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National Association of Federally-Insured Credit Unions

July 31, 2020

Frank Kressman
Acting General Counsel
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

RE: Regulatory Review (2020)

Dear Mr. Kressman:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing to you regarding the National Credit Union Administration's (NCUA) 2020 Regulatory Review of one-third of its regulations. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 120 million consumers with personal and small business financial service products. NAFCU looks forward to an open dialogue with the agency regarding opportunities to modernize, improve, and find appropriate flexibilities in existing regulations so that credit unions can grow and better serve their communities. NAFCU and its member credit unions greatly appreciate the NCUA Board's willingness to consider regulatory changes to properly tailor rules to the risks and activities actually taken by credit unions.

With respect to the regulations under consideration in 2020, certain aspects may require Congressional action to achieve full modernization with industry standards and practices. In such instances, NAFCU urges the NCUA to coordinate with members of Congress and support legislation to update the *Federal Credit Union Act* (FCU Act). As for areas of regulations in which the agency has authority to act, NAFCU asks that the NCUA carefully consider the recommendations outlined below. NAFCU looks forward to future opportunities to work with the NCUA to achieve the modernization of the regulations affecting America's credit unions.

COVID-19 Regulatory and Examination Relief

NAFCU is appreciative of the actions Chairman Hood and the NCUA Board have taken to provide appropriate relief to credit unions in the wake of the COVID-19 pandemic, which has allowed them to safely and quickly serve the emergency needs of their members despite reduced capabilities and resources. However, there is much to be done, and it is critical that this relief is renewed, extended, or made permanent as appropriate. Even after the pandemic resolves, the economic effects may linger for members and their communities. Credit unions must continue to be able to access the tools and flexibilities necessary to serve struggling members as they attempt to regain their footing. Further, it is critical that credit unions have confidence that examiners will not penalize credit unions after the fact for making decisions under circumstances that are

unpredictable, where clear guidance may not have been available, and where resources and staffing may have been limited.

NAFCU believes that the NCUA should have greater powers to ensure the safety and stability of credit union deposits during the COVID-19 pandemic. This includes amending the FCU Act to modernize credit unions' field of membership requirements, improving credit union access for underserved populations, extending the NCUA's ability to establish a maximum guarantee to all shares or deposits held in a federally-insured credit union, increasing the amount of funding for Community Development Financial Institution Fund and Community Development Revolving Loan Fund programs, and improving the NCUA's latitude to offer capital. NAFCU is asking Congress for its support for these requests so that credit unions may loan more to their members who need during the pandemic and as recovery begins.[1]

Financial Inclusion and the Future of MDI Credit Unions

Given the economic impact of the pandemic and uncertain shape of any potential recovery, minority depository institutions (MDIs) are particularly at risk for consolidation at a time when they are most needed by their communities. The NCUA currently offers mentoring grants to help MDI credit unions establish mentoring programs with larger, low-income credit unions. However, our understanding is that these grants are undersubscribed because, in part, they are not meeting the true needs of MDI credit unions. Now is the time when the NCUA must explore creative solutions for preserving, growing, and maintaining resilience of MDIs on a long-term basis. While identifying preferential merger partners and preserving fields of membership are helpful in ensuring that these communities continue to be served by credit unions, these solutions simply fall short in preserving the value and character of MDI credit unions for their membership.

Accordingly, NAFCU recommends the NCUA undertake an information request from MDI credit unions to discover what they need to improve their resiliency. Using those findings, the NCUA should ensure resources are allocated towards meaningful steps to preserve and grow these institutions, as well as support requests for Congress to provide further funding towards these goals.

Part 712 Credit Union Service Organizations (CUSOs)

In March of this year, the NCUA issued a proposed corporate credit rule that included an amendment to the definition of corporate CUSO so that a corporate credit union could make a de minimis, non-controlling investment in a natural person CUSO without the CUSO having to meet the requirements of a corporate CUSO.[2] A similar de minimis threshold should be included in Part 721 for natural person credit unions where the CUSO has a majority, controlling credit union investor. This threshold should indicate that credit unions that hold de minimis, non-controlling investments in a CUSO are not required to comply with the customer base requirement of

[1] Letter from Dan Berger, CEO, NAFCU to Senate Leadership (June 4, 2020) (available at https://www.nafcu.org/system/files/files/6-4-20%20Letter%20to%20Senate%20on%20COVID-19%20Phase%20IV%20Relief.pdf)(last accessed July 13, 2020).
[2] 85 Federal Register17288, 17289 (published March 27, 2020).

paragraph 712.3(b) and the accounting, audits, and financial statement provisions of subsection 712.3(d). This change would provide regulatory relief for minority-interest holding credit unions and ease transactions with credit union service organizations which already comply due to their majority ownership and control by other credit unions.

