

Comments submitted Via Email: regcomments@ncua.gov

September 27, 2019

Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314– 3428

Re: Comments on the NCUA's Proposed "Second Chance IRPS" Guidance

Dear Mr. Poliquin:

The undersigned organizations are writing in response to the National Credit Union Administration's (NCUA) request for comments (84 Fed. Reg. 36488, dated July 29, 2019) on proposed guidance ("Second Chance IRPS") regarding prohibitions imposed by Section 205(d) of the Federal Credit Union Act (FCUA) that regulate the criminal background checks required of all people employed by a credit union.

While we appreciate the NCUA's efforts "to expand career opportunities for those who have demonstrated remorse and responsibility for past indiscretions and wish to get on a path productive living," elements of the NCUA's proposals will continue to make it difficult for applicants with arrest and conviction records to compete fairly for employment. Thus, as described below, we urge the NCUA to go beyond the proposed expansions of the *de minimis* offenses adopted by the FDIC in 2018¹ to include several key reforms that will better streamline the consent petition process, reduce the administrative burden on workers and the agency, and help enhance the "quality, utility, and clarity of the information to be collected" by the NCUA. 84 Fed. Reg. at 36492.

Specially, we call on the NCUA to adopt the following improvements to the proposed Second Chance IRPS:

1. Clarify that workers may file directly for an exemption from the Board, which will help streamline the process and reduce delays that impact both the agency and the workers.
2. Instruct credit unions to inquire into an applicant's criminal history only after the conditional offer stage of the hiring process.
3. Expand the proposed changes to the *de minimis* offense exceptions in several key areas.
4. Clarify the NCUA's treatment of "complete expungement," "set aside" and "reversed" convictions.
5. Clarify the general Section 205(d) evaluation standards for waiver application reviewers and applicants.

¹ Federal Deposit Insurance Corporation, "FDIC Statement of Policy for Section 19 of the FDI Act" (Revised August, 3, 2018) available on-line at <https://www.fdic.gov/regulations/laws/rules/5000-1300.html>

I. Building on the Bi-Partisan Reforms Expanding Employment Opportunities for People with Records

Over 70 million people in the U.S., or one in three adults, have an arrest or conviction record that can show up on a routine background check for employment.² Significant progress has been made across the U.S. reforming employment policies to expand fair chance hiring for this significant segment of the budding U.S. workforce. At a White House event held earlier this year to celebrate the passage of the First Step Act, President Trump signaled the Administration's support for stronger reentry measures, announcing that "the Second Step Act will be focused on successful reentry and reduced unemployment for Americans with past criminal records, and that's what we're starting right away."³

In recent years, more robust federal policies have expanded employment opportunities of people with records, which provide helpful context to evaluate the NCUA's proposed reforms. For example, the Office of Personnel Management (OPM) finalized regulations in 2016 implementing a "ban the box" policy for federal employment that removes the background check question from the federal job application and extends the criminal history inquiry until the conditional offer stage of the hiring process.⁴ And in Congress, there is strong bi-partisan support for the Fair Chance Act (S. 387/H.R. 1076), which codifies the OPM regulations and extends the policy to federal contractors as well. Modeled on fair chance licensing reforms that have been embraced by the states, legislation has also been introduced in Congress (S. 697, Title VIII) that would reduce barriers to occupational licensing and certification that limit the career opportunities of people with records. And recently, the Administration rescinded OPM's proposed changes to the Declaration of Federal Employment form that would have vastly expanded the items collected about job applicants to include participation in diversionary programs and other prejudicial information.⁵

Recognizing the significant demand for qualified and diverse financial services workers, banking industry leaders have vocally advocated for greater flexibility to hire people with arrest and conviction records, and called for major reform of the FDIC Section 19 policies that the NCUA expressly relies upon in support of the proposed policy. As the *Wall Street Journal* reported, "[b]anks say the restriction is too tight, keeping them from hiring a more diverse pool of candidates."⁶ Significantly, the Bank Policy Institute recently called on Congress to provide "banking organizations flexibility to consider employment for a broader universe of qualified individuals without prior approval,"⁷ and JP Morgan Chase urged the FDIC to remove unnecessary criminal record restrictions imposed by its Section 19

