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National Association of Federally-Insured Credit Unions

June 30, 2023

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

RE: Regulatory Review (2023)

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) 2023 Regulatory Review of one-third of its regulations. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 135 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 may grow and better serve their communities. NAFCU and its member credit unions greatly appreciate the NCUA Board's willingness to consider regulatory changes that properly tailor rules to the risks and activities actually taken by credit unions.

With respect to the regulations under consideration in 2023, 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 and act swiftly to issue proposed rules or take other action as appropriate. NAFCU looks forward to future opportunities to work with the NCUA to achieve modernization of the regulations affecting America's credit unions.

Part 712 Credit Union Service Organizations (CUSOs)

In October 2021, the Board issued a final rule that amended the credit union service organization (CUSO) regulation. This was intended to accomplish two objectives: (1) expand the list of permissible activities and services for CUSOs to include the origination of any type of loan that an FCU may originate and (2) grant the Board additional flexibility to approve permissible activities and services. NAFCU generally supported the rule as proposed but noted that investment in financial technology (fintech) should not be limited to investments in CUSOs. To

remain competitive in a fintech landscape where larger banks can easily acquire startup talent and innovative products in their infancy, credit unions need the authority to invest as stakeholders in promising technology companies without needing to rely on the limited functionality of a CUSO to make strategic inroads with financial product developers. Because of their limited direct investment powers, credit unions are potentially missing opportunities to invest directly in innovative and beneficial new strategies that would serve members well and lead to additional growth and stability for the industry.

CUSOs are limited as they must primarily serve credit unions, a fact that may deter fintech companies from engaging with credit unions to the extent that they see the CUSO structure as more of a hinderance than a benefit to reaching a wide consumer audience. The NCUA must also recognize that collaboration between fintechs and credit unions as equal partners does not necessarily mean that an FCU's common bond will necessarily erode. Reasonable investment limitations could be implemented to ensure that "seed investments" in fintech companies do not change the common bond of the credit union or its member-driven focus. In the absence of greater investment flexibility, current limitations will continue to impair the credit union industry's ability to compete at a critical turning point in the financial services landscape. In the past few years, new special purpose depository institutions have gained acceptance with banking regulators, even while touting business models that are radically different from anything previously seen in the traditional banking landscape. Granting credit unions the comparatively modest authority to invest outside of CUSOs does not disrupt the safety and soundness of the industry but rather enhances the credit union system's adaptability and resilience at a time of disruptive change.

NAFCU requests that credit unions be allowed to invest directly in financial technology to "bring strategic technology solutions to credit unions that enable them to effectively compete in a rapidly changing technology environment."[1] The National Association of Credit Union Service Organizations (NACUSO) has issued a white paper titled "Enabling Collaborative Fintech in Credit Union Industry," that explains a specific example of how credit unions can invest in fintech in order to remain competitive in an increasingly challenging marketplace. NACUSO's white paper proposes a rule with recommended language based on the provisions and prohibitions of the FCU Act.[2] NAFCU requests that the NCUA consider the rule proposed in this white paper.

In accordance with Generally Accepted Accounting Principles (GAAP), consolidated financial statements typically encompass enterprises in which the parent holds a controlling financial interest, which is often a majority voting interest. The NCUA has previously expressed concern about the rights of minority interest holding credit unions and their ability to obtain a separate opinion audit. This issue can be easily resolved by requiring such CUSOs to undergo independent audits upon the request of the minority interest holding credit unions. This provision would be much more flexible than the current requirement of automatic audits, which are mandatory

[1] NACUSO, Enabling Collaborative Fintech in Credit Union Industry, 2 (2021).
[2] Id.

irrespective of the wishes of minority interest holders. Consequently, NAFCU strongly urges the NCUA to consider granting relief for minority-interest holding, non-controlling credit unions by introducing a de minimis threshold and allowing majority-owned CUSOs to file consolidated financial statements, with the option for minority interest-holding credit unions to obtain independent audits upon request.

Finally, NAFCU's member credit unions would benefit from clarifying guidance on several topics within Part 712. Several points of clarification relate to corporate separateness between credit unions and CUSOs. These include whether there is a requirement for separate staffing between a credit union and CUSO, whether the provisions in section 701.21(c)(8) and (d) apply to employees and officials of a CUSO owned by the credit union, and whether it is permissible for credit union and CUSO employees to share calendars. Additional uncertainty involves whether CUSO employees would be included in the credit union's field of membership (FOM) as "employees of the credit union." In addition to these separateness issues, NAFCU urges the NCUA to provide guidance on whether there is a minimum ownership interest required for a credit union to invest in a CUSO and whether a credit union's acquisition of a business to serve as a CUSO is subject to the 1 percent investment limit. NAFCU and its members would greatly appreciate any guidance that can help clarify these points of uncertainty.

