U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 29, 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This presents the views of the Department of Justice on H.R. 1537, the "Credit Union Regulatory Improvements Act of 2007," and H.R. 5519, the "Credit Union Regulatory Relief Act of 2008." In general, we defer to the Secretary of the Treasury regarding the need for, or desirability of, the enactment of H.R. 1537 or H.R. 5519. We do, however, have serious concerns of our own about the bill, as explained below.

1. Exemption of Credit Union Mergers from Pre-merger Antitrust Notification

The Department has serious concerns about section 309 of H.R. 1537 and an identical provision, section 13 of H.R. 5519. These provisions would exempt credit union mergers from the pre-merger notification and waiting period requirements of the Clayton Act, 15 U.S.C. § 18a, commonly referred to as the Hart-Scott-Rodino Act (HSR Act). The HSR Act requires that merging parties notify the antitrust enforcement agencies in advance, and observe a prescribed waiting period to permit an appropriate antitrust review, in order to ensure that their merger will not harm competition. These requirements apply only if the transaction and parties meet certain size thresholds, including a size-of-transaction threshold that was increased in 2001 from $15 million to $50 million, with automatic annual adjustments beginning in 2005 to reflect changes in Gross National Product (GNP). (The current threshold is $63.1 million.)

Bank and bank holding company mergers that require banking agency approval are exempted from these HSR Act pre-merger requirements under 15 U.S.C. § 18a(c)(7), this is because the banking agency approval process already entails a full pre-merger competitive review, conducted in consultation with the Department's Antitrust Division. In other words, these mergers were exempted from HSR Act pre-merger requirements because they are "already subject to advance antitrust review." H.R. Rep. No. 1373, 94th Cong., 2d Sess. 6 (1976). In marked contrast, the approval process for credit union mergers under 12 U.S.C. § 1785(b)(3) does not entail any comparable competitive review.

Because of this fundamental difference, credit union mergers were appropriately omitted from the HSR Act exemptions in section § 18a(c)(7), so that they, like banks and bank holding companies, still would be "subject to advance antitrust review." Thus, these provisions in the proposed legislation would not, as some have suggested, promote parity of treatment

among various types of financial institutions. Instead, these provisions but rather would single out credit union mergers for an unwarranted exemption from advance antitrust review by either the antitrust enforcement authorities or a specialized banking agency.

Because the size-of-transaction threshold has been raised to $63.1 million, with automatic annual adjustments, and because certain types of credit union assets (such as cash or mortgages) are not included in calculating size of transaction, only the very largest credit union mergers are likely to be subject to the HSR Act reporting requirements. Data provided by the Credit Union National Association indicates that of 1,506 credit union mergers from 1995-2001, eight or fewer would have been reportable under the higher new threshold, and only nine credit union mergers have been reported under the HSR Act since the higher threshold took effect on February 1, 2001, or about one per year. Thus, the reporting burden is small, but it is very important that these few large mergers remain subject to advance antitrust review under the HSR Act, in order to ensure that competition is protected.

2. Constitutional Concerns

Section 204 of H.R. 1537 and section 4 of H.R. 5519 would add the following italicized language to 12 U.S.C. § 1757a(a): "no insured credit union may make any member business loan that would result in a total amount of such loans, *excluding loans made to nonprofit religious organizations*, outstanding at that credit union at any one time equal to more than" an amount specified by formula. We previously noted constitutional issues with respect to identical provisions in H.R. 1375, the "Financial Services Regulatory Relief Act of 2003 and H.R. 3035, the "Financial Services Regulatory Relief Act of 2005."

By placing nonprofit religious organizations in a favored position vis-à-vis nonprofit secular organizations, this provision raises significant concerns under the Establishment Clause. *See, e.g., Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (it is a "principle at the heart of the Establishment Clause" that government "should not prefer ... religion to irreligion"). We recognize that not all measures that single out religion run afoul of this principle. An accommodation for religious activity alone, even if it is not compelled by the Free Exercise Clause, may be justified if "it alleviates exceptional government-created burdens on private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (upholding section of the Religious Land Use and Institutionalized Persons Act (RLUIPA) that exempts prisoners from regulations imposing a "substantial burden" on their religious exercise, unless the burden is "the least restrictive means" of furthering "a compelling governmental interest"); *see also Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 339 (1987) (a statutory exception exclusively for religion may be a permissible "accommodation" where it has the purpose and effect of "alleviat[ing] significant governmental interference" with the exercise of religion); *Kiryas Joel*, 512 U.S. at 705 ("[T]he Constitution

allows the State to accommodate religious needs by alleviating special burdens."); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 670 (1970) (exception to New York City property tax for religious properties used solely for religious worship did not violate Establishment Clause, because it "simply spar[ed] the exercise of religion from the burden of property taxation levied on private profit institutions"). Here, however, it is not readily apparent that the religion-neutral application of 12 U.S.C. § 1757a(a) would impose a significant or special burden on free exercise. In the absence of a record providing such an adequate justification for the accommodation, we recommend deleting the word "religious" from section 204 of H.R. 1537 and section 4 of H.R. 5519.

Thank you for the opportunity to comment on this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar Smith
Ranking Minority Member