

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR part 746

RIN 3133-AE69

Supervisory Review Committee; Procedures for Appealing Material Supervisory Determinations

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking with request for comments.

SUMMARY: The NCUA Board (Board) proposes to amend its procedures for appealing material supervisory determinations to the NCUA Supervisory Review Committee (SRC) to enhance due process and to be more consistent with the practices of the federal banking agencies. The proposed rule would expand the number of supervisory determinations appealable to the SRC and provide credit unions with the opportunity for additional review by the Director of the Office of Examinations and Insurance (E&I). The Board proposes to codify these procedures as Subpart A to part 746.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods (**Please send comments by one method only**):

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web Site: <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx>. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name]—Comments on Supervisory Review Committee; Proposed Procedures for Appealing Material Supervisory Determinations” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

PUBLIC INSPECTION: You can view all public comments on NCUA’s website at <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA’s law library at 1775 Duke Street, Alexandria, Virginia 22314, by

appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Michael J. McKenna, General Counsel, Frank S. Kressman, Associate General Counsel, or Benjamin M. Litchfield, Staff Attorney, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428 or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION

I. Background

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act)¹ required the NCUA and the federal banking agencies to establish independent intra-agency appellate processes to review material supervisory determinations.² The Riegle Act also required the NCUA and the federal banking agencies to ensure that appeals of material supervisory determinations are heard and decided expeditiously and that appropriate safeguards exist for protecting appellants from retaliation by agency examiners.³

On November 17, 1994, the Board published proposed Interpretive Ruling and Policy

¹ Pub. L. 103-325, 108 Stat. 2160 (1994).

² 12 U.S.C. 4806(a).

³ *Id.* at 4806(b)(1)-(2).

Statement (IRPS) 94-2 “Guidelines for the Supervisory Review Committee” in the Federal Register and solicited public comment.⁴ The Board proposed to establish a committee of five regular members consisting of NCUA’s Executive Director, General Counsel, Director of E&I, a regional director, and one additional senior or Board staff member. The regional director was to be selected on a rotating basis every two years and an alternate regional director was to be designated to consider matters arising in the regular regional director member’s region. The Executive Director was to serve as chair. The jurisdiction of the SRC was to be limited to matters specifically listed as material supervisory determinations in the Riegle Act.⁵

After receiving and considering public comment, the Board adopted an IRPS and published it in the Federal Register on March 20, 1995 as IRPS 95-1.⁶ In the final IRPS, the Board reduced the size of the SRC from five members to three, with each member appointed by the NCUA Chairman. The jurisdiction of the SRC was limited to matters specifically listed as material supervisory determinations in the Riegle Act, although the Board reserved the right to expand the number of supervisory determinations appealable to the SRC after gaining some experience with the process. The final IRPS also clarified that material “examination ratings” included composite CAMEL ratings of 3, 4, or 5, as well as component ratings of those composite ratings.

⁴ 59 FR 59437 (Nov. 17, 1994).

⁵ The Riegle Act defines “material supervisory determination” to include determinations relating to: (1) examination ratings; (2) the adequacy of loan loss reserve provisions; and (3) classifications on loans that are significant to a federally insured credit union. 12 U.S.C. 4806(f)(1)(A)(i)-(iii).

⁶ 60 FR 14795 (Mar. 20, 1995).

The Board revised the IRPS in 2002 to expand the jurisdiction of the SRC to include decisions by a regional director to revoke a credit union's authority under NCUA's then Regulatory Flexibility Program (RegFlex).⁷ In 2011, the Board revised the IRPS again to expand the jurisdiction of the SRC to include denials of Technical Assistance Grant (TAG) reimbursements by the Director of the Office of Small Credit Union Initiatives (OSCUI).⁸ This revision was published in the Federal Register as IRPS 11-1, "Supervisory Review Committee" on April 29, 2011. The Board has not made material changes to IRPS 11-1 since 2012, when it removed all references to RegFlex to reflect the elimination of that program.⁹

II. Summary of Proposed Rule

The proposed rule would: (1) expand the number of material supervisory determinations appealable to the SRC; (2) create an optional intermediate level of review before an appeal is brought to the SRC; and (3) change the nature and composition of the SRC. The proposed rule would be codified as Subpart A to part 746. The Board is requesting comment on all aspects of this proposed rule.

A. Expansion of Supervisory Review Committee Jurisdiction

⁷ 67 FR 19778 (Apr. 23, 2002) (revocation of RegFlex authority).

⁸ 76 FR 3674 (Jan. 20, 2011) (interim final rule); 76 FR 23871 (Apr. 29, 2011) (final rule).

⁹ 77 FR 32004 (Aug. 29, 2012). RegFlex permitted some federal credit unions with advanced levels of net worth and consistently strong supervisory examination ratings to request exemptions, in whole or in part, from certain NCUA regulations. *See* 66 FR 58655 (Nov. 23, 2001). The Board eliminated this program in 2011, but made certain regulatory relief provisions previously available under the program widely available to all federal credit unions. *See* 77 FR 31981 (May 31, 2012).

Based on NCUA's experience in administering the current appellate process, the Board believes that it would be efficient and beneficial if the SRC appeals process is more transparent and objective and if more material supervisory determinations are appealable to the SRC. The proposed rule would, therefore, redefine the term "material supervisory determination" to include supervisory determinations that may affect the capital, earnings, operating flexibility, or that may otherwise affect the nature and level of supervisory oversight of a federally insured credit union (FICU). Certain exceptions would be made for material supervisory determinations that are specifically excluded by the Riegle Act or where other appeals procedures exist.

B. Addition of Optional Intermediate Level of Review

The Board is also proposing to add an optional intermediate level of review by the Director of E&I, or his or her designee, before a FICU appeals to the SRC. A decision by the Director of E&I would be made in writing with no opportunity for oral presentations from either the petitioner or the program office. The Director of E&I, in addition to his or her supervisory expertise, would have the ability to consult with the parties either jointly or separately before rendering a decision. If the FICU or program office is unsatisfied with the decision rendered by the Director of E&I, or his or her designee, either may appeal that decision to the SRC. This optional level of review provides enhanced due process to FICUs that wish to use it.

C. Composition of the Supervisory Review Committee

The proposed rule would restructure the SRC by creating a rotating SRC pool of not less than eight individuals appointed by the NCUA Chairman from among NCUA's senior staff in the regional and central offices. The Secretary of the Board would serve as the permanent SRC Chairman and would select three SRC members from this SRC pool to serve as the SRC for a particular appeal. As the permanent SRC Chairman, the Secretary of the Board would also be a member of the SRC pool and be eligible to serve as a member of the SRC for a particular appeal.¹⁰ The Special Counsel to the General Counsel (Special Counsel) would serve as a permanent non-voting member of each SRC to advise each committee on procedural and legal matters.