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

During the comment period for the October 22, 2019, final rule on fidelity bonds, NAFCU wrote to the NCUA asking that it conduct an impact study to ascertain the ultimate effect of the rule on the ease and costs of obtaining fidelity bonds. Now, several years after the implementation of the final rule, NAFCU again asks the NCUA to perform that study or a cost-benefit analysis of the effects of the final rule to determine the extent of an increase in prices as a result of a credit union's loss of bargaining power and market competition due to the implementation of the final rule.

Additionally, credit unions could benefit from clarifying guidance on the following questions regarding a credit union board's approval and review of coverage:

- Does the board approve fidelity bond coverage through a resolution, or does an actual insurance form need to be signed?
- Can management provide a summary of the policy to the board of directors (BOD), or must the BOD review the actual policy in its entirety?
- CUSOs which a CU owns at least 50 percent or more can be covered by the credit union's fidelity bond, but what about entities that are owned by the CUSO?
- Must the BOD review the fidelity bond in years when the bond is not up for renewal?
- Must the BOD review all bids for fidelity bond coverage, or just the ones that are ultimately chosen by management?

Part 715 Supervisory Committee Audits and Verifications

The supervisory committee has an important and official role in resolving complaints that are reported through the NCUA's Consumer Assistance Center. However, there is no reference to this duty in Part 715, which includes Appendix A. In the absence of official guidance, committee members would need to review relevant Letters to Credit Unions to discover their duties and role in the process. Given that the NCUA's Consumer Assistance Center has established formal processes involving federal credit union supervisory committees, it is important to provide formal indications of their role. Therefore, NAFCU suggests that the NCUA consider bridging this gap by referencing this duty and available official guidance, such as the Letters to Credit Unions, in the appendix. Additionally, an appendix discussing the number and type of audits that should be conducted by a supervisory committee would be beneficial for credit unions.

Part 717: Credit Reporting

NAFCU requests that the NCUA issue clarifying guidance in regard to Section 717.91. Specifically, Section 717.91 references a requirement that a credit union "card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address." As the regulation is generally silent on the means by which a credit union might "assess the validity," credit unions would benefit from additional direction.

Part 721 Incidental Powers

The NCUA has previously suggested that credit unions may face legal repercussions under the Uniform Commercial Code (UCC) if they refuse to pay an "on-us" check written by a member on their credit union account and payable to a nonmember. This was implied in two legal opinion letters, one from 1986 and another from 2007. The 2007 letter stated that FCUs have explicit authority to cash checks for persons within their field of membership, and incidental powers necessary to carry on their business, which combined give them the authority to cash checks drawn by members for nonmembers. However, despite this being a common situation for credit unions, there is little guidance on this legal question, making it difficult to research.

NAFCU requests that the NCUA add cashing "on-us" checks and offering the use of coin sorter machines in credit union lobbies as preapproved activities necessary to carry on the business of the credit union in Section 721.3. Additionally, NAFCU asks that the sale of stored value products to nonmembers within the field of membership be considered as a marketing activity. The NCUA has previously approved limited activities with members as permissible marketing or charitable activities, as they increase potential members' familiarity with the credit union and banking in general. Prepaid cards are particularly useful for the unbanked population, as they do not require a credit check and provide security that cash cannot. Therefore, if credit unions were able to offer prepaid cards to nonmembers, they could gain members and introduce those consumers to the security and safety of the U.S. banking system.

Additionally, NAFCU requests that the NCUA amend Part 721 to include the authority to issue and sell securities. In the June 2017 NCUA Legal Opinion Letter 17-0670, the NCUA's Office of General Counsel noted "that an FCU does have the authority to issue and sell securities as a power incidental to its operation." As noted in the Legal Opinion, "issuing and selling securities is consistent with the FCU [Act] and is convenient and useful in carrying out the mission or business of FCUs…issuing and selling securities is a logical outgrowth of credit union's core business activities...[and] issuing and selling securities involves risks that are similar in nature to those already assumed as part of the business of credit unions." This analysis is accurate and should be reflected in the NCUA Regulations so that credit unions may better understand their authority to engage in this type of activity.

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 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 2010, the NCUA outlined in its Interagency Appraisal and Evaluation Guidelines that credit unions could only utilize automated tools or sampling techniques for pre-funding evaluations of appraisals or assessments for low-risk residential mortgages if prior authorization was obtained from the NCUA. To avoid ambiguity, Part 722 should clearly grant authorization for the use of automated tools in conducting pre-funding reviews of appraisals or evaluations for all residential mortgages pertaining to 1- to 4-family units.

Part 723 Member Business Loans; Commercial Lending

Current Part 723.2 excludes from the definition of commercial loan, and therefore the underwriting requirements in the written commercial loan policy, any business loan with a net aggregate balance less than $50,000. Since the COVID-19 pandemic, inflation has driven up the cost of most goods, making $50,000 an extremely low threshold to require such stringent underwriting. Additionally, access to commercial credit continues to suffer in the wake of the pandemic and credit unions would be well suited to meet the demand for small business lending, if not for Part 723.2. The Commercial Loan underwriting requirements of Part 723.4 are unnecessarily burdensome for small-dollar, low-risk loans, and safe, cheaper alternative underwriting methods are currently available. Finally, the imposition of Part 723.4 underwriting requirements on small-dollar loans places credit unions at a competitive disadvantage with unregulated, fraud-prone fintechs, which could pose a threat to small business borrowers. The

NCUA should amend Part 723.2 to raise the threshold for net aggregate business loans that are excluded from the definition of a Commercial Loan, and thereby its stringent underwriting requirements, from $50,000 to $250,000. Doing so would enable small and micro-businesses to obtain additional lines of credit.

The definition of a member business loan, as outlined in section 723.8, is difficult to understand and use due to its numerous exceptions, carve-outs, and exclusions. Moreover, the current cap on member business lending is not proportional to the actual risks involved, as not all transactions included in the definition pose commercial-type risks to the credit union. These provisions are outdated, and commercial lending within credit unions has become increasingly sophisticated, and the demand has grown. As a result, the current member business lending (MBL) cap prevents credit unions from providing safe and sound business loans to small business members and their local communities.

To address this issue, Congress must amend the FCU Act to provide credit unions with greater relief and flexibility from the MBL cap, thereby increasing access to lending for small businesses across the nation. In order to achieve this, Congress could increase the cap to 20 percent of assets of the credit union, a proposal that has garnered bipartisan support in previous Congresses. In addition, Congress could exempt loans to veterans from the cap or exempt all government-backed loans, such as Small Business Administration (SBA) loans, from the cap. Alternatively, Congress could fully guarantee all SBA loans. Currently, only the guaranteed portion of the loan is exempt from the MBL cap. NAFCU would welcome the NCUA's support in these efforts.

Part 725 National Credit Union Administration Central Liquidity Facility

In March 2020, in response to the COVID-19 pandemic, Congress enacted relief legislation in the form of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act made four important changes to the Central Liquidity Facility (CLF) including: 1) Increasing its maximum legal borrowing authority; 2) Permitting temporary access for corporate credit unions borrowing for their own needs; 3) Providing greater flexibility and affordability to agent members by no longer imposing a strict capital stock subscription requirement for all members the agent serves, and instead allowing the agent to buy capital stock for a subset of its members; and 4) Providing the NCUA with more clarity and flexibility to approve applications for CLF members that have made a reasonable effort to first utilize primary sources of funding. These changes helped the credit union system and protected the taxpayer during the COVID-19 pandemic; unfortunately, due to congressional inaction, they were allowed to lapse. These changes should be made permanent as a bulwark against the risk of future systemic shocks to industry liquidity.

NAFCU appreciates the NCUA Board’s bipartisan support for legislation to make permanent the enhancements to the CLF made under the CARES Act. These enhancements, although expired, provided the NCUA with a vital tool to ensure the credit union system had access to a critical contingent liquidity source as it responded to the COVID-19 pandemic. NAFCU urges the NCUA

to continue its support for legislative action to make these changes permanent, as it would provide regulatory certainty for federally insured credit unions (FICUs) and grant the NCUA additional flexibility to safely manage access to emergency liquidity.

Part 740 Accuracy of Advertising and Notice of Insured Status

The Official Advertising Statement and Changing Technology

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 was crucial to updating the outdated language of Part 740. The prevalence of technology and social media has only escalated since the finalization of the rule, and this focus was intensified by the COVID-19 pandemic and the need for social distancing. Despite this, the NCUA Board has yet to issue comprehensive guidance on Part 740 compliance in the context of digital advertising, including website banners and social media posts. Consequently, credit unions are still grappling with these challenges.

To address the issues that arise with social media and text messaging advertising, which are often subject to unique formatting restrictions, NAFCU recommends that the NCUA exempt them from the obligation to display the official advertising statement. These types of advertisements may include images or text that resemble radio or television ads, but they do not receive equivalent flexibility. NAFCU believes that the exemption that applies to short radio and television ads should also apply to social media and text message advertising.

Alternatively, the NCUA could allow for a "one click away" option for online advertising, as has been allowed by the CFPB for Truth in Lending regulations and by the NCUA for Truth in Savings regulations. Click-through disclosures are now widely recognized and expected by consumers, and this would provide an easy way for credit unions to ensure compliance without significantly limiting their ability to utilize social media and other online channels to reach out to current and potential members.

Moreover, the NCUA should recognize the continually changing nature of technology and its role in advertising and remain vigilant to ensure that its regulations remain up to date. As we have seen repeatedly, the pace of technological innovation trends toward acceleration and a regular periodic review of NCUA regulations is crucial to ensure that credit unions remain competitive in the consumer financial services marketplace.

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, or increasingly, including the official advertising statement on every page of a credit union website. The NCUA has provided informal guidance indicating that section 740.5 does not prohibit inclusion of the official advertising statement on any particular webpage, however this guidance should be codified. While many credit unions ultimately decide to rely on the current exception in section 740.5(c)(11), which exempts: "[a]dvertisements that do not relate to member accounts…" in these situations, it would be more efficient to include 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 examine FICUs. 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 such as MERIT to ensure examinations are not disruptive. NAFCU requests the NCUA continue to provide additional transparency around these modernization efforts.

NAFCU appreciated the agency's pivot to virtual and offsite examinations in response to the COVID-19 pandemic. NAFCU supports the NCUA Virtual Examination project and supports the use of more virtual exams, but also recognizes the value of in-person interactions. Therefore, a hybrid approach that maintains some in-person meetings is in the best interest of credit unions, the agency, and the agency's budget. The agency should reconsider its proposed travel budget because of the effectiveness of offsite examinations over the past several years. The third largest portion of the NCUA's Operating Budget is travel expenses, so considering the lessons learned from 2020, 2021, and 2022 regarding the extent to which supervisory and exam operations can be conducted offsite, NAFCU urges the NCUA to cut travel across the board going forward.

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.

Part 746 Appeals Procedures

In spite of the substantial alterations made to the appeals process in 2017, NAFCU has received reports from its members indicating that credit unions remain hesitant to contest examiners'

decisions. NAFCU acknowledges and values the challenging position that examiners must maintain. However, it is crucial for the well-being of the credit union industry that credit unions possess viable avenues to challenge examiners, promoting openness and responsibility in the examination process.

In its response to the proposed appeals rule on August 3, 2017, NAFCU proposed that the NCUA adopt a 2012 Office of Inspector General recommendation for a national reporting mandate. This would require each regional office to furnish the Office of Examination and Insurance with precise information regarding examination matters contested by credit unions and elevated to the Regional Director for a regional determination. This proposal aligns with the Federal Deposit Insurance Corporation's existing reporting procedures. NAFCU reiterates its recommendation that the NCUA should adopt this requirement.

Additionally, credit union management and boards have conveyed instances where examiners' reports have exhibited a tone perceived as retributive and directed towards specific individuals. While it may be appropriate to remove and prohibit an individual for an offense they have committed, credit union staff are reportedly concerned about subjective evaluations of individuals who have not committed such an offense. NCUA examiners must assume responsibility for exercising caution and discretion while making personal comments about individuals, and only do so when it is absolutely necessary to address risks that may impact the institution's safety and soundness. In this regard, section 746.103 should comprise a "material supervisory determination" of any personal or professional assessments targeting identifiable individuals affiliated with the institution.

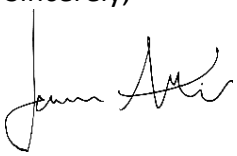
Part 747 Administrative Actions, Adjudicative Hearings, Rules of Practice and Procedure, and Investigations

NAFCU suggests that the NCUA evaluate whether subpoenas issued under Part 747 should be subject to review by the Office of General Counsel. Granting full subpoena authority to an appointed investigator without any additional scrutiny creates an excessive amount of power for the investigator. Instead, the Office of General Counsel should closely monitor the investigator's actions. The subpoena should be presented to the General Counsel or Deputy General Counsel, along with an explanation of the basis for the subpoena. The Office of General Counsel should then authorize the subpoena as the appointing authority. This measure represents a reasonable system of checks and balances in 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 questions or concerns, please do not hesitate to contact me at jakin@nafcu.org or 703-615-5109.

Sincerely,



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