

August 07, 2017

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

RE: Comments on Proposed Supervisory Review Process

Dear Mr. Gerald Poliquin,

I am writing on behalf of the California and Nevada Credit Union Leagues (Leagues), one of the largest state trade associations for credit unions in the United States, representing the interests of more than 250 credit unions and their approximately 10 million members/consumers.

The Leagues welcome the opportunity to provide comments to the National Credit Union Administration (NCUA) on their proposed rulemaking for appealing material supervisory determinations (MSDs) to the Supervisory Review Committee (SRC).

The Leagues occasionally hear from our members that they are unable to reach an agreement with their NCUA examiner on a MSD. Often, in these situations, the credit union chooses not to pursue an appeal, either from fear of retaliation or the perception that an appeal would not be truly independent and, therefore, unsuccessful. This belief is not without merit. In the NCUA Office of Inspector General's (OIG) Report to Congress, dated August 31, 2012 [\[1\]](#), the OIG reported that each of the five regional offices handle, on average, only six examination-related complaints annually, and an overall average of 85 percent of the outcomes are decided in favor of the NCUA. Further, in a study that looked at NCUA's appeals record from 2002 to 2012, the study showed in that 10-year period the SRC issued only six decisions, and in each case the SRC upheld the examiner's decisions [\[2\]](#).

For these reason, the Leagues thank and applaud the NCUA Board for taking steps to improve the MSD appeal process and expand the coverage. The proposed rule would (1) expand the number of supervisory determinations appealable to the SRC; (2) create an optional intermediate level of review by the Director of the Office of Examinations and Insurance (E&I) before an appeal is brought to the SRC; and (3) change the nature and composition of the SRC. While the Leagues generally support the proposed MSD appeal procedures, we respectfully offer the following comments and recommendations.

Background

Section 309(a) of the *Riegle Community Development and Regulatory Improvement Act of 1994* (Riegle Act) required the NCUA and the federal banking agencies to establish independent intra-agency appellate processes to review MSDs. The Riegle Act also required the agencies to ensure that appeals of MSDs are heard and decided

expeditiously and that appropriate safeguards exist for protecting appellants from retaliation by agency examiners.

In response, the Board adopted IRPS 95-1 in March 1995. In the final IRPS the jurisdiction of the SRC was limited to matters specifically listed as MSDs 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.

In 2011, the Board revised the IRPS 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 (OSCU). The Board has not made material changes to the jurisdiction of the SRC since 2012, when it removed all references to the Regulatory Flexibility Program to reflect the elimination of that program.

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 Board also states a desire for the agency’s practices to be more consistent with the federal banking agencies.

Expand Supervisory Determinations Appealable to SRC

The proposed rule would expand the number of supervisory determinations appealable to the SRC by redefining the term “material supervisory determination.” The proposal defines the term “material supervisory determination” to mean 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 (FICU). The Leagues support this expanded definition.

In the current process “examination ratings” appealable to the SRC include composite CAMEL ratings of 3, 4, or 5, as well as component ratings of those composite ratings. The proposed definition limits the ability to appeal CAMEL ratings to composite ratings of 3, 4, or 5, and component ratings would no longer be appealable, 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 component rating of 3 would be appealable to the SRC.

The Board states they do not believe that component ratings are “material” in most cases if the FICU otherwise maintains an overall composite CAMEL rating of 1 or 2. The Leagues recommend the Board reconsider this and include component ratings as MSDs appealable to the SRC.

As stated, the Board seeks consistency with the federal banking agencies. The Federal Deposit Insurance Corporation (FDIC) allows institutions to appeal all

CAMELS ratings under the Uniform Financial Institutions Rating System, both composite ratings and component ratings^[3]. The Leagues urge the NCUA take this approach and allow credit unions the opportunity to address component ratings early, before they lead to increased composite ratings.

Additional Flexibility

Request for Reconsideration

Prior to filing an appeal with the SRC, a FICU must make a request for reconsideration from the appropriate program office. A program office would be required to issue a written determination within 30 calendar days of receiving a request for reconsideration. If the program office fails to make a determination within 30 calendar days, the request for reconsideration will be treated as denied, and the FICU can take the next step in the appeals process. In general, the Leagues support a 30-day deadline for the program office to review a request for reconsideration and issue a determination. This should be sufficient time for a program office to review the determination and consider any new information.

