NEW YORK creditunion ASSOCIATION

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August 4, 2017

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

RIN: 3133-AE69
RIN: 2133-AE68

Dear Mr. Poliquin:

For 100 years, the New York Credit Union Association has represented both state- and federally-chartered credit unions throughout New York on legislative and regulatory matters. I am writing this letter on behalf of the Association to comment on a pair of proposals by NCUA to implement a more formal structure for credit unions and clarify the types of issues eligible for more formal appellate review. Taken as a whole, the proposals would greatly enhance the process used by credit unions appealing "Material Supervisory Determinations;" allow credit unions to appeal these determinations to the Director of Examinations and Insurance and reconfigure the composition of the Supervisory Review Committee. These are important changes, but more can and should be done.

According to a survey conducted by the Association, credit unions are generally satisfied with the performance of their examiners. Conversely, credit unions consistently tell the Association that when the inevitable dispute arises, they are hesitant to use NCUA's existing appeals process because they feel it would be futile. This is unfortunate. As the laws and regulations credit unions are subject to become more complex, so too does the importance of a more formalized appeals process that provides independent third-party review and a means of evaluating nuanced and complicated issues. These proposals are a step in the right direction. The requirements outlined in this letter would maximize the benefits of a more robust appeals process for both NCUA and credit unions.

Enhanced Input by State Examiners

NCUA is unique among financial regulators in that it is both the primary regulator of federally-chartered institutions as well as the administrator of the National Credit Union Share Insurance Fund. In this capacity, it also exercises regulatory oversight over state-chartered credit unions. Under the proposed regulation, NCUA would have to request input from state regulators on appeals involving state-chartered credit unions. Specifically, in the event that a material supervisory determination made pursuant to a joint review examination is appealed, the body hearing the appeal would have to "solicit the SSA's views regarding the merits of the request before making a determination."

This requirement does not do nearly enough to ensure that state regulators retain equality with their federal counterparts. The final regulation should mandate not only that NCUA seek the input of state regulators, but also that state regulators be given the opportunity to submit written comments on the record of appeal. These comments would be analogous to amicus briefs.

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In addition, the newly reconstituted Supervisory Review Committee should include at least one representative of state credit union supervisors. Finally, anytime a state-chartered federally-insured credit union is appealing a supervisory determination, the relevant state regulator should have the right to comment on the appeal, whether or not it was the product of a joint examination.

PCA Determinations Should be Subject to Appellate Review

In 1995, banks complained that the FDIC's definition of a "material determination" was too narrow. In response, it added "catch all" language to its appellate guidelines explaining that determinations subject to appeal include "any determination (unless otherwise not eligible for appeal) that may impact the capital, earnings, operating flexibility, or capital category for prompt corrective action purposes of an institution, or otherwise affect the nature and level of supervisory oversight accorded an institution." (Intra-Agency Appellate Process, 60 FR 15923-01.). Similar language should be adopted by NCUA.

PCA determinations are a core concern of credit unions; they are precisely the type of issue for which appellate review is most effective. First, they are highly fact-sensitive. Secondly, PCA requirements can have a dramatic impact on a credit union. Simply put, these are the type of important, fact-sensitive inquiries that regulators have to get right.

Review of CAMEL Rating and their Components

Even with these amendments credit unions would not be allowed to appeal composite scores of one or two or a component score unless it results in a "significant adverse effect on the nature and level of supervisory oversight of a federally insured credit union." This approach is misguided.

First, no such restrictions are imposed by the FDIC, which is operating under the same mandate regarding appeals as the NCUA. Furthermore, component scores are important indicators of a credit union's overall management. A board would be derelict in its duty if it didn't scrutinize why a CAMEL rating was downgraded or a component score lowered irrespective of whether such changes have immediate regulatory consequences. In fact, NCUA has underscored the importance of component scores by considering addressing interest rate risk as an additional component category.

Additional Concerns

There are other more technical changes that would substantially improve the appellate process. Under the FDIC's recently updated appellate procedures, banks can apply for a stay of material determinations pending appeal (Guidelines for Appeals of Material Supervisory Determinations (82 FR 34522-01, 34526). The same flexibility should be given to credit unions. There are many instances in which an examiner's concern for the safety and soundness of a credit union will outweigh the inconvenience to the credit union of complying with an order with which it disagrees. There are, however, situations involving changes that will necessitate the investment of time and money when perceived safety and soundness concerns are outweighed by the cost involved in forcing a credit union to comply with a finding that could ultimately be overturned.

NCUA's proposal to require credit unions to formally request that an examiner reconsider a determination before commencing an appeal should be removed. In many circumstances, issues surrounding a material determination have already been discussed. Forcing credit unions to file a formal request that an examiner reconsider his/her determination as a predicate for intermediate appellate review will do nothing more than delay the process.

Finally, the regulations should clarify precisely what will comprise the record on appeal. For example, under this proposal, NCUA will be authorized to consult with staff and state regulators. These consultations should take the form of written staff submissions. Due process requires that all parties to an appeal be aware of the arguments being made for or against their position. As drafted, the proposed appeals process would give NCUA too much flexibility to base decisions on analysis not included in the formal record.

With the proposed consolidation of NCUA's supervisory regions, now is an opportune time to review the process credit unions may use when they disagree with supervisory determinations. A well-functioning appellate process will not only give individual credit unions the ability to seek independent redress, but it will also provide a body of written decisions that can be used to foster uniform and consistent application of NCUA's regulations. The suggested amendments that the Association has outlined would result in much needed improvements to the regulatory appeals process.

Sincerely,

William J. Mellin
President/CEO