December 22, 2025

The Honorable Kyle S. Hauptman, Chairman
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Submitted via regulations.gov

RE: Request for Public Comments Regarding Prohibition on Use of Reputation Risk by NCUA, 90 Fed. Reg. 48,409 (proposed Oct. 21, 2025); RIN 3133-AF67; Docket ID: NCUA-2025-0972

Chairman Hauptman,

Landmark Legal Foundation ("Landmark") respectfully submits the following comment in support of the agencies' proposed rulemaking, "Prohibition on Use of Reputation Risk by NCUA," 90 Fed. Reg. 48,409 (proposed Oct. 21, 2025); RIN 3133-AF67; Docket ID: NCUA-2025-0972.

Landmark is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, and promoting an originalist construction of the Constitution.

Landmark appreciates the opportunity to comment on the proposed rule as submitted by the National Credit Union Administration (NCUA). This action is designed to codify the Administration's recent policy to prohibit regulators from using the subjective reputation risk standard when supervising federal credit unions (FCUs) and federally insured credit unions (FICUs) to ensure their safety and soundness.[1] Landmark believes this proposed rule is necessary to guard against the well-documented misuse of "reputational risk" to disadvantage lawful businesses and activities that some regulators disfavor for political or other constitutionally protected reasons.

Subjective Standards, Like the Reputational Risk Standard, are Easily Abused

The problem of debanking is real, with several high-profile cases of abuse by federal regulators coming to light over the last decade. In each case, subjective standards, like the reputational risk standard, provide financial regulators with unprecedented regulatory power that at a minimum chills, and in many cases, shuts down lawful business activity.

A December 2025 report issued by the House Committee on Financial Services documents the Biden Administration's efforts to debank digital assets.[2] According to the House report, in early 2023, federal banking regulators signaled a coordinated shift toward heightened scrutiny of the

[1] 90 Fed. Reg. 48,409 (proposed Oct. 21, 2025).
[2] Staff of H. Comm. on Fin. Serv., 119th Cong., Operation Choke Point 2.0: Biden's Debanking of Digital Assets (Dec. 2025).

digital asset ecosystem, echoing broader White House concerns.[3] In a joint statement, the Federal Reserve, Federal Deposit Insurance Commission (FDIC), and Office of the Comptroller of the Currency (OCC) emphasized perceived risks associated with crypto-asset activities, particularly those involving open or decentralized networks and stablecoins, which regulators warned could create run risk and deposit outflows.[4] Although the agencies nominally stated that banks were not prohibited or discouraged from serving lawful crypto-related customers, they simultaneously cast doubt on whether such activities could ever adequately satisfy safety and soundness, consumer protection, and compliance expectations.[5] This ambiguity—combined with repeated public warnings from regulators and financial stability officials—left banks without clear, objective standards and encouraged widespread risk aversion.[6] The result was not tailored supervision based on demonstrable financial risk, but a de facto chilling effect on lawful activity driven by regulatory skepticism and reputational concerns rather than transparent, rule-based guidance.

In addition, recent findings by the OCC demonstrate how reliance on "reputational risk" has led large banks to restrict access to financial services for lawful industries and individuals based not on safety and soundness, but on perceived public, political, or activist scrutiny. Between 2020 and 2023, the OCC observed that banks adopted public and nonpublic policies requiring heightened reviews or outright restrictions for entire sectors because of how relationships might "appear" to the public or whether activities aligned with a bank's stated values.[7] These restrictions commonly targeted industries such as energy production, coal, firearms, private prisons, payday lending, tobacco, adult entertainment, political organizations, and digital asset businesses—often justified by concerns about media attention, controversy, or reputational harm rather than legal compliance or financial risk.[8] Some banks extended this approach to individual customers, triggering enhanced scrutiny based solely on negative press or public controversy.[9] The OCC's review underscores that reputational risk has become a proxy for subjective value judgments and political considerations, resulting in de facto debanking of lawful activities without transparent, objective, or safety-and-soundness-based justification.