² National Employment Law Project, "Opening Pathways for People with Records to Join Licensed Professions" (November 2018), at Appendix E. <https://www.nelp.org/publication/fair-chance-licensing-reform-opening-pathways-for-people-with-records-to-join-licensed-professions/>

³ The White House, Office of the Press Secretary. (2019). Remarks by President Trump at 2019 Prison Reform Summit and First Step Act Celebration. <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-2019-prison-reform-summit-first-step-act-celebration/>

⁴ 81 Fed. Reg. 86555 (December 1, 2016).

⁵ "White House Kills Plan for Expanded Criminal Background Checks for Federal Jobs," *Washington Post* (May 29, 2019); 84 Fed. Reg. 38305 (August 6, 2019) (Referencing the 2,748 public comments received in response to the proposed Declaration of Federal Employment form, OPM stated that "it supports efforts by the Administration and Congress to take steps to reform the criminal justice system and improve second chance hiring employment opportunities.").

⁶ "Small Time Crimes a Deal Breaker for Banking Jobs," *Wall Street Journal* (April 21, 2019).

⁷ Letter from the Banking Policy Institute to the House and Senate Chairs of the Banking and Financial Services Committees (dated April 8, 2019).

policy.⁸ Similar concerns apply to the credit unions, which are severely constrained in their ability to recruit and hire qualified and diverse workers by virtue of the FCUA and the NCUA's proposed policy.

II. Recommendations to Clarify and Expand the NCUA's Fair Chance Screening Policies

A. Clarify that workers may file directly for an exemption from the Board, which will help streamline the process and reduce delays that impact both the agency and the workers.

According to the proposed Second Chance IRPS, an applicant waiver must be filed by an insured credit union (the employer) on behalf of a person unless the Board, "for substantial good cause, grants a waiver of that requirement and allows the person to file an application on their own right." 84 Fed. Reg. at 36492. As described below, we believe the process would be far more streamlined and accessible to more potential qualified applicants if the NCUA expressly authorizes and encourages applicants to file directly with the Board for a waiver rather than requiring that the credit union sponsor the application.

In the proposed guidance, the NCUA acknowledges that applicants will not be paid during Board review, even with a conditional offer of employment, and that the review process can be time consuming. 84 Fed. Reg. at 36492. To help alleviate these unnecessary delays, Section 205(d) applicants should be able to apply directly for a blanket individual waiver to be employed by a credit union and immediately seek employment in any institution with available positions, which is the common practice governing the FDIC Section 19 waiver process.⁹ Indeed, the FDIC Section 19 application expressly states, "When an insured depository institution will not file a Section 19 application on behalf of a covered person, a second method allows that individual to seek a waiver of the requirement that an insured depository institution file a Section 19 application on their behalf (Individual Waiver)."¹⁰ The NCUA should similarly clarify its Section 205(d) policy and forms to ensure that applicants may directly seek individual waivers.

In addition, we support the NCUA's proposal to edit the Section 205(d) application form to more clearly align the NCUA applications with the more transparent and applicant-friendly FDIC Section 19 form, and we agree with the motivation behind the proposal to delegate responsibility for reviewing certain applications to streamline the application process. 84 Fed. Reg. at 36492. In that spirit, we also urge the NCUA to consider creating a central office to accept and review waiver applications and be a resource to credit unions seeking to verify that applicants have received an exemption and approval to work by the NCUA. This centralized office could also be delegated the responsibility to only forward applications for further Board review that significantly merit an additional level of scrutiny.

⁸ Letter from Reid Broda, Associate General Counsel, JP Morgan Chase & Co. to Robert Feldman, Executive Secretary of the FDIC (dated March 6, 2018).