Further, section 712.3(d) contains an exemption to the requirement to obtain a separate annual financial statement audit for wholly-owned CUSOs, so long as those CUSOs are included in the annual consolidated financial statement audit of the investing credit union. While NAFCU appreciates that NCUA does not require separate audits for wholly-owned CUSOs, we firmly believe that this exemption should be extended to CUSOs that are majority-owned. Under Generally Accepted Accounting Principles (GAAP), consolidated financial statements generally include enterprises in which the parent has a controlling financial interest, usually a majority voting interest. In the past, the NCUA has expressed concern about the rights of minority interest holding credit unions and their ability to obtain a separate opinion audit. This concern can be easily addressed by requiring such CUSOs to avail themselves of independent audits at the request of the minority interest holding credit unions. This provision would be much more flexible than the current mandate of automatic audits, regardless of the desires of the minority interest holders. Accordingly, NAFCU strongly urges the NCUA to consider providing relief for minority-interest holding, noncontrolling credit unions by including a de minimis threshold and permitting majority-owned CUSOs to file consolidated financial statements, with the option that minority interest-holding credit unions can obtain independent audits upon request.

Part 713 Fidelity Bond and Insurance Coverage for Federally Insured Credit Unions

The recent final rule on fidelity bonds only became effective October 22, 2019.[3] As the rule has only been in place for nine months, its ultimate effect on the ease and costs of obtaining fidelity bonds is still an open question. On January 22, 2019, NAFCU wrote to the NCUA in response to its proposed rule asking that it conduct an impact study to ensure that there would not be a negative effect on federal credit unions as a result of the changes to the discovery period. NAFCU asks that NCUA consider performing that study or a cost-benefit analysis of the effects of the final rule as soon as possible to determine the extent of an increase in prices as a result of credit union's loss of bargaining power and market competition due to the implementation of the final rule.

Part 715 Supervisory Committee Audits and Verifications

NCUA's final rule amending Part 715 became effective January 6, 2020. NAFCU appreciates the agency's changes to the delivery date of the written report from an outside, compensated auditor, the elimination of the need to seek a waiver, and the removal of the report on examination of internal controls over call reporting data. These changes provided needed flexibility, removed burdensome requirements, and eliminated outdated provisions.

The supervisory committee plays an important and official role in the resolution of complaints channeled through NCUA's Consumer Assistance Center. It is notable that nothing in Part 715,

[3] 84 Federal Register 35517 (published July 24, 2019).

including new Appendix A, refers to this duty. NAFCU is grateful that NCUA has maintained the Supervisory Committee Guide on its website as unofficial guidance, as the detail in that document is important for many supervisory committees given the brevity of new Appendix A to Part 715. However, outside of that unofficial guidance, a supervisory committee member seeking to understand their duties would have to intuit the need to review relevant Letters to Credit Unions in order to discovery their duties and role in the consumer complaint process. As NCUA's Consumer Assistance Center has established formal processes implicating federal credit union supervisory committees in the complaint process, there should be some formal indication to these committees of their role. As the Supervisory Committee Guide has been decommissioned and there is no reference to this in Appendix A to Part 715, there is currently a gap in official guidance for these volunteers in fully understanding their duties. NAFCU asks the NCUA to consider bridging this gap referencing this duty and available official guidance, such as these Letters to Credit Unions, in the appendix.

