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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 746

RIN 3133-AE69

Supervisory Review Committee; Procedures for Appealing Material Supervisory Determinations

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is adopting regulatory procedures for appealing material supervisory determinations to the NCUA's Supervisory Review Committee (SRC). These procedures significantly expand the number of material supervisory determinations appealable to the SRC to include most agency decisions that could significantly affect capital, earnings, operating flexibility, or the nature or level of supervisory oversight of a federally insured credit union (FICU). Furthermore, the procedures contain a number of safeguards designed to provide FICUs with enhanced due

process and promote greater consistency with the practices of the Federal banking agencies.

DATES: This rule is effective January 1, 2018.

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SUPPLEMENTARY INFORMATION:

I. Background

Section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act) required the NCUA and the Federal banking agencies¹ to establish independent intra-agency appeals procedures for the review of “material supervisory determinations” no later than 180 days after September 23, 1994.² The Riegle Act defined the term “material supervisory determination” to include agency decisions relating to “(i) examination ratings; (ii) the adequacy of loan loss reserve provisions; and (iii) loan classifications on loans that are significant to the [credit union]” and to exclude

¹ The Federal banking agencies include the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and the Board of Governors of the Federal Reserve System (FRB). See 12 U.S.C. 1813(q) (defining “appropriate Federal banking agency”).

² Pub. L. 103-325, tit. III, section 309, 108 Stat. 2160, 2218 (Sept. 23, 1994) (codified at 12 U.S.C. 4806).

agency decisions to appoint a conservator or liquidating agent for a FICU, or to take prompt corrective action pursuant to section 216 of the Federal Credit Union Act (FCU Act).³

When establishing the intra-agency appeals procedures, the Riegle Act required the NCUA and the Federal banking agencies to ensure that (1) any appeal of a material supervisory determination by an insured depository institution or insured credit union is heard and decided expeditiously; and (2) appropriate safeguards exist for protecting the appellant from retaliation by agency examiners.⁴ Furthermore, the Riegle Act required the NCUA and the Federal banking agencies to appoint an agency ombudsman responsible for serving as a liaison “between the agency and any affected person with respect to any problem such party may have in dealing with the agency resulting from the regulatory activities of the agency” and assuring “that safeguards exist to encourage complainants to come forward and preserve confidentiality.”⁵

The Board published a proposed Interpretive Ruling and Policy Statement (IRPS) setting out intra-agency appeals procedures for the review of material supervisory determinations in the Federal Register on November 17, 1994 for a 30-day comment period ending on December 19, 1994.⁶ The proposed IRPS took the form of guidelines that established an SRC of five senior NCUA staff members consisting of the Executive Director, the General Counsel, the Director of the Office of Examination and Insurance (E&I), one

³ 12 U.S.C. 1790d.

⁴ 12 U.S.C. 4806(b)(1)-(2).

⁵ 12 U.S.C. 4806(d)(1)-(2).

⁶ 59 FR 59437 (Nov. 17, 1994).

Regional Director, and one additional senior staff or Board staff member to hear appeals of material supervisory determinations. The Executive Director was to serve as the SRC Chairman. Furthermore, the proposed IRPS limited the scope of appealable determinations to agency decisions specifically defined as “material supervisory determinations” under section 309 of the Riegle Act with the appeal of “examination ratings” further limited to composite CAMEL ratings of 4 and 5.

The Board extended the comment period until January 18, 1995 to allow stakeholders additional opportunity to comment on the proposed IRPS.⁷ After reviewing and considering the public comments, the Board published a final IRPS in the Federal Register on March 20, 1995 as IRPS 95-1 “Supervisory Review Committee.”⁸ The final IRPS took the form of guidelines that established an SRC consisting of three senior NCUA staff members each appointed by the NCUA Chairman. The scope of appealable determinations remained limited to agency decisions specifically defined as “material supervisory determinations” under section 309 of the Riegle Act, however, the final IRPS expanded the ability to appeal CAMEL ratings cover composite ratings of 3, 4, and 5 as well as all component ratings of those composite ratings.

On April 23, 2002, the Board adopted IRPS 02-1, which amended IRPS 95-1 to expand the scope of appealable determinations to include a decision by a Regional Director to revoke a Federal credit union’s (FCU) authority under the NCUA’s then-Regulatory

⁷ 59 FR 61003 (Nov. 29, 1994).

⁸ 60 FR 14795 (Mar. 20, 1995).

Flexibility Program (RegFlex).⁹ RegFlex permitted an FCU with advanced levels of net worth and consistently strong supervisory examination ratings to request exemptions, in whole or in part, from certain NCUA regulations.¹⁰ The Board eliminated this program in 2011, but made certain regulatory relief provisions previously available under the program widely available to all FCUs.¹¹

The Board adopted IRPS 11-1, which contains the current SRC appeals procedures, on April 29, 2011.¹² IRPS 11-1 expanded the jurisdiction of the SRC to include denials of Technical Assistance Grant (TAG) reimbursements by the Director of the Office of Small Credit Union Initiatives (OSCU). A TAG is an award of money, in such amounts and according to such terms and conditions as the NCUA may establish, to a credit union participating in the Community Development Revolving Loan Fund that does not have to be repaid.¹³ TAGs are paid on a reimbursement basis to cover expenses approved in advance by the NCUA and supported by adequate documentation. In IRPS 11-1, the Board determined that the fact-intensive nature of TAG reimbursement requests warranted review by the SRC. The Board has not made material changes to IRPS 11-1 since 2012 when it removed all references to RegFlex to reflect the elimination of that program.¹⁴

II. Summary of the Proposed Rule

⁹ 67 FR 19778 (Apr. 23, 2002).

¹⁰ 66 FR 23971 (Nov. 23, 2001).

¹¹ 77 FR 31981 (May 31, 2012).

¹² 76 FR 3674 (Jan. 20, 2011) (interim final IRPS); 76 FR 23871 (Apr. 29, 2011) (final IRPS).

¹³ 12 CFR 705.2.

¹⁴ 12 CFR 705.7(g)(2).

On June 7, 2017, the Board published a proposed rule in the Federal Register formally codifying the SRC appeals process as part of the NCUA's regulations.¹⁵ The proposed rule also included significant amendments to the SRC appeals process to enhance due process and to be more consistent with the Federal banking agencies. The proposed rule expanded the number of supervisory determinations appealable to the SRC and provided FICUs with an opportunity to seek review by the Director of E&I. To accommodate the increased workload of the SRC, the Board proposed to expand the size of the SRC to include a rotating pool of not less than eight senior staff from the NCUA's regional and central offices. Central office staff would have included high level officials within the Office of the Executive Director (OED), the Office of Consumer Financial Protection and Access (OCFPA), the Office of National Examinations and Insurance (ONES), and OSCUI. The Secretary of the Board was to serve as the permanent SRC Chairman and select three individuals (one of whom could include the SRC Chairman) to hear a particular appeal.

III. Summary of Comments to the Proposed Rule

The Board received 9 comments on the proposed rule from State and national credit union trade associations, an FCU, a management consulting company, a professional association for State credit union supervisors, and a private individual. Commenters generally approved of the proposed rule and appreciated the Board's efforts to provide FICUs with enhanced due process regarding agency decisions. However, commenters

¹⁵ 82 FR 26391 (June 7, 2017).

raised several concerns with various aspects of the proposed rule and recommended changes to address those concerns. Specific comments and recommendations are discussed in more detail in the Section-by-Section Analysis set out in Part V below.

One commenter requested that the Board establish an examination outreach officer position to conduct a post-examination interview with each FICU to determine whether the goals of a healthy exam are being met, and if not, what parts of the exam can be improved upon to achieve those goals. The commenter also requested that the Board establish an advisory committee of senior credit union officials similar to the Consumer Financial Protection Bureau's credit union advisory council (CUAC) to advise the NCUA on credit union matters. These requests are outside the scope of the proposed rule and, therefore, the Board will not address them in this rulemaking.

IV. Summary of the Final Rule

The Board is generally adopting the rule as proposed, with certain modifications based on public comments and other considerations as discussed in greater detail in the section-by-section analyses set out in Part V below. The final rule expands the scope of appealable determinations to include most agency decisions that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature and level of supervisory oversight of a FICU. This includes, but is not limited to, a composite examination rating of 3, 4, or 5; a determination relating to the adequacy of loan loss reserve provisions; the classification of loans and other assets that are significant to the

FICU; a determination relating to compliance with Federal consumer financial law; and a determination relating to a waiver request or application for additional authority where independent appeals procedures have not been specified in other NCUA regulations.

The final rule also creates an optional intermediate level of review (at the FICU's option) by the Director of E&I, or his or her designee, before a FICU appeals an agency decision to the SRC. Review by the Director of E&I will be based entirely on written submissions provided by the appropriate program office and the petitioning FICU with no opportunity for an oral hearing. The Director of E&I will have an opportunity, however, to request additional information from the parties and may consult with them jointly or separately before rendering a decision. The Director of E&I may also solicit input from any other pertinent program office, including the Office of General Counsel, as necessary. A FICU that receives an adverse decision from the Director of E&I may appeal that decision to the SRC. Under no circumstances, however, may either party request reconsideration of a decision rendered by the Director of E&I.

Furthermore, the final rule restructures the SRC by creating a rotating pool of at least eight senior staff appointed by the NCUA Chairman from NCUA's central and regional offices who may be selected by the SRC Chairman to serve on a three-member panel to hear a particular appeal. The Secretary of the Board will serve as the permanent SRC Chairman and will also be eligible to serve as one of the three members on any particular panel. The Special Counsel to the General Counsel (Special Counsel), or any senior staff within the Office of General Counsel assigned such duties, will serve as a permanent

non-voting advisor to each three-member panel to consult on procedural and legal matters regarding the jurisdiction of the SRC. To avoid any real or apparent conflicts of interest, the SRC Chairman will not be permitted to select individuals for the program office that rendered the material supervisory determination that is the subject of the appeal to serve on the three-member panel hearing that appeal.

V. Section-by-Section Analysis

Part 746 – Appeals Procedures

Subpart A – Procedures for Appealing Material Supervisory Determinations

The proposed rule, along with a companion rule on agency appeals, created a comprehensive set of appeals procedures to the appeal of most agency decisions to the Board. This comprehensive set of procedures was to be codified in a new part of the NCUA's regulations, part 746, with the SRC appeals process codified in subpart A to part 746 and the appeals procedures codified in subpart B to part 746. The Board received one substantive comment on this aspect of the proposed rule. The commenter requested that the Board codify the SRC appeals process in part 741, NCUA's share insurance requirements rule, to make the procedures more conspicuous for federally insured, State-chartered credit unions (FISCUs). While the commenter's argument is not without merit, the Board believes that codifying these procedures in their own part of the NCUA's regulations gives all credit unions, regardless of charter, greater notice of the procedures

for appealing most agency decisions. Accordingly, the Board is codifying the SRC appeals process as subpart A to part 746 as proposed.