⁹ While the "FDIC Statement of Policy for Section 19 of the FDI Act" contains similar "substantial good cause" language, in practice the FDIC routinely accepts and processes the overwhelming majority of individual waiver applications without requiring that the financial institution sponsor the applicant. FDIC Statement of Policy available on-line at <https://www.fdic.gov/regulations/laws/rules/5000-1300.html>. Indeed, of the more than 1,200 prospective employees who petitioned the FDIC between 2008 and 2018 for an exemption, 84 percent of the petitions were filed by individual workers, not by a financial institution. "Small Time Crimes a Deal Breaker for Banking Jobs," *Wall Street Journal* (April 21, 2019).

¹⁰ Federal Deposit Insurance Corporation Application Pursuant to Section 19 of the Federal Deposit Insurance Act, available on-line at <https://www.fdic.gov/formsdocuments/6710-07.pdf>

B. Instruct credit unions to inquire into an applicant's criminal history only after the conditional offer stage of the hiring process.

When employers make criminal record inquiries on the initial job application, the applications of otherwise-qualified applicants are often discarded, even when the applicant's record may have no relation to the job requirements and are not indicative of an applicant's ability to perform the job. The "ban the box" policy, which has been embraced by 35 states,¹¹ was borne out of this reality faced by millions of workers with arrest and conviction records.

As OPM explained in the preamble to its regulations, inquiries into an individual's record "could have the effect of discouraging motivated, well-qualified individuals from applying for a Federal job because they have an arrest record, when the arrest did not result in a conviction or when, following a conviction, they have fully complied with the penalty and have been rehabilitated in the eyes of the law." 81 Fed. Reg. at 86555. Furthermore, criminal background checks for employment have a disparate discriminatory impact on Blacks and Latinos, as racial profiling and discriminatory sentencing schemes have caused these groups to be targeted by law enforcement, arrested, and convicted at rates that far exceed their representation in the population at large.¹²

Consistent with the OPM regulations, we recommend that the NCUA amend the Second Chance IRSP to direct credit unions to inquire into criminal record history only after extending a conditional offer of employment to an applicant. This would safeguard that insured credit unions do not unfairly discard the applications of persons with conviction histories while also ensuring that they continue to engage in appropriate levels of screening. It would also reduce regulatory and staffing burdens because the Board would review waiver applications from more people who have been extended a conditional offer rather than from any persons with such histories who have applied for a position.

At a minimum, we urge the NCUA to clarify that the credit unions are entirely within their rights under the federal law to adopt a ban the box policy, and that they are not required to collect information on their job applications listing the individual's criminal history until the conditional offer stage of the hiring process. Notably, the proposed Second Chance IRPS appears to undermine such policies by instructing credit unions to mandate that applicants complete a "written employment application which requires a listing of all convictions and pretrial diversion program entries." (84 Fed. Reg. at 36495).

¹¹ Beth Avery, "Ban the Box: U.S. Cities, Counties and States Adopt Fair-Chance Policies to Expand Employment Opportunities for People with Records" (National Employment Law Project, July 2019), available on-line at <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

¹² "Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey," *ACLU of New Jersey* (Dec. 2015), https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf (in test cities, African Americans were 2.6 to 9.6 times more likely than whites to be arrested for disorderly conduct, trespassing and marijuana possession); "Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System," *The Sentencing Project* (Aug. 2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>; "Mandatory Minimum Penalties in the Federal Criminal Justice System." *The U.S. Sentencing Commission*. (Oct. 2011), <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>. (mandatory minimum sentences disproportionately impact communities of color).

C. Expand the proposed Second Chance IRPS changes to the *de minimis* offense exceptions in several key areas.¹³

We support the NCUA's proposal to broaden the definition of *de minimis* offenses to include minor drug offenses, simple theft, offenses committed by an individual prior to the age of 21, and offenses punishable by a fine of \$2,500 or less. These and other changes will increase access to employment for marginalized workers with records while maintaining the safety and soundness of insured credit union. However, there are several key areas where we urge the NCUA to be more expansive in its treatment of *de minimis* offenses.

