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**National Association of Federally-Insured Credit Unions**

December 30, 2020

Ms. Melane Conyers-Ausbrooks  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314

**RE: Role of Supervisory Guidance (Docket ID NCUA-2020-0098)**

Dear Ms. Conyers-Ausbrooks:

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) notice of proposed rulemaking regarding the role of supervisory guidance. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve nearly 123 million consumers with personal and small business financial service products. NAFCU appreciates the NCUA's commitment to working with the other federal banking regulators to emphasize the distinction between rules and supervisory guidance. Additionally, NAFCU appreciates the NCUA clarifying ambiguities in the 2018 Statement Clarifying the Role of Supervisory Guidance (2018 Statement). Supervisory guidance plays a critical role in assisting credit unions to shape their practices, policies, and procedures. Transparent guidance provides a more consistent supervisory approach. NAFCU supports the proposal and urges the NCUA to ensure that examiners apply this position consistently so that supervisory guidance is not relied upon as de facto regulation. In addition, NAFCU urges the NCUA to provide additional supervisory guidance that is easily accessible to alleviate examination inconsistencies and assist credit unions.

**General Comments**

The 2018 Statement reiterated well-established law, that unlike a law or regulation, supervisory guidance does not have the full force and effect of law. Additionally, the 2018 Statement affirmed that the NCUA does not issue criticisms for violations of supervisory guidance. NAFCU appreciates the codification of the 2018 Statement into the NCUA's regulations. The 2018 Statement provides clarification regarding the supervisory process; however, NAFCU continues to seek supervision and examination reform, including a more streamlined and efficient examination process.

NAFCU previously provided the NCUA with recommendations for a more streamlined and efficient examination process in a comment letter submitted August 28, 2020, in response to the agency's request for information on the future of examinations. More specifically, NAFCU reiterates its recommendation for expanded eligibility of the extended 18-month exam cycle for

all well-run, low-risk credit unions. Additionally, the NCUA should reconsider the agency's approach to supervision to better coordinate resources and expertise with other regulators, including the Bureau of Consumer Financial Protection and state supervisory authorities. Credit unions over \$10 billion and subject to supervision and examination by both the NCUA and CFPB have reported experiencing overlapping or consecutive examinations, which imposes operational burdens and utilizes critical staff member time. Better coordination between the NCUA and other regulators would greatly assist credit unions. Also, NAFCU urges the NCUA to provide credit unions with a streamlined, independent appeals process for supervisory and examination determinations. Many credit unions report that they are unaware of their right of appeal during an exam and that potential examiner retaliation is a barrier to an appeal.

Lastly, NAFCU urges the NCUA to establish efficient security protocols to protect the integrity and confidentiality of credit union information in the transfer, storage, and use of confidential information in the context of an exam. The NCUA should develop mature cybersecurity controls akin to those required by the Federal Financials Examination Council (FFIEC), to assist credit unions minimize associated compliance and litigation risks surrounding member privacy. NAFCU appreciates the NCUA's examination modernization efforts thus far and looks forward to working with the agency on future efforts to reduce examination and supervision burdens.

### **NAFCU Supports the Proposal Clarifying Supervisory Guidance**

The proposal provides that examiners will not base supervisory criticism on violations of supervisory guidance, nor will examiners issue an enforcement action based on a violation of supervisory guidance. Despite this added transparency, NAFCU urges examiners apply this position consistently. The proposal outlines the types of agency communications that constitute supervisory guidance and the NCUA does not need to provide any additional clarification regarding types of communication. NAFCU members do not expect to make any changes as to how they approach certain practices due to the proposal and this does not create any additional burdens. To further reduce burdens, the NCUA should continue to encourage examiners to take all necessary steps to identify and advise on deficient practices before they rise to the level of a violation of law or regulation or constitute an unsafe or unsound banking practice. This includes providing supervisory guidance as a reference or example for credit unions.