Section 746.101 Authority, Purpose, and Scope

Proposed § 746.101 set out the authority for issuing the regulation as well as the regulation's purpose and scope. Paragraph (a) provided that the rule was being issued pursuant to section 309 of the Riegle Act¹⁶ and the Board's plenary regulatory authority to administer the FCU Act.¹⁷ Paragraph (b) noted that the purpose of the rule was to establish an expeditious review process for a FICU to appeal a material supervisory determination to an independent supervisory panel and, if applicable, to the Board. Finally, paragraph (c) clarified that the rule only applied to the appeal of a material supervisory determination made by NCUA staff. The proposed rule did not apply to a decision to appoint a conservator or liquidating agent for a FICU, to order a FICU to take prompt corrective action, or to enforcement-related actions and decisions. The Board did not receive any comments on proposed § 746.101 and is finalizing this provision as proposed with minor wording changes for clarification.

Section 746.102 Definitions

Proposed § 746.102 set out definitions for certain terms relevant to the proposed rule. The Board received one substantive comment on this aspect of the proposed rule

¹⁶ 12 U.S.C. 4806(a).

¹⁷ 12 U.S.C. 1766(a), 1789(a)(11).

requesting that the Board add a definition of “senior staff” to clarify which individuals are eligible to be appointed by the NCUA Chairman to serve as members of the rotating pool of individuals able to be selected by the SRC Chairman to hear a particular appeal. The commenter expressed concerns that many of the procedural safeguards in the proposed rule designed to prevent conflicts of interest might actually result in NCUA staff with executive level knowledge and experience being ineligible to serve as part of the rotating pool. As a result, NCUA staff with the same level of knowledge and experience as the individuals making the initial material supervisory determination may be called upon to evaluate judgments and impressions of their peers which could create pressure to affirm that initial material supervisory determination.

The Board appreciates the commenter’s concerns and agrees that the SRC will function best if the most knowledgeable and experienced NCUA staff are reviewing appeals to the SRC. However, the Board does not believe that adding a definition of “senior staff” is either the most practical or effective solution for ensuring the competency and independence of members of the rotating pool. A definition of “senior staff” would necessarily need to be open-ended and vague, as opposed to being tied to particular titles or pay grades, to account for any operational changes at the NCUA, as well as to ensure that there is a sufficiently broad group of individuals from which the NCUA Chairman can select members of the rotating pool. As a result, the Board believes that any definition of “senior staff” would almost certainly lack the clarity that the commenter seeks. Therefore, the Board will not define “senior staff” in the final rule. The

determination of which individuals are considered “senior staff” eligible to be appointed to the rotating pool will rest solely within the discretion of the NCUA Chairman.

The Board did not receive any other substantive comments on proposed § 746.102 and is finalizing this provision as proposed with minor modifications. The Board is removing the definitions of “petitioner” and “respondent” to reflect the fact that a program office will no longer be eligible to appeal an adverse decision by the Director of E&I or the SRC. The Board is adopting this policy change in response to concerns raised by the commenters that are discussed in more detail below. The Board has replaced the words “petitioner” and “respondent” with “insured credit union” and “program office” where appropriate throughout the final rule.

Section 746.103 Material Supervisory Determinations

Proposed § 746.103 set out a general definition of “material supervisory determination” and provided a list of examples. The proposed rule defined “material supervisory determination” to mean a written decision by a program office that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature or level of supervisory oversight of a FICU. The Board intended this general definition to be broad, capturing most agency decisions where independent appeals procedures did not exist, and as consistent with the definitions adopted by the Federal banking agencies as possible taking into consideration any operational differences between those agencies and the NCUA. Commenters generally supported this aspect of the proposed rule,

highlighting the importance of significantly expanding the ability of FICUs to appeal agency decisions to the SRC and the Board. Accordingly, the Board is adopting the general definition of “material supervisory determination” set out in § 746.103 substantially as proposed with modifications for clarity.

The Board is modifying § 746.103(a) to clarify that the SRC appeals procedures do not apply to agency decisions that have been committed to the sole discretion of the appropriate program office director. While the Board seeks to provide FICUs with the greatest possible opportunity to seek agency review of material supervisory determinations, some agency decisions require significant expertise that is unique to a particular program office or must be made with such finality that the SRC appeals procedures would be inappropriate. Accordingly, the Board is revising the general definition of “material supervisory determination” in the final rule to read “a written decision by a program office (unless ineligible for appeal) that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature or level of supervisory oversight of a FICU.” In cases where an agency decision has been committed to the sole discretion of the program office, a FICU that receives an adverse decision could potentially seek judicial review of the agency decision under the Administrative Procedure Act (APA).¹⁸

The Board is also modifying § 746.103(a) to clarify that a decision by the reviewing authority (i.e., the appropriate program office director, the Director of E&I, the SRC, or the Board) to dismiss an appeal will be considered a “material supervisory

¹⁸ 5 U.S.C. 704 (permitting judicial review of a final agency action).

determination.” Allowing the reviewing authority to dismiss an appeal avoids unnecessary administrative burden on the NCUA caused by inconsequential disputes and reinforces the Board’s longstanding policy that supervisory disputes should be resolved at the program office level as often as possible. However, the Board also believes that it is important to counterbalance this ability of the reviewing authority to dismiss an appeal with the right of a FICU to appeal a wrongful dismissal. Accordingly, should the Director of E&I, the SRC, or the Board determine that dismissal was inappropriate under the circumstances, the reviewing authority will address appeal on its merits without referring the matter back to the original reviewing authority that dismissed the appeal.¹⁹ The Board is making a similar change to § 746.104(b) which addresses dismissal and withdrawal.

This clarification is particularly necessary to address cases where the reviewing authority dismisses an appeal because an agency decision is not a “material supervisory determination.” The threshold test for determining whether an agency decision is appealable to the SRC is whether it is a “material supervisory determination.” An agency decision is only a “material supervisory determination” if it has a significant impact on capital, earnings, operating flexibility, or the nature or level of supervisory oversight of a FICU. Terms like “significant” are difficult to define in the abstract but an agency

¹⁹ Unlike Federal courts of appeal, which review factual determinations by a Federal district court for clear error, the Director of E&I, the SRC, and the Board review the factual basis of an appeal *de novo*. Accordingly, while the Board encourages a FICU to resolve all supervisory disputes at the examiner or Regional Office level as often as possible, there is little merit to sending an appeal back to the reviewing authority that made the determination that an agency decision was not a “material supervisory determination.” See *e.g. Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (“We are also aware that we review the District Court’s findings only for ‘clear error.’ In applying this standard, we, like any reviewing court, will not reverse a lower court’s finding of fact simply because we ‘would have decided the case differently.’”).

decision is most likely to be “significant” if it has an actual effect in some direct and immediate way on the FICU’s capital, earnings, operating flexibility, or the nature or level of supervisory oversight of the FICU. An agency decision that requires the FICU to incur substantial costs would be the clearest example of a “material supervisory determination.” In contrast, an agency decision where the harm is more speculative, such as an impact on long-term growth strategies, would likely not be a “material supervisory determination.” In each case, it will be the responsibility of the reviewing authority to determine whether an agency decision meets this threshold test. If the agency decision does not, the reviewing authority may dismiss the appeal. Accordingly, the Board believes it is necessary to allow a FICU to appeal that agency decision to ensure accountability and enhance due process.

Examination Ratings

Proposed § 746.103(a)(1) listed a composite examination rating of 3, 4, or 5 as an example of a material supervisory determination. Proposed § 746.103(b)(1), however, excluded a composite examination rating of 1 or 2 because the Board did not believe that a composite examination rating of 2 would have a significant impact on the supervisory oversight of a FICU. Similarly, proposed § 746.103(b)(2) excluded component examination ratings unless such ratings had a significant adverse effect on the nature or level of supervisory oversight of a FICU. Several commenters objected to these aspects of the proposed rule, highlighting that the Federal banking agencies permit insured

depository institutions to appeal all composite and component examination ratings and urging the Board to adopt a similar approach.

However, the Board does not believe that adopting an approach that is entirely consistent with the Federal banking agencies is appropriate. The NCUA uses a credit union examination as a diagnostic tool to identify potential operational vulnerabilities and address regulatory compliance concerns that could impact the safety and soundness of a FICU. While a FICU's composite examination rating may change if an NCUA examiner identifies an emerging trend that increases a FICU's risk profile, a change in an examination rating does not, in and of itself, typically have a significant impact on a FICU until the FICU reaches a composite examination rating of 3, 4, or 5. Furthermore, a change in a component examination rating hardly impacts a FICU unless that particular component examination rating is connected with some specified regulatory relief initiative by the NCUA, such as the ability to participate in an extended examination cycle.²⁰

In contrast, the FDIC uses composite and component examination ratings issued by the respective Federal banking agencies (including the FDIC) as a basis for determining an insured depository institution's Federal deposit insurance premium.²¹ Under FDIC's risk-based assessment system, an insured depository institution's weighted average

²⁰ See e.g. Letter to Credit Unions 16-CU-12 (Dec. 2016) (announcing an extended examination cycle for certain FICUs with a composite examination rating of 1 or 2 with a corresponding management component rating of 1 or 2).

²¹ See 12 CFR 327.16. The term "insured depository institution" refers to a bank or savings association the deposits of which are insured by the FDIC under the Federal Deposit Insurance Act. See 12 U.S.C. 1813(c).

component examination rating is used along with other financial ratios and risk indicators to determine the initial base assessment rate.²² This initial base assessment rate is then used to determine an insured depository institution's quarterly Federal deposit insurance premium which can vary within an established range based on the institution's composite examination rating.²³ As a result of these complex formulas, any change in an insured depository institution's composite or component examination ratings could have a significant impact on the amount of its Federal deposit insurance premium.

Put differently, a change in a composite or component examination rating is not a "material supervisory determination" for a FICU until the FICU reaches a composite examination rating of 3, 4, or 5, or unless the particular component examination rating changes the nature or level of supervisory oversight of the FICU. Meanwhile, a change in a composite or component examination may be a "material supervisory determination" for an insured depository institution because it can lead to an increase in that institution's Federal deposit insurance premium. In light of this important distinction, the Board does not believe that absolute consistency with the Federal banking agencies is necessary to provide FICUs with enhanced due process. Accordingly, the Board adopts this aspect of § 746.103 as proposed.

Restitution Orders Pursuant to the Truth in Lending Act and Regulation Z

²² *Id.*

²³ See 12 CFR 327.10.

Proposed § 746.103(a)(4) listed a restitution order pursuant to the Truth in Lending Act (TILA)²⁴ and its implementing regulation, Regulation Z,²⁵ as an example of a material supervisory determination. By doing so, the Board intended to signal to FICUs that any determination by NCUA examiners or by OCFPA regarding a FICU's compliance with Federal consumer financial law,²⁶ as that term is defined in the Consumer Financial Protection Act of 2010,²⁷ would be appealable to the SRC under the proposed rule. However, the Board recognizes that by specifically discussing restitution orders under TILA and Regulation Z, the Board may have given the false impression that other determinations regarding other aspects of TILA and Regulation Z or other Federal consumer financial laws would not be appealable to the SRC and the Board. Accordingly, the Board is revising this aspect of proposed § 746.103 to clarify that all agency decisions regarding a FICU's compliance with Federal consumer financial law are appealable to the SRC and the Board.

Prompt Corrective Action

Proposed § 746.103(b)(5) excluded from the definition of material supervisory determination a directive imposing prompt corrective action under section 216 of the

²⁴ 15 U.S.C. 1601 *et seq.*

²⁵ 12 CFR part 1026.

²⁶ The term "Federal consumer financial law" means any provision of the Consumer Financial Protection Act, enumerated consumer laws, or any regulation issued by the Consumer Financial Protection Bureau. *See* 12 U.S.C. 5481(14). The term "enumerated consumer laws" refer to several Federal consumer protections statutes including the Consumer Leasing Act of 1976, the Electronic Fund Transfer Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the Truth in Lending Act. *See* 12 U.S.C. 5481(12). The NCUA has exclusive supervision and enforcement authority with respect to the Consumer Financial Protection Bureau for compliance with Federal consumer financial law for FICUs with assets of \$10 billion or less. *See* 12 U.S.C. 5516.

²⁷ Pub. L. 111-203, tit. X, 124 Stat. 1375, 1955 (July 21, 2010).

FCU Act.²⁸ One commenter objected to this exclusion, arguing that the significance and potential impact of such a directive warrants further review by the SRC to provide FICUs with enhanced due process. The Board disagrees. The current procedures for issuing a directive imposing prompt corrective action provide FICUs with significant procedural safeguards. A FICU may present written arguments against a proposed directive directly to the Board and request that the Board modify or rescind an existing directive at any time due to changed circumstances.²⁹ Such a request is automatically granted if it remains outstanding for more than 60 calendar days after receipt by the Board.³⁰ A FICU may also request a written recommendation from the NCUA Ombudsman, an impartial agency official who does not report directly or indirectly to any program office involved with the issuance of the directive, regarding a proposed directive or a pending request for modification or rescission of an existing directive.³¹ The Board believes that these procedural safeguards provide FICUs with even more due process than the SRC appeals procedures.

The commenter also argued that allowing a FICU to appeal a directive imposing prompt corrective action to the SRC would be consistent with the approach adopted by the FDIC. However, proposed § 746.103(b)(5) is nearly identical to an exclusion adopted by the FDIC in its “Guidelines for Appeal of Material Supervisory Determinations,” (Guidelines) which establishes the FDIC’s Supervisory Appeals Review Committee (SARC) and sets out procedures for insured depository institutions to appeal material

²⁸ 12 U.S.C. 1790d.

²⁹ 12 CFR 747.2002(a)(1) and (f).

³⁰ 12 CFR 747.2002(f).

³¹ 12 CFR 747.2002(g).

supervisory determinations by FDIC staff.”³² While the FDIC did adopt “catch all” language in its Guidelines that allows an insured depository institution to appeal an agency decision that may impact the institution’s “capital category for prompt corrective action purposes,” that language does not independently authorize an insured depository institution to appeal a directive imposing prompt corrective action. Rather, it allows an insured depository institution to appeal an underlying agency decision that could impact net worth,³³ which may cause the institution to fall within a lower capital classification.³⁴ To avoid this kind of confusion, the Board specifically omitted this language from its definition of “material supervisory determination” in the proposed rule.

Because the Board already provides significant procedural safeguards for FICUs prior to issuing a directive imposing prompt corrective action that are more expeditious than the SRC appeals process and consistent with the practices of the Federal banking agencies, the Board does not believe that subjecting these agency decisions to the SRC appeals process would be appropriate. Accordingly, the Board is adopting § 746.103(b)(5) as proposed.

Enforcement Matters

³² See 60 FR 15923 (Mar. 28, 1995) (establishing the FDIC’s intra-agency appeals procedures under the Riegle Act). The FDIC recently adopted amended Guidelines on July 18, 2017 following publication of the proposed rule. See 82 FR 34522 (July 25, 2017).

³³ “Net worth” for prompt corrective action purposes is defined principally as a FICU’s retained earnings balance at quarter-end as determined under U.S. Generally Accepted Accounting Principles (U.S. GAAP). See 12 CFR 702.2(f).

³⁴ See 12 CFR part 702, subpart A (net worth classification).

Proposed § 746.103(b)(6) excluded from the definition of “material supervisory determination” all decisions to initiate formal enforcement actions. One commenter objected to this exclusion noting that the FDIC recently revised its Guidelines to allow insured depository institutions to appeal a decision regarding the institution’s level of compliance with a formal enforcement action. The commenter argued that the Board should similarly expand the definition of material supervisory determination for consistency with the FDIC. The Board disagrees. Compliance with a formal enforcement action is monitored by high-level NCUA staff within a program office in consultation with staff attorneys within the Office of General Counsel. Accordingly, the Board believes that FICUs already have significant procedural and structural safeguards with respect to formal enforcement matters such that subjecting these decisions to the SRC appeals process would be unnecessarily duplicative.

As the Board noted in the preamble to the proposed rule, once a formal enforcement action is initiated, the SRC appeals process is suspended regardless of how far along the FICU may be in that process. Once the formal enforcement action is resolved, the FICU may continue to seek redress through the SRC appeals process to the extent that any matters remain outstanding and were not addressed as part of the formal enforcement action. To avoid confusion, the Board is adopting a modification in the final rule to clarify when a formal enforcement action commences. A formal enforcement action begins when the NCUA provides written notice to the FICU of a recommended or proposed formal enforcement action under section 206 of the FCU Act³⁵. A FICU will be notified in writing that the NCUA has recommended or proposed a formal enforcement

³⁵ 12 U.S.C. 1786.

action. Other types of correspondence from the NCUA, such as letters requesting additional information or referencing a violation of law without an express statement that the NCUA has recommended or proposed formal enforcement action are not considered to constitute notice of a recommended or proposed formal enforcement action for purposes of the SRC appeals process.

Other Examples and Exclusions

Proposed § 746.103 included several other examples of and exclusions from the general definition of “material supervisory determination.” The examples and exclusions included matters specifically addressed by the Riegle Act and preliminary matters such as the scope and timing of supervisory contacts. The Board did not receive substantive comments on these examples and exclusions. Accordingly, the Board is adopting the examples set out in proposed § 746.103(a)(2), (3), and (5) and the exclusions set out in proposed § 746.103(b)(3), (4), (7), (8), (9), and (10) as proposed.

Section 746.104 General Provisions

Proposed § 746.104 set out general provisions to be applied by each reviewing authority during the SRC appeals process. The proposed rule established an explicit standard of review to ensure that the NCUA’s policies and procedures were applied fairly and consistently. The proposed rule also addressed the effect of an appeal on the commencement of enforcement actions, applications for additional authority, and waiver

requests. The Board received several comments on various aspects of proposed § 746.104. As discussed in more detail below, the Board is adopting § 746.104 as proposed with minor modifications for clarity.

Standard of Review

Proposed § 746.104(a) established a *de novo* standard of review for each stage of the SRC appeals process. The standard of review required each reviewing authority to make an independent decision regarding whether the material supervisory determination was correct and not just reasonable. If the appropriate reviewing authority determined that the material supervisory determination was incorrect, they would render a corrected determination. Commenters generally supported this explicit standard of review for each stage of the SRC appeals process. However, commenters requested that the Board modify § 746.104(a) to explicitly state that a decision by a FICU to forgo optional review by the Director of E&I would not prejudice the FICU in an appeal to the SRC or the Board. While the Board believes that the retaliation provision in proposed § 746.112 was sufficient to address this issue, the Board understands the commenters' concerns and is adopting a modification to § 746.104(a) in the final rule to clarify that a decision to bypass optional review by the Director of E&I may not be used by the SRC or the Board as a basis to deny an otherwise proper appeal.

Commenters also requested that the Board clarify what constitutes the administrative record to be reviewed by the relevant reviewing authority at each stage of the SRC

appeals process. While the Board believes that several sections of the proposed rule addressed this issue, such as proposed § 746.106(c), which outlined the basis for review of a material supervisory determination by the Director of E&I, the Board recognizes that a more general statement regarding the administrative record may be necessary to provide FICUs with greater clarity and enhanced due process. Accordingly, the Board is adopting a new paragraph in the final rule, § 746.104(f), to explicitly describe what information is part of the administrative record to be reviewed by the reviewing authority at each stage of the SRC appeals process. For most appeals, the administrative record consists entirely of written submissions by the petitioning FICU and the appropriate program office. In cases involving a federally insured, State-chartered credit union (FISCU), the administrative record may also include written submissions by the appropriate State supervisory authority (SSA). A decision by an intermediate reviewing authority, such as the Director of E&I or the SRC, is also part of the administrative record. Furthermore, the administrative record includes a transcript of any oral hearing before the SRC or the Board.

One commenter specifically requested that the Board require that any consultations between a reviewing authority and another party must take the form of written submissions that would become part of the administrative record. The proposed rule explicitly allowed the Director of E&I to consult with the FICU, the program office, or any other party prior to rendering a decision. The consultation process was meant to allow the Director of E&I to get clarification on a written submission or seek advice from a program office, such as the Office of General Counsel, on a technical or legal matter

outside of the Director of E&I's area of expertise. In fact, the Board anticipates that much of the consultation process will involve outreach to staff within the Office of General Counsel to seek legal opinions on various regulatory matters which may be subject to one or more evidentiary privileges. Accordingly, the Board does not believe that it is appropriate to include such communications as part of the administrative record.

Dismissal and Withdrawal

Proposed § 746.104(b) set out the conditions under which a reviewing authority could dismiss the appeal of a material supervisory determination. Under the proposed rule, a reviewing authority could dismiss an appeal if it was not timely filed, if the basis for the appeal was not discernable, if the petitioner asked to withdraw the request in writing, or for reasons deemed appropriate by the reviewing authority, including, for example, if the petitioner acted in bad faith by knowingly withholding evidence from the appropriate reviewing authority. The Board cautioned that FICUs are encouraged to make good faith efforts to resolve supervisory issues at the most direct level possible, starting with their examinations or program office staff, and as efficiently as possible. Accordingly, the Board stated that if a FICU engaged in bad faith by knowingly withholding evidence from an examiner, the program office, the Director of E&I, the SRC, or the Board, withholding that evidence would result in dismissal of the appeal. The Board did not receive substantive comments on this aspect of the proposed rule and is adopting § 746.104(b) substantially as proposed with one clarification to address the appeal of a

dismissal for failure to state a material supervisory determination discussed in the section analysis of § 746.103 above.

Discovery

Proposed § 746.104(c) prohibited discovery or any similar process in connection with an appeal. Instead, each appeal was based entirely on written submissions to the reviewing authority and, where permitted, oral presentations to the SRC and the Board. The Board did not receive substantive comments on this aspect of the proposed rule and is, therefore,. Accordingly, the Board is adopting § 746.104(c) as proposed.

Enforcement Matters

Proposed § 746.104(d) clarified that no provision of the proposed rule was intended to affect, delay, or impede any formal or informal supervisory or enforcement action in progress or affect the NCUA's authority to take any supervisory or enforcement action against a FICU. The purpose of this provision was to ensure that appeals to the SRC and enforcement matters remained separate processes governed by different rules. The Board received one comment on this specific aspect of the proposed rule. The commenter requested that the Board modify § 746.104(d) to allow a FICU to request a stay of a supervisory or enforcement action during the pendency of an appeal consistent with recently adopted amendments to the FDIC's Guidelines. The Board has carefully reviewed the recent amendments to the FDIC's Guidelines and believes that proposed §

746.104(d) is consistent with the overall approach adopted by the FDIC. While the FDIC, in response to a public comment, noted that the Guidelines do not prohibit an insured depository institution from requesting a stay from a Division Director, the Guidelines make abundantly clear that the FDIC does not generally stay supervisory actions during the pendency of an appeal.³⁶ Similarly, while the proposed rule does not explicitly prohibit a FICU from requesting a stay of a supervisory or enforcement action during the pendency of an appeal, such a stay would be reluctantly countenanced and rarely granted. Accordingly, the Board adopts § 746.104(d) as proposed.

Additional Authority and Waiver Requests During the Pendency of an Appeal

Proposed § 746.104(e) required a program office to delay action on a waiver request or an application for additional authority that could be affected by the outcome of an appeal unless the FICU specifically requested that the waiver request or application for additional authority be considered notwithstanding the appeal. The proposed rule suspended any deadline for a program office to make a determination on a waiver request or application for additional authority set out in any part of the NCUA's regulations until the FICU exhausted its administrative remedies under the SRC appeals process or was no longer eligible to pursue an appeal. The purpose of this provision was to avoid situations where a FICU receives an adverse determination on a waiver request or an application for additional authority based on a material supervisory determination, only to have the material supervisory determination subsequently reversed by the SRC. It also prevented a waiver request or an application for additional authority from being automatically

³⁶ 82 FR 34522, 34526 (July 25, 2017).

denied by operation of other parts of the NCUA's regulations. The Board did not receive comments on § 746.104(e) and is adopting this provision as proposed.

Section 746.105 Procedures for Reconsideration from the Appropriate Program Office

Proposed § 746.105 set out procedures for a FICU to request reconsideration from the appropriate program office. Prior to requesting review by the Director of E&I or filing an appeal with the SRC, the proposed rule required a FICU to make a written request for reconsideration from the appropriate program office within 30 calendar days after receiving an examination report or other written communication containing a material supervisory determination. The request for reconsideration needed to include a statement of the facts on which the request for reconsideration was based, a statement of the basis for the material supervisory determination and the alleged error in the determination, and any other evidence relied upon by the FICU that was not previously provided to the appropriate program office making the material supervisory determination.

Under the proposed rule, the appropriate program office was required to reach a decision on a request for reconsideration within 30 calendar days after receiving the request. If a written decision was not issued within 30 calendar days after receiving a request for reconsideration, the request was automatically deemed to have been denied. Any subsequent request for reconsideration was to be treated as a request for review by the Director of E&I or an appeal to the SRC as determined by the Secretary of the Board after consultation with the FICU. As the Board explained in the preamble to the

proposed rule, these procedures largely follow NCUA's long standing policy of requiring a FICU to first request reconsideration from the program office prior to filing an appeal with the SRC. This is to encourage a program office and a FICU to resolve disputes informally and as expeditiously as possible.³⁷

Several commenters requested that the Board remove the requirement that a FICU seek reconsideration from the appropriate program office prior to a request for review by the Director of E&I or an appeal to the SRC. Alternatively, some commenters requested that the Board permit a FICU to appeal time-sensitive matters directly to the SRC. As the Board first explained in IRPS 94-2,³⁸ it is NCUA policy to require a FICU to attempt to resolve supervisory disputes with the program office before invoking the jurisdiction of the SRC. Review by the SRC is disruptive to the normal organizational structure of NCUA and should only be reserved for those issues that cannot be resolved in good faith between a program office and the FICU. Requiring a FICU to request reconsideration as a prerequisite before obtaining further review under the SRC appeals process preserves the ordinary relationship between FICUs and program offices and ensures that only serious disputes are elevated to the SRC. Accordingly, the Board is adopting § 746.105 as proposed.

Section 746.106 Procedures for Requesting Review by the Director of the Office of Examination and Insurance

³⁷ 82 FR 26391, 26395 (June 7, 2017).

³⁸ 59 FR 59437 (Nov. 17, 1994).

Proposed § 746.106 set out procedures for requesting review by the Director of E&I, or his or her designee. Prior to filing an appeal with the SRC, but after receiving a written decision by the appropriate program office in response to a request for reconsideration, the proposed rule allowed a FICU to make a written request for review by the Director of E&I of the program office's material supervisory determination. The proposed rule required such a request to be made in writing within 30 calendar days after receiving a final decision on reconsideration by the appropriate program office. The request for review needed to include a statement that the FICU is requesting review by the Director of E&I, a statement of the facts on which the request for review was based, a statement of the basis for the material supervisory determination and the alleged error in the determination, any evidence relied upon by the FICU that was not previously provided to the program office making the material supervisory determination, and a certification from the FICU's board of directors authorizing the request for review to be filed.

Under the proposed rule, review of a material supervisory determination by the Director of E&I was based on written submissions provided with the initial documents requesting review. The Director of E&I could request additional information from any party within 15 calendar days after the Secretary of the Board received the request for review and the relevant party had 15 calendar days to submit the requested information. The Director of E&I also had the authority to consult with the FICU and the program office jointly or separately, and with any other party prior to issuing a written decision. The proposed rule required the Director of E&I to issue a written decision within 30 calendar days after the Secretary of the Board receives the request for review. However, the deadline would

be extended by the time period during which the Director of E&I gathered additional information from the FICU or the program office. If a written decision was not issued within 30 calendar days, or as extended by any additional time during which information was being gathered, the request for review was automatically deemed to have been denied. Any subsequent request for review was to be treated as an appeal to the SRC.

The Board received one substantive comment regarding the ability of the Director of E&I to consult with any party, including the FICU or the program office, prior to issuing a written decision. The commenter requested that these consultations take the form of written submissions that would become part of the administrative record. As the Board discussed above in the section analysis of § 746.104, the Board does not believe that consultations should be part of the administrative record. The Board sees little merit in including these kinds of communications as part of the administrative record because they will already be reflected in the initial submissions of the FICU and the program office and the final decision of the Director of E&I. Accordingly, the Board is adopting § 746.106 as proposed.

Section 746.107 Procedures for Appealing to the Supervisory Review Committee

Proposed § 746.107 set out procedures for appealing a material supervisory determination to the SRC. The proposed rule required a FICU to file an appeal within 30 calendar days after receiving a written decision by the appropriate program office on reconsideration or, if the FICU requested review by the Director of E&I, within 30 calendar days after a final

decision made by the Director of E&I, or his or her designee. The appeal documents submitted to the SRC needed to include a statement that the FICU was filing an appeal with the SRC, a statement of the facts on which the appeal is based, a statement of the basis for the material supervisory determination to which the FICU objected and the alleged error in the determination, any other evidence relied upon by the FICU, and a certification that the FICU's board of directors authorized the appeal to be filed.

The conduct of the appeal was primarily by oral hearing before the SRC at NCUA headquarters in Alexandria, Virginia, except where the FICU requested that an appeal be based entirely on the written record. At the oral hearing, the FICU and the appropriate program office could introduce written evidence or witness testimony during each side's oral presentation. The SRC was also permitted to ask questions of any individual, including witnesses, appearing before it. Prior to the oral hearing, both the FICU and the program office would submit notices of appearance identifying no more than two individuals who would be representing them in the oral hearing, including counsel. However, either party could request permission from the SRC to allow additional individuals to appear before the SRC. The SRC was required to reach a decision within 30 calendar days after an oral presentation or, if the appeal was based entirely on the written record, within 30 calendar days from the date of receipt of the appeal. If a written decision was not issued within 30 calendar days, the appeal was automatically deemed to have been denied.

The proposed rule also required the SRC to publish its decisions on the NCUA's website with appropriate redactions to protect confidential or exempt information. In cases where redaction was insufficient to prevent improper disclosure, published decisions could be presented in summary form. If an appeal involved the interpretation of material supervisory policy or generally accepted accounting principles, the SRC was required to notify the Director of E&I and solicit input from E&I prior to rendering a decision. Likewise, if an appeal involved an interpretation of NCUA's regulations, the FCU Act, or any other law applicable to FICUs, the SRC was required to notify the General Counsel and solicit input from the Office of General Counsel. Finally, the proposed rule authorized the SRC Chairman to issue rules governing the operations of the SRC, to order that material be kept confidential, or to consolidate appeals that presented similar issues of law or fact. The Board is adopting § 746.107 substantially as proposed with minor modifications discussed below.

The Board received four substantive comments on this aspect of the proposed rule. One commenter requested that the Board remove the ability of the program office to appeal a decision by the Director of E&I to the SRC. The commenter argued that it would be inappropriate to allow a program office to challenge a determination by the central head of examination policy and that only a FICU should have the ability to appeal a decision by the Director of E&I. The Board agrees with the commenter and has accordingly removed the ability of the program office to appeal a decision by the Director of E&I to the SRC in the final rule. For the same reasons, the Board has also removed the ability of

the program office to appeal an adverse decision by the SRC to the Board under § 746.108.

Another commenter requested that the Board include, as part of the publication of a written decision by the SRC, a synopsis of each appeal and a summary of the final result on NCUA's website. The Board agrees with the commenter and has accordingly added language in the final rule indicating that a synopsis of each appeal and a summary of the final result will be published on NCUA's website along with the written decision by the SRC with appropriate redactions. The Board believes that publishing a synopsis and the final result will make it easier for a FICU to research previous SRC decisions which enhances the precedential value of each SRC decision and encourages consistent results throughout the SRC appeals process. For the same reasons, the Board will also publish a synopsis of each appeal and a summary of the final result for appeals from the SRC to the Board under § 746.110.

A third commenter requested that the Board expand the publication of written decisions by the SRC to include publication of appeals that were rejected without being considered by the SRC. The commenter argued that allowing stakeholders to determine the number of petitions granted or rejected enhances the ability of stakeholders to evaluate the efficacy of the SRC appeals process. However, the Board does not believe that publishing rejected appeals will necessarily achieve either of those goals. The Board anticipates that a large majority of rejected appeals will involve a FICU failing to file a timely appeal. The Board sees little merit in publishing these determinations on NCUA's

website because those determinations are of little precedential value to FICUs and give little, if any, insight into the SRC appeals process. Accordingly, neither the SRC nor the Board will not publish rejected appeals.

Finally, a commenter objected to the ability of the SRC Chairman to issue supplemental rules governing the operations of the SRC. The commenter argued that while the SRC Chairman may use this authority to ensure the SRC appeals process operates efficiently, the broad authority to adopt supplemental rules invites potential misuse of that authority. The Board disagrees. The substantive appellate rights of each FICU are set out in the final rule. The SRC Chairman may not adopt any supplemental rules that would limit or alter those rights in any way. For example, the SRC Chairman could not adopt a supplemental rule that would conflict with the requirement in § 746.107(b) to submit certain information as part of an appeal to the SRC. Instead, the SRC Chairman may only adopt rules that further define, clarify, or simplify the SRC appeals process. For example, the SRC Chairman could adopt a supplemental rule to allow a FICU to make an oral presentation through video conference rather than in person at NCUA headquarters in Alexandria, Virginia. As a result, the Board sees little opportunity for the SRC Chairman to misuse the authority to adopt supplemental rules and declines to limit the authority of the SRC Chairman to issue such rules. Should a FICU believe that a particular rule adopted by the SRC Chairman is an inappropriate exercise of the SRC Chairman's authority, the FICU may appeal that rule to the Board as part of its appeal of the SRC decision.

Section 746.108 Composition of the Supervisory Review Committee

Proposed § 746.108 set out rules governing the formation and composition of the SRC. Under the proposed rule, the NCUA Chairman would appoint not less than eight individuals from among the NCUA's central and regional offices to serve along with the SRC Chairman as a rotating pool from which individual members could be selected by the SRC Chairman to serve as the three-member SRC for a particular appeal. Each member of the rotating pool, with the exception of the SRC Chairman, was to serve a one year term with eligibility to be reappointed by the NCUA Chairman for additional terms. Certain individuals, however, such as the General Counsel and Executive Director, were ineligible to serve as members of the rotating pool and, accordingly, could not be selected by the SRC Chairman to serve on the SRC for any particular appeal.

The Secretary of the Board was to serve as permanent SRC Chairman and the Special Counsel was to serve as a permanent non-voting member of each SRC to offer advice to the SRC on procedural and legal matters. When selecting SRC members to hear a particular appeal, the SRC Chairman was required to consider any real or apparent conflicts of interest that could impact the SRC member's objectivity as well as that individual's experience with the subject matter of the appeal. Members of the program office that rendered the material supervisory determination that was the subject of the appeal were ineligible to serve as SRC members for that appeal. Likewise, E&I staff were ineligible to serve as SRC members for appeals where the FICU appealed a decision by the Director of E&I. Commenters generally favored this aspect of the proposed rule

but raised some concerns and offered suggested modifications discussed below. With the exception of a minor modification to grant the NCUA additional flexibility and the increase of the term limits for members of the rotating pool, the Board is adopting § 746.108 as proposed.

Formation and Composition of the Committee Pool

Proposed § 746.108(a) established a rotating pool of at least eight senior staff appointed by the NCUA Chairman from NCUA's central and regional offices who may be selected by the SRC Chairman to serve on a three-member panel to hear a particular appeal. The Board received several comments on this aspect of the proposed rule. One commenter requested that the Board include a representative from an SSA as part of the rotating pool similar to the representative from the State Liaison Committee who serves on the Federal Financial Institutions Examination Council (FFIEC).³⁹ Another commenter requested that the Board allow senior credit union executives to serve as part of the rotating pool similar to establishing a jury of credit union peers to judge appeals of material supervisory determinations. The Board appreciates the commenters' suggestions but believes that review by senior NCUA staff who are not involved in the material supervisory determination at issue is more consistent with the Riegle Act, which requires the Board to establish an independent *intra-agency* appellate process.

The Board is adopting one modification to proposed § 746.108(a), however, to address the closure and consolidation of various program offices to avoid the need for future

³⁹ 12 U.S.C. 3303(a)(6), 3306.

technical corrections to the SRC appeals rule. The proposed rule specifically listed several central offices from which the NCUA Chairman could select senior staff to serve on the rotating pool. However, on July 21, 2017, the Board announced a major restructuring initiative including the consolidation of two Regional Offices and the creation of the Office of Credit Union Resources and Expansion which could eliminate at least one central office listed in the proposed rule. Accordingly, the Board is modifying § 746.108(a) in the final rule to eliminate any reference to specific central offices. Instead, the regulatory text will refer, generally, to senior staff in the central and regional offices to allow for additional agency flexibility.

Term of Office for Members of the Committee Pool

Proposed § 746.108(b) limited each member of the rotating pool to a one year term with the option of being reappointed by the NCUA Chairman for additional terms. This was to ensure greater accountability among members of the rotating pool. However, one commenter expressed concerns that such an approach could lead to a lack of consistency in SRC decisions and requested that the Board modify this provision to establish permanent members of the rotating pool with the ability to appoint alternatives in the event of a conflict of interest. Another commenter requested that the Board adopt a minimum five year term for members of the rotating pool. The Board is mindful of commenters' concerns regarding the need to retain experienced senior staff as part of the rotating pool to ensure greater consistency in SRC decisions. Accordingly, the Board is

adjusting the term limit in § 746.108(b) to a two-year term with the option of reappointment by the NCUA Chairman after the expiration of the two-year term.

Selection Criteria

Proposed § 746.108(d) required the SRC Chairman when selecting members from the rotating pool to serve as the SRC for a particular appeal to consider any real or apparent conflicts of interest that may impact the objectivity of the member as well as the individual's experience with the subject matter of the appeal. One commenter requested that the Board also include language requiring the SRC Chairman to also consider any perceived conflict of interest, in addition to a real or apparent conflict of interest, in selecting members of the rotating pool to hear a particular appeal. Functionally, this would allow a FICU to veto the selection of a member of the SRC panel that the FICU subjectively feels cannot render an impartial decision. While the Board seeks to adopt a process that is transparent and provides FICUs enhanced due process, adopting such a subjective disqualification standard would unnecessarily complicate the SRC appeals process by opening every SRC decision to challenge from a FICU that subjectively felt that a particular member of the SRC panel was biased against the FICU regardless of any objective evidence to indicate a real or potential conflict of interest. Accordingly, the Board is adopting § 746.108(d) as proposed.

Section 746.109 Procedures for Appealing to the NCUA Board

Proposed § 746.109 set out procedures for appealing an adverse decision by the SRC to the Board. The proposed rule required a FICU or program office to file an appeal within 30 calendar days after receiving an adverse decision from the SRC. Under the proposed rule, an appeal to the Board was not an automatic right. Instead, the proposed rule required at least one Board Member to agree to hear an appeal within 20 calendar days of receiving a request for an appeal to the Board. If at least one Board Member did not agree to hear an appeal within 20 calendar days, the request for an appeal was automatically deemed to have been denied. If a FICU or program office failed to file an appeal within 30 calendar days after receiving an adverse decision from the SRC, the FICU was deemed to have waived all claims pertaining the subject matter of the appeal. Consistent with IRPS 12-1, an adverse decision by the SRC on the denial of a TAG reimbursement was not reviewable by the Board.

The appeal documents submitted to the Board needed to include a statement of the facts on which the appeal was based, a statement of the basis for the material supervisory determination to which the FICU or program office objected and the alleged error in the determination, and (for FICUs) a certification that the FICU's board of directors authorized the appeal to be filed with the Board. For a FICU or program office requesting an oral hearing, the appeal documents also needed to include a separate written document requesting an oral hearing and demonstrating good cause why an appeal could not be presented adequately in writing. A FICU or program office could amend or supplement its appeal in writing within 15 calendar days from the date the Secretary of the Board received the appeal. If the FICU amended or supplemented its

appeal, the program office was permitted to file responsive materials within 15 calendar days from the date the Secretary of the Board received the amended or supplemental information.

The Board received one substantive comment regarding this aspect of the proposed rule. The commenter argued that a FICU should be allowed to appeal all adverse decisions from the SRC to the Board as a matter of right rather than at the discretion of one Board Member. The commenter reasoned that requiring the Board to hear all appeals would serve an important agency goal of alerting the Board to emerging trends in supervisory policy.⁴⁰ The Board disagrees. As the Board stated in the preamble to the proposed rule, the purpose of this provision is to reserve Board review only for those cases involving significant issues of supervisory policy that cannot be addressed at a lower appellate level or that may require further Board action such a rulemaking to clarify an ambiguity in one of the NCUA's regulations.⁴¹ For all other supervisory issues, the Director of E&I, the central office responsible for supervisory policy, is in the best position to respond to emerging trends through the issuance of guidance documents. Accordingly, the Board is adopting § 746.109 as proposed.

Section 746.110 Administration of the Appeal

⁴⁰ The commenter also suggested that the Board does not have the authority to delegate the ability to render a final agency decision to a subordinate official. It is a settled principle of Federal administrative law that a Federal agency has the authority to subdelegate responsibilities to a subordinate official absent affirmative evidence of a contrary Congressional intent. *See U.S. Telecom. Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) (citing *United States v. Giordano*, 416 U.S. 505 (1974)).

⁴¹ 82 FR 26391, 26397 (June 7, 2017).

Proposed § 746.110 set out procedures for appealing an adverse decision from the SRC to the Board based solely on the written record. Under the proposed rule, the Board or the Special Counsel could request additional information to be provided in writing from either party within 15 calendar days after: (1) either the FICU or the program office filed an appeal with the Secretary of the Board; (2) either the FICU or the program office filed an amendment or supplemental information; or (3) either the FICU or the program office filed responsive materials, whichever was later. The Board was required to reach a decision within 90 calendar days from the date of receipt of the appeal. If a written decision was not issued within 90 calendar days, the appeal was automatically deemed to have been denied. The proposed rule also required the Board to publish its decisions on the NCUA's website with appropriate redactions to protect confidential or exempt information. In cases where redaction was insufficient to prevent improper disclosure, published decisions could be presented in summary form. The Board did not receive substantive comments on this aspect of the proposed rule and is adopting § 746.110 with a slight modification to the provision regarding publication of decisions as discussed in the section analysis of § 746.107.

Section 746.111 Oral Hearing

Proposed § 746.111 set out procedures for appealing an adverse decision from the SRC to the Board through an oral hearing. Under the proposed rule, a petitioner was required to request an oral hearing before the Board as part of the initial appeal documents submitted in accordance with § 746.109. The proposed rule required the request for an oral hearing

to take the form of a separate written document titled “Request for Oral Hearing” and show good cause why the appeal could not be presented adequately in writing. Similar to a decision to hear an appeal, the proposed rule required at least one Board Member to approve an oral hearing within 20 days after receiving the request for an oral hearing and direct the Secretary of the Board to serve notice of the Board’s determination in writing to both the FICU and the program office. In the event that a request for an oral hearing was denied, the Board could review an appeal based entirely on the written record provided that at least one Board Member agreed to hear the appeal.

The proposed rule required the Secretary of the Board to notify the parties of the date and time for the oral hearing making sure to provide reasonable lead time and scheduling accommodations. In most cases the oral hearing was to be held at NCUA headquarters in Alexandria, Virginia. However, the proposed rule allowed the NCUA Chairman to permit an oral hearing to be conducted through teleconference or video conference in his or her sole discretion. The parties were required to submit a notice of appearance identifying the individuals who would be representing them in the oral hearing with each party designating no more than two individuals without the prior consent of the NCUA Chairman. The oral hearing was to consist entirely of oral presentations. The proposed rule expressly prohibited the introduction of written evidence or witness testimony at the oral hearing. The proposed rule also required the oral hearing to be on the record and transcribed by a stenographer, who was to prepare a transcript of the proceedings. Finally, the proposed rule required the Board to maintain the confidentiality

of any information or materials submitted in the course of the proceedings subject to applicable Federal disclosure laws.

The Board received one comment on this specific aspect of the proposed rule. The commenter raised concerns regarding the limitation on the introduction of written evidence or witness testimony at the oral hearing. The commenter argued that an oral presentation cannot provide the same level of detail as a written brief on the merits of a particular appeal and, therefore, the Board should permit the introduction of written evidence at the oral hearing. Furthermore, the commenter argued that the Board should permit witness testimony, where appropriate, to accommodate circumstances where an expert may have special knowledge that could assist the Board with a particular appeal. The commenter's arguments are misplaced. The proposed rule did not prohibit the submission of a written brief on the merits or expert testimony. Instead, the proposed rule simply required a written brief or expert testimony to be submitted as part of the initial appeal documents provided to the Secretary of the Board in accordance with § 746.109. The purpose of the prohibition on submitting written evidence or witness testimony at the oral hearing was to avoid conducting a full administrative trial in front of the Board. Rather, the Board was to serve as an appellate body hearing oral arguments and deciding a case on the administrative record and the written submissions of the parties, which could include written briefs and expert testimony presented before the oral hearing.

The Board is not convinced that a full administrative trial, including the submission of written evidence and witness testimony, is necessary to provide FICUs with enhanced due process. At various stages of the SRC appeals process, a FICU will have the opportunity to provide the appropriate reviewing authority with written and oral evidence which may include written briefs or expert testimony. This information should already be part of the administrative record presented to the Board on appeal and it would be unnecessarily duplicative to allow the reintroduction of this kind of evidence at an oral hearing. The Board has reserved ample authority, either on its own initiative or through the Special Counsel, to request additional information from an expert witness or to request supplemental briefings from either party. Furthermore, allowing a full administrative trial would frustrate the overarching policy goal of the SRC appeals process to allow a FICU with an expeditious and fair method for appealing material supervisory determinations while also encouraging the FICU to work out most disputes at the examiner or program office-level. Accordingly, the Board is adopting § 746.111 as proposed.

Section 746.112 Retaliation Prohibited

Proposed § 746.112 allowed a FICU to file a complaint with the NCUA Office of Inspector General regarding retaliation, abuse, or retribution by NCUA staff in connection with an appeal to the SRC. The proposed rule required a complaint to include an explanation of the factual circumstances surrounding the complaint and any evidence of retaliation. Information submitted as part of a complaint would be kept strictly

confidential. If the Office of Inspector General concluded that any NCUA staff had retaliated against a FICU for filing an appeal with the SRC, that staff member would be subject to disciplinary or remedial action by his or her appropriate supervisor including reprimand, suspension, or separation from employment depending on the facts and circumstances. The Board did not receive substantive comments on this aspect of the proposed rule and is adopting § 746.112 as proposed.

Section 746.113 Coordination with State Supervisory Authority

Proposed § 746.113 set out a framework for the appropriate reviewing authority to cooperate with the SSA regarding an appeal of a material supervisory determination by a FISCO that was the joint product of the NCUA and the SSA. The proposed rule required the reviewing authority to promptly notify the SSA of the appeal, provide the SSA with a copy of the appeal and any other related materials, solicit the SSA's views regarding the merits of the appeal before rendering a decision, and notify the SSA of the reviewing authority's decision. Once the NCUA reviewing authority had issued its decision, any other issues remaining between the FISCO and the SSA were left to those parties to resolve. The Board received one comment regarding this aspect of the proposed rule. The commenter argued that the Board should permit an SSA to comment on an appeal in all cases involving a FISCO and not only when the appeal involves a material supervisory determination that is the joint product of the NCUA and the SSA. The Board disagrees. Congress vested the NCUA with exclusive authority to administer the FCU Act.⁴² Accordingly, the Board believes that it would be inappropriate to allow an SSA to

⁴² 12 U.S.C. 1766, 1784, 1789, and 1795b.

comment on matters that fall exclusively within the NCUA's exercise of its supervisory powers under the FCU Act. As a practical matter, the Board also finds little value in soliciting input from an SSA on matters that involve legal or factual issues that are entirely the result of an NCUA examination or exclusively involve matters of Federal law.

The commenter also argued that the Board should permit an SSA to make written submissions similar to amicus briefs that would become part of the administrative record. The proposed rule did not prohibit an SSA from expressing its views regarding the merits of an appeal in the form of written submissions. In fact, the Board anticipated that most comments from an SSA would be submitted in writing and become part of the administrative record reviewed by each successive reviewing authority before rendering a decision on appeal. While the Board believes that clarifications regarding the administrative record discussed above in the section analysis of § 746.104 may be sufficient to address commenter's concerns, the Board is also adopting a modification to § 746.113 to clarify that a reviewing authority is required to solicit an SSA's written views regarding the merits of an appeal before rendering a decision. Under § 746.104(f), the written submissions of the SSA will become part of the administrative record reviewed on appeal by the appropriate reviewing authority.

VI. Withdrawal of IRPS 12-1 "Supervisory Review Committee"

IRPS 11-1 “Supervisory Review Committee,” as amended by IRPS 12-1, sets out the current guidelines for appealing a material supervisory determination to the SRC. With the issuance of this final rule, the Board is withdrawing IRPS 11-1 effective January 1, 2018. IRPS 11-1 shall remain on the NCUA’s website and govern the appeal of all material supervisory determinations appealed prior to January 1, 2018. The final rule will not have retroactive effect and will only apply to material supervisory determinations appealed after January 1, 2018.

VII. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities (primarily those under \$100 million in assets).⁴³ This rule has no economic impact on small credit unions because it only impacts internal NCUA procedures and provides voluntary options for credit unions. Accordingly, NCUA certifies the final rule will not have a significant economic impact on a substantial number of small credit unions.

Small Business Regulatory Enforcement Fairness Act

⁴³ 5 U.S.C. 603(a).

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act. NCUA does not believe this final rule is a “major rule” within the meaning of the relevant sections of SBREFA. As required by SBREFA, NCUA has filed the appropriate reports so that this final rule may be reviewed.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or increases an existing burden.⁴⁴ For purposes of the PRA, a paperwork burden may take the form of a reporting or recordkeeping requirement, both referred to as information collections. Information collected as part of a civil action or administrative action, investigation, or audit, however, is not considered an information collection for purposes of the PRA. Subpart A to part 746 establishes procedures for appealing material supervisory determinations to the NCUA Supervisory Review Committee. Because the only paperwork burden in this final rule relates to activities that are not considered to be information collections, NCUA has determined that this rule is exempt from the requirements of the PRA.⁴⁵

Assessment of Federal Regulations and Policies on Families.

⁴⁴ 44 U.S.C. 3507(d); 5 CFR part 1320.

⁴⁵ 44 U.S.C. 3518(c)(1)(B)(ii).

The NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.⁴⁶

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests.⁴⁷ The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The final rule will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has therefore determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

List of Subjects in 12 CFR Part 746

Administrative practice and procedure, Claims, Credit Unions, Investigations.

By the National Credit Union Administration Board on October 19, 2017.

⁴⁶ Pub. L. 105-277, section 654, 112 Stat. 2681, 2681-581 (1998).

⁴⁷ 64 FR 43255 (Aug. 4, 1999).

Gerard Poliquin
Secretary of the Board

For the reasons discussed above, the NCUA Board adds 12 CFR part 746 to read as follows:

PART 746 – APPEALS PROCEDURES

Subpart A – Procedures for Appealing Material Supervisory Determinations

Sec.

- 746.101 Authority, purpose, and scope.
- 746.102 Definitions.
- 746.103 Material supervisory determinations.
- 746.104 General provisions.
- 746.105 Procedures for reconsideration from the appropriate program office.
- 746.106 Procedures for requesting review by the Director of the Office of Examination and Insurance.
- 746.107 Procedures for appealing to the Supervisory Review Committee.
- 746.108 Composition of Supervisory Review Committee.
- 746.109 Procedures for appealing to the NCUA Board.
- 746.110 Administration of the appeal.
- 746.111 Oral hearing.
- 746.112 Retaliation prohibited.
- 746.113 Coordination with State supervisory authority.

Subpart B [Reserved]

Authority: 12 U.S.C. 1766, 1787, and 1789.

Subpart A – Procedures for Appealing Material Supervisory Determinations

§ 746.101 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4806), which requires the NCUA Board to establish an independent intra-agency appeals process to review appeals of material supervisory determinations made by NCUA staff, and sections 120 and 209 of the Federal Credit Union Act (12 U.S.C. 1766, 1789).

(b) *Purpose.* The purpose of this subpart is to establish an expeditious review process for insured credit unions to appeal material supervisory determinations made by NCUA staff to an independent supervisory panel and, if applicable, to the NCUA Board. This subpart is also intended to establish appropriate safeguards for protecting insured credit unions from retaliation by NCUA staff.

(c) *Scope.* This subpart applies to the appeal of material supervisory determinations made by NCUA staff. This subpart does not apply to the appeal of determinations for which an independent right to appeal exists such as a decision to appoint a conservator or liquidating agent for an insured credit union or to take prompt corrective action pursuant to section 216 of the Federal Credit Union Act (12 U.S.C. 1790d) and part 702 of this chapter. This subpart also does not apply to enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a pending enforcement action.

§ 746.102 Definitions.

For purposes of this subpart:

Board means the NCUA Board.

Committee means the Supervisory Review Committee.

Director of the Office of Examination and Insurance has the same meaning as used in § 790.2 of this chapter but also includes individuals designated by the Director of the Office of Examination and Insurance from among senior staff in the Office of Examination and Insurance to handle requests for review pursuant to § 746.106 of this subpart.

Material Supervisory Determination is defined in § 746.103 of this subpart.

Program office means the office within NCUA responsible for rendering a material supervisory determination.

Special Counsel to the General Counsel or *Special Counsel* means an individual within the Office of General Counsel providing legal or procedural advice to the Committee in accordance with the procedures set forth in this subpart.

§ 746.103 Material supervisory determinations.

(a) *Material supervisory determination.* The term “material supervisory determination” means a written decision by a program office (unless ineligible for appeal) that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature or level of supervisory oversight of an insured credit union. The term includes, but is not limited to:

- (1) A composite examination rating of 3, 4, or 5;
- (2) A determination relating to the adequacy of loan loss reserve provisions;
- (3) The classification of loans and other assets that are significant to an insured credit union;
- (4) A determination regarding an insured credit union’s compliance with Federal consumer financial law;
- (5) A determination on a waiver request or an application for additional authority where independent appeal procedures have not been specified in other NCUA regulations; and
- (6) A determination by the relevant reviewing authority that an appeal filed under this subchapter does not raise a material supervisory determination.

(b) *Exclusions from coverage.* The term “material supervisory determination” does not include:

- (1) A composite examination rating of 1 or 2;
- (2) A component examination rating unless the component rating has a significant adverse effect on the nature or level of supervisory oversight of an insured credit union;
- (3) The scope and timing of supervisory contacts;
- (4) A decision to appoint a conservator or liquidating agent for an insured credit union;
- (5) A decision to take prompt corrective action pursuant to section 216 of the Federal Credit Union Act (12 U.S.C. 1790d) and part 702 of this chapter;
- (6) Enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a pending enforcement action;

(7) Preliminary examination conclusions communicated to an insured credit union before a final exam report or other written communication is issued;

(8) Formal and informal rulemakings pursuant to the Administrative Procedure Act (5 U.S.C. 500 *et seq.*);

(9) Requests for NCUA records or information under the Freedom of Information Act (5 U.S.C. 552) and part 792 of this chapter and the submission of information to NCUA that is governed by this statute and this regulation; and

(10) Determinations for which other appeals procedures exist.

§ 746.104 General provisions.

(a) *Standard of review.* Each reviewing authority shall make an independent decision regarding whether a material supervisory determination by the program office subject to appeal was appropriate. The reviewing authority shall give no deference to the legal or factual conclusions of the program office or a subordinate reviewing authority; *provided, however,* that the burden of showing an error in a material supervisory determination shall rest solely with the insured credit union. An insured credit union shall not be prejudiced in any respect by electing to forgo optional review by the Director of the Office of Examination and Insurance pursuant to § 746.106 of this subpart.

(b) *Dismissal and withdrawal.* Any appeal under this subpart may be dismissed by written notice if it is not timely filed; if the basis for the appeal is not discernable; if an insured credit union asks to withdraw the request in writing; if an insured credit union fails to provide additional information requested pursuant to any authority granted in this subpart; if an insured credit union engages in bad faith; if the appeal fails to state a material supervisory determination as defined in § 746.103 of this subpart; or for reasons deemed appropriate by the reviewing authority.

(c) *Discovery.* No provision of this subpart is intended to create any right to discovery or similar process.

(d) *Supervisory or enforcement actions not affected.* No provision of this subpart is intended to affect, delay, or impede any formal or informal supervisory or enforcement action in progress or affect NCUA's authority to take any supervisory or enforcement action against an insured credit union. For purposes of this subpart, a supervisory or enforcement action is considered to be commenced when NCUA provides an insured credit union with written notice of a recommended or proposed enforcement action under the Federal Credit Union Act or other applicable law.

(e) *Additional authority and waiver requests during the pendency of an appeal.* A program office will not consider a waiver request or an application for additional authority that could be affected by the outcome of an appeal of a material supervisory determination unless specifically requested by an insured credit union appealing the

material supervisory determination. Any deadline for a program office to decide a waiver request or an application for additional authority set forth in any part of this chapter shall be suspended until an insured credit union appealing a material supervisory determination has exhausted its administrative remedies under this subpart or may no longer appeal the material supervisory determination, whichever is later.

(f) *Administrative record.* A decision by the reviewing authority pursuant to this subpart shall be based exclusively on the administrative record. The administrative record shall consist of all written submissions by an insured credit union and a program office, decisions by subordinate reviewing authorities, and (where applicable) transcripts of an oral hearing before the SRC. For appeals where consultation with the appropriate State supervisory authority is required pursuant to § 746.113, the administrative record shall also consist of any written submissions by the State supervisory authority.

§ 746.105 Procedures for reconsideration from the appropriate program office.

(a) *Reconsideration.* An insured credit union must make a written request for reconsideration from the appropriate program office prior to requesting review by the Director of the Office of Examination and Insurance pursuant to § 746.106 or filing an appeal with the Committee pursuant to § 746.107. Such a request must be made within 30 calendar days after receiving an examination report containing a material supervisory determination or other official written communication of a material supervisory

determination. A request for reconsideration must be in writing and filed with the appropriate program office.

(b) *Content of request.* Any request for reconsideration must include:

(1) A statement of the facts on which the request for reconsideration is based;

(2) A statement of the basis for the material supervisory determination to which the insured credit union objects and the alleged error in such determination; and

(3) Any other evidence relied upon by the insured credit union that was not previously provided to the appropriate program office making the material supervisory determination.

(c) *Decision.* Within 30 calendar days after receiving a request for reconsideration, the appropriate program office shall issue a written decision, stating the reasons for the decision, and provide written notice of the right to file a request for review by the Director of the Office of Examination and Insurance pursuant to § 746.106 or file an appeal with the Committee pursuant to § 746.107. If a written decision is not issued within 30 calendar days, the request for reconsideration will be deemed to have been denied.

(d) *Subsequent requests for reconsideration.* Any subsequent request for reconsideration following an initial request made pursuant to this section will be treated as a request for review by the Director of the Office of Examination and Insurance pursuant to § 746.106 or an appeal to the Committee pursuant to § 746.107 as determined by the Secretary of the Board after consultation with the insured credit union.

§ 746.106 Procedures for requesting review by the Director of Office of Examination and Insurance.

(a) *Request for review.* Prior to filing an appeal with the Committee pursuant to § 746.107, but after receiving a written decision by the appropriate program office in response to a request for reconsideration pursuant to § 746.105, an insured credit union may make a written request for review by the Director of the Office of Examination and Insurance of the program office's material supervisory determination. Such a request must be made within 30 calendar days after a final decision on reconsideration is made by the appropriate program office. A request for review must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Content of request.* Any request for review by an insured credit union must include:

- (1) A statement that the insured credit union is requesting review by the Director of the Office of Examination and Insurance;

(2) A statement of the facts on which the request for review is based;

(3) A statement of the basis for the material supervisory determination to which the insured credit union objects and the alleged error in such determination;

(4) Any other evidence relied upon by the insured credit union that was not previously provided to the appropriate program office making the material supervisory determination; and

(5) A certification that the board of directors of the insured credit union has authorized the request for review to be filed.

(c) *Conduct of review.* Review of a material supervisory determination shall be based on the written submissions provided under paragraph (b) of this section. The Director of the Office of Examination and Insurance may request additional information from the appropriate program office or the insured credit union within 15 calendar days after the Secretary of the Board receives a request for review by the Director of the Office of Examination and Insurance. The relevant party must submit the requested information to the Director of the Office of Examination and Insurance within 15 calendar days after receiving such request for additional information. The Director of the Office of Examination and Insurance may consult with the parties jointly or separately before

rendering a decision and may solicit input from any other pertinent program office as necessary.

(d) *Decision.* Within 30 calendar days after the Secretary of the Board receives a request for review, the Director of the Office of Examination and Insurance shall issue a written decision, stating the reasons for the decision, and provide written notice of the right to file an appeal with the Committee pursuant to § 746.107. The 30 calendar day deadline is extended by the time period during which the Director of the Office of Examination and Insurance is gathering additional information. If a written decision is not issued within 30 calendar days, as extended by additional time during which the information is being gathered, the request for review will be deemed to have been denied.

(e) *Subsequent requests for review.* No party may request reconsideration of the decision rendered by the Director of the Office of Examination and Insurance. Any subsequent request for review following the rendering of a decision by the Director of the Office of Examination and Insurance will be treated as an appeal to the Committee.

§ 746.107 Procedures for appealing to the Supervisory Review Committee.

(a) *Request for appeal.* After receiving a written decision by the appropriate program office in response to a request for reconsideration pursuant to § 746.105, an insured credit union may file an appeal with the Committee. Such an appeal must be filed within 30 calendar days after receiving a written decision by the appropriate program office on

reconsideration or, if the insured credit union requests review by the Director of the Office of Examination and Insurance pursuant to § 746.106, within 30 calendar days after a final decision is made by the Director of the Office of Examination and Insurance. An appeal must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Content of appeal.* Any appeal must include:

- (1) A statement that the insured credit union is filing an appeal with the Committee;
- (2) A statement of the facts on which the appeal is based;
- (3) A statement of the basis for the determination to which the insured credit union objects and the alleged error in such determination;
- (4) Any other evidence relied upon by the insured credit union that was not previously provided to the appropriate program office or, if applicable, the Director of the Office of Examination and Insurance; and
- (5) A certification that the board of directors of the insured credit union has authorized the appeal to be filed.

(c) *Conduct of appeal.* The following procedures shall govern the conduct of an appeal to the Committee:

(1) *Submission of written materials.* The Committee may request additional information from either of the parties within 15 calendar days after the filing of an appeal. The parties must submit the requested information to the Committee within 15 calendar days after receiving a request for additional information.

(2) *Oral hearing; duration; location.* Except where an insured credit union has requested that an appeal be based entirely on the written record, an appeal shall also consist of oral presentations to the Committee at NCUA headquarters. The introduction of written evidence or witness testimony may also be permitted at the oral hearing. The insured credit union shall argue first. Each side shall be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Committee and will be based on the complexity of the appeal. Committee members may ask questions of any individual appearing before it.

(3) *Appearances; representation.* The parties shall submit a notice of appearance identifying the individual(s) who will be representing them in the oral presentation. The insured credit union shall designate not more than two officers, employees, or other representatives including counsel, unless authorized by the Committee. The program office shall designate not more than two individuals,

one of whom may be an enforcement attorney from NCUA's Office of General Counsel, unless authorized by the Committee.

(d) *Decision.* Within 30 calendar days after the oral presentation of the appeal to the Committee, the Committee shall issue a decision in writing, stating the reasons for the decision, and provide the insured credit union with written notice of the right to file an appeal with the NCUA Board (if applicable). If an insured credit union has requested that an appeal be entirely based on the written record, the Committee shall issue a decision within 30 calendar days from the date of receipt of an appeal by the Secretary of the Board. The 30 calendar day deadline to decide an appeal based entirely on the written record is extended by any time period during which the Committee is gathering additional information pursuant to paragraph (c)(1) of this section.

(e) *Publication.* The Committee shall publish its decisions on NCUA's website with appropriate redactions to protect confidential or exempt information. In cases where redaction is insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published decisions may be cited as precedent in appeals to the Committee. Publication shall include a synopsis of each appeal and a summary of the final result.

(f) *Consultation with Office of Examination and Insurance or Office of General Counsel Required.* If an appeal involves the interpretation of material supervisory policy or generally accepted accounting principles, the Committee shall notify the Director of the

Office of Examination and Insurance of the appeal and solicit input from the Office of Examination and Insurance. If an appeal involves the interpretation of legal requirements, including NCUA's regulations, the Committee shall notify the General Counsel of the appeal and solicit input from the Office of General Counsel.

(g) *Supplemental procedures authorized.* In addition to the procedures contained in this subpart, the Committee Chairman may adopt supplemental procedures governing the operations of the Committee, order that material be kept confidential, or consolidate appeals that present similar issues of law or fact.

§ 746.108 Composition of Supervisory Review Committee.

(a) *Formation and composition of committee pool.* The NCUA Chairman shall select not less than eight members from among senior staff in NCUA's regional and central offices as a Committee pool from which the Committee Chairman may select Committee members. None of the members appointed by the NCUA Chairman shall also serve as a Regional Director, Associate Regional Director, Executive Director, Deputy Executive Director, General Counsel, Director of the Office of Examination and Insurance, or a senior policy advisor or chief of staff to a Board Member.

(b) *Term of office for members of Committee pool.* Each member of the Committee pool shall serve for a two-year term and may be reappointed by the NCUA Chairman for additional terms.

(c) *Designation and role of Committee Chairman.* The Secretary of the Board shall serve as permanent Committee Chairman. The Committee Chairman shall be responsible for designating three Committee members (one of whom may be the Committee Chairman) from among the Committee pool to hear a particular appeal.

(d) *Selection criteria.* When selecting Committee members to hear an appeal pursuant to paragraph (c) of this section, the Committee Chairman shall consider any real or apparent conflicts of interest that may impact the objectivity of the Committee member as well as that individual's experience with the subject matter of the appeal.

(e) *Interested staff ineligible.* Members of the Committee pool from the program office that made the material supervisory determination that is the subject of the appeal are ineligible to serve on the Committee for that appeal. Members of the Committee pool from the Office of Examination and Insurance are ineligible to serve on the Committee for appeals where the insured credit union previously requested review by the Director of the Office of Examination and Insurance pursuant to § 746.106.

(f) *Role of the Special Counsel.* The Special Counsel to the General Counsel shall serve as a permanent nonvoting member of the Committee to advise on procedural and legal matters.

(g) *Quorum; meetings.* A quorum of two Committee members (excluding the Special Counsel to the General Counsel) shall be present at each Committee meeting and a majority vote of a quorum is required for an action on an appeal. Meetings of the Committee will not be open to the public.

§ 746.109 Procedures for appealing to the NCUA Board.

(a) *Request for appeal.* An insured credit union may file an appeal with the Board challenging a decision by the Committee within 30 calendar days after receiving that decision. An appeal must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Granting an appeal.* At least one Board Member must agree to consider an appeal from a decision by the Committee. If a request for an oral hearing pursuant to § 746.111 is granted, the Secretary of the Board will notify the parties of the time and location where the oral hearing shall be heard. Except in unusual circumstances, any appeal shall be held at NCUA headquarters. If at least one Board Member does not agree to consider an appeal from a decision by the Committee within 20 days of receiving a request, the request will be deemed to have been denied.

(c) *Failure to file a timely appeal.* An insured credit union that fails to file an appeal within the specified 30-day period shall be deemed to have waived all claims pertaining to the matters in issue.

(d) *Certain actions not reviewable.* Notwithstanding any other provision of this subpart, Committee decisions on the denial of a technical assistance grant reimbursement are final decisions of NCUA and may not be appealed to the Board.

(e) *Content of appeal.* Any request for appeal must include:

- (1) A statement of the facts on which the appeal is based;
- (2) A statement of the basis for the determination to which the insured credit union objects and the alleged error in such determination; and
- (3) A certification that the board of directors of the insured credit union has authorized the appeal to be filed.

(f) *Amending or supplementing the appeal.* The insured credit union may amend or supplement the appeal in writing within 15 calendar days from the date the Secretary of the Board receives an appeal. If the insured credit union amends or supplements the appeal, the program office will be permitted to file responsive materials within 15 calendar days.

(g) *Request for oral hearing.* In accordance with § 746.111, the insured credit union may request an opportunity to appear before the Board to make an oral presentation in support of the appeal.

§ 746.110 Administration of the appeal.

(a) *Conduct of appeal.* Except as otherwise provided in § 746.111, the following procedures shall govern the conduct of an appeal to the Board:

(1) *Review based on written record.* The appeal of a material supervisory determination shall be entirely based on the written record.

(2) *Submission of written materials.* The Board or the Special Counsel to the General Counsel may request additional information to be provided in writing from either of the parties within 15 calendar days after the filing of an appeal, any amendments or supplementary information to the appeal documents by the insured credit union, or any responsive materials by the program office, whichever is later. The parties must submit the requested information to the Board or the Special Counsel within 15 calendar days of receiving a request for additional information.

(b) *Decision.* The Board shall issue a decision within 90 calendar days, unless there is an oral hearing, from the date of receipt of an appeal by the Secretary of the Board. The

decision by the Board shall be in writing, stating the reasons for the decision, and shall constitute a final agency action for purposes of chapter 7 of title 5 of the United States Code. Failure by the Board to issue a decision on an appeal within the 90-day period, unless there is an oral hearing, shall be deemed to be a denial of the appeal.

(c) *Publication.* The Board shall publish its decisions on NCUA's website with appropriate redactions to protect confidential or exempt information. In cases where redaction is insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published decisions may be cited as precedent. Publication shall include a synopsis of each appeal and a summary of the final result.

§ 746.111 Oral hearing.

(a) *Request for oral hearing.* The insured credit union may request to appear before the Board to make an oral presentation in support of the appeal. The request must be submitted with the initial appeal documents and should be in the form of a separate written document titled "Request for Oral Hearing." The request must show good cause for an oral presentation and state reasons why the appeal cannot be presented adequately in writing.

(b) *Action on the request.* The Board shall determine whether to grant the request for oral hearing and shall direct the Secretary of the Board to serve notice of the Board's determination in writing to the parties. A request for oral hearing shall be granted with

the approval of any Board Member within 20 days of receiving a request for an oral hearing.

(c) *Effect of denial.* In the event a request for an oral hearing is denied, the appeal shall be reviewed by the Board on the basis of the written record.

(d) *Procedures for oral hearing.* The following procedures shall govern the conduct of any oral hearing:

(1) *Scheduling of oral hearing; location.* The Secretary of the Board shall notify the parties of the date and time for the oral hearing, making sure to provide reasonable lead time and schedule accommodations. The oral hearing will be held at NCUA headquarters; *provided, however*, that on its own initiative or at the request of the insured credit union, the NCUA Chairman may in his or her sole discretion allow for an oral hearing to be conducted via teleconference or video conference facilities.

(2) *Appearances; representation.* The parties shall submit a notice of appearance identifying the individual(s) who will be representing them in the oral presentation. The insured credit union shall designate not more than two officers, employees, or other representatives including counsel, unless authorized by the NCUA Chairman. The program office shall designate not more than two

individuals one of whom may be an enforcement attorney from NCUA's Office of General Counsel, unless authorized by the NCUA Chairman.

(3) *Conduct of oral hearing.* The oral hearing shall consist entirely of oral presentations. The introduction of written evidence or witness testimony shall not be permitted at the oral hearing. The insured credit union shall argue first. Each side shall be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Board and will be based on the complexity of the appeal. Members of the Board may ask questions of any individual appearing before the Board.

(4) *Transcript.* The oral hearing shall be on the record and transcribed by a stenographer, who will prepare a transcript of the proceedings. The stenographer will make the transcript available to the insured credit union upon payment of the cost thereof.

(e) *Confidentiality.* An oral hearing as provided for herein constitutes a meeting of the Board within the meaning of the Government in the Sunshine Act (5 U.S.C. 552b). The Chairman shall preside over the conduct of the oral hearing. The meeting will be closed to the public to the extent that one or more of the exemptions from public meetings apply as certified by NCUA's Office of General Counsel. The Board shall maintain the confidentiality of any information or materials submitted or otherwise obtained in the course of the procedures outlined herein, subject to applicable law and regulations.

(f) *Conclusion of the oral hearing.* The Board shall take the oral presentations under advisement. The Board shall render its decision on the appeal in accordance with § 746.110.

§ 746.112 Retaliation prohibited.

(a) *Retaliation prohibited.* NCUA staff may not retaliate against an insured credit union making any type of appeal. Alleged acts of retaliation should be reported to the NCUA Office of Inspector General, which is authorized to receive and investigate complaints and other information regarding abuse in agency programs and operations.

(b) *Submission of complaints.* Insured credit unions may submit complaints of suspected retaliation to the NCUA Office of Inspector General, 1775 Duke Street, Alexandria, VA 22314-3428. Complaints should include an explanation of the circumstances surrounding the complaint and evidence of any retaliation. Information submitted as part of a complaint shall be kept confidential.

(c) *Disciplinary action.* Any retaliation by NCUA staff will subject the employee to appropriate disciplinary or remedial action by the appropriate supervisor. Such disciplinary or remedial action may include oral or written warning or admonishment, reprimand, suspension or separation from employment, change in assigned duties, or

disqualification from a particular assignment, including prohibition from participating in any examination of the insured credit union that was the subject of the retaliation.

§ 746.113 Coordination with State supervisory authority.

(a) Coordination when request for review by the Director of the Office of Examination and Insurance filed. In the event that a material supervisory determination subject to a request for review by the Director of the Office of Examination and Insurance is the joint product of NCUA and a State supervisory authority, the Director of the Office of Examination and Insurance will promptly notify the appropriate State supervisory authority of the request for review, provide the State supervisory authority with a copy of the request for review and any other related materials, solicit the State supervisory authority's views regarding the merits of the request for review before making a determination, and notify the State supervisory authority of the Director's determination.

(b) Coordination when appeal to Supervisory Review Committee filed. In the event that a material supervisory determination appealed to the Committee is the joint product of NCUA and a State supervisory authority, the Committee will promptly notify the State supervisory authority of the appeal, provide the State supervisory authority with a copy of the appeal and any other related materials, solicit the State supervisory authority's views regarding the merits of the appeal before making a determination, and notify the State supervisory authority of the Committee's determination. Once the Committee has issued

its determination, any other issues that may remain between the insured credit union and the State supervisory authority will be left to those parties to resolve.

(c) Coordination when appeal to board filed. In the event that a material supervisory determination appealed to the Board is the joint product of NCUA and a State supervisory authority, the Board will promptly notify the State supervisory authority of the appeal, provide the State supervisory authority with a copy of the appeal and any other related materials, solicit the State supervisory authority's views regarding the merits of the appeal before making a determination, and notify the State supervisory authority of the Board's determination. Once the Board has issued its determination, any other issues that may remain between the insured credit union and the State supervisory authority will be left to those parties to resolve.

Subpart B [Reserved]

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