Drug Offenses: Currently, most persons with drug-related convictions, including nearly all offenses involving drug sales of any quantity,¹⁴ would be required to undergo the NCUA's exemption process, even though the underlying statute does not specifically mention drug-related crimes. Section 205(d) of the FCUA prohibits a person convicted of "any criminal offense involving dishonesty or breach of trust" from participating directly or indirectly in the conduct of the affairs of a credit union without the prior consent of the Board. 12 U.S.C. Section 1785(d)(1)(A).

While the proposed Second Chance IRPS would expand the list of *de minimis* offenses to include a narrow group of individuals convicted of drug possession (i.e., those convicted of misdemeanor simple drug possession, provided the individual has no other conviction and at least five years have passed since the offense), we urge the NCUA to broadly expand this provision to cover most drug convictions and clarify that drug offenses do not rise to the level of "dishonesty or breach of trust" covered by Section 205(d).

As the NCUA proposed guidance states, "research shows that drug convictions are a disproportionate burden on people of color," and that marijuana is now legal in a number of states. 84 Fed. Reg. at 36491. Yet, the proposed *de minimis* offense requirements still preclude many individuals convicted of minor drug offenses from being exempted from filing the waiver application because mandatory minimum federal sentences imposed for even very minor drug offenses push these applicants over the NCUA's threshold requirements. Similarly, the *de minimis* provision requiring that an offense be punishable by a term of one year or less effectively removes any individual federally convicted of a drug-related offense from the purview of the exemption. Taken together, the actual effects of the broadened *de minimis* offense exemptions undermine the NCUA's second chance goals.

Specifically, we recommend that the NCUA remove the waiver application requirement for persons convicted of drug possession and abandon the proposed restriction limiting the exemption to people convicted of misdemeanors that occurred more than five years ago. We also urge the NCUA to remove the waiver application requirement for the majority of applicants with drug offenses involving sales or distribution that clearly do not constitute "dishonesty or a breach of trust or money laundering."

¹³ Specifically, the general *de minimis* criteria require that there have only been one conviction (or pretrial diversion entry) on the individual's record, that the offense was punishable by a term of less than one year or a fine of \$2,500 (as proposed), that the offense occurred five years prior to the application, and that the offense did not involve a financial institution. 84 Fed. Reg. at 36490.

¹⁴ According to the proposed Second Chance IRPS, "Convictions or program entries for intent to distribute, illegal distribution, illegal sale or trafficking of a controlled substance, or illegal manufacture of a controlled substance would continue to require an application for the Board's consent, unless otherwise qualifying as *de minimis*." 84 Fed. Reg. at 36491.

Requiring a waiver application from individuals convicted of these offenses is overly broad and inconsistent with the underlying statutory language in Section 205(d) of the FCUA.

Jail Time: The NCUA proposes a new requirement that prevents individuals from qualifying for a *de minimis* offense if they served over three days of “jail time,” which is defined to cover “any significant restraint on an individual's freedom of movement which includes, as part of the restriction, confinement where the person may leave temporarily only to perform specific functions or during specified times periods or both.” 84 Fed. Reg. at 36490.

We have serious concerns with this expansive definition of “jail time” given the impact it might have on many low-risk applicants who would otherwise qualify for a *de minimis* exception. This revision of the definition of “jail time” could substantially expand the number of persons forced to seek waivers, as the expanded “jail time” definition includes time served in pretrial confinement, for civil infractions, or in home confinement – all of which sometimes impose a “significant restraint on an individual's freedom of movement.” This new definition would disqualify low-risk individuals who had their freedom of movement restricted for failure to pay a low-grade traffic fine, for example, or who could not afford to pay bail.¹⁵ As such, we recommend that the NCUA refrain from further defining “jail time,” and retain the existing language of the guidance.

Small Dollar Simple Theft: The NCUA proposes a new *de minimis* exception for convictions for small-dollar simple theft, where the value of the goods, services or currency stolen was \$500 or less at the time of the conviction. 84 Fed. Reg. at 36491. However, the NCUA proposed guidance would still require that the person have no other Section 205(d) convictions on his or her record, and that at least five years have passed since the conviction.