Part 721 Incidental Powers

NCUA has historically implied that when a member writes a check on their credit union account payable to a nonmember and that nonmember presents it for payment at the FCU, refusal to pay that "on-us" check could have legal implications for the FCU under the Uniform Commercial Code (UCC). This is implied in two Legal Opinion Letters. First it was implied in a 1986 Legal Opinion Letter no longer publicly available.[4] Second, in a 2007 letter, NCUA stated that the FCU Act and section 701.30 provide FCUs explicit authority to cash checks for persons in the field of membership, and, in addition, FCUs have such incidental powers as shall be necessary or requisite to enable them to effectively carry on the business for which they are incorporated.[5] NCUA implied that, with these powers combined, FCUs do have the authority to cash checks drawn by a member on the FCU's account and payable to a nonmember.

Despite this being a situation commonly encountered by credit unions, the guidance on the legal question is scarce. As a result, this is a question that is frequently asked and difficult to research. The NCUA should include cashing "on us" checks as a preapproved activity necessary or requisite to carry on the business of the credit union in Section 721.3.

In the past, the NCUA has also interpreted credit unions' incidental powers to include providing the use of a coin sorter machine to nonmembers as a marketing activity.[6] This summer, the Federal Reserve announced low coin inventories and established a task force to mitigate its effects. Given the NCUA's existing guidance indicating the permissibility of establishing and offering the use of a coin machine to members as a marketing activity and the importance of improving the circulation of coinage through the larger system, NAFCU requests that the NCUA consider adding the provision of coin machines to credit union lobbies as an incidental power as an example of a

[4] *See* Legal Opinion Letter from Steven R. Bisker, Ass't General Counsel, NCUA to Mark O. Farber, M.D. (January 14, 1986).
[5] *See* Legal Opinion Letter 2007-0743 from Sheila A. Albin, Assoc. General Counsel, NCUA to Robert Braswell, Commissioner, Ga. Dept. of Banking and Finance (August 7, 2007).
[6] *See* Legal Opinion Letter 10-0756 from Hattie Ulan, Assoc. General Counsel, NCUA to Ms. Brittin (September 2010).

marketing activity in paragraph 721.3(i), a monetary instrument service under paragraph 721.3(j) or as a stand-alone preapproved power.

Finally, NAFCU asks that the NCUA consider the sale of stored value products to nonmembers within the field of membership as a marketing activity. In the past, the NCUA has approved limited activities with members as being permissible marketing or charitable activity as they increase the potential member's familiarity with the credit union, and for populations that are unbanked, with banking in general.[7] The use of prepaid cards is much higher for the unbanked than the general population as prepaid cards do not require a credit check and provide security that cash cannot. If credit unions had the ability to offer prepaid cards to nonmembers they would gain members and introduce those consumers to the security and safety of the United States banking system.

Part 722 Appraisals

NAFCU is appreciative of the agency's 2019 final rule on nonresidential real estate transactions and the 2020 final rule on residential real estate transactions, which gave credit unions parity with the banks regarding the requirements for appraisals. Maintaining this parity in lending regulations is critical to ensuring credit unions remain competitive and are able expend staff time and resources on offering lower costs, better rates, and improved service to members, rather than navigating regulatory hurdles.

In a 2010 Interagency Appraisal and Evaluation Guidelines,[8] the NCUA stated that a credit union may employ automated tools or sampling methods for performing pre-funding reviews of appraisal or evaluations supporting lower risk residential mortgages only with prior approval from NCUA. For clarity, Part 722 should explicitly provide approval for the use of automated tools in performing pre-funding reviews of appraisals or evaluations on all 1- to 4- family residential mortgages.

Finally, credit unions are appreciative of NCUA's interim final rule on appraisals regarding the COVID-19 pandemic. NAFCU recommends the NCUA consider extending the date for closing transactions from December 31, 2020 until the end of the first quarter of 2021. This extension would then provide credit unions 120 days from that point to obtain any required appraisal or written estimate. Given the continued uncertainty and inconsistent re-opening of states, extension of the timeframe would assist credit unions in providing expedient credit to members during this time without delays caused by the inability to obtain an appraisal.

