



Michael Lee
Director of Regulatory Advocacy
League of Southeastern Credit Unions
22 Inverness Parkway, Suite 200
Birmingham, AL 35242

Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke St.
Alexandria, VA 22314-3428

Re: Appeals Procedures for Material Supervisory Determinations to Supervisory Review Committee
12 CFR part 746 [RIN 3133-AE69]

8/4/2017

Mr. Poliquin,

The League of Southeastern Credit Unions and Affiliates (League) appreciates the opportunity to comment on the proposed changes to the appeals procedures. The LSCU supports most of the regulatory amendments that are intended to provide more transparency to reviews of Material Supervisory Determinations. However, our primary concern is ensuring uniformity, transparency, and due process in appeals of Material Supervisory Determinations. LSCU agrees with many of the proposed changes to this regulation, but we believe a number of additional changes would benefit the industry and Administration. The League of Southeastern Credit Unions is a trade association that represents 260 credit unions in Florida and Alabama. Our mission is “to create an operating environment that enables credit unions to grow and succeed.”

As a whole, the LSCU supports the proposals of the NCUA to 1) expand the number of supervisory determinations appealable to the Supervisory Review Committee; 2) to create another level of review

before an appeal is brought before the Supervisory Review Committee; and 3) to change the nature and composition of the Supervisory Review Committee. However, there are a number of concerns that we hope the Board will consider in making the process of appealing Material Supervisory Determinations. A law review article described this appeals process as “dysfunctional and seldom used.”¹ That article found that credit unions believe examiners relied more on their views of best practices rather than legal or regulatory requirements.² There are even claims of bias and retaliation against credit unions who challenge examiner findings.³ Indeed, some of these issues have been brought up to LSCU by our affiliated credit unions.

Related to this is the need to make exams more uniform throughout the country so that there is no distinction in the exam findings from identical loan practices in two separate regions (or even two different examiners in the same region). Therefore, LSCU proposes that while, maintaining an informal appeal to the Regional office, formal appeals from an exam go directly to the program office. Furthermore, the NCUA should also publish an annual record of appeals decisions so that the industry can be better informed about the expectations of NCUA and can be proactive in complying or challenging those determinations. Our thoughts on the specific proposed rules are below:

1. Section 746.102 Definitions – The NCUA’s proposed definitions are clear and the LSCU supports the definitional changes.
2. Section 746.103 Material Supervisory Determination – The LSCU supports a definition to broadly mean “a written decision by a program that may significantly affect the capital, earnings,

¹ Julie Anderson Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 Wash. U. L. Rev. 1101, 1105 (2015).

² *Id.* at 1104.

³ *Id.*

operating flexibility, or that may otherwise affect the nature and level of supervisory oversight of a FICU.”

- a. *CAMEL Ratings* – The LSCU does not support allowing appeals to the SRC for only composite ratings of 3, 4 or 5 or a component rating that triggers supervisory action. Because the component ratings are so intertwined in many regards, a credit union may want to appeal the finding, even if there is no apparent harm from a rating. NCUA should not be concerned over allowing these appeals as credit unions are unlikely to appeal those ratings often.⁴
- b. *TILA Restitution Orders* – The LSCU agrees that the SRC is the appropriate mechanism for a credit union to appeal a determination by examiners of whether a credit union is in violation of the Truth in Lending Act. The SRC should be able to adequately review whether the examiner’s factual findings of both policy and practice rise to the level of a violation of TILA.
- c. *Jurisdictional Exclusions* – Clearly, areas where the Riegle Act⁵ specifically stated the SRC has no jurisdiction, like triggers for Prompt Corrective Action, the Board has no authority to alter those. Regarding those areas where the NCUA has a specific, quasi-judicial process, the LSCU agrees that those areas, like enforcement actions, should not be appealable to the SRC.

3. Section 746.104 General Provisions

- a. *Standard of Review* – The LSCU supports the burden of proof being upon the petitioner with a *de novo* standard of review as these are appropriate and common in legal and administrative proceedings. The *de novo* standard is very important because once

⁴ *Id.* at 1171-1172.

⁵ Riegle Community Development and Regulatory Improvement Act of 1994, 103rd Cong. H.R. 3474.

- NCUA has made a final decision; its findings will receive *Chevron*⁶ deference during judicial proceedings, so it is important that NCUA have a more balanced standard of review to avoid systematic bias in favor of the Administration. Interestingly, there is a bill in Congress⁷ to require all agency decisions to have a *de novo* standard of review,
- b. *Dismissal and Withdrawal* – The LSCU is not opposed to various reasons for dismissal of a FICU’s appeal such as bad faith in the appeal or not filing the appeal in a timely manner as these are consistent with dismissal of cases in judicial proceedings.
 - c. *Supervisory or Enforcement Actions Not Affected* – We understand that supervisory and enforcement actions are covered under other statutory and regulatory sections and are unaffected by these proposed changes and we are not opposed to this.
4. *Section 746.105 Procedures for Reconsideration from the Appropriate Program Office* – The LSCU would not support a continuation of the mandatory requirement for a credit union to request reconsideration of a material supervisory determination before appealing that decision. While we understand NCUA’s reasoning in that premature appeals are disruptive to its staff, examinations, appeals are also disruptive to credit unions and the time, costs, and energy of credit union staff is no less important than that of NCUA. There does not seem to be a compelling reason as to why, after a program office has made a determination, the credit union should seek reconsideration. If the program office has had an opportunity to review the request and stands by it, the credit union should have the opportunity to appeal to the next level. If reconsideration of a decision that a credit union disputes is important, one solution is for NCUA to automatically reconsider all decisions. For instance, if a the supervisory office in one region denies a credit union’s appeal of a finding, then that denial would be sent to another office for review.

⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

⁷ Separation of Powers Restoration Act of 2016, 114th Cong. H.R.4768

5. *Section 746.106 Procedures for Requesting Review by the Director of the Office of Examination and Insurance* – LSCU agrees with the proposed rule to allow an appeal of material supervisory decisions to the Director of Exams and Insurance. While we may not agree that the E & I has no bias to affirm a material supervisory decision, it may not have as much of an interest to affirm the findings of other program offices and should have an interest in correcting improper or unclear exam criteria so that the additional review of a MSD is an appropriate additional step in some cases.

6. *Section 746.107 Procedures for Appealing to the Supervisory Review Committee* – LSCU supports the three primary proposals under this section giving the SRC the ability to develop rules for its operations, that material involving the appeals will be kept confidential, and to consolidate appeals when there are common issues of fact or law. All of these proposals are common to other regulatory bodies and represent good practices for such proceedings. Furthermore, the proposed requirements for the SRC to consult with E & I and the General Counsel respectively when issues are raised during an appeal that directly requires input from those offices are sound and LSCU supports them. By conferring with those offices, the NCUA can better maintain uniformity within the Agency when considering exam or regulatory interpretations and policies.

7. *Section 746.108 Composition of Supervisory Review Committee* – LSCU agrees with the creation of a rotating pool from which to create the SRC to hear appeals. Also, LSCU agrees with the Board in creating a pool of people from the various regional and program offices, we think that the variety of perspectives coming from people with different interactions, experiences, and locations could provide a better perspective from which to make decisions on appeals and to avoid conflicts of interest or bias in deciding appeals.

8. *Section 746.109 Procedures for Appealing to the NCUA Board* – LSCU agrees with the provisions proposed by the Board that are required to initiate an appeal. Requiring a statement of facts, the petitioner’s principal objections to the SRC’s decision, and certification that the FICU’s board of directors has authorized the appeal are reasonable criteria for beginning an appeal to the Board.

However, LSCU will not support the Board refusing to hear appeals for two reasons. The first is that the responsibility of the Board to implement regulations is given to it by Congress and because it has the power to amend and propose regulations it should be the final arbiter on these issues within the agency. Binding decisions by someone who has been appointed by the President and confirmed by the Senate and is accountable to the people via the electoral process is a principle of our system of government.⁸ Second, if the Board is required to ultimately review appeals as a final agency determination, the Board will be more intimately associated with challenges in policy and regulation and because it has the power to amend policy and regulation, issues that arise concerning these matters would more likely be resolved in a quicker manner when the Board is reviewing those appeals.

9. *§ 746.110 Administration of the Appeal* – LSCU approves the codification of the appeals procedures presently being used. We would suggest the Board consult the procedures of the other banking agencies that were created to comply with the Riegle Act, as their procedures may prove useful, particularly OCC. Also, we agree that 90 calendar days is an appropriate window for the Board to render a final decision on an appeal.

⁸Anne Joseph O’Connell, *Vacant offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 943-944 (2008-2009).

10. § 746.111 *Oral Hearing* – LSCU agrees with the proposal to require petitioners to file, along with the initial appeal, an additional document “Request for Oral Hearing” to justify the need to have an oral hearing and why written submissions are insufficient. Regarding representation at an appearance, we accept the Board’s decision to limit presenting representatives to two, unless the Board approves a greater number. However, LSCU does not support the proposal to limit submission of written evidence, unless the purpose is to prevent the duplication of evidence submitted in the initial request for appeal. A persuasive oral presentation cannot go into the detail a written brief can, so the Board should consider a full written record on the issues at appeal. Similarly, LSCU does not support an outright prohibition on witness testimony as it is possible that an expert may have special knowledge on a topic that is relevant for the Board’s consideration. If this prohibition is unnecessary because some witnesses would be considered representatives and would only need to obtain permission from the Board to be included in the presenting representatives, then this arrangement may be acceptable. However, it is also important to note that administrative bodies are triers of fact and law and the Board may be called upon to decide a fact, therefore it is possible the Board would want to consider the testimony of a witness.

11. § 746.112 *Retaliation Prohibited* – LSCU agrees with the regulatory prohibition on retaliation. We believe the promulgation of this rule should be accompanied by the publication of an annual summary of the Inspector General investigations. Naturally, many aspects of the investigations are confidential, but releasing redacted summaries of complaints with their resolution, along with general statistics, would generate more effective oversight.

Conclusion

LSCU appreciates the opportunity to comment on these proposed regulations. We support the efforts of NCUA to regulate in a more effective and efficient manner. Please let me know if we can be of assistance in these efforts or to clarify anything herein.

Sincerely,



Michael Lee