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National Association of Federally-Insured Credit Unions

September 26, 2019

Gerard Poliquin
Office of General Counsel
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

RE: Exceptions to Employment Restrictions Under Section 205(d) of the Federal Credit Union Act (RIN: 3133-AF02)

Dear Mr. Poliquin:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the National Credit Union Administration's (NCUA) proposed Interpretive Ruling and Policy Statement (IRPS) regarding statutory prohibitions imposed by Section 205(d) of the *Federal Credit Union Act* (FCU Act) ("Second Chance IRPS"). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 118 million consumers with personal and small business financial service products. NAFCU and its members appreciate the NCUA's efforts to amend and expand the current *de minimis* exception to reduce the scope and number of offenses that would require an application to the NCUA. NAFCU generally supports an update to the exceptions to employment restrictions that ensures the safety and soundness of credit unions while extending opportunities to qualified candidates with minor criminal records. NAFCU encourages the NCUA to clarify how this proposed IRPS affects fidelity bonds. Additionally, NAFCU recommends the NCUA evaluate whether the delegation of the waiver process would compromise sensitive credit union information.

General Comments

NAFCU supports reform of the NCUA's current *de minimis* exceptions to employment restrictions under Section 205(d). Section 205(d) of the FCU Act prohibits, without prior Board consent, a person 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 conduct of the affairs of an insured credit union.

In August 2008, the Board issued final IRPS 08-01 describing the actions that are prohibited under the statute and establishing the procedures for applying for Board consent on a case-by-case basis.¹ The IRPS has not been updated in the past decade.

¹ 73 FR 48399 (Aug. 19, 2008).

The NCUA's recent proposal would update and revise the IRPS to waive the application for insufficient funds checks of aggregate moderate value, small dollar simple theft, false identification, simple drug possession, and isolated minor offenses committed by covered persons as young adults. Additionally, the proposed Second Chance IRPS considers whether the NCUA Board should delegate responsibility of reviewing certain applications to streamline the application process. In reviewing the IRPS, the Board considers Section 19 of the *Federal Deposit Insurance Act* (FDIA), which contains a prohibition provision similar to Section 205(d) of the FCU Act.

NAFCU supports the NCUA's efforts to reduce regulatory burden in this area and encourages the NCUA to finalize a comprehensive Second Chance IRPS that maintains the safety and soundness of credit unions, while also evaluating the effect of this IRPS on fidelity bonds and whether outsourcing the application processes for employment waivers would compromise sensitive credit union information.

Proposed Second Chance IRPS

Under the NCUA's current policy, a covered offense is considered *de minimis* if it meets the following five criteria: (1) there is only one conviction or entry into a pretrial diversion program of record for a covered offense; (2) 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; (3) the conviction or pretrial diversion program was entered at least five years prior to the date an application would otherwise be required; (4) the offense did not involve an insured depository institution or insured credit union; and (5) the Board or any other Federal financial institution regulatory agency has not previously denied consent under Section 205(d) of the FCU Act or Section 19 of the FDIA, respectively, for the same conviction or participation in a pretrial diversion program.²

The proposed Second Chance IRPS changes only one criteria (criterion 2) from the previous IRPS. The current standard also broadly restricts any jail time, meaning an individual would not qualify under the exception if they spend even one day in jail. The changes in the proposed Second Chance IRPS would relax this standard to better align with developments in criminal reform. NAFCU supports the update to the punishment and/or fine provision to allow those 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, to meet that *de minimis* criterion. Moreover, NAFCU appreciates the update to the current IRPS to add the definition of "jail time" to clarify the circumstances under which a lesser crime would qualify as *de minimis*.

Millions of Americans have some kind of criminal record, most of which are for relatively minor or nonviolent offenses.³ Federal banking regulators are moving toward revising outdated rules to broaden the scope of exceptions to employment prohibition related to minor crimes. The FDIC last year changed its rules to exempt convictions involving fake IDs, small-dollar thefts and drug-

² Interpretive Ruling and Policy Statement 08-1.

³ See, Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, National Institute of Justice (July 26, 2011), <https://www.ncjrs.gov/pdffiles1/nij/238488.pdf>.

related offenses in certain circumstances.⁴ Similarly, the proposed Second Chance IRPS recognizes the reality of most Americans who struggle to find employment by expanding the current *de minimis* exception to include convictions or program entries for insufficient funds checks of aggregate moderate value, small dollar simple theft, false identification, and simple misdemeanor drug possession.

Moreover, the proposed new age-based exception to the filing requirement is reasonable and comports with similar regulations set by other prudential regulators.⁵ Currently, there is no specified statute of limitation for minor crimes; accordingly, offenses from early adulthood can affect a candidate decades later. Under the proposed Second Chance IRPS, a person with a covered conviction or program entry that occurred when the individual was 21 years of age or younger, and who otherwise meets the general *de minimis* criteria, will qualify for this *de minimis* exception if: the conviction or program entry was entered at least 30 months prior to the date an application would otherwise be required; and all sentencing or program requirements have been met prior to the date an application would otherwise be required. Nearly one-third of American adults have been arrested by age 23.⁶ Consequently, the current IRPS would prevent these individuals from obtaining employment, even if they have paid their dues, are qualified for the job and are unlikely to reoffend.

The presence of a criminal record requirement significantly impacts minorities, particularly black Americans; this is further exasperated by their experience of racial discrimination in the labor market. As a result, these otherwise qualified individuals are left unemployed or underemployed. With reasonable reform of the employment restrictions under Section 205(d) of the FCU Act, individuals who have paid their dues could contribute greatly and become an asset to credit unions. While the safety and soundness of credit unions is of the utmost importance; it is also imperative for the credit union industry to make strides in its employment policies to better meet the needs of the communities credit unions serve. As not-for-profit, cooperative organizations, credit unions want to serve their communities by giving second chances to qualified individuals.