We support the NCUA’s proposed change because credit unions would no longer have to apply the additional restrictions that govern *de minimis* offenses, including the maximum penalty for the crime and how much jail time was served. However, in practice, this change would not significantly increase the number of individuals who clear the NCUA’s screening process. The fact is that simple theft convictions exceeding \$500 or less are unlikely to be punishable by imprisonment for a term of more than one year or a fine of more than \$2,500, and the individual is unlikely to have served more than three days in jail.

Thus, we believe that the NCUA can go further without introducing risk by excluding a number of minor “dishonesty,” including convictions for use of a fake ID (beyond the proposed NCUA exemption for people under the legal age to purchase alcohol), shoplifting, fare evasion and other lesser offenses – all of which will currently disqualify an applicant from employment. At a minimum, the NCUA should exclude such convictions from coverage after a limited time period (e.g., one year, not five years as proposed), and remove the burdensome *de minimis* offense restrictions that severely limit the impact of the proposed simple-dollar, simple theft exception. .

Offenses Committed Prior to Age 21: The NCUA proposes to create an age-based exception to the filing requirement for individuals who were age 21 or younger at the time of the conviction or program entry, recognizing that “[i]ndividuals who committed minor offenses when they were still at an impressionable

¹⁵ Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor,” *White House Council of Economic Advisors*, at 1 (Dec., 2015)
https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf

age deserve a greater opportunity for redemption.” 84 Fed. Reg. at 36490. As proposed, these individuals must still satisfy all the “general *de minimis*” criteria and at least 30 months (rather than the standard five years) have passed prior to the date of the application. While we support this proposed change, we urge the NCUA to reduce the restriction further by also modifying the burdensome *de minimis* criteria that still apply to offenses committed prior to the age of 21 (e.g., that the offense be punishable by a jail term of less than one year or a fine of less than \$2,500, as proposed by the Second Chance IRPS).

D. The Second Chance IRPS treatment of “complete expungement,” “set aside” and “reversed” convictions should be clarified.

Complete Expungement: The NCUA proposes to clarify that an expungement will not be considered if the jurisdiction issuing the expungement “cannot allow the conviction or program entry to be used for any subsequent purpose,” which includes “an evaluation of the person’s fitness or character.” 84 Fed. Reg. at 36491-36492. However, “failure to destroy or seal the records would not prevent the expungement from being considered complete . . .” 84 Fed. Reg. at 36492.

We appreciate the NCUA’s intention in making this change, which expands the situations in which an expungement will no longer be considered by the NCUA. However, we recommend that the NCUA state that all expungements be treated as “complete expungements,” regardless of whether law enforcement or other government entity retains access to the records and whether the expungement may be accessed by an agency, board of employer to determine an individual’s “fitness or character.” Indeed, the proposed “fitness or character” restriction threatens to swallow the progressivity of the proposed new rule given the vast number of laws and regulations that often arbitrarily govern character and fitness determinations in the states.¹⁶

Set Aside and Reversed Convictions: The proposed Second Chance IRPS states that “convictions that are set aside or reversed after the applicant has completed sentencing will be treated consistent with pretrial diversions or similar programs unless the court records reflect that the underlying conviction was set aside based on a finding on the merits that such conviction was wrongful.” 84 Fed. Reg. at 33492. Under this change, individuals with set aside or reversed convictions (except for those where there was a finding of a wrongful conviction by the court) would be, for the first time, explicitly subject to Section 205(d) waiver application requirements.

We oppose this substantial expansion of the screening and waiver requirements to persons with convictions that are set aside or reversed. While every state and local government has a different process for setting aside or reversing convictions, each process represents a determination that it would be unjust to subject the individual to all of the penalties and disabilities that stem from a conviction. In any such case, a court has determined that an individual is qualified to rejoin society without being subjected to legal constraints that arise from a conviction. We recommend that the NCUA amend the relevant language of the Second Chance IRPS to remove this expansion of the screening and waiver

¹⁶ Michelle Natividad Rodriguez, Beth Avery, “Untapped and Unlicensed: Removing Barriers to State Occupational Licenses for People with Records” (National Employment Law Project, April 2016), available on-line at <https://s27147.pcdn.co/wp-content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>

requirements and retain the existing language so that convictions that are set aside or reversed will not require a waiver application.

