of Lenders and Mortgage Markets

We would also support any effort to indemnify lenders who work with their borrowers to modify loans so that if those loans were sold on the secondary market, the lenders are protected from any claims made against them because of the modification. Failure to tie together lenders' efforts to modify loans that were sold in the secondary market and protection of such lenders against any claims related to the modification could have the adverse impact of pushing more people into bankruptcy, as lenders would not be able to modify loans outside of bankruptcy for fear of possible future claims against them. This should also be accompanied by a GAO study of the impact the implementation of this provision is having on the mortgage backed securities markets to ensure that Congress is aware of any additional action that may be needed after it is enacted to help stabilize the markets.

Finally, we would ask for further modifications to Section 3 of the legislation. We have concerns that the language could lead to a lender's claim on a loan being thrown out due to inadvertent and unintentional violations of the Truth in Lending Act (TILA). While egregious and intentional violations warrant this standard, we believe that this language may be too broad as it currently stands in the bill.

Economic Stimulus

We understand that the likely vehicle for moving this bill will be the economic package that Congress is expected to move early this session. We believe that it is important that any economic recovery package provide relief on the housing front. We also believe that there are other steps that can be included in the broader package to aid the American people via their relationships with financial institutions, such as credit unions.

For example, an antiquated and arbitrary business lending cap (12.25% of assets) placed on credit unions is prohibiting credit unions from assisting Americans and American businesses during the current credit crunch. This cap was placed on credit unions in 1998 and has remained unmodified since then, despite a 2001 Treasury Department report that indicated that credit union business lending meets the needs of America's small businesses that other institutions are unable to serve. With the current credit crisis, we believe that sentiment rings even more true today, and we ask Congress to include language to provide a slight modification of the cap, raising it to 20% of assets. Doing so will allow credit unions to lend millions more to our nation's small businesses and help stimulate the economy, while not costing the American taxpayer a penny.

Additionally, in these turbulent economic times, we urge Congress to allow the National Credit Union Administration to take into account the risk of assets when looking at a credit union's balance sheet and determining capital levels. Unlike banks and thrifts, credit unions have an outdated "one-size-fits-all" prompt corrective action system that does not give the regulator the ability to adjust capital levels based on risk. It does not make sense that the current prompt corrective action system for credit unions applies the same risk to a 30-year mortgage in its last month of repayment as it does to an unsecured loan in its first month of repayment. We believe now is the time for Congress to act on such an important principal and urge the inclusion of the risk-based approach in any potential economic stimulus legislation. Doing so would establish a more appropriate risk-based capital system for credit unions and allow them to better serve your constituents at a time when credit lending has tightened.

Including these two measures in an economic recovery package will allow credit unions to provide additional aid to the American people at no additional cost to the American taxpayer.

NAFCU appreciates the opportunity to continue to work with you and your staff on this matter. We believe that our proposal to limit this legislation in scope would substantially improve the bill, providing help to those who truly need relief and presents a more workable solution. We thank you for your continued efforts in addressing our nation's mortgage crisis.

If you or your staff should have any questions on this matter, please do not hesitate to contact me or NAFCU's Director of Legislative Affairs, Brad Thaler at (703) 522-4770. Thank you for your leadership on this very important matter.

Sincerely,

B. Dan Berger
Senior Vice President, Government Affairs

thanks for all you do!

cc: Members of the United States Senate