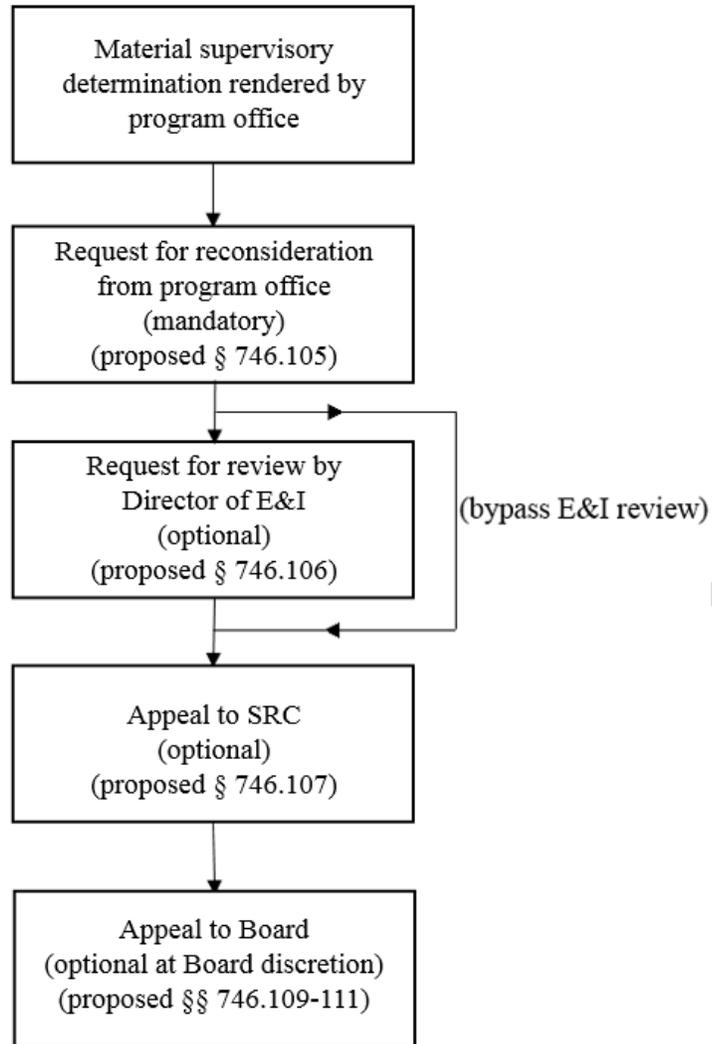
The SRC Chairman would not be permitted to select SRC members from the program office that rendered the material supervisory determination that is the subject of the appeal to hear that appeal. Likewise, in cases where the FICU requested review by the Director of E&I, staff from E&I would be ineligible to serve as SRC members for that appeal. The presence of two SRC members (physically, telephonically, or by video conference) would be required as a quorum, and a majority of votes present would be required for action on an appeal.

D. Summary Chart of Proposed SRC Appeals Procedures

Under the proposed rule, an appeal to the SRC would resemble the following decision

¹⁰ With the inclusion of the SRC Chairman, the total number of NCUA senior staff in the SRC pool will be not less than nine; eight or more of which would be appointed by the NCUA Chairman.

tree:



III. Section by Section Analysis

Part 746 – Appeals Procedures

Subpart A – Procedures for Appealing Material Supervisory Determinations

The Board is proposing to create Subpart A to part 746 which would contain a comprehensive set of procedures to govern the appeal of material supervisory determinations. In a separate rulemaking issued together with this proposed rule, the Board is proposing significant changes to the administrative appeals process for matters that are outside of the jurisdiction of the SRC, which would be contained in Subpart B to part 746.

Section 746.101 Authority, Purpose, and Scope

Proposed § 746.101 states the legal authority for the Board to issue this proposed rule. As noted in the Background section above, the Board is issuing this proposed rule pursuant to its authority under § 309(a) of the Riegle Act.¹¹ The Board is also issuing this proposed rule under its plenary regulatory authority in the Federal Credit Union Act.¹²

This section also states the purpose and scope of the rule. The scope of the proposed rule is limited to appeals of “material supervisory determinations,” a term defined by the regulation, and does not apply to appeals where the petitioner has been granted a right to a hearing on the record or appeals governed by Subpart B to part 746.

Section 746.102 Definitions

¹¹ 12 U.S.C. 4806(a).

¹² 12 U.S.C. 1766(a), 1789(a)(11).

In § 746.102, the Board proposes to define certain terms. Unless defined, the Board expects FICUs and other affected parties to interpret terms or phrases consistently with the general definitions in § 700.2 of NCUA's regulations or, where not defined, according to their plain meaning.

Petitioner

The term "petitioner" refers to an entity, including a program office, requesting reconsideration or review, or filing an appeal pursuant to the procedures set forth in this subpart. As detailed more fully below, FICUs must first request reconsideration from the appropriate program office and then may request review from the Director of E&I. Either a FICU or a program office may appeal a partial or complete adverse decision by the Director of E&I, or his or her designee, to the SRC. Similarly, either a FICU or program office may appeal a partial or complete adverse decision by the SRC to the Board. Recognizing that, depending on the procedural posture of a particular appeal, the entity requesting review may be either a FICU or a program office, the Board is proposing to adopt a uniform term to describe all entities requesting agency action on a particular matter.

Program Office

The Board is proposing to adopt a uniform term "program office" to refer to all offices within NCUA responsible for making material supervisory determinations. Several

NCUA offices are responsible for administering various NCUA regulations. Rather than use different terminology, the Board is proposing to adopt “program office” as a uniform term to describe all of the different NCUA offices responsible for making material supervisory determinations.

Respondent

The term “respondent” refers to an entity, including a program office, defending against an action by a petitioner. As noted above, depending on the procedural posture of a particular appeal, the entity requesting review may be either a FICU or a program office. Therefore, the Board is proposing to adopt a uniform term to describe all entities defending against a petitioner’s action.

Section 746.103 Material Supervisory Determination

In response to proposed IRPS 94-2, several commenters argued that the additional disputes other than those specifically listed in the Riegle Act should be appealable to the SRC. In IRPS 95-1, however, the Board adopted a narrow definition of “material supervisory determination” in order to allow for the opportunity to gain experience with the SRC appeals process. Having administered SRC appeals for over 20 years, the Board has gained sufficient experience with the SRC appeals process and believes that expanding the jurisdiction of the SRC to be consistent with the federal banking agencies is now appropriate to provide FICUs with enhanced due process.

Proposed § 746.103 defines the term “material supervisory determination” to mean a written decision by a program office (unless ineligible for appeal) that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature and level of supervisory oversight of a FICU subject to the exclusions detailed below. Examples of material supervisory determinations include, but are not limited to, determinations related to the adequacy of loan loss reserve provisions; classification of loans and other assets that are significant to a FICU; and determinations related to restitution orders under the Truth in Lending Act (TILA). This proposed definition is similar to the definition used by the Federal Deposit Insurance Corporation (FDIC).¹³

CAMEL Ratings

The proposed definition limits the ability to appeal CAMEL ratings to composite ratings. Component ratings would no longer be appealable to the SRC unless those ratings may affect the nature and level of supervisory oversight of a FICU. For example, if eligibility for an extended examination cycle is contingent on a component rating of 1 or 2 in management, a management rating of 3 would be appealable to the SRC. Based on its experience with administering the current appellate process, the Board does not believe that component ratings are “material” in most cases if the FICU otherwise maintains an

¹³ FDIC currently defines “material supervisory determination” to include, among other things, “any supervisory determination (unless otherwise not eligible for appeal) that may affect the capital, earnings, operating flexibility, or capital category for prompt corrective action purposes of an institution, or otherwise affect the nature and level of supervisory oversight accorded an institution.” 77 FR 17055 (Mar. 20, 2012).

overall composite CAMEL rating of 1 or 2. Therefore, the proposed definition of “material supervisory determination” limits the ability of FICUs to appeal examination ratings only to those cases where the FICU has received a composite rating of 3, 4, or 5, or a component rating that could trigger supervisory action.

TILA Restitution Orders

The proposed rule specifically lists a restitution order pursuant to TILA as a material supervisory determination appealable to the SRC.¹⁴ Section 108 of TILA permits the Board, where appropriate, to order federal credit unions (FCUs) to make restitution to consumers that have been harmed by inaccurate disclosures.¹⁵ Determining whether restitution is appropriate often depends on whether there is a clear and consistent pattern or practice of violations, gross negligence, or a willful disregard for the requirements of TILA. Examiners are in the best position, in the first instance, to determine whether FCUs demonstrate clear and consistent patterns of TILA violations. Because review of these determinations requires consideration of the facts and circumstances before the examiner, the Board believes the SRC appeals process is the most appropriate method for considering these appeals before taking an appeal to the Board.

Exclusions from Coverage

¹⁴ On September 30, 2010, the Board delegated the authority to examine and supervise FCUs for compliance with consumer laws and regulations to the Office of Consumer Financial Protection and Access. This includes the authority to order an FCU to make restitution to consumers where permitted under TILA.