A 2016 report by the FDIC's Office of Inspector General (OIG) provides another illustration of the dangers of allowing regulators to rely on vague, extra-statutory concepts—such as reputational risk or "moral suasion"—rather than objective safety and soundness standards. OIG found that, although refund anticipation loans (RALs) were lawful banking products offered for decades, FDIC leadership became determined to force banks out of the business based on evolving and largely undocumented concerns, not demonstrable financial risk.[10] Without issuing formal guidance, FDIC officials pressured examiners to downgrade institutions, altered examination narratives, rejected risk-mitigation plans despite contrary evidence, and pursued

[3] *Id.* at 9-10.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Off. of the Comptroller of the Currency, *Preliminary Findings from the OCC's Review of Large Banks' Debanking Activities* (Dec. 2025).
[8] *Id.*
[9] *Id.*
[10] Off. of Inspector Gen., Fed. Deposit Ins. Corp., No. OIG-16-001, Report of Inquiry Into the FDIC's Supervisory Approach to Refund Anticipation Loans and the Involvement of FDIC Leadership and Personnel (Feb. 2016); *See also The FDIC's Targeting of Refund Anticipation Loans: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Serv.*, No. 114-79 (Mar. 16, 2016).

aggressive enforcement actions even while acknowledging high litigation risk.[11] These actions caused reputational harm, increased insurance assessments, and imposed significant costs on supervised institutions, despite a lack of examination-based evidence that RALs threatened safety and soundness.[12] OIG concluded that the episode reflected serious deficiencies in transparency, accountability, and supervisory restraint—and warned of the need to prevent similar abuses in the future. This history underscores why regulators should not be permitted to invoke subjective concepts like reputational risk as a standalone basis for determining whether a credit union is safe and sound.

Reputational Risk is an Ineffective Tool for Assessing a Credit Union's Safety and Soundness

In addition to being ripe for abuse, Landmark submits that reputational risk is a poor tool for financial regulators to use to ensure the safety and soundness of the nation's FCUs and FICUs.

As Professor Julie Andersen Hill has explained in her debanking scholarship, reputational risk is inherently ill-suited to regulation because it is typically derivative of other, more concrete risks, like credit quality, liquidity, and even legal violations.[13] And, as even regulators admit, reputational risk is inherently difficult to identify, measure, or predict.[14] Reputational harm may stem from misinformation, rapidly shifting public sentiment, or the conduct of third parties—factors regulators cannot reliably foresee or control.[15] Even when reputational issues trigger liquidity stress, regulators already have tools to address liquidity risk directly, again rendering reputational risk analysis largely superfluous.[16]

Professor Hill warns that assessing reputational risk arising from lawful third-party relationships is especially fraught with difficulties.[17] Whether negative perceptions of a customer or industry will transfer to a bank depends on multiple uncertain steps, including public sentiment, stakeholder reactions, and whether perceived harms are offset by other benefits.[18] As she explains, any industry or customer may become controversial at some point, making comprehensive regulatory monitoring impractical and speculative.[19] Bank failure reports rarely cite reputational risk as a causal factor, and there is scant evidence that reputational concerns tied to lawful third parties have caused material bank losses, let alone runs or systemic instability.[20]

Finally, Professor Hill argues that regulators are poorly positioned to weigh competing reputational tradeoffs. Banks serve diverse stakeholder groups with differing and sometimes conflicting values, and reputational outcomes may vary sharply depending on local communities

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[11] Off. Of Inspector Gen., Fed. Deposit Ins. Corp., No. OIG-16-001. Report of Inquiry Into the FDIC's Supervisory Approach to Refund Anticipation Loans and the Involvement of FDIC Leadership and Personnel (Feb. 2016).
[12] *Id.*
[13] Julie Andersen Hill, *Regulating Bank Reputational Risk*, 54 Ga. L. Rev. 523, 584–92 (2020).
[14] *Id.* at 585.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 586.
[18] *Id.* at 586-92.
[19] *Id.*
[20] *Id.* at 588.

and customer bases. Banks, which engage directly with their stakeholders and can conduct market analysis, are better equipped than distant regulators to assess and manage these risks.

Reputational Risk is a Creature of Administrative Discretion Without Specific Statutory Authorization

Among other things, the Fair Credit Union Act requires the NCUA to consider safety and soundness principles regarding membership, insurance, or business practices.[21] But nothing in the Act references the term "reputation risk."

Reputational risk entered federal banking supervision not through legislative action, but through administrative policy choices made by the NCUA. Following the lead of the OCC and the FDIC in the 1990s, the NCUA transitioned to a risk-focused supervisory approach in 2002.[22] Importantly, the NCUA developed the definition of "reputation risk" through guidance rather than rulemaking.[23] Once federal regulators formally recognized reputational risk as an official category of risk, it rapidly became ubiquitous, with the NCUA, OCC, and FDIC characterizing it as ever-present and incorporating it throughout a broad range of regulatory guidance and later in some regulations.[24]

The administrative origins of reputational risk supervision underscore why codifying its elimination through formal rulemaking is essential. Because reputational risk was never statutorily mandated, future agency leadership could theoretically reintroduce it through guidance or informal policy changes unless its prohibition is firmly established in regulation.

Recommended Improvements to the Proposed Rule

While the proposed rule is a significant improvement over the status quo, Landmark does believe the Administration could go further to ensure that the rights of all Americans to access our financial system are protected.

First, the proposed rule should be strengthened to categorically prohibit the use of reputational risk to justify supervisory actions based on lawful political, cultural, or religious activities in all circumstances. As drafted, proposed 12 C.F.R. § 791(c) leaves open the possibility that an agency could direct a regulated institution to initiate or terminate relationships based on perceived reputational concerns tied to such activities, even absent supervisory animus. Limiting the prohibition to cases of overt disagreement is insufficient because the logic of reputational risk can pressure even neutral regulators to take action against lawful activities simply in response to public criticism or external controversy. The agency should not lend regulatory force to such dynamics, and lawful speakers or organizations should not face the risk that public or activist attacks will be amplified through supervisory action.

Second, NCUA should amend proposed 12 C.F.R. § 791(g) to prohibit supervisory actions motivated by the disagreement or disapproval of any agency official or employee, not merely the views of the assigned supervisor. While the proposal meaningfully improves existing protections

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[21] 12 U.S.C. §§ 1759 (d), (f); 12 U.S.C. §§ 1781(c)(2), 1782(a)(6)(B); 12 U.S.C. §§ 1786(b), (e), (f), (g), (k)(2), (r), (s).
22 Julie Andersen Hill, *Regulating Bank Reputational Risk*, 54 Ga. L. Rev. 523, 544-45 (2020).

[23] *Id.* at 546.
[24] *Id.* at 549-553.

by barring actions intended to punish or discourage lawful political, cultural, religious, or business activity, it leaves open a critical gap where senior officials may exert pressure on supervisory staff to achieve outcomes driven by personal or institutional animus. Given documented instances of such conduct in the past—most notably the FDIC's targeting of RALs—it is essential to close this loophole and expressly preclude adverse actions motivated by the views or preferences of any agency personnel.

Third, NCUA should remove the "financial condition" prong from the definition of reputation risk and make clear that reputational considerations cannot serve as an independent basis for supervisory action under any circumstances. Expanding the definition to include operational issues would only increase the risk of ineffective or potentially abusive regulatory interventions. Reputation risk is redundant at best and prone to misuse at worst, as the agency already has ample authority to address safety, soundness, operational, financial, and legal risks. Eliminating reputational risk as a regulatory justification would reduce opportunities for abuse, focus agency resources on meaningful oversight, and provide clear boundaries for supervisory conduct.

Conclusion

Landmark applauds the agency for taking this crucial step to address the problem of debanking by prohibiting regulators from using reputation risk as a basis for supervising credit unions. This policy recognizes a fundamental principle: all Americans should have access to the financial system so long as they are engaged in lawful political, cultural, religious, or expressive activities. By ensuring that lawful conduct—regardless of public opinion or political sensitivity—cannot be used to justify denial of banking services, the agency is protecting both the integrity of the financial system and the constitutional freedoms of all individuals.

Thank you for your consideration of these comments. If we can be of further assistance or answer any questions you may have, please contact us at Pete.hutch@landmarklegal.org or at (816) 931-5559.

Sincerely,

Richard P. Hutchison, Esq.

Landmark Legal Foundation