Part 723 Member Business Loans; Commercial Lending

NAFCU appreciates the NCUA's reforms of Part 723 in its 2016 final rule. The changes focused NCUA's regulatory posture towards commercial loans from the arbitrary limitations of the "member business loan" set by the FCU Act. This shift adopts a risk-based focus that considers the risk posed to the credit union by the actual lending activities. This has freed many credit unions

[7] *See* Legal Opinion Letter 2002-0250 from Robert M. Fenner, General Counsel, NCUA to Maria J. Partinez, President, Border Federal Credit Union (February 22, 2002).
[8] *See* Letter to Credit Unions 10-CU-13 and attached Interagency Appraisal and Evaluation Guidelines, page 17.

to begin making healthy, sound commercial loans to small businesses in their fields of membership. Further, NAFCU thanks the NCUA for its partnership with the Small Business Administration and the Export-Import Bank to expand business loan opportunities largely exempt from the MBL cap. This is especially critical as credit unions seek to assist small businesses in their fields of membership in the economic fallout of the pandemic by making Paycheck Protection Program loans and other small business loans.

The definition of a member business loan in section 723.8 is difficult to understand and use because of its multiple exceptions, carve-outs, and separate exclusions. Further, the cap bears little relationship to the actual risks involved to the credit union as not all transactions included in the definition actually pose commercial-type risks to the credit union. These provisions are outdated and the demand for and sophistication of commercial lending within credit unions has greatly increased. The current member business lending cap prevents credit unions from helping small business members and their local communities by providing safe and sound business loans. This cap is, of course, established by the FCU Act and is therefore a problem Congress must address as soon as possible. NAFCU is actively advocating for modernization and reform of the cap to improve small business access to credit union loans.[9]

Congress must increase access to lending for our nation's small businesses by amending the FCU Act to provide credit unions greater relief and flexibility from the MBL cap. There are multiple approaches to accomplish this. First, Congress could raise the cap to 20 percent of assets of the credit union. Such an approach has received bipartisan support in previous Congresses. Second, Congress could raise the threshold for what counts as a business loan toward to the cap (currently $50,000) to a higher level (such as $200,000), which could open up additional lines of credit to small and micro businesses. This $50,000 threshold has not been updated since the cap was established in 1998 and has eroded in value over time. Modernizing it now would allow more credit unions to help small business by offering important lines of credit as they seek to recover.

Third, Congress could exempt loans to our nation's veterans from the cap. Bipartisan legislation is pending in the House (H.R. 2305) and the Senate (S. 2834) that would provide this relief. Finally, relief could also be provided by exempting the entirety of all government-backed loans (such as SBA loans) from the cap or fully guaranteeing all SBA loans. Currently, only the guaranteed portion of the loan is exempt from the MBL cap. Such a step would allow credit unions to do more with the new $1 million SBA express loan limit established in the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act). NAFCU would welcome the NCUA's support in these efforts.

Part 725 National Credit Union Administration Central Liquidity Facility

NAFCU is supportive of the recent changes to the Central Liquidity Facility (CLF) in response to the COVID-19 pandemic. Particularly, NAFCU appreciates those amendments that will carry

[9] *See* Letter from Dan Berger, CEO, NAFCU to Congressional leadership (April 7, 2020) (available at https://www.nafcu.org/system/files/files/4-7-20%20Letter%20to%20House%20and%20Senate%20Leadership%20on%20COVID-19%20Phase%20IV%20Relief.pdf)(last accessed July 10, 2020).

forward beyond the end of 2020, such as the elimination of the waiting period and the easing of the collateral requirements on some assets. NAFCU and credit unions are appreciative that both Chairman Rodney Hood and Board Member Todd Harper have called on Congress to make the temporary changes permanent. The CLF is an important liquidity tool for credit unions, and the recovery ahead will likely extend beyond the end of 2020 when the changes are set to expire.

Additionally, we support a statutory change to grant temporary authority to the NCUA Board to allow federally chartered credit unions the ability to lend to other credit unions. NAFCU believes strong liquidity is vital to ensuring loans to struggling families and small businesses continue to flow within the credit union system. NAFCU welcomes the NCUA's support in permanent legislative amendments to the CLF to allow the temporary provisions to become permanent and make technical amendments to modernize the CLF.

Part 740 Accuracy of Advertising and Notice of Insured Status

Credit unions are supportive of the NCUA's 2018 final rule creating an additional option for making the "Insured by NCUA" statement and expanding the exemptions for radio and television advertisements to 30 seconds. The regulatory language was outdated and this final rule updated Part 740 significantly.