¹⁵ 15 U.S.C. 1607(e); *see also* 63 FR 47495 (Sept. 8, 1998).

Notwithstanding the broad definition of “material supervisory determination,” the Board proposes to exclude certain material supervisory determinations from the jurisdiction of the SRC. The Riegle Act specifically excludes the decision to appoint a conservator or liquidating agent for a FICU and the decision to take prompt corrective action.¹⁶ The proposed rule also excludes enforcement-related actions and decisions, including appeals related to the underlying facts and circumstances that form the basis of a recommended or pending enforcement action, because NCUA has explicit rules governing the adjudication of these matters that provide affected parties with trial-like protections.¹⁷

The purpose of excluding enforcement-related actions and decisions (including the underlying facts and circumstances that form the basis of a pending formal enforcement action) is to ensure that the enforcement and SRC processes remain separate. Therefore, once an enforcement action is pending against a FICU, the proposed rule would prohibit FICUs from requesting review by the Director of E&I, or his or her designee, or appealing to the SRC any material supervisory determination that serves as the basis of that enforcement action. In other words, once an enforcement action is initiated, the SRC appeals process is suspended, regardless of how far along the FICU may be in that process, until the enforcement action is resolved.

The proposed rule also excludes supervisory determinations for which other appeals

¹⁶ 12 U.S.C. 4806(f)(1)(B).

¹⁷ See 12 CFR 747.

procedures exist such as a capital classification for prompt corrective action purposes.¹⁸ This recognizes that there are some situations where the Board may, in its discretion, draft rules with explicit appeals procedures or explicitly state that certain matters are governed by particular appeals procedures set forth elsewhere in NCUA's regulations. In those cases, the Board expects FICUs to follow the explicit procedures stated in the regulation rather than attempting to appeal matters to the SRC.

Section 746.104 General Provisions

Proposed § 746.104 addresses a series of general procedural issues that apply throughout the proposed rule. These matters include the standard of review, the effect of an appeal on the commencement of enforcement actions, the effect of an appeal on applications for additional authority or waiver requests, and the tolling of timing requirements.

Standard of Review

The goal of the proposed rule is to enhance due process for credit unions and to apply NCUA's policies and practices fairly and consistently among all FICUs. Therefore, the Board proposes to place the burden of showing an error in an appealed determination on the petitioner. The objective of appellate review by the Director of E&I, the SRC, and the Board is to ensure that the appealed determination is correct and not just reasonable. If the Director of E&I, the SRC, or the Board, as applicable, determines that the appealed

¹⁸ See 12 CFR 747.2003.

determination is incorrect upon their respective *de novo* review, then they will render a corrected determination.

Dismissal and Withdrawal

The proposed rule permits an appeal to be dismissed if it is not timely filed, if the basis for the appeal is not discernable, if the petitioner asks to withdraw the request in writing, or for reasons deemed appropriate by the reviewing authority, including, for example, if a petitioner in an appeal acts in bad faith by knowingly withholding evidence from the appropriate reviewing official. FICUs are encouraged to make good-faith efforts to resolve supervisory issues, including those concerning a material supervisory determination, at the most direct level possible, starting with their examiners or program office staff, and as efficiently as possible. If the Director of E&I, the SRC, or the Board, as applicable, finds that a FICU has engaged in bad faith by knowingly withholding evidence from an examiner, the program office, the Director of E&I, the SRC, or the Board, that withholding may serve as a basis for dismissing an appeal.

Supervisory or Enforcement Actions Not Affected

Under the proposed rule, an appeal at any level would not affect, delay, or impede any formal or informal supervisory or enforcement action in progress, nor would it affect NCUA's authority to take any supervisory or enforcement action against a FICU. Unless otherwise specified in a written decision on appeal, the material supervisory

determination would remain in effect until the SRC appeals process has been exhausted.

Additional Authority and Waiver Requests During the Pendency of an Appeal

Likewise, under the proposed rule, an appeal would delay action on a waiver request or an application for additional authority that could be affected by the outcome of the appeal unless the FICU specifically requests that the waiver request or application for additional authority be considered notwithstanding the appeal. Any deadline for a program office to make a determination on a waiver request or application for additional authority set out in any part of NCUA's regulations would be suspended until the FICU has exhausted its administrative remedies under Subpart A or is no longer eligible to pursue an appeal. The purpose of this provision is to avoid situations where a FICU receives an adverse determination on a waiver request or an application for additional authority based on a material supervisory determination, only to have the material supervisory determination subsequently reversed by the SRC. It also prevents a waiver request or an application for additional authority from being automatically denied by operation of other parts of NCUA's regulations.

Section 746.105 Procedures for Reconsideration from the Appropriate Program Office

FICUs are encouraged to resolve supervisory issues with their examiners and other NCUA staff as efficiently as possible without the need to appeal supervisory matters to the SRC. The Board anticipates that most disputes will be handled in that manner.

Proposed § 746.105 reflects this policy by requiring a FICU to request reconsideration of a material supervisory determination from the program office that rendered the determination and by establishing procedures that control such a request. The Director of E&I or the SRC would only assume jurisdiction over a material supervisory determination after the FICU has requested reconsideration from the appropriate program office and that program office has had an opportunity to render a decision on that request.

As the Board explained in IRPS 94-2, it is NCUA policy that the SRC should only assume jurisdiction over a material supervisory determination after the FICU establishes that it has been unsuccessful in attempting to resolve the matter with the FICU's examiner or the appropriate program office. Early involvement by the Director of E&I or the SRC would be disruptive to the established organizational structure of NCUA and the relationships between FICUs and NCUA program offices. Therefore, the Board believes that requesting reconsideration from the appropriate program office should continue to be a mandatory part of the process of appealing a material supervisory determination to the SRC.

Nevertheless, to avoid unnecessary delays, a second request for reconsideration will be treated as either a request for review by the Director of E&I or an appeal to the SRC as determined by the Secretary of the Board after consultation with the petitioner. While the reconsideration process promotes greater efficiency by facilitating dispute resolution at the program office level, allowing multiple requests for reconsideration would be inefficient. Upon receiving a second request for reconsideration, the program office will

forward that to the Secretary of the Board to be processed as either a request for review pursuant to § 746.106 or an appeal pursuant to § 746.107.

Section 746.106 Procedures for Requesting Review by the Director of the Office of Examination and Insurance

Proposed § 746.106 provides an optional intermediate level of review by the Director of E&I, or his or her designee, before a FICU appeals a material supervisory determination to the SRC. The purpose of this intermediate level of review is to give FICUs another opportunity to resolve supervisory issues and to refine the issues that may be presented to the SRC and the Board on appeal. A request for review by the Director of E&I must be in writing and filed with the Secretary of the Board.

The Board believes that the Director of E&I, or his or her designee, is the appropriate official for these intermediate reviews because E&I is NCUA's central office in charge of examination policy. E&I staff are expert in nearly all examination-related matters. Additionally, E&I is not in the direct line of supervision over any program office, thus avoiding any bias or predisposition to affirm a material supervisory determination by a program office.

Under the proposed rule, the Director of E&I, or his or her designee, will issue a written decision based on written submissions by the FICU and the program office. The Director of E&I, or his or her designee, will have the ability to consult with parties jointly or

separately before rendering a decision. Either the FICU or the program office will be able to appeal any adverse decision by the Director of E&I, or his or her designee, to the SRC.

Neither party may make a request for reconsideration of the decision rendered by the Director of E&I, or his or her designee. If a party disagrees with the decision rendered by the Director of E&I, or his or her designee, the next step for further review is to file an appeal to the SRC.

Section 746.107 Procedures for Appealing to the Supervisory Review Committee

Proposed § 746.107 codifies many of the existing procedures contained in IRPS 11-1, as amended by IRPS 12-1, and expands on them by permitting the SRC Chairman to: (1) adopt supplemental rules governing its operations; (2) order that material be kept confidential; and (3) consolidate appeals that present similar issues of law or fact. The Board believes that with the expanded jurisdiction of the SRC, additional procedures may be necessary to address operational issues. For example, after some experience with the appeals process, the SRC Chairman may determine that supplemental rules allowing all appeals to be presented through teleconference rather than in person at NCUA headquarters are necessary to ensure that appeals are conducted efficiently and promptly. The proposed rule grants the SRC Chairman the flexibility to adopt such supplemental rules.

