

Cooperative Credit Union Association

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Creating Cooperative Power

January 4, 2021

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

**Re: Cooperative Credit Union Association Inc.'s Comments
on Proposed Rule: Role of Supervisory Guidance**

BY ELECTRONIC MAIL ONLY: <http://www.regulations.gov>

Dear Ms. Conyers-Ausbrooks:

On behalf of the member credit unions of the Cooperative Credit Union Association, Inc. (“Association”), please accept this letter relative to the request for comments issued by the National Credit Union Administration Board (“NCUA”) on a proposed rule (“proposal”) relative to the role of supervisory guidance. The Association is the state trade association representing approximately 200 state and federally-chartered credit unions located in the states of Delaware, Massachusetts, New Hampshire, and Rhode Island which further serve over 3.6 million consumer members.

The Association conducted a survey of its members on the provisions of the proposal and member views from the survey as well as direct comments received provide the basis for this comment letter.

A. Overview

The Association generally supports the proposal and the efforts of NCUA and others to clarify the purpose and function of supervisory guidance. Members firmly believe that a final rule will enhance the transparency of regulatory positions. Supervisory guidance can be a highly effective tool in communicating to stakeholders important views on how various issues could be managed in order to meet expectations. It should be noted, however, that Association members remain

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concerned that the distinctions between guidance, which is not enforceable, and laws and rules with which the NCUA has the authority to enforce compliance, remain unclear and dispersed.¹

The Association sincerely hopes that any final rule will help further the understanding of the correct nature and proper use of supervisory guidance by both examiners and credit union officials. Accordingly, this comment letter offers several recommendations to help NCUA achieve our shared objectives.

B. Broad Issue of Concern

The Association strongly agrees that a regulation is necessary to stipulate the scope and use of supervisory guidance and to bind regulators and staff now and into the future to prevent the unlawful enforcement of interpretations that do not have the force of law.² The proposal is a step in the right direction in this area and reflects a common sense approach.

In addition to support for the proposal generally, Association members respectfully request that the guidance be made more clear and more useful. To begin, it is recommended that the title of the guidance should be revised and the word “Supervisory” should be removed. The provisions are intended to be solely guidance and by removing the word “Supervisory,” NCUA will help underscore that the guidance has no enforcement implications. Also, based on a recommendation of the Administrative Conference of the United States³, it is recommended that each guidance statement should include a prominent notice in the same size type as the entire document highlighting that the information provided is strictly guidance and cannot be enforced by examiners.

C. Responses to Specific Questions

1. The proposal provides that in some situations, examiners may reference, including in writing, supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations.

¹ One survey respondent noted that “...While the statement affirms guidance does not have the force of law, it now clearly has the force of examination, which is likely the same effect to an individual credit union.”

² One survey respondent noted that a regulation “would verify the clear-cut difference between suggestion and rule of law.” Another added, “It is just plain common sense that guidance...is very different than a regulation promulgated by virtue of underlying legislation...it is imperative that requirements be administered consistently among NCUA examiners. (A rule) does not guarantee consistent administration but without it consistent administration is impossible.”

³ The Administrative Conference of the United States is an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures. [2017-28124.pdf \(govinfo.gov\)](https://www.govinfo.gov/2017-28124.pdf)

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Should examiners reference supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations when criticizing (through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, supervisory recommendations, or otherwise) a supervised financial institution? Are there specific situations where providing such examples would be appropriate, or specific situations where providing such examples would not be appropriate?

A. Association members support using examples “if referencing the guidance helps specify and/or clarify the examiner’s concern.” However, caution is advised to ensure that the use of any examples should be clearly identified by examiners. Furthermore, the Association requests absolute transparency and that no room should be left for uncertainty about what the examiner is communicating. It is inappropriate to use such examples if a credit union has its own reasonable approach that comported with legal requirements. Without question, issues that have immaterial risks should not be the concern of examiners. In addition, emphasis on the permissibility of financial institutions to develop and implement individual responses and solutions rather than having to exclusively and strictly follow examiner advice would be useful.

2. Is it sufficiently clear what types of agency communications constitute supervisory guidance? If not, what steps could the agencies take to clarify this?

A. No. More precisely, it is not clear what is not supervisory guidance when the message is delivered by an examiner or from the NCUA Board. While the proposal is a good step in the right direction, more clarity is needed relative to what communications are included and which ones are not. For example, is the NCUA’s annual Letter to Credit Unions detailing supervisory and examination priorities merely guidance? To what extent are credit unions allowed to set or supplement supervisory/safety and soundness priorities provided that they are reasonable and tailored to the credit union’s risk profile? How does NCUA categorize communications such as its annual letter on supervisory priorities?

3. Are there any additional clarifications to the 2018 Statement that would be helpful?

A. Yes. The proposal continues the language that “examiners will not criticize” a financial institution for noncompliance with supervisory guidance. The Association appreciates efforts of NCUA and others to clarify what is intended but does not support the continued use of the words “criticize” and “criticisms” as they relate to communications to credit unions from examiners. Many Association members believe that any “criticism” from an examiner is significant and signals what the examiner expects the credit unions to do. The use of “supervisory criticisms” compounds the confusion. Also, examiners can communicate their intent in a number of ways, not just through the supervisory vehicles identified in the proposal.

In addition, the proposal adds that enforcement actions will not be issued on the basis of a “violation” or “noncompliance” with supervisory guidance. The Association suggests that these

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descriptions further cloud what NCUA seeks to accomplish because even though these terms are italicized, there can never be a violation or noncompliance if the guidance is unenforceable.

Association members believe that NCUA's goal would be more clear if terms relating to "criticize" and "criticisms" were removed. These terms should be replaced with a statement(s) such as "Examiners will not evaluate credit unions for compliance based on supervisory guidance but will base their directives and examination report conclusions on laws and regulations applicable to the examined credit union."⁴

4. Are there other aspects of the proposal where you would like to offer comment?

A. Yes. Association members consistently raise serious concerns about the issue of inconsistent application of NCUA policies by examiners. This is not a new criticism but one that remains a persistent concern, extending beyond guidance versus regulation to other NCUA policies and requirements. The Association believes that the duration and implications of this concern warrants that NCUA create a task force comprised of both credit union officials and key staff to finally bring the issue to light, to raise the visibility of the seriousness of the issue and NCUA's commitment to it, to actually address it and to develop recommendations for all stakeholders to review and comment. Such course of action would serve to document and facilitate the consistent implementation of NCUA requirements and policies.

In addition, consistent with the Association's recommendation that each guidance statement from NCUA include a notice that it is nonbinding, NCUA is further urged to add a notice to each guidance statement to support that credit unions are fully permitted to develop their own approaches to compliance issues, and that the examiner's recommendations or suggestions do not eliminate the ability of the credit union to implement its specific solutions.

Finally, the Association asserts that guidance statements should be published for public comments before the statements are issued to the credit union system. The proposal indicates that the agencies have done that in the past and may do so for future guidance statements. This process should be implemented for each guidance statement as it would go a long way toward reinforcing the nature of the guidance and provide credit unions a role in helping to achieve vetted guidance that is useful to their operations. This approach is also consistent with the objectives of the Administrative Conference of the United States.

D. Conclusion

The Association applauds NCUA's efforts to work with the other federal regulators to develop a regulation that would clarify the role of supervisory guidance. Members offer support of the proposal and of further changes to advance NCUA's objectives while making the use of guidance clearer and more useful for credit unions and examiners.

⁴ One member noted that this type of approach provides "clarity and less animosity" due to an examiner's interpretation.

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Thank you for the opportunity to share the views of the Association's members on the proposal relative to supervisory guidance. If you have any questions about the recommendations set forth in this comment letter or require further information, then please do not hesitate to contact the Association at govaff-reg@ccua.org.

Sincerely,



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