The current IRPS allows for only one conviction or entry into a pretrial diversion program of record for a covered offense. The proposed Second Chance IRPS is silent in regard to any updates to the “one conviction” requirement. Some credit unions have expressed that the single conviction limit for covered offenses is too restrictive. In particular, a credit union’s ability to hire a qualified applicant with more than one *de minimis* conviction is limited under both the current IRPS and the Second Chance IRPS.

Relatedly, NAFCU also encourages the NCUA to review the application form for the waiver process. Some credit unions have found the current information requested to be lengthy and onerous to both the credit union and the proposed new hire. For example, credit unions have encountered difficulty obtaining certain background information to provide to the NCUA due to the lack of information available on certain old criminal record systems. Accordingly, the NCUA should weigh the value of the information sought against the feasibility of obtaining certain

⁴ 83 FR 38143.

⁵ See, 83 FR 38143 (Aug. 3, 2018)

⁶ See, Solomon, *supra* at 3.

documentation and consider eliminating some of the more stringent requirements for background information.

NAFCU appreciates the NCUA updating its rules to reduce the number of minor criminal offenses that preclude individuals who pose a low risk to credit unions from working for, or otherwise participating in the affairs of, a credit union unless they obtain the NCUA's written consent. Before the NCUA proposed the Second Chance IRPS, several job applicants sought a waiver from its rules preventing individuals with minor criminal convictions from working at a credit union. For example, there have been records of applicants meeting four of the five *de minimis* criteria and failing to qualify for the exception because the potential punishment exceeded the current standard. As the NCUA recognizes in the proposal, recent applications requesting the Board's consent pursuant to Section 205(d) involved fairly minor, low-risk, and isolated offenses that did not fall within the current *de minimis* exception. This proposed Second Chance IRPS improves consistency with other prudential regulators, allows credit unions to better serve their communities, and decreases the burden of the waiver application process. Accordingly, NAFCU supports the NCUA reforming its policy related to employment restrictions under Section 205(d) so that credit unions could expand their pool of qualified employees while preserving the safety of the institution and its assets. As the NCUA has recognized, these individuals with minor and isolated offenses do not pose a risk to credit unions.

Impact on Fidelity Bond

The proposed Second Chance IRPS would continue to require that any person who meets the *de minimis* criteria must be covered by a fidelity bond to the same extent as other employees in similar positions. Section 120 of the FCU Act requires credit unions to obtain fidelity bonds regarding "every person appointed or elected" by an FCU "to any position requiring the receipt, payment or custody of money or other personal property" of the FCU. Assuming an individual meets the proposed *de minimis* criteria and their position does not require the handing of money or personal property, the proposed Second Chance IRPS implies that they do not require fidelity bond coverage.

Nevertheless, NAFCU's member credit unions are concerned about the insurance impact of hiring individuals that qualify under the Second Chance IRPS. In particular, credit unions have raised questions regarding whether hiring employees under the *de minimis* exception would result in additional fees for the credit union. NAFCU supports an employment restriction policy that would reduce credit unions' burden; however, hiring employees under the Second Chance IRPS should not result in an increase to their insurance premiums. Insurers have historically increased premiums in instances where an employee has any theft or fraud conviction.⁷ As such, credit unions are concerned about their ability to provide insurance coverage under the proposed Second Chance IRPS for individuals who have a minor criminal history of fraud or acts of dishonesty. NAFCU recommends the NCUA weigh the costs and benefits of requiring a fidelity bond for individuals that qualify for employment under the Second Chance IRPS.

⁷ See, Joe Palazzolo, *Criminal Records Haunt Hiring Initiative*, Wall Street Journal, (July 12, 2015) <https://www.wsj.com/articles/criminal-records-haunt-hiring-initiative-1436736255?mobile=y>.

Delegation of Application Review

The proposed Second Chance IRPS considers whether to delegate the review of certain applications to streamline the application process and reduce burdens on credit unions. NAFCU supports a streamlined application process that would not compromise the sensitive information of both the individual and the credit union seeking the waiver. To determine whether delegating responsibility for reviewing applications could further streamline the application process, the NCUA should evaluate whether the current average response timeline for waiver applications is practicable. Credit unions and individuals applying for a waiver should receive a reply from the agency within a reasonable period to proceed with the hiring and not lose otherwise qualified candidates.

Moreover, credit unions recognize the importance of cybersecurity. Consequently, if the NCUA delegates the review of certain applications, NAFCU is concerned the level of detail third parties will be privy to when reviewing a credit union-sponsored or individual waiver. Data security breaches pose a serious threat for both consumers and credit unions application both in terms of resources and reputation risk. NAFCU requests more information on the process of delegation, including the efforts the NCUA would take to protect sensitive credit union and individual applicant data. NAFCU recommends the NCUA institute proper protocols to ensure any access of credit union information to third party entities does not compromise sensitive credit union data and preserves consistency of the waiver process.

Conclusion

NAFCU appreciates the NCUA's leadership on updating the IRPS and supports a Second Chance IRPS that allows credit unions the ability to employ qualified individuals with minor criminal records, maintains the safety and soundness of credit unions, and preserves sensitive credit union information. If you have questions, please contact me at mmakonnen@nafcuh.org or (703) 842-2222.

Sincerely,

A handwritten signature in black ink, appearing to read 'MM', with a long horizontal line extending to the right.

Mahlet Makonnen
Regulatory Affairs Counsel