In addition, proposed § 746.107 creates an explicit right for a FICU to request that an appeal be conducted entirely based on the written record. As the Board explained in IRPS 95-1, the decision of whether to make a personal appearance should be up to the FICU involved in a particular appeal because FICUs are responsible for all costs associated with a personal appearance. While IRPS 95-1 attempted to save resources of both FICUs and NCUA by permitting the SRC Chairman to work out disputes via teleconference, the Board believes that more can be done to provide enhanced due process. Therefore, the proposed rule explicitly grants FICUs the right to request that an appeal be conducted entirely based on the written record.

The proposed rule also requires the SRC Chairman to notify the Director of E&I of an appeal that involves the interpretation of material supervisory policy or generally accepted accounting principles and solicit input from E&I on how to interpret the policy or accounting principle that applies to the subject matter of the appeal. E&I staff are responsible for setting supervisory policy and interpreting accounting principles for NCUA. Therefore, it is appropriate to require the SRC to solicit input from the Director of E&I and E&I staff on these matters. Furthermore, the proposed rule requires the SRC Chairman to notify the General Counsel and solicit input from the Office of General Counsel on the interpretation of laws, including NCUA regulations, which may apply to the subject matter of an appeal. The Office of General Counsel serves as legal counsel for NCUA and, therefore, consultation with that office on these issues is necessary and proper.¹⁹

¹⁹ See 12 CFR 790.2(b)(7) (describing the role of the Office of General Counsel).

Effect of Requesting Review by the Director of the Office of Examination and Insurance

The proposed rule encourages a FICU to resolve supervisory matters as efficiently as possible by allowing the FICU to request an optional review by the Director of E&I, or his or her designee. Accordingly, for FICUs that have elected to request review by the Director of E&I, or his or her designee, the proposed rule suspends the deadline to file an appeal with the SRC until after the Director of E&I, or his or her designee, has rendered a decision. In practice, this means that a FICU could potentially delay the deadline to file an appeal with the SRC until after the Director of E&I, or his or her designee, has considered the matter. While this could potentially give FICUs additional time to file an appeal with the SRC, the Board believes that the potential benefits of reduced caseloads at the SRC and Board levels exceed any potential risks of delay, especially because material supervisory determinations would remain in place during the pendency of a review by the Director of E&I, or his or her designee. Additionally, during this time, NCUA would not be prohibited from taking supervisory or enforcement actions.

Section 746.108 Composition of Supervisory Review Committee

The Board proposes to create a rotating pool of not less than eight individuals appointed by the NCUA Chairman from among NCUA's senior staff in the regional offices, the Office of the Executive Director (OED), the Office of Examination and Insurance (E&I), the Office of National Examination and Supervision (ONES), the Office of Small Credit

Union Initiatives (OSCUI), and the Office of Consumer Financial Protection and Access (OCFPA) to serve with the SRC Chairman as a SRC pool from which individual members may be selected by the SRC Chairman to serve as the SRC for a particular appeal.²⁰ Each member of the SRC pool, with the exception of the SRC Chairman, will serve for a one-year term and is eligible to be reappointed for additional terms. A regional director, associate regional director, executive director, deputy executive director, a general counsel, and a senior policy advisor or chief of staff to a Board Member will be ineligible to serve as a member of the SRC pool.

The Secretary of the Board will serve as permanent SRC Chairman and will select three SRC members (one of whom may be the SRC Chairman) from this SRC pool to serve as the SRC for each particular appeal. The Special Counsel will serve as a permanent non-voting member of the SRC to advise the SRC on procedural and legal matters. When selecting SRC members to hear a particular appeal, the SRC Chairman will consider any real or apparent conflicts of interest that may impact the SRC member's objectivity as well as that individual's experience with the subject matter of the appeal. Members of the SRC pool from the program office rendering the material supervisory determination that is the subject of the appeal will be ineligible to serve as SRC members for that appeal. Likewise, E&I staff will be ineligible to serve as SRC members for appeals where the FICU is appealing a determination following a request for review by the Director of E&I.

²⁰ With the inclusion of the SRC Chairman, the total number of NCUA senior staff in the SRC pool will be not less than nine; eight or more of which would be appointed by the NCUA Chairman.

The Board believes that creating a rotating SRC pool of individuals eligible to serve on the SRC from among NCUA's senior staff in the regional offices, OED, E&I, ONES, OSCUI, and OCFPA is appropriate because these individuals are well-suited to understand supervisory issues and render consistent, well-reasoned decisions. Senior staff from the regional offices, E&I, and ONES are actively engaged in examination-related activities and have in-depth knowledge of current trends in the credit union industry. Likewise, senior staff from OSCUI have specialized knowledge of the needs of small and low-income FICUs. Moreover, senior staff from OCFPA have specialized knowledge of the latest issues in chartering, field of membership, and consumer protection. Each of these program offices brings a unique and diverse set of skills that will greatly benefit the SRC appeals process.

In addition, expanding the number of individuals eligible to serve on the SRC enhances due process by eliminating the potential for conflicts of interest. Having a wider pool from which to draw when selecting SRC members allows the SRC Chairman to avoid conflicts of interest by selecting SRC members without any direct ties to the program office that rendered the material supervisory determination. Moreover, having additional members in the SRC pool means that the Board can expand the jurisdiction of the SRC, while still providing an expeditious process for a FICU to appeal a material supervisory determination.

Nevertheless, the Board continues to believe that regional directors and associate regional directors should not serve in the pool of individuals eligible to serve on the SRC. The

Riegle Act mandated NCUA to establish an “independent appellate process,” which it defines as “a review by an agency official who does not directly or indirectly report to the agency official who made the material supervisory determination under review.”²¹ This reflects a clear Congressional intent to afford a FICU a separate and meaningful appeal of a material supervisory determination. As the Board explained in IRPS 95-1, allowing regional directors and associate regional directors to serve as members of the SRC pool would place these individuals in the untenable position of potentially reviewing material supervisory determinations made by their colleagues. While the Board does not believe that these individuals would be predisposed to support other regional directors or associate regional directors, the Board wishes to eliminate any perception that the SRC appeals process may be biased against FICUs.

Likewise, the Board continues to believe that the executive director, deputy executive director, policy advisors and chiefs of staff to Board Members should not serve as members of the SRC pool.²² These individuals serve in positions that report to and represent the interests of Board Members. In order to ensure a separate and meaningful final appeal to the Board, these individuals should not serve as members of the SRC pool. Likewise, the Board believes that attorneys from the Office of General Counsel should not serve as members of the SRC pool. These individuals are responsible for providing legal advice to NCUA including the SRC and the Board. In order to prevent any conflicts of interest, these individuals should not serve as members of the SRC pool.

²¹ 12 U.S.C. 4806(f)(2).

²² See IRPS 95-1.

Section 746.109 Procedures for Appealing to the NCUA Board

This section of the proposed rule describes the filings that must be made with the Secretary of the Board in order to appeal a decision by the SRC to the Board. It also addresses timing requirements. A request for appeal must include a statement of facts on which the appeal is based, a statement of the petitioner's principal objections to the SRC's decision, and, for FICUs, a certification that the FICU's board of directors has authorized the appeal to be filed. The proposed rule cross references procedures set out in § 746.111 that must be followed to request an oral hearing.

Granting an Appeal

Consistent with IRPS 11-1, as amended by IRPS 12-1, appeals to the Board would not be granted as a matter of right. Rather, at least one Board Member would be required to agree to hear an appeal from a decision by the SRC within 20 calendar days from the date the petitioner first filed the appeal with the Secretary of the Board. The purpose of this provision is to reserve Board review for only those cases involving significant issues of supervisory policy that cannot be addressed at the several lower appellate levels provided by this rule or through a request for reconsideration from the appropriate program office. At this stage, petitioners would have had the opportunity to obtain potentially three levels of review (i.e., reconsideration from the program office, review by the Director of E&I or his or her designee, and appeal to the SRC). Therefore, the Board believes that limiting Board review to only certain matters is not unfairly prejudicial. Furthermore, if a request

for an appeal is denied, the decision of the SRC would be treated as a final agency action permitting the petitioner to seek judicial review in federal court under the Administrative Procedure Act (APA).

If a request for an appeal is granted, the Board generally will decide the matter based solely on written submissions by the parties. However, if a request for an appeal is granted with an oral hearing, the Secretary of the Board would notify the parties of the date and time where the appeal shall be heard. As discussed in more detail below, an oral hearing may be either in person (including through counsel) or through video or teleconference.

Within 15 calendar days from the date the Secretary of the Board receives an appeal, the petitioner may amend or supplement the appeal in writing. The respondent would then be permitted 15 calendar days to respond to any supplemental filings.

Certain Actions Not Reviewable

Under the proposed rule, petitioners are permitted to request an appeal to the Board in all circumstances except denials of TAG reimbursements. As the Board explained in its rulemaking regarding the Community Development Revolving Loan Fund, TAG reimbursements are subject to the discretion of the Director of OSCUI and availability of funds.²³ Therefore, such determinations are not subject to administrative appeal to the

²³ 76 FR 67583, 67586 (Nov. 11, 2011).

Board. However, whether a FICU meets the qualifications set forth in a Notice of Funding Opportunity, which is different from whether the FICU should be granted a TAG reimbursement, is subject to administrative appeal to the Board under separate procedures and not through the SRC appeals process.

Section 746.110 Administration of the Appeal

Proposed § 746.110 sets out the standard procedures followed by the Board upon receipt of a timely appeal. These proposed procedures are, in some respects, a codification of informal practices that the Board currently follows when reviewing other types of appeals that were not heard by the SRC. To date, the Board has only received one appeal of a decision by the SRC.

Proposed paragraph (b) requires the Board to render a written decision stating the reasons for the decision within 90 calendar days, unless extended by the Board, from the date of receipt of an appeal by the Secretary of the Board. Such a decision would constitute a final agency action permitting the petitioner to seek judicial review in federal court under the APA. If the Board does not reach a decision within 90 calendar days, unless otherwise extended, from the date of receipt, then it would be treated as a denial.

Building this deadline into the rule ensures that the Board has adequate time to decide a matter on appeal while avoiding any undue prejudice to petitioners from unnecessary delays.

Section 746.111 Oral Hearing

This section of the proposed rule sets out the process for requesting and conducting an oral hearing. The Board recognizes that, in some unusual cases, the opportunity to make an oral presentation in person (or through video or teleconference) is necessary or useful to ensure a thorough understanding of the issues in a case. Therefore, the Board proposes to allow a FICU to make an oral presentation to the Board where at least one Board Member agrees with the petitioner that good cause exists for holding an oral hearing. Individual Board Members must act on such a request within 20 days of receiving a request for an oral hearing.

Request for Oral Hearing; Action on Request; Effect of Denial

Paragraph (a) describes the process for requesting an oral hearing. The request must accompany the notice of appeal itself, set out in a separate document titled “Request for Oral Hearing.” The petitioner would be required to show good cause for holding an oral hearing, stating reasons why the case cannot be presented adequately with just written statements. Proposed paragraph (b) specifies that an oral hearing would be scheduled provided at least one Board Member agrees to the oral hearing. The Secretary of the Board would notify the parties of the Board’s determination regarding the request for an oral hearing. Proposed paragraph (c) specifies that, in the event the request does not receive the support of at least one Board Member, the appeal will proceed on the basis of written submissions.

Procedures for Oral Hearing - Appearances; Representation

At an oral hearing, the petitioner would be permitted to be represented by one or more representatives of its choice (but not more than two without prior approval by the NCUA Chairman). This proposed paragraph recognizes the general right granted in the APA for individuals appearing in person before an agency to be “accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative[s].”²⁴ In general, courts have found the right to counsel to be a fundamental aspect of procedural due process in both informal and formal agency adjudications.²⁵

Conduct of Oral Hearing

Proposed paragraph (d)(3) permits the use of presentations based on written evidence submitted as part of the appeal documents. The submission of written evidence or witness testimony at the oral hearing would not be permitted. The petitioner would be given the opportunity to argue first, followed by a representative of the opposing party.

Section 746.112 Retaliation Prohibited

²⁴ 5 U.S.C. 555(b).

²⁵ See *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.”).

The Riegle Act required the Board to appoint an official to handle any problems FICUs may have as a result of appealing a material supervisory determination.²⁶ NCUA policy prohibits any retaliation, abuse, or retribution by NCUA personnel against a FICU in this regard. FICUs that believe they are victims of impermissible retaliation would be able to file complaints with the NCUA Office of Inspector General, who will investigate such claims and recommend appropriate action.

Section 746.113 Coordination with State Supervisory Authority

In the event that a material supervisory determination becomes the subject of a request for review by the Director of E&I and is the joint product of NCUA and a state supervisory authority (SSA), proposed § 746.113 requires the Director of E&I, or his or her designee, to promptly notify the SSA of the request for review, provide the SSA with a copy of the request and any other related materials, solicit the SSA's views regarding the merits of the request before making a determination, and notify the SSA of the Director's determination.

In the event that an appeal is subsequently filed with the SRC, the SRC is required to notify the SSA of the appeal, provide the SSA with a copy of the appeal and any other related materials, solicit the SSA's views regarding the merits of the appeal before making a determination, and notify the SSA of the SRC's determination. Once the SRC issues a determination, any other issues not addressed by the SRC that may remain

²⁶ 12 U.S.C. 4806(d).

between the FICU and the SSA would be left to those parties to resolve. Similar procedures would be followed for appeals to the Board.

IV. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities (primarily those under \$100 million in assets).²⁷ This rule has no economic impact on small credit unions because it only impacts internal NCUA procedures and provides voluntary options for credit unions. Accordingly, NCUA certifies the rule will not have a significant economic impact on a substantial number of small credit unions.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or increases an existing burden.²⁸ For purposes of the PRA, a paperwork burden may take the form of a reporting or recordkeeping requirement, both referred to as information collections. Information collected as part of a civil action or administrative action, investigation, or audit, however, is not considered an information collection for purposes of the PRA.

²⁷ 5 U.S.C. 603(a).

²⁸ 44 U.S.C. 3507(d); 5 CFR 1320.

Proposed Subpart A to part 746 establishes procedures for appealing material supervisory determinations to the NCUA Supervisory Review Committee. Because the only paperwork burden in this proposed rule relates to activities that are not considered to be information collections, NCUA has determined that this rule is exempt from the requirements of the PRA.²⁹

Assessment of Federal Regulations and Policies on Families.

NCUA has determined that this rule will not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, 1999.³⁰

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests.³¹ NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

²⁹ 44 U.S.C. 3518(c)(1)(B)(ii).

³⁰ Pub. L. 105-277, § 654, 112 Stat. 2681, 2681-581 (1998).

³¹ 64 FR 43255 (Aug. 4, 1999).

List of Subjects

12 CFR Part 746

Administrative practice and procedure, Claims, Credit Unions, Investigations.

By the National Credit Union Administration Board on _____, 2017.

Gerard Poliquin
Secretary of the Board

For the reasons discussed above, the NCUA Board proposes to add Subpart A to 12 CFR part 746 as follows:

PART 746 – APPEALS PROCEDURES

1. The authority citation for part 746 reads as follows:

Authority: 12 U.S.C. 1766, 1787, and 1789.

2. Add a new subpart A to read as follows:

SUBPART A – Procedures for Appealing Material Supervisory Determinations

Sec.