The Official Advertising Statement and Changing Technology

The role of technology and social media has only increased since the rule became final, especially in light of the COVID-19 pandemic and need for social distancing. At that time, the NCUA Board opted to delay providing guidance on compliance with Part 740 within the context of social media and digital advertisements such as website banners. Credit unions continue to struggle with these issues.

To accommodate advertising on social media and text messaging platforms, many of which impose unique formatting constraints, NAFCU urges NCUA to exempt social media posts and text messages from the requirement to display the official advertising statement. Social media posts and text messages can contain images or text that mirror the substance of radio or television advertisements, yet these types of advertisements are not afforded commensurate flexibility. NAFCU believes that the exemption afforded to brief radio and television ads should be extended to social media and text message advertisements.

In the alternative, the NCUA should provide for a "one click away" option for online advertisements as the Consumer Financial Protection Bureau (CFPB) has permitted with regard to its Truth in Lending regulation[10] and the NCUA has permitted with regard to the Truth in Savings regulation.[11] Click-thru disclosures are now widely understood and expected by consumers. It provides an easy method for credit unions to ensure compliance without significantly limiting

[10] *See*, 12 C.F.R. §§ 1026.16(c), 1026.24(e).
[11] *See*, 12 C.F.R. § 707.8(a).

credit unions' ability to properly make use of social media and other online channels of outreach to new and existing members.

As a result of the pandemic, credit unions are also increasingly considering the use of interactive teller machines. It is not clear whether these machines should be treated like automated teller machines (ATMs) or live tellers. Credit unions struggle to determine their compliance obligations with these machines and would appreciate guidance.

Credit Union Logos

Finally, the NCUA should also consider adding language to section 740.5(c)(11) that explicitly states that advertisements merely consisting of the credit union's logo do not require the inclusion of the official advertising statement. This is a frequently asked question that arises in situations such as purchasing space for posting the logo on a local athletic field or including a logo on a poster of sponsors of an event. While many credit unions ultimately decide to rely on the current exception in section 740.5(c)(11) in these situations, it would be more efficient to include a specific, explicit language regarding use solely of the logo given the frequency of the question.

Part 741 Requirements for Insurance

Section 741.1 provides for the authorization of the NCUA Board to exam federally insured credit unions. NAFCU asks the NCUA to implement extended 18-month exam cycles for all well-run, low-risk credit unions to reduce the burden on credit unions and achieve cost savings for the agency. In furtherance of these goals, NAFCU supports the NCUA's efforts to modernize its examination program, including streamlining examination processes and leveraging technologies to ensure examinations are not disruptive. NAFCU requests the NCUA provide additional transparency around these modernization efforts.

NAFCU appreciates the agency's pivot to virtual and off-site examinations in response to the COVID-19 pandemic. NAFCU requests that NCUA maintain an off-site posture in connection with examinations as long as the pandemic is ongoing, and that examiners confer with credit unions regarding their current circumstances in light of the pandemic prior to initiating examinations. NAFCU welcomes the recently issued Request for Information in connection with the Virtual Examination Program and looks forward to a robust conversation about how virtual and off-site examinations should operate in the future to reduce the burden and lost time associated with examinations.

Further, NAFCU requests more transparency from the NCUA generally regarding supervisory expectations. For the past few years, credit unions have consistently reported the revelation of new supervisory expectations during the examination process. Some of these expectations vary by examiner. Transparency of expectations improves consistency among examiners, provides credit unions with clarity in establishing policies and procedures, protects the National Credit Union Share Insurance Fund (NCUSIF) from unsafe practices and ensures credit union members receive a proper level of service and benefit from their credit union.

Capitalization of Interest

Appendix B to Part 741 contains NCUA's Interpretive Rule and Policy Statement on Loan Workouts, Nonaccrual Policy, and Regulatory Reporting of Troubled Debt Restructured Loans. NAFCU appreciates the flexibilities provided by the recent interagency guidance on loan modifications and the ability to suspend GAAP requirements with respect to loan modifications that would otherwise be categorized as TDRs under the CARES Act. However, despite this additional flexibility, credit unions still anticipate a substantial uptick in TDRs because some businesses and consumers will likely not be able to recover sufficiently to resume normal payments within the next six months.