However, the Leagues contend that there may be cases in which the MSD appeal is a time-sensitive issue and any delay may create unnecessary harm to the FICU. The Leagues recommend the NCUA permit FICUs to appeal directly to the SRC in time-sensitive cases. The SRC could make these determinations on a case-by-case basis and respond to the FICU as to their request to bypass the program office within 10 calendar days after the filing of the appeal. If denied, the FICU would still have the option to make a request for reconsideration from the appropriate program office.

Intermediate Level of Review

The proposed rule would allow a FICU, prior to filing an appeal with the SRC but after receiving a written decision by the appropriate program office, to make a written request for review of the MSD by the Director of E&I of the program. This intermediate level of review by the Director E&I is optional. The Leagues support this optional intermediate level of review.

No Prejudice

The final rule should clarify that a FICU that chooses to appeal directly to the SRC regarding a time-sensitive MSD, or chooses to bypass the optional intermediate level of review by the Director of E&I, will not be prejudiced by SRC (or the program office when a time-sensitive appeal to the SRC is diverted).

Composition of the Supervisory Review Committee

Currently, the SRC is made up of “three regular members of the NCUA’s senior staff as appointed by the NCUA Chairman.” The committee members serve one-year terms and may be reappointed for additional terms. One member is designated by the NCUA Chairman as chairperson. To maintain independence, there are prohibitions on who can serve on the committee ^[4].

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 (OSCU), and the Office of Consumer Financial Protection and Access (OCFPA). These individuals would serve as a SRC pool from which individual members may be selected by the SRC Chairman to serve as the SRC for a particular appeal. 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.

The Secretary of the Board will serve as permanent SRC Chairman. The Special Counsel will serve as a permanent non-voting member of the SRC to advise the SRC on procedural and legal matters.

To facilitate an independent appellate process, those *ineligible* to serve as a member of the SRC pool include: 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.

The Leagues support the creation of a pool of individuals to serve as the SRC from which individual members may be selected by the SRC Chairman to serve for a particular appeal. However, we offer the following recommendations to support consistency and transparency.

1. We recommend the individuals in the SRC pool serve a minimum five-year term and retain the eligibility to be reappointed for additional terms. Having a consistent group of persons will increase the likelihood of consistent decisions.
2. When selecting SRC members to hear a particular appeal, the SRC Chairman is to 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. We recommend the SRC Chairman not only consider "real or apparent" conflicts, but also the perception of potential conflicts. The SRC Chairman should consider the individual's past history with the relevant program office or any employees involved in issuing the MSD. Perception is reality, and removing even a perceived conflict of interest will support improved transparency and fairness.
3. We recommend the Board consider adding credit union employees (chief executive officers, chief financial officers, compliance officers, etc.) to the SRC pool and that the SRC for each appeal include at least one credit union employee. In appointing credit union employees, the Board should consider, at a minimum, credit union asset sizes and geographical locations. Having a credit union executive on the SRC will increase the perception of a truly independent review since the SRC would not be solely made up of NCUA staff. Credit unions may be more likely to appeal an MSD when it will be "a jury of their peers."

Publication of Decisions

The proposed rule would require the SRC to publish its decisions on NCUA's Web site 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. The Leagues fully support the publication of SRC

decisions and appreciate the transparency it will afford. Furthermore, publication of the SRC's decisions provides consistency with other federal agencies, such as the FDIC.

Conclusion

The Leagues commend the NCUA Board for seeking to improve the MSD appeal process and expanding the number of supervisory determinations appealable to the SRC. We believe credit unions will benefit from an improved process with greater flexibility and transparency. We thank you for the opportunity to comment on the proposal and for considering our views. If you have any questions regarding our comments, please contact me.

[1] NCUA OIG Review Of NCUA's Examination And Complaint Processes For Small Credit Unions; Report #OIG-12-10

[2] When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations; Washington University Law Review, Volume 92; Issue 5;2015

[3] FDIC Guidelines for Appeals of Material Supervisory Determinations; available at <https://www.fdic.gov/regulations/laws/sarc/sarcguidelines.html>

[4] NCUA IRPS 2011-1

Sincerely,

Sharon Lindeman
VP, Regulatory Advocacy
California and Nevada Credit Union Leagues

cc: CCUL