746.101 Authority, Purpose, and Scope.

746.102 Definitions.

746.103 Material Supervisory Determinations.

746.104 General Provisions.

746.105 Procedures for Reconsideration from the Appropriate Program Office.

746.106 Procedures for Requesting Review by the Director of the Office of Examination and Insurance.

746.107 Procedures for Appealing to the Supervisory Review Committee.

746.108 Composition of Supervisory Review Committee.

746.109 Procedures for Appealing to the NCUA Board.

746.110 Administration of the Appeal.

746.111 Oral Hearing.

746.112 Retaliation Prohibited.

746.113 Coordination with State Supervisory Authority.

§ 746.101 Authority, Purpose, and Scope.

(a) *Authority.* This subpart is issued pursuant to section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. § 4806), which requires the NCUA Board to establish an independent intra-agency process to

review appeals of material supervisory determinations made by agency officials, and sections 120 and 209 of the Federal Credit Union Act (12 U.S.C. §§ 1766, 1789).

(b) *Purpose.* The purpose of this subpart is to establish an expeditious review process for federally insured credit unions to appeal material supervisory determinations to an independent supervisory panel and, if applicable, to the NCUA Board. This subpart is also intended to establish appropriate safeguards for protecting appellants from retaliation by agency officials.

(c) *Scope.* This subpart applies to the appeal of material supervisory determinations made by agency officials. This subpart does not apply to the appeal of determinations for which an independent right to appeal exists such as a decision to appoint a conservator or liquidating agent for a federally insured credit union or to take prompt corrective action pursuant to section 216 of the Federal Credit Union Act (12 U.S.C. § 1790d) and part 702 of this chapter. This subpart also does not apply to enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a pending enforcement action.

§ 746.102 Definitions.

For purposes of this subpart:

Board means the NCUA Board.

Committee means the Supervisory Review Committee.

Director of the Office of Examination and Insurance has the same meaning as used in § 790.2 of this chapter but also includes individuals designated by the Director of the Office of Examination and Insurance from among senior Office of Examination and Insurance staff to handle requests for review by the Director of the Office of Examination and Insurance pursuant to § 746.106 of this subpart.

Material Supervisory Determination is defined in § 746.103 of this subpart.

Petitioner means an entity, including a program office, requesting reconsideration, review, or filing an appeal pursuant to the procedures set forth in this subpart.

Program Office means the office within NCUA responsible for making a material supervisory determination.

Respondent means an entity, including a program office, defending against an action by a petitioner.

Special Counsel to the General Counsel or *Special Counsel* means an individual within the Office of General Counsel providing legal or procedural advice to the Committee in accordance with the procedures set forth in this subpart.

§ 746.103 Coverage.

(a) *Material Supervisory Determination.* The term “material supervisory determination” means a written decision by a program office that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature and level of supervisory oversight of a federally insured credit union. The term includes, but is not limited to:

- (1) Composite examination ratings of 3, 4, or 5;
- (2) Determinations relating to the adequacy of loan loss reserve provisions;
- (3) Classifications of loans and other assets that are significant to a federally insured credit union;
- (4) Restitution orders pursuant to the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*) and its implementing regulation, Regulation Z (12 CFR part 1026); and
- (5) Determinations on a waivers request or an application for additional authority where independent appeal procedures have not been specified in other NCUA regulations.

(b) *Exclusions from Coverage.* The term “material supervisory determination” does not include:

- (1) Composite examination ratings of 1 or 2;
- (2) Component examination ratings unless such ratings have a significant adverse effect on the nature and level of supervisory oversight of a federally insured credit union;
- (3) The scope and timing of supervisory contacts;

(4) Decisions to appoint a conservator or liquidating agent for a federally insured credit union;

(5) Decisions to take prompt corrective action pursuant to section 216 of the Federal Credit Union Act (12 U.S.C. § 1790d) and part 702 of this chapter;

(6) Enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a pending enforcement action;

(7) Preliminary examination conclusions communicated to a federally insured credit union before a final exam report or other written communication is issued;

(8) Formal and informal rulemakings pursuant to the Administrative Procedure Act (5 U.S.C. § 500 *et seq.*);

(9) Requests for NCUA records or information under the Freedom of Information Act (5 U.S.C. § 552) and part 792 of this chapter and the submission of information to NCUA that is governed by this statute and this regulation; and

(10) Determinations for which other appeals procedures exist.

§ 746.104 General Provisions.

(a) *Standard of Review.* The burden of showing an error in an appealed determination shall rest solely with the petitioner. Review shall be *de novo*.

(b) *Dismissal and Withdrawal.* Any appeal under this subpart may be dismissed by written notice if it is not timely filed; if the basis for the appeal is not discernable; if the petitioner asks to withdraw the request in writing; if any party fails to provide additional

information requested pursuant to any authority granted in this subpart; if any party engages in bad faith; or for reasons deemed appropriate by the reviewing authority.

(c) *Discovery.* No provision of this subpart is intended to create any right to discovery or similar process.

(d) *Supervisory or Enforcement Actions Not Affected.* No provision of this subpart is intended to affect, delay, or impede any formal or informal supervisory or enforcement action in progress or affect NCUA's authority to take any supervisory or enforcement action against a federally insured credit union.

(e) *Additional Authority and Waiver Requests During the Pendency of an Appeal.* A program office will not consider a waiver request or an application for additional authority that could be affected by the outcome of an appeal of a material supervisory determination unless specifically requested by the federally insured credit union appealing the material supervisory determination. Any deadline for a program office to decide a waiver request or an application for additional authority set forth in any part of this chapter shall be suspended until the federally insured credit union appealing a material supervisory determination has exhausted its administrative remedies under this subpart or may no longer appeal the material supervisory determination, whichever is later.

§ 746.105 Procedures for Reconsideration from the Appropriate Program Office.

(a) *Reconsideration.* A federally insured credit union must make a written request for reconsideration from the appropriate program office prior to requesting review by the

Director of the Office of Examination and Insurance pursuant to § 746.106 or filing an appeal with the Committee pursuant to § 746.107. Such a request must be made within 30 calendar days after receiving an examination report containing a material supervisory determination or other official written communication of a material supervisory determination. A request for reconsideration must be in writing and filed with the appropriate program office.

(b) *Content of Request.* Any request for reconsideration must include:

- (1) A statement of the facts on which the request for reconsideration is based;
- (2) A statement of the basis for the material supervisory determination to which the petitioner objects and the alleged error in such determination; and
- (3) Any other evidence relied upon by the petitioner that was not previously provided to the appropriate program office making the material supervisory determination.

(c) *Decision.* Within 30 calendar days after receiving a request for reconsideration, the appropriate program office shall issue a written decision, stating the reasons for the decision, and provide written notice of the right to file a request for review by the Director of the Office of Examination and Insurance pursuant to § 746.106 or file an appeal with the Committee pursuant to § 746.107. If a written decision is not issued within 30 calendar days, the request for reconsideration will be deemed to have been denied.

(d) *Subsequent Requests for Reconsideration.* Any subsequent request for reconsideration following an initial request made pursuant to this section will be treated as a request for review by the Director of the Office of Examination and Insurance

pursuant to § 746.106 or an appeal to the Committee pursuant to § 746.107 as determined by the Secretary of the Board after consultation with the federally insured credit union.

§ 746.106 Procedures for Requesting Review by the Director of Office of Examination and Insurance.

(a) *Request for Review.* Prior to filing an appeal with the Committee pursuant to § 746.107, but after receiving a written decision by the appropriate program office in response to a request for reconsideration pursuant to § 746.105, a federally insured credit union may make a written request for review by the Director of the Office of Examination and Insurance of the program office's material supervisory determination. Such a request must be made within 30 calendar days after a final decision on reconsideration is made by the appropriate program office. A request for review must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Content of Request.* Any request for review by a federally insured credit union must include:

- (1) A statement that the federally insured credit union is requesting review by the Director of the Office of Examination and Insurance;
- (2) A statement of the facts on which the request for review is based;
- (3) A statement of the basis for the material supervisory determination to which the federally insured credit union objects and the alleged error in such determination;

(4) Any other evidence relied upon by the federally insured credit union that was not previously provided to the appropriate program office making the material supervisory determination; and

(5) A certification that the board of directors of the federally insured credit union has authorized the request for review to be filed.