To further ease compliance requirements for loan modifications, the NCUA should reinterpret the capitalized interest section of Part 741 Appendix B to be consistent with the requirements of Fannie Mae and Freddie Mac, the government-sponsored enterprises (GSEs) and the other banking regulators. Many of NAFCU's members' loan systems are generally modeled to work based on GSE practices, which means they assume a re-amortization with capitalized interest. Re-amortizing a loan without capitalizing the interest is not currently possible and would require the establishment of two different loans for the borrower: one to repay the outstanding principal balance, and one at a zero percent interest rate to repay the interest owed. Taking these steps as many examiners have required of credit unions during the latest examination cycle, creates additional documentation burdens and confusion for the borrower. This complicated bifurcation also creates servicing and monitoring challenges for the credit union in addition to complicating the net present value process used to create the required loan loss reserve at the time of modification and in future periods.

The NCUA should reinterpret Appendix B to address the recapitalization of interest and align with GAAP, which permits the capitalization of interest on loan modifications. Appendix B should provide for the capitalization of interest and fees upon objective and persuasive evidence supporting the timing and collectability of future payments of the capitalized amounts. To ensure adequate consumer protections, credit unions would provide members with disclosures detailing the amount of capitalized interest and any associated fees. To ensure safety and soundness, credit unions would establish procedures for monitoring and controlling these loans. NAFCU urges the NCUA to reconsider its approach to the capitalization of interest based on its reading of Appendix B to Part 741.

Part 746 Appeals Procedures

Despite the significant procedural changes to the appeals procedure in 2017, NAFCU continues to hear from members that credit unions are not comfortable challenging examiners. NAFCU fully recognizes and appreciates that examiners must strike a difficult balance. But it is important for the overall health of the credit union industry that credit unions have access to meaningful mechanisms to challenge examiners to promote transparency and accountability.

In its August 3, 2017 comments to the proposed appeals rule, NAFCU asked the NCUA to consider implementing a 2012 Office of Inspector General recommendation for a national reporting

requirement wherein each regional office would regularly provide to the Office of Examination and Insurance specific details on disputed examination issues elevated by credit unions to the Regional Director for a regional determination. This suggestion is in line with existing reporting already done by the Federal Deposit Insurance Corporation.[12] NAFCU again recommends that NCUA adopt such a requirement.

Further, credit union management and boards have reported examiner tone in reports that is viewed as punitive and personal against identifiable parties. There are certainly times in which individual credit union staff or volunteers may have committed a serious offense and the removal and issuance of a prohibition order regarding that person may be appropriate. However, subjective characterizations of individuals who have not committed such an offense is reportedly feared by some credit union staff. NCUA examiners must have an obligation to exercise care and discretion in making personal comments regarding individuals, and to do so only to the degree absolutely necessary to capture any risks posed to the safety and soundness of the institution. To this end, section 746.103 should include as a "material supervisory determination" any characterizations aimed at identifiable institution-affiliated parties of a personal or professional nature.

Part 747 Administrative Actions, Adjudicative Hearings, Rules of Practice and Procedure, and Investigations

NAFCU recommends that the NCUA consider whether subpoenas issued under Part 747 should first be reviewed by the Office of General Counsel. Delegating all subpoena authority to an appointed investigator without any further checks on that subpoena power places an excessive amount of power in the investigator. Instead, the investigator should be more closely overseen by the Office of General Counsel. Subpoenas should be submitted to the General Counsel or Deputy General Counsel along with a statement of the supporting rationale for the subpoena. The Office of General Counsel should then approve that subpoena as the appointing authority. This is a reasonable check and balance within the context of a government investigation.

Conclusion

NAFCU appreciates the opportunity to provide comments on regulations under consideration in this year's annual regulatory review. If you have any question or concerns, please do not hesitate to contact me or Ann Kossachev, NAFCU's Director of Regulatory Affairs, at akossachev@nafcu.org or (703) 842-2212.

Sincerely,

Carrie R. Hunt

Carrie R. Hunt
Executive Vice President of Government Affairs and General Counsel

[12] *See*, Appeals of Material Supervisory Determinations: Guidelines & Decisions, Section N (available at https://www.fdic.gov/regulations/laws/sarc/sarcguidelines.html) (last accessed July 13, 2020).