Examiners should be able to reference supervisory guidance as an example of safe and sound conduct, and appropriate consumer and risk management practices. Providing supervisory guidance as a reference is helpful for both the examiner and the credit union and offers greater examination consistency and transparency. However, the risk of "regulation by examination" presents itself if the line between supervisory guidance and regulatory requirement is blurred. Deviating from supervisory guidance should not automatically be construed as a deviation from safe and sound practices and should not in and of itself form the basis of an enforcement action. Rather, examiners should use regulatory requirements as the basis to assess credit union operations and afford credit unions with the opportunity to demonstrate that their practices, which may deviate from the examples provided in supervisory guidance, nonetheless constitute safe and sound practices that meet regulatory requirements. As such, NAFCU supports this proposed rule but

stresses that for supervisory guidance to work as a reference or example, the NCUA must ensure there is sufficient and quality guidance available.

NAFCU urges the NCUA to provide additional supervisory guidance on examination-related matters, as necessary, and ensure that it is easily accessible for credit unions. In fact, the NCUA's website only lists six Supervisory Letters, issued between 2006 and 2017 under the subject of "Examination Program." For example, a few years ago examiners began requesting audit reports directly from credit union auditors versus credit union management, as was done in years prior. The NCUA provided scant public-facing information regarding an important change pertaining to examinations, but only later provided transparent instructions. The NCUA should ensure that internal supervisory guidance impacting examinations is promptly made public, so as not to surprise credit unions during examinations and slow down the process. In addition, supervisory guidance must be accessible.

Despite recent website improvements, NAFCU continues to hear from members that the searchability of supervisory guidance on the NCUA's website is difficult, especially interagency guidance. This lack of functionality impairs credit unions' ability to obtain the most up-to-date guidance. In a November 2019 *Economic & CU Monitor Survey*, 65 percent of respondents reported the accessibility of exam-specific guidance to be somewhat or very challenging. Inaccessibility to guidance likely contributes to examiners' misunderstanding and divergent application of the agency's rules and guidance. Moreover, 77 percent of respondents want the NCUA to provide more supervisory guidance. As supervision and examination becomes more complex, it is important to have clear supervisory direction to alleviate future enforcement actions. Moreover, additional, detailed supervisory guidance may alleviate some of the persistent examination inconsistencies in the credit union industry.

According to NAFCU's November 2020 *Economic & CU Monitor Survey*, 50 percent of respondents indicated that their highest priority for exam reform is more consistent application of the rules and guidance. Examination consistency has historically, and continues to be, an issue expressed by NAFCU members. NAFCU members report that examinations have evolved into an examiner-in-charge led decision-making and interpretation. An area that continues to be a topic of inconsistency is *Bank Secrecy Act (BSA)*/ anti-money laundering (AML). NAFCU members report varying degrees of examiner consistency surrounding BSA/AML, with some examiners focusing holistically on the credit union's over-arching BSA/AML compliance program while other examiners focused on the details of required reports and filing deadlines. NAFCU encourages the NCUA to increase coordination with the Financial Crimes Enforcement Network (FinCEN) and other FFIEC regulators to ensure examination consistency.

NAFCU is also concerned about instances where examiners begin implementing new practices without first publicly disclosing these changes to credit unions. Although these practices may be intended to be implemented uniformly across all regions, one region may begin adopting these practices before others, leading to inconsistency and confusion. For example, recently, examiners were requiring credit union to provide board member minutes on a recurring, monthly basis, versus during the examination. Credit unions in a particular region were subject to this requirement while

others were not. The NCUA should ensure that there are no regional examination inconsistencies. One way to accomplish this goal is through a more transparent process that requires public notice of such significant changes in examiner practices before these practices are implemented. The NCUA has repeatedly acknowledged that improving examination consistency is a primary goal of the agency and NAFCU encourages the NCUA to continue to make examination consistency a top priority.

## **Conclusion**

NAFCU appreciates the opportunity to share its members' views on this matter. NAFCU supports the proposal as it provides transparency and clarity surrounding the examination and supervisory process. NAFCU encourages the continued use of supervisory guidance as a reference or example and urges the NCUA to provide additional supervisory guidance that is easily accessible to alleviate examination inconsistencies. In addition, the NCUA should further improve the functionality of the agency's website to improve searchability of supervisory guidance. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2249 or [kschafer@nafcuhq.org](mailto:kschafer@nafcuhq.org).

Sincerely,



Kaley Schafer  
Senior Regulatory Affairs Counsel