(c) *Conduct of Review.* Review of a material supervisory determination shall be based on the written submissions provided under paragraph (b) of this section. The Director of the Office of Examination and Insurance may request additional information from the appropriate program office or the federally insured credit union within 15 calendar days after the Secretary of the Board receives a request for review by the Director of the Office of Examination and Insurance. The relevant party must submit the requested information to the Director of the Office of Examination and Insurance within 15 calendar days after receiving such request for additional information. The Director of the Office of Examination and Insurance may consult with the parties jointly or separately before rendering a decision and may solicit input from any other pertinent program office as necessary.

(d) *Decision.* Within 30 calendar days after the Secretary of the Board receives a request for review, the Director of the Office of Examination and Insurance shall issue a written decision, stating the reasons for the decision, and provide written notice of the right to file an appeal with the Committee pursuant to § 746.107. The 30 calendar day deadline is extended by the time period during which the Director of the Office of Examination and Insurance is gathering additional information. If a written decision is

not issued within 30 calendar days, as extended by additional time during which the information is being gathered, the request for review will be deemed to have been denied.

(e) *Subsequent Requests for Review.* No party may request reconsideration of the decision rendered by the Director of the Office of Examination and Insurance. Any subsequent request for review following the rendering of a decision by the Director of the Office of Examination and Insurance will be treated as an appeal to the Committee.

§ 746.107 Procedures for Appealing to the Supervisory Review Committee.

(a) *Request for Appeal.* After receiving a written decision by the appropriate program office in response to a request for reconsideration pursuant to § 746.105, a petitioner may file an appeal with the Committee. Such an appeal must be filed within 30 calendar days after receiving a written decision by the appropriate program office on reconsideration or, if the petitioner requests review by the Director of the Office of Examination and Insurance pursuant to § 746.106, within 30 calendar days after a final decision is made by the Director of the Office of Examination and Insurance. An appeal must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Content of Appeal.* Any appeal must include:

- (1) A statement that the petitioner is filing an appeal with the Committee;
- (2) A statement of the facts on which the appeal is based;
- (3) A statement of the basis for the determination to which the petitioner objects and the alleged error in such determination;

(4) Any other evidence relied upon by the petitioner that was not previously provided to the appropriate program office or, if applicable, the Director of the Office of Examination and Insurance; and

(5) For federally insured credit unions, a certification that its board of directors has authorized the appeal to be filed.

(c) *Conduct of Appeal.* The following procedures shall govern the conduct of an appeal to the Committee:

(1) *Submission of Written Materials.* The Committee may request additional information from either of the parties within 15 calendar days after the filing of an appeal. The parties must submit the requested information to the Committee within 15 calendar days after receiving a request for additional information.

(2) *Oral Hearing; Duration; Location.* Except where a federally insured credit union, as either petitioner or respondent, has requested that an appeal be based entirely on the written record, an appeal shall also consist of oral presentations to the Committee at NCUA headquarters. The introduction of written evidence or witness testimony may also be permitted at the oral hearing. The petitioner shall argue first. Each side shall be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Committee and will be based on the complexity of the appeal. Committee members may ask questions of any individual appearing before it.

(3) *Appearances; Representation.* The parties shall submit a notice of appearance identifying the individual(s) who will be representing them in the oral

presentation. The federally insured credit union shall designate not more than two officers, employees, or other representatives including counsel, unless authorized by the Committee. The program office shall designate not more than two individuals, one of whom may be an enforcement attorney from NCUA's Office of General Counsel, unless authorized by the Committee.

(d) *Decision.* Within 30 calendar days after the oral presentation of the appeal to the Committee, the Committee shall issue a decision in writing, stating the reasons for the decision, and provide the petitioner with written notice of the right to file an appeal with the NCUA Board (if applicable). If a federally insured credit union has requested that an appeal be entirely based on the written record, the Committee shall issue a decision within 30 calendar days from the date of receipt of an appeal by the Secretary of the Board. The 30 calendar day deadline to decide an appeal based entirely on the written record is extended by any time period during which the Committee is gathering additional information pursuant to paragraph (c)(1) of this section.

(e) *Publication.* The Committee shall publish its decisions on NCUA's website with appropriate redactions to protect confidential or exempt information. In cases where redaction is insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published decisions may be cited as precedent in appeals to the Committee.

(f) *Consultation with Office of Examination and Insurance or Office of General Counsel Required.* If an appeal involves the interpretation of material supervisory policy or generally accepted accounting principles, the Committee shall notify the Director of the Office of Examination and Insurance of the appeal and solicit input from the Office of

Examination and Insurance. If an appeal involves the interpretation of legal requirements, including NCUA's regulations, the Committee shall notify the General Counsel of the appeal and solicit input from the Office of General Counsel.

(g) *Supplemental Procedures Authorized.* In addition to the procedures contained in this subpart, the Committee Chairman may adopt supplemental procedures governing the operations of the Committee, order that material be kept confidential, or consolidate appeals that present similar issues of law or fact.

§ 746.108 Composition of Supervisory Review Committee.

(a) *Formation and Composition of Committee Pool.* The NCUA Chairman shall select not less than eight members from among senior staff in the regional offices, the Office of the Executive Director, the Office of Examination and Insurance, the Office of National Examination and Supervision, the Office of Small Credit Union Initiatives, and the Office of Consumer Financial Protection and Access to serve along with the Committee Chairman as a Committee pool from which the Committee Chairman may select Committee members. None of the members appointed by the NCUA Chairman shall also serve as a regional director, associate regional director, executive director, deputy executive director, general counsel, or a senior policy advisor or chief of staff to a Board Member.

(b) *Term of Office for Members of Committee Pool.* Each member of the Committee pool shall serve for a one year term and may be reappointed by the NCUA Chairman for additional terms.

(c) *Designation and Role of Committee Chairman.* The Secretary of the Board shall serve as permanent Committee Chairman. The Committee Chairman shall be responsible for designating three Committee members (one of whom may be the Committee Chairman) from among the Committee pool to hear a particular appeal.

(d) *Selection Criteria.* When selecting Committee members to hear an appeal pursuant to paragraph (c), the Committee Chairman shall consider any real or apparent conflicts of interest that may impact the objectivity of the Committee member as well as that individual's experience with the subject matter of the appeal.

(e) *Interested Staff Ineligible.* Members of the Committee pool from the program office that made the material supervisory determination that is the subject of the appeal are ineligible to serve on the Committee for that appeal. Members of the Committee pool from the Office of Examination and Insurance are ineligible to serve on the Committee for appeals where the petitioner previously requested review by the Director of the Office of Examination and Insurance pursuant to § 746.106.

(f) *Role of the Special Counsel.* The Special Counsel to the General Counsel shall serve as a permanent nonvoting member of the Committee to advise on procedural and legal matters.

(g) *Quorum; Meetings.* A quorum of two Committee members (excluding the Special Counsel) shall be present at each Committee meeting and a majority vote of a quorum is required for an action on an appeal. Meetings of the Committee will not be open to the public.

§ 746.109 Procedures for Appealing to the NCUA Board.

(a) *Request for Appeal.* A petitioner may file an appeal with the Board challenging a decision by the Committee within 30 calendar days after receiving that decision. An appeal must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Granting an Appeal.* At least one Board Member must agree to consider an appeal from a decision by the Committee. If a request for an oral hearing pursuant to § 746.111 is granted, the Secretary of the Board will notify the parties of the time and location where the oral hearing shall be heard. Except in unusual circumstances, any appeal shall be held at NCUA headquarters. If at least one Board Member does not agree to consider an appeal from a decision by the Committee within 20 days of receiving a request, the request will be deemed to have been denied.

(c) *Failure to File a Timely Appeal.* A petitioner that fails to file an appeal within the specified 30-day period shall be deemed to have waived all claims pertaining to the matters in issue.

(d) *Certain Actions Not Reviewable.* Notwithstanding any other provision of this subpart, Committee decisions on the denial of a technical assistance grant reimbursement are final decisions of NCUA and may not be appealed to the Board.

(e) *Content of Appeal.* Any request for appeal must include:

- (1) A statement of the facts on which the appeal is based;
- (2) A statement of the basis for the determination to which the petitioner objects and the alleged error in such determination; and

(3) For federally insured credit unions, a certification that its board of directors has authorized the appeal to be filed.

(f) *Amending or Supplementing the Appeal.* The petitioner may amend or supplement the appeal in writing within 15 calendar days from the date the Secretary of the Board receives an appeal. If the petitioner amends or supplements the appeal, the respondent will be permitted to file responsive materials within 15 calendar days.

(g) *Request for Oral Hearing.* In accordance with § 746.111, the petitioner may request an opportunity to appear before the Board to make an oral presentation in support of the appeal.

§ 746.110 Administration of the Appeal.

(a) *Conduct of Appeal.* Except as otherwise provided in § 746.111, the following procedures shall govern the conduct of an appeal to the Board:

(1) *Review Based on Written Record.* The appeal of a material supervisory determination shall be entirely based on the written record.

(2) *Submission of Written Materials.* The Board or the Special Counsel to the General Counsel may request additional information to be provided in writing from either of the parties within 15 calendar days after the filing of an appeal, any amendments or supplementary information to the appeal documents by the petitioner, or any responsive materials by the respondent, whichever is later. The parties must submit the requested information to the Board or the Special Counsel within 15 calendar days of receiving a request for additional information.

(b) *Decision.* The Board shall issue a decision within 90 calendar days, unless there is an oral hearing, from the date of receipt of an appeal by the Secretary of the Board. The decision by the Board shall be in writing, stating the reasons for the decision, and shall constitute a final agency action for purposes of chapter 7 of title 5 of the United States Code. Failure by the Board to issue a decision on an appeal within the 90-day period, unless there is an oral hearing, shall be deemed to be a denial of the appeal.

(c) *Publication.* The Board shall publish its decisions on NCUA's website with appropriate redactions to protect confidential or exempt information. In cases where redaction is insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published decisions may be cited as precedent.

§ 746.111 Oral Hearing.

(a) *Request for Oral Hearing.* The petitioner may request to appear before the Board to make an oral presentation in support of the appeal. The request must be submitted with the initial appeal documents and should be in the form of a separate written document titled "Request for Oral Hearing." The request must show good cause for an oral presentation and state reasons why the appeal cannot be presented adequately in writing.

(b) *Action on the Request.* The Board shall determine whether to grant the request for oral hearing and shall direct the Secretary of the Board to serve notice of the Board's determination in writing to the parties. A request for oral hearing shall be granted with

the approval of any Board Member within 20 days of receiving a request for an oral hearing.

(c) *Effect of Denial.* In the event a request for an oral hearing is denied, the appeal shall be reviewed by the Board on the basis of the written record.

(d) *Procedures for Oral Hearing.* The following procedures shall govern the conduct of any oral hearing:

(1) *Scheduling of Oral Hearing; Location.* The Secretary of the Board shall notify the parties of the date and time for the oral hearing, making sure to provide reasonable lead time and schedule accommodations. The oral hearing will be held at NCUA headquarters; *provided, however*, that on its own initiative or at the request of the petitioner, the NCUA Chairman may in his or her sole discretion allow for an oral hearing to be conducted via teleconference or video conference facilities.

(2) *Appearances; Representation.* The parties shall submit a notice of appearance identifying the individual(s) who will be representing them in the oral presentation. The federally insured credit union shall designate not more than two officers, employees, or other representatives including counsel, unless authorized by the NCUA Chairman. The program office shall designate not more than two individuals one of whom may be an enforcement attorney from NCUA's Office of General Counsel, unless authorized by the NCUA Chairman.

(3) *Conduct of Oral Hearing.* The oral hearing shall consist entirely of oral presentations. The introduction of written evidence or witness testimony shall not be permitted at the oral hearing. The petitioner shall argue first. Each side shall

be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Board and will be based on the complexity of the appeal. Members of the Board may ask questions of any individual appearing before the Board.

(4) *Transcript.* The oral hearing shall be on the record and transcribed by a stenographer, who will prepare a transcript of the proceedings. The stenographer will make the transcript available to the federally insured credit union upon payment of the cost thereof.

(e) *Confidentiality.* An oral hearing as provided for herein constitutes a meeting of the Board within the meaning of the Government in the Sunshine Act (5 U.S.C. § 552b). The Chairman shall preside over the conduct of the oral hearing. The meeting will be closed to the public to the extent that one or more of the exemptions from public meetings apply as certified by NCUA's Office of General Counsel. The Board shall maintain the confidentiality of any information or materials submitted or otherwise obtained in the course of the procedures outlined herein, subject to applicable law and regulations.

(f) *Conclusion of the Oral Hearing.* The Board shall take the oral presentations under advisement. The Board shall render its decision on the appeal in accordance with § 746.110.

§ 746.112 Retaliation Prohibited.

(a) *Retaliation Prohibited.* NCUA staff may not retaliate against a federally insured credit union making any type of appeal. Alleged acts of retaliation should be reported to the NCUA Office of Inspector General, which is authorized to receive and investigate complaints and other information regarding abuse in agency programs and operations.

(b) *Submission of Complaints.* Federally insured credit unions may submit complaints of suspected retaliation to the NCUA Office of Inspector General, 1775 Duke Street, Alexandria, VA 22314-3428. Complaints should include an explanation of the circumstances surrounding the complaint and evidence of any retaliation. Information submitted as part of a complaint shall be kept confidential.

(c) *Disciplinary Action.* Any retaliation by NCUA staff will subject the employee to appropriate disciplinary or remedial action by the appropriate supervisor. Such disciplinary or remedial action may include oral or written warning or admonishment, reprimand, suspension or separation from employment, change in assigned duties, or disqualification from a particular assignment, including prohibition from participating in any examination of the federally insured credit union that was the subject of the retaliation.

§ 746.113 Coordination with State Supervisory Authority.

(a) *Coordination when Request for Review by the Director of the Office of Examination and Insurance Filed.* In the event that a material supervisory determination subject to a request for review by the Director of the Office of Examination and Insurance is the joint product of NCUA and a state supervisory authority, the Director of

the Office of Examination and Insurance will promptly notify the appropriate state supervisory authority of the request for review, provide the state supervisory authority with a copy of the request for review and any other related materials, solicit the state supervisory authority's views regarding the merits of the request for review before making a determination, and notify the state supervisory authority of the Director's determination.

(b) *Coordination when Appeal to Supervisory Review Committee Filed.* In the event that a material supervisory determination appealed to the Committee is the joint product of NCUA and a state supervisory authority, the Committee will promptly notify the state supervisory authority of the appeal, provide the state supervisory authority with a copy of the appeal and any other related materials, solicit the state supervisory authority's views regarding the merits of the appeal before making a determination, and notify the state supervisory authority of the Committee's determination. Once the Committee has issued its determination, any other issues that may remain between the federally insured credit union and the state supervisory authority will be left to those parties to resolve.

(c) *Coordination when Appeal to Board Filed.* In the event that a material supervisory determination appealed to the Board is the joint product of NCUA and a state supervisory authority, the Board will promptly notify the state supervisory authority of the appeal, provide the state supervisory authority with a copy of the appeal and any other related materials, solicit the state supervisory authority's views regarding the merits of the appeal before making a determination, and notify the state supervisory authority of the Board's determination. Once the Board has issued its determination, any other issues

that may remain between the federally insured credit union and the state supervisory authority will be left to those parties to resolve.

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