

September 27, 2019

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

RE: Comments on Notice of Proposed Guidance Regarding Prohibitions Imposed by Sec. 205(d) of the FCU Act

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 approximately 250 credit unions and their more than 11 million members.

The National Credit Union Administration (NCUA) Board issued a proposal to update and revise its Interpretive Ruling and Policy Statement (IRPS) regarding statutory prohibitions imposed by Section 205(d) of the Federal Credit Union Act (FCU Act).

Section 205(d) of the Federal Credit Union Act (FCU Act) prohibits, except with the prior written consent of the Board, any person who has been convicted of any criminal offense involving dishonesty or breach of trust (or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense) from participating in the affairs of an insured credit union.

The proposal would significantly expand the current *de minimis* exceptions to include additional offenses and eliminate the need to submit an application to the Board for consent for certain low-risk, isolated offenses. The Leagues generally support the proposed modifications and we respectfully offer the following comments.

## Background

In August 2008, the NCUA Board issued final IRPS 08-1 to provide direction and guidance to federally insured credit unions and those persons who may be affected by Section 205(d) by describing the actions that are prohibited under the statute and establishing the procedures for applying for Board consent on a case-by-case basis. The IRPS 08-1 has not been revised since 2008.

Recognizing that certain offenses are so minor and occurred so far in the past so as to not currently present a substantial risk to the insured credit union, IRPS 08-1 excludes certain *de minimis* offenses from the need to obtain consent from the Board.

Recent applications requesting the Board's consent involved fairly minor, low-risk, and isolated offenses that did not fall within the current *de minimis* exception. In light of these recent cases, the substantial passage of time since IRPS 08-1 was adopted, and the Board's stated commitment to opening a path forward for those seeking redemption for past criminal activities, the Board is proposing to significantly expand the current *de minimis* exceptions. Proposed IRPS 19-1 will supersede and replace IRPS 08-1.

## General Criteria

Proposed IRPS 19-1 would amend one of the five *de minimis* exception general criteria. Under the NCUA's current policy in IRPS 08-1, a covered offense is considered *de minimis* if it, among other things, was punishable by imprisonment for a term of less than one year and/or a fine of less than \$1,000, and the punishment imposed by the court did not include incarceration.

Proposed IRPS 19-1 would modify this criterion to better align with developments in criminal reform and sentencing guidelines that have occurred since 2008. Specifically, the potential punishment and/or fine

provision would be updated to allow covered offenses punishable by imprisonment for a term of one year or less and/or a fine of \$2,500 or less, and those punishable by three days or less of jail time.

In addition, proposed IRPS 19-1 would define “jail time” since various jurisdictions take different approaches to confinement depending on the nature of the crime (e.g., house arrest, home detention, ankle monitor, voice curfew, work release, etc.). The new definition would clarify that the term “jail time” includes any significant restraint on an individual’s freedom of movement, including confinement to a specific facility or building on a continuous basis where the person may leave temporarily only to perform specific functions or during specified time periods or both. The definition does not include individuals on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location.

The Leagues agree with and support the proposed amendments to the potential punishment and/or fine provision in the general criteria for a *de minimis* offense. Expanding criterion 2 from “less than one year” to “one year or less” is a minor change, but one that will have a meaningful reduction in the number of applications to the Board. We also agree the increase from \$1,000 to \$2,500 is appropriate and better aligns with current criminal reform and sentencing guidelines. Further, we also support the related definition of “jail time.”

### **De Minimis Exceptions**

The Leagues generally support the proposed modifications to the list of *de minimis* exceptions. We believe the proposed amendments will streamline the hiring process for all involved, including the prospective employee, the hiring credit union, and the NCUA Board. Eliminating the need to submit an application for these low-risk, isolated offenses will reduce regulatory burdens for both credit unions and the NCUA.

Specifically, we agree with including the following categories of *de minimis* exceptions as proposed, including their individual proposed qualifying criteria:

- small dollar simple theft,
- insufficient funds checks of aggregate moderate value,
- false identification used by an underage person to obtain or purchase alcohol or to enter a location where alcohol is served;
- misdemeanor drug possession, and
- isolated minor offenses committed by covered persons as young adults.

The Leagues do have some concern with the proposed category of insufficient funds checks. Unlike the other proposed categories, the writing of insufficient funds checks is not a “victim-less” crime and can be a conscious intent to take advantage of someone and injure them financially. In addition, unlike all of the other categories, except a fake identification used to obtain alcohol, this category does not include a timeframe since the conviction or program entry occurred. We recommend the Board revisit the qualifying criteria for this *de minimis* exception, including the aggregate dollar amount and the time since conviction or program entry.

While we support the proposed modifications, we strongly recommend the revised IRPS 19-1 clearly provide that nothing in the guidance takes away a credit union’s hiring discretion. That is, even though the NCUA considers any of the above to be *de minimis* exceptions, a credit union must retain the right to consider an applicant’s past crime(s) and use their own discretion in hiring decisions.

### **Conclusion**

The Leagues thank the Board for the opportunity to comment on the proposed IRPS 19-1 and the expansion of current *de minimis* exceptions to prohibitions imposed by Section 205(d) of the FCU Act. We generally support the proposed modifications. We recommend the Board revisit the qualifying criteria for the insufficient funds checks *de minimis* exception, including the aggregate dollar amount and the time since conviction or program entry. We also recommend the Board clarify in the final IRPS 19-1 that nothing in the guidance removes or replaces a credit union’s hiring discretion.

Thank you for considering our views and recommendations. If you have any questions regarding our comments, please contact me.

Sincerely,

Diana R. Dykstra  
President and CEO  
California and Nevada Credit Union Leagues

cc: CCUL