

May 20, 2011

Mary Rupp  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314-3428

Re: *Notice of Proposed Rulemaking  
(Part 751 Incentive-Based Compensation Arrangements)*

Dear Ms. Rupp:

Thank you for the opportunity to comment on NCUA's proposed rules related to Part 751 Incentive-Based Compensation Arrangements.

OnPoint Community Credit Union is a state-chartered Credit Union headquartered in Portland, Oregon and serves 218 thousand members. We understand and agree with the need for NCUA to adopt reasonable regulations to govern incentive-based compensation arrangements pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 USC 5641). We respectfully submit the following comments to NCUA to assist NCUA in modifying the proposed rule in a manner that reduces unnecessary regulatory burdens while maintaining the essential requirements of the rule of prohibiting abusive incentive-based compensation arrangements.

**Definitions – 751.3**

**1. Compensation - 751.3(b).**

a. Sufficiency of Scope. The Board has asked if the definition of incentive based compensation is sufficiently broad to include all types of compensation that should be covered. We believe the definition is drafted appropriately to cover the types of compensation offered by credit unions.

b. Exclusions. In describing applicable exclusions in Sec. 751.3(b), the definition includes a reference to Section 701.33, which is inapplicable to all state chartered credit unions. This reference should either be deleted or expanded to read "consistent with Sec. 701.33 of this chapter or as provided by applicable state law..." As drafted, these exclusions could be interpreted narrowly to only include 701.33 benefits and not other equally applicable benefits allowed for state chartered Credit Unions.

## **2. Covered Persons – 751.3(d).**

Within the definition of “covered persons” is a broad reference to all “employees” without qualification. This broad reference makes the definition of “covered persons” overly broad and exceeds the underlying purpose of the rule—to address compensation of persons that encourages inappropriate risk. Outside of senior management, OnPoint has few employees who stand in a position to influence or manipulate operations that could increase risk in a manner to receive a significant direct or indirect benefit. To sweep all “employees” into the definition of “covered persons” will require significant compliance efforts, policy and internal control changes, just to avoid possible coverage. The term “employees” could be more precisely drafted as “employees in a position to encourage or create inappropriate risk.” This type of clarification will help avoid additional and unnecessary compliance burdens of an overly broad definition and more effectively serves the purpose of the underlying rule.

## **3. Incentive-based Compensation 751.3(g).**

a. Define the Term “Variable.” This definition is overly broad with the use of the word “variable” without any qualification or reasonable exclusions. As drafted, the term “variable” is not limited to variable in amount, but literally makes any variable element of such compensation arrangement possibly result in the arrangement being construed and enforced as a variable compensation arrangement. For example, payment timing variables, vesting time variables, and length of service variables are all common elements of the benefits made available to all Credit Union employees under the Credit Union’s vacation leave, sick leave and similar benefit plans, which serve as incentives for employee performance. The overly broad reference to “variable” needs to be reasonably defined to be consistent with the underlying purposes of the rule—to prohibit compensation for inappropriate risk.

b. Exclusions. The Board has asked if there are any forms of compensation that NCUA should clarify as excluded from incentive-based compensation. We strongly encourage the Board to specify clear categories of compensation that should be excluded. Variable pay plans are important for OnPoint to reward positive results for the Credit Union and to keep the total compensation program competitive.

In the Supplementary Information, NCUA lists three examples of types of compensation that would not fall within the scope of the definition, including: compensation solely tied to continued employment; compensation solely for activities that do not involve risk taking; and compensation based solely on a covered person’s fixed compensation and do not vary based on one or more performance metrics. Each of these compensation categories should be expressly addressed in the final rule. It is unfair and counterproductive to the Credit Union’s compliance for NCUA to recognize obvious compensation exclusions in the Supplementary Information, but not state them in the rule. Bringing greater clarity to the rule will help minimize the compliance burdens rather than increase such burdens. Other common compensation categories that should be excluded include:

- Compensation arrangements that are awarded to all Credit Union staff without consideration of performance metrics of any one person, group or department of persons.
- Variable pay plan awards based on organization or team (department or branch) meeting pre-established goals measured over a quarterly, semi-annual or annual period.
- Special recognition awards for results or contributions that are beyond expectations.

## **Reporting 751.4**

### **1. Concerns with Reporting Format and Information**

The Board has asked if the Proposed Rule fulfills the requirement to obtain meaningful and useful descriptions of incentive-based compensation arrangements for supervisory and compliance purposes. We do not believe the Proposed Rule achieves this goal for two significant reasons:

a. Unpublished Report Format. The Credit Union will be required to submit its annual report to NCUA in the format directed by NCUA. However, the report format has not been published or proposed. While the Proposed Rule sets forth "minimum" standards of information to be submitted under Sec. 751.4(c), it is essential for OnPoint to review and comment on the actual format of the required report. As with many required reports to NCUA, the format of this report itself will contain substantive compliance elements (e.g., additional standards and reporting specifics) that will impact the Credit Union for which OnPoint has not been allowed an opportunity to review or comment.

b. NCUA Compliance Assessment Not Based on Reporting. The Proposed Rule establishes two sets of compliance standards: reporting standards for Credit Unions (751.4(c)) and NCUA compliance assessment standards (751.5(a)(2)) that are not congruent and are a set up for Credit Union violations. In its annual report to the NCUA, the Credit Union will provide four categories of information related to its incentive-based compensation benefits including: (1) descriptions of components, (2) policies and procedures, (3) material changes and (4) supporting reasons of plan compliance. The report does not include actual compensation of particular employees, the value of benefits to employees, compensation history of any one employee and post employment benefits and costs. Yet under the Proposed Rule, those are the standards by which NCUA will determine whether a Credit Union's reported plan is prohibited. When and how will the Credit Union be required to report this additional compensation and benefit information of its employees for purposes of determining if amounts paid to a covered person are unreasonable or disproportionate to the services the person performs?

## **2. Interim Reporting Unnecessary and Burdensome.**

In response to the Board's inquiry, we believe any reporting on an interim basis, more frequently than annual or as plan modifications are made, is unnecessary and would be an added compliance burden with little or no benefit supporting the purpose of the Rule. The Credit Union will make changes in its compensation and benefit plans from time to time but for budget purposes, such changes will generally be made annual or only have an annual impact. To require more frequent reporting such as when a new employee is hired, following the Credit Union's budget approval, or as a result of a merger, will add compliance burdens that will outweigh the benefit of more information to analyze.

## **3. Confidentiality of Reports.**

The Proposed Rule fails to provide reasonable assurances that OnPoint's proprietary and sensitive compensation information, policies and procedures and practices will remain confidential and protected from unreasonable public access. In the Supplementary Information, the agencies expressly recognize the nature of this issue and provide a general pledge to maintain the confidentiality of the information, as nonpublic to the extent permitted by law. However, we feel these Supplementary Information references are not enough. The proprietary and sensitive nature of the Credit Union's compensation information deserves and requires more definitive protection. We urge the Board to add an express confidentiality requirement in the Rule. Such protection will permit OnPoint to provide more substantive reporting disclosures, free from additional legal disclaimers.

## **Prohibitions – 751.5**

We understand the primary focus of this rule and the goal of Section 956 of the Dodd-Frank Act to prohibit excessive incentive-based compensation arrangements that encourage inappropriate risks. We are supportive of this goal. However, we believe the Proposed Rule contains two provisions in Sec. 751.5 that are problematic.

a. **Unlimited NCUA Authority.** NCUA 751.5(a)(2) provides NCUA with unlimited authority in considering the permissibility of an incentive-based compensation arrangement as follows: "Any other factors, the NCUA determines to be relevant." We believe this standard should be reasonably revised to limit NCUA's authority to applicable law requirements and not "any factor" it feels relevant. Sec. 751.5(a)(2)(vi) should be revised to read: "Such other requirements under applicable law that NCUA determines relevant."

We believe it is unreasonable for NCUA to have such unlimited subjective authority to unilaterally determine any factors it wants to apply to a credit union's compensation plan. For example, in the Supplementary Information (p. 21173), NCUA refers to specific compensation rules of NCUA under the Federal Credit Union Act, NCUA Reg. 701.2 and 21, and Model FCU Bylaws as rules relevant to supplement the Proposed Rule. However, these rules have no applicability to state chartered credit unions and should not be factors that NCUA should consider in assessing the Credit Union's incentive-based compensation plan. OnPoint is

subject to different state law requirements in various areas affecting our compensation plans and not to the federal references mentioned above.

b. Deferral of Payments. In Sec. 751.5(b)(2)(i), the agencies have proposed credit unions use deferral of payments as an example of a way to properly balance risk and financial rewards. From an economic standpoint, this makes sense. However, a credit union's deferral of compensation or benefits, without careful planning and drafting, will result in extreme liability risk to the Credit Union and recipient. A payment deferral feature for any compensation or benefit will be subject to very complex tax requirements under Internal Revenue Code Section 409A Nonqualified Deferred Compensation Plans. NCUA needs to carefully review the term "deferred compensation" under Treasury Reg. Sec. 1.409A-1(b) and the rules applicable to such deferrals. These tax rules apply to a variety of deferral arrangements, whether or not the features are part of a formal deferred compensation arrangement, such as a 457(f) plan. Unless the 409A tax requirements are strictly complied with, both the Credit Union and recipient may be subject to significant tax liabilities and penalties. We believe such harsh unintended consequences should be avoided by removal of the reference suggesting or inviting deferral of payments as a way to minimize risk.

#### **Policies - 751.6**

a. Board Authority to Design Incentive-based Compensation Plan. The policy standards of the Proposed Rule set forth in Sec. 751.6(b)(2) might appropriately apply to other financial institutions but do not accurately apply to credit unions. Unlike bank directors, credit union Board members cannot be "covered persons" under such plans. Thus, the extra degree of independent oversight is not necessary. We do not object to the need for risk management oversight of the Credit Union's incentive-based compensation arrangements. However the authority to ensure the performance of those risk management functions needs to be within the Board's control and direction. The Proposed Rule suggests the Credit Union's internal auditor or even the Supervisory Committee have design and management authority over such plans. The Supervisory Committee has limited risk management authority that should not be extended by the Rule to how the Credit Union designs its compensation plans. These concerns can be addressed by clarifying the Board's authority and independence and responsibilities by revising subsection (2) to read as follows:

"(2) address the Board's responsibility to ensure that risk management, risk oversight and proper internal controls are properly established and maintained by appropriate persons, independent of any covered person, for designing incentive-based compensation arrangements and for assessing their effectiveness in restraining inappropriate risk taking."

b. Applicability to Credit Unions < \$10 Billion. Sec. 751.6(b)(6) contains a required policy standard that refers to the payment deferral provisions that only apply to the larger credit unions (> \$10 billion) under Sec. 751.5(b)(3). These provisions do not apply to credit unions

with less than \$10 billion in assets. This subsection should be clarified such as, "(6) For credit unions subject to §751.5(b)(3)... "

#### **Additional Issues**

a. CUSOs. In response to the Board's inquiry of whether this Rule should apply to CUSOs, we strongly believe CUSOs should not be subject to this Rule for multiple reasons:

1. Sec. 5641 of the Dodd-Frank Act applies to financial institutions, except for CUSO broker-dealers. CUSOs are not financial institutions.
2. Sec. 751.2 specifies the rule only applies to federally insured Credit Unions with assets of \$10 billion or more. No CUSO in the country has assets close to this threshold.
3. CUSOs are not regulated by NCUA and do not have any activities insured by the NCUSIF. Accordingly, NCUA would not have the same authority over or existing regulatory reporting or examination infrastructure necessary to evaluate their compensation practices.
4. From a practical standpoint, few CUSOs engage in the types of risk activities or compensate employees on an incentive basis, for which the incentive based compensation rules are intended.
5. To the extent a CUSO was used by a Credit Union to evaluate the requirements, Sec. 751.7 of the Proposed Rule provides NCUA all necessary and proper authority to enforce such violations, without regulating the entire CUSO industry.

Thank you for the opportunity to comment on this proposal. We understand the importance of these issues and appreciate the chance to contribute during this rule making process.

Best Regards,



Robert A. Stuart  
President/CEO