E. The Second Chance IRPS should clarify the general Section 205(d) evaluation standards for waiver application reviewers and applicants.

The NCUA proposes several commendable changes to how Section 205(d) waiver applications are to be evaluated. However, we recommend additional improvements that would help promote more transparency and clarity, both for waiver application reviewers and applicants.

Most importantly, the Second Chance IRPS should clarify how the Board takes into account the passage of time since conviction in evaluating a waiver application. Specifically, when the Board evaluates Section 205(d) waiver applications, reviewers should be aware that the risk of offending among persons who do not recidivate within three to seven years (depending on the offense) of their most recent conviction is minimal.¹⁷ This critical “desistance” research and guidance should be expressly incorporated into the Second Chance IRPS.

More generally, the Second Chance IRPS should implement the standards for reviewing arrest and conviction records adopted by the courts under Title VII of the Civil Rights Act of 1964 and guidance issued by the EEOC.¹⁸ For example, according to these federal civil right protections, prior convictions that are not relevant (i.e. not “job-related”) to the position sought should not be considered during the hiring process and employers should conduct an “individualized assessment” that takes into account evidence of rehabilitation and other mitigating factors. These and other civil rights standards that apply to the nation’s employers should be embraced as well by the NCUA and the Section 205(d) waiver process.

* * *

We appreciate this opportunity to comment on the NCUA’s proposed changes to its criminal background policies, which will have a significant impact on the ability of the nation’s credit unions to attract qualified and more diverse workers. If you have any questions regarding the content of these comments, please contact Maurice Emsellem, Fair Chance Program Director at the National Employment Law Project (emsellem@nelp.org), Meghan Maury, Policy Director at the National LGBTQ

¹⁷ As recognized by the Equal Employment Opportunity Commission’s (EEOC) guidance on the use of arrest and conviction records, a leading study found that three to seven years after offending, nearly all people who have been convicted of a felony are no more at risk of being arrested for a new offense than anyone in the general population. The “desistance” period varies depending on the offense. In the states studied, the period was four to seven years for someone previously arrested or convicted of a violent felony, four years for someone previously arrested or convicted of drug felony, and three to four years for someone previously arrested or convicted of a felony property crime. Alfred Blumstein and Kiminori Nakamura, “Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences, submitted to the Nat’l Institute of Justice (November 2012), at page 89. Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.” n. 118, Equal Employment Opportunity Commission. (April 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

¹⁸ Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.” Equal Employment Opportunity Commission. (April 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Task Force (mmaury@thetaskforce.org), or Roberta Meyers, Director of State Strategy and Reentry at the Legal Action Center (rmeyers@lac.org).

Sincerely,

National Employment Law Center
Legal Action Center
National LGBTQ Task Force
Clarica Group LLC
Collateral Consequences Resource Center
Community Renewal Society
Community Service Society of New York
Economic Policy Institute
Equality California
Greater Boston Legal services s
Greater Gwinnett Reentry Alliance
Justice & Accountability Center of Louisiana
Justice Action Network
JustLeadership USA
Latino Justice PRLDEF
Legal Aid at Work
Mazzoni Center
National Center for Lesbian Rights
National Center for Transgender Equality
National Disability Rights Network
National Incarceration Association
National Partnership for Women & Families
NewLife-Second Chance Outreach, Inc.
Operation Restoration
Racial Justice Action Center
Racial Justice Action Center
Root & Rebound
Root & Rebound
Safer Foundation
Safer Foundation
Service Employees International Union
SJSU Record Clearance Project
The Leadership Conference on Civil and Human Rights
The Legal Aid Society
Women on the Rise GA
Workplace Fairness