Cooperative
Credit Union Association

Creating Cooperative Power

September 27, 2019

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

BY EMAIL ONLY

Re: Comments on NCUA's Notice of Proposed Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act

Dear Mr. Poliquin:

On behalf of the member credit unions of the Cooperative Credit Union Association, Inc. ("Association"), please accept this letter relative to the National Credit Union Administration's Proposed Guidance to clarify its policies on credit union hiring practices as they relate to individuals who have been convicted of crimes of dishonesty or breach of trust. The Association is the state trade association representing credit unions located in the states of Delaware, Massachusetts, New Hampshire, New Jersey and Rhode Island, serving approximately 200 credit unions which further serve approximately 3.6 million consumer members.

A. Proposal Would Continue the Current General Approach

Under the current guidance, a credit union or its job applicant must apply for NCUA Board approval if the applicant has a criminal record involving a crime of dishonesty or breach of trust. However, a credit union under certain circumstances may hire an individual who has a criminal record without first seeking NCUA Board approval if the circumstances meet a *de minimis* test or the record has been expunged. The Association is pleased that the proposed guidance would continue that approach, which seems balanced and flexible, and is most impactful to the business of credit unions.

B. Scope

The Association recognizes that the NCUA's current guidance and the proposed changes are similar to the policies of its companion federal deposit insurer for banks, the Federal Deposit Insurance Corporation.

Specifically, the proposal seeks to clarify who is covered by the credit union guidance. It is not clear to the Association, however, why the guidance needs to address both "institution-affiliated

parties" and "participants in the affairs of an insured credit union" since "institution-affiliated party" seems to cover those who would meet the definition of participants. The Association acknowledges that NCUA guidance on the second chance issue needs to remain consistent with that of the FDIC, which includes both terms in its scope. However, the FDIC has provided specific examples of participants. The Association strongly urges the agency to identify individuals who are participants who would not be classified as institution-affiliated parties. It is recommended that the guidance delete the description of participants as it does not seem to enlarge the scope of coverage and seems redundant with the term "institution-affiliated party," if not unclear.

The Association agrees with the proposed treatment of references to "independent contractors," largely because, to the extent they are involved in the affairs of the credit union, then they would be "institution-affiliated parties." Furthermore, the Association notes that by deleting the term "participants," NCUA and credit unions will not have to depend on litigation to provide a definition, but rather, all parties would have greater clarity, relying on the definition of "institution-affiliated party" found in 12 U.S.C. 1786(r).

C. *De Minimis* Offenses That Do Not Require NCUA Board Approval Prior to Hiring

At present, an offense is considered *de minimis* if it meets all of the following elements:

- There is only one conviction or entry into a pretrial diversion program of record for a covered offense;
- The offense 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;
- The conviction or pretrial diversion program was entered at least five years prior to the date an application would otherwise be required;
- The offense did not involve an insured depository institution or insured credit union; and
- The Board or any other federal financial institution regulatory agency has not previously denied consent under Section 205(d) of the Federal Credit Union Act or Section 19 of the Federal Deposit Insurance Act, respectively, for the same conviction or participation in a pretrial diversion program.

Proposed IRPS 19-1 would expand the *de minimis* exceptions to include:

- Amend the second provision above to provide that the fine could be up to $2,500 or less and jail time, which would include "significant restraint" but not probation or parole, could be up to three days.
- Allow leeway for persons who were 21 years of age or younger when the crime was committed;
- Cover insufficient check convictions where the value of the checks is $1,000 or less;
- Include simple theft of goods, services and/or currency or other monetary instrument where the value of the goods is $500 or less;
- Encompass convictions for false identification such as to purchase alcohol; and

- Include convictions for misdemeanor drug charges.

These changes further the second chance spirit of the proposal and are relevant for inclusion in the final guidance. The Association recognizes and supports that the NCUA has included with these revisions a number of safeguards to protect the credit union, such as violations of Title 18 of the U.S. Code, the primary federal criminal statutes, do not qualify as *de minimis*, and crimes of theft and passing bad checks which may have involved financial institutions. Other safeguards help ensure the job applicant is not continuing the criminal behavior, such as generally limiting *de minimis* exceptions to one-time convictions or requiring the passage of time between the conviction and hiring, are also supported. The Association also believes and supports NCUA's efforts which have endeavored to ensure that such new exceptions would not create undue safety and soundness issues for credit unions, particularly in light of the expectations for the application screening process discussed under the guidance, the disclosure of the criminal record to affected credit unions in which the employee participates, and the fact the if hired, then fidelity bond coverage would be provided, as for other similarly situated employees.

It is clear that the hiring of job applicants with expunged records does not necessitate prior NCUA approval. Furthermore, the proposed guidance clarifies that the failure to destroy or seal records would not prevent them from being considered expunged, which is another modification providing greater flexibility to the hiring decisions and administrative processes for credit unions.

D. Credit Unions' Responsibilities and Leeway

The Association agrees with the guidance that credit unions should follow prudent employment and hiring practices that help ensure applicants with a criminal record can be identified before they enter the credit union's workforce, such as sufficient background checks and documenting in the employment file that the individual qualifies for the *de minimis* exception.

The proposal would permit credit unions to offer a job on a conditional basis to an applicant where the circumstances require prior NCUA Board approval. However, the proposal indicates that employment could not begin until receipt of advance regulatory approval from NCUA. The Association supports this approach, but questions its practicality, particularly if the credit union is unaware of or does not have a reasonable expectation of the timing of the approval process. It is recommended that the guidance remain permissive in this area and provide some general parameters for the length of time that the NCUA Board will need to review a request.

E. Comments on Whether NCUA's Review Could Be Delegated

The NCUA Board is also requesting specific comments on whether its approval process could be delegated as a means of streamlining the review. The Association strongly believes that delegating the review to regional directors to consider applications of the credit unions in their regions or the applications of individuals to work in credit unions in their regions could be useful. Delegation to the region will also likely ensure a more timely and deeper understanding of any local factors or information that may be relevant or material to decision making. However, the Association also recommends that a timetable for reasonable review be established in the

guidance and that expeditious appeals to the NCUA Board of denials be incorporated into the process. Finally, the right to a hearing for a Board denial should be preserved.

F. Conclusion

The Association understands the need for efforts that would facilitate the ability of credit unions to offer job opportunities to certain applicants who have committed *de minimis* crimes but who seek to contribute to society and improve their lives through their work at a credit union.

Thank you for the opportunity to share our member's views on the proposal and for your consideration of the Association's comments. If you have any questions about these comments or require further information, then please do not hesitate to contact me.

Please feel free to contact me if you have any questions about our letter.

Sincerely,

Ronald McLean
President/CEO
Cooperative Credit Union Association, Inc.

RM/mac/kb