America's Credit Unions

June 28, 2024

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

RE: NCUA 2024 Regulatory Review

To Whom It May Concern:

On behalf of America's Credit Unions, I am writing to the National Credit Union Administration's (NCUA) Office of the General Counsel (OGC) regarding the OGC's annual review of one-third of the agency's regulations. America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their over 140 million members nationwide.

We appreciate the NCUA's willingness to solicit public input on one-third of its regulations on an annual basis. We support the agency's commitment to continually reviewing its regulations to determine whether they should be updated, clarified, simplified, or eliminated.

As the NCUA is aware, the cumulative regulatory burden on credit unions is near an all-time high. Therefore, we urge the NCUA to promulgate new or expand existing rules only if such rules are clearly warranted based on a compelling need. Similarly, the agency should strongly consider the current regulatory burden on credit unions as it proceeds with this and future regulatory reviews.

2024 Regulatory Review

The 2024 regulatory review includes Parts 748 through 797. This letter offers a number of suggestions on how to streamline, clarify, and/or otherwise improve the regulatory requirements included within several of these parts.

Part 748 – Security Program, Suspicious Transactions, Catastrophic Acts, Cyber Incidents, and Bank Secrecy Act Compliance

This Part contains the NCUA's rules and policies for credit union security programs, how and when to file reports such as cyber incident or suspicious activity reports, and procedures for monitoring Bank Secrecy Act (BSA) compliance. The NCUA's current cyber incident notification standard[1] is modeled after the Cyber Incident Reporting for Critical Infrastructure Act of 2022

[1] 12 C.F.R. § 748.1(c).

(CIRCIA),[2] which generally requires critical infrastructure operators to report cyber incidents within 72-hours and report ransom payments within 24 hours. Under the NCUA standard, all federally insured credit unions must notify the NCUA as soon as possible, and no later than 72 hours, after the credit union reasonably believes it has experienced a reportable cyber incident or received a notification from a third party regarding a reportable cyber incident. When the NCUA finalized the notification standard, the Cybersecurity and Infrastructure Security Agency (CISA) had not yet published a proposed rule to implement the CIRCIA. Due to uncertainty surrounding future implementation of the CIRCIA by CISA, the NCUA chose not to adopt a separate ransom payment reporting requirement when it adopted a final rule in 2023.[3]

On April 4, 2024, the CISA published a notice of proposed rulemaking to implement cyber incident and ransom payment reporting requirements adopted in the CIRCIA.[4] CISA's proposed rule would require all credit unions, regardless of size, to report covered cyber incidents and ransom payments directly to CISA, unless CISA acknowledges by agreement with the NCUA that the existing cyber incident notification standard in Part 748 is "substantially similar" for reporting purposes.

The NCUA's current cyber incident notification standard is closely aligned with the statutory definitions employed in the CIRCIA. Similar to CISA's proposal, reportable cyber incidents are generally defined by the NCUA as "substantial cyber incidents," and both NCUA's current regulation and CISA's proposal share common triggering criteria with respect to operational disruption and unauthorized access. However, the NCUA's current standard omits a specific ransom payment reporting requirement—a key feature of the CIRCIA and CISA's proposal. This omission could impair the NCUA's ability to take advantage of the CIRCIA's substantially similar reporting exception, which would greatly reduce the administrative burden placed on credit unions that would otherwise need to report cyber incidents to two separate agencies under potentially differing formats.

We urge the NCUA to work closely with CISA to ensure that credit unions need only report to the NCUA when they experience a covered cyber incident or make a ransom payment. To the extent that slight differences may exist between CISA's proposal and the NCUA's current standard in Part 748, we urge careful consideration of "substantially similar reporting" that may also occur through the supervisory process, a regulatory communications channel that is often unique to financial sector critical infrastructure entities and one that CISA may not fully appreciate as an alternative to supplemental reporting for covered cyber incidents. Reducing administrative burden by allowing a single cyber incident reporting structure through the NCUA will ensure that credit unions can prioritize frontline defense instead of having to devote resources to duplicative or overlapping reporting requirements. Credit union members are best served when credit unions can focus their attention on cybersecurity and mitigation efforts,

[2] Cyber Incident Reporting for Critical Infrastructure Act of 2022, Pub. L. No. 117-103 (2022).
[3] 88 Fed. Reg. 12,811, 12,816 (Mar. 1, 2023).
[4] 89 Fed. Reg. 23,644 (Apr. 4, 2024).

rather than redundant paperwork. Accordingly, we urge the NCUA to coordinate with CISA to ensure that a substantially similar reporting exception exists for all credit unions.

Part 749 – Records Preservation Program and Appendices – Record Retention Guidelines; Catastrophic Act Preparedness Guidelines

This Part describes the obligations for credit unions to maintain a records preservation program to identify, sort and reconstruct "vital records" in the event that a credit union's records are destroyed and provides recommendations for restoring vital member services. The NCUA is currently considering comments received in response to a recent advance notice of proposed rulemaking (ANPR) on Part 749.[5] Below is an overview of America's Credit Unions' suggestions to improve Part 749.[6]

Credit unions' biggest frustration with the existing records preservation program requirements is the lack of detail on retention periods, as well as the suggestion in the guidance to retain certain items permanently. Updating the existing regulations to address these general issues will go a long way in clarifying regulatory expectations under Part 749.

Definition of Vital Records: The current definition of "vital records" is reasonable, provided the retention period for the required records is limited to the most recent period (*e.g.*, the close of the most recent business day for members' loan balances).

Overall, we do not have any significant concerns with the existing definition of "vital records." We believe each of the items listed are necessary to allow the credit union to resume operations in the event records are destroyed. Further, the volume of items identified as "vital records" is reasonable. To be clear, we believe the requirement to maintain each of the items currently considered to be "vital" should be limited to the most recent/current information—as noted above. America's Credit Unions does not agree with an approach requiring permanent retention of these records on an ongoing basis.

Appendix A – Records Retention Guidelines: Unlike the requirements addressed elsewhere in Part 749, Appendix A provides guidelines for record retention. We believe the existing requirement to permanently retain the "official records" described above is appropriate. These items are of such importance to the existence and continuing ability to operate that it is critical the credit union always maintain secure access to these documents. While we do not necessarily advocate that credit unions be required to permanently retain additional items, we ask the NCUA to address any retention requirements for legal documents associated with a merger.

[5] 89 Fed. Reg. 31,117 (Apr. 24, 2024).
[6] America's Credit Unions letter to NCUA re Records Preservation Program (June 24, 2024), https://www.americascreditunions.org/wp-content/uploads/2024/06/CL-NCUA-ANPR-Record-Retention_final.pdf.

Unlike the "official records" addressed above, we do not agree with the guidance to permanently retain certain "key operational records" as provided in current Appendix A. Generally, the permanent retention of financial records creates a host of challenges, while providing few, if any, clear benefits. There are obvious costs and resource expenditures necessary to retain records permanently. These challenges are compounded for credit unions that have experienced one or multiple mergers over the years. Another significant concern relates to document production as the result of a legal subpoena for various records. The ability to destroy records after a set, relatively short number of years minimizes risks in this area. Thus, we urge the NCUA to update the guidance to suggest "key operational records" be retained for a single retention period—or multiple periods based on the particular record if the agency believes that to be more appropriate. A retention period of seven years might be appropriate for most, if not all, of the "key operational records."

Appendix B – Catastrophic Act Preparedness Guidelines: Appendix B provides guidance on developing a program to prepare for a catastrophic act. The guidance includes several suggested elements of the program, all of which are reasonable and likely to be helpful in preparing for a catastrophic act. Importantly, the catastrophic act preparedness guidelines are included in the appendix as *guidance*. Given the range in asset size and complexity of federally insured credit unions, it is important that the language in Part 749 surrounding catastrophic act preparedness remain just guidance. In addition to suggestions on existing guidance in Appendix B, we offered in our letter a number of recommendations on other guidance that might be helpful for catastrophic act or other disaster preparedness, such as developing a Business Continuity Plan, maintaining a disaster communication plan, and providing member education on how to protect assets in the event of an emergency.

Regulation Versus Guidance: Part 749 should be updated to clearly reflect that guidance included in Appendix A and Appendix B does not carry the weight of or examination expectation of regulation. Credit unions should be afforded the ability to operate their records preservation programs and processes in accordance with management's best judgement in a manner most appropriate for their credit union. As such, we urge the NCUA to communicate unequivocally in the regulation, as well as to its examination staff, that credit unions have latitude to operate their records preservation programs as they deem proper, consistent with regulatory requirements as provided in the text of Part 749.

Part 791 – Rules of NCUA Board Procedure; Promulgation of NCUA Rules and Regulations; Public Observation of NCUA Board Meetings

This Part provides the rules for NCUA Board procedure, promulgation of NCUA rules and regulations, as well as public observation of NCUA Board meetings under the Sunshine Act.

Subpart B addresses promulgation of the agency's rules and regulations. Further, this Subpart provides specific parameters around how and when the NCUA must adhere to the Administrative Procedure Act (APA) and Regulatory Flexibility Act,[7] publish proposed

[7] 12 C.F.R. § 791.8(a).

rulemakings in the *Federal Register*,[8] and allow for public participation in the rulemaking process.[9]

It is imperative that the NCUA operate in accordance with Subpart B. Afterall, as a regulatory body, the rules, regulations, and guidance the NCUA produces are critical to the ability of credit unions to function and serve their members. We have found that the vast majority of the time the NCUA operates clearly within the requirements of Subpart B. However, there are instances where it may be beneficial to the industry for the Board to utilize its latitude and provide greater opportunity for public involvement in the rulemaking process.

Specifically, the late-2023 proposal to add fields to the Call Report requiring credit unions above $1 billion in assets to list income related to overdraft fees and non-sufficient funds (NSF) fees was noticed in the *Federal Register* in December, shortly before the holidays, with only a 30-day comment period.[10] There was no alert shared with credit unions, information posted on the NCUA website, or other source flagging this notice containing important Call Report changes. Many credit unions, including some of the largest institutions with more staff capable of monitoring these types of developments, were surprised to learn about these proposed changes only when referenced by the NCUA Board Chairman at a public event. Although these changes do not impact all credit unions, those impacted deserved ample time to review significant Call Report changes and provide the agency with feedback. As shared with the NCUA,[11] America's Credit Unions objected to the inclusion of these new account codes for overdraft fees and NSF fees and is deeply concerned about the obscure process the NCUA utilized for such important changes.

More importantly for the purposes of this letter to the OGC, we ask that the NCUA post all proposed changes to the Call Report at least two quarters in advance so that credit unions have a chance to thoroughly review the changes and share input with the agency. Absent extraordinary circumstances, additions should not be proposed the quarter prior to the effective date of the changes. Further, we ask the Board to utilize the notice and comment process under the APA, even in instances where strict adherence to the Act may not be required. The full notice and comment process provides greater opportunity for the industry and the public at large to review and provide input regarding changes impacting credit unions.

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[8] 12 C.F.R. § 791.8(b).
[9] 12 C.F.R. § 791.8(c).
[10] Revisions of Agency Information Collection of a Previously Approved Collection; Request for Comments, 88 Fed. Reg. 85,327 (Dec. 7, 2023), https://www.federalregister.gov/documents/2023/12/07/2023-26854/revisions-ofagency-information-collection-of-a-previously-approved-collection-request-for-comments.
[11] America's Credit Unions Letter to NCUA Board (Apr. 19, 2024), https://www.americascreditunions.org/wp-content/uploads/2024/04/Letter-to-NCUA-Board-Nondisclosure-of-Call-Report-Data-4.19.2024.pdf; America's Credit Unions Letter to NCUA OGC (Mar. 21, 2024), https://www.americascreditunions.org/wpcontent/uploads/2024/04/Letter-Requesting-LoL-and-Nondisclosure-of-Call-Report-Data-re-OD-and-NSFFees.pdf; and America's Credit Unions Letter to NCUA Chairman Harper on Transparency Regarding Call Report Changes (Feb. 28, 2024), https://www.americascreditunions.org/wp-content/uploads/2024/02/ACU-Letter-to-NCUACall-Report-Changes-2.28.2024.pdf.

Subpart D to Part 791 addresses the distinctions between regulations and guidance, as promulgated by the NCUA. In particular, Appendix A to Subpart D includes a *Statement Clarifying the Role of Supervisor Guidance* that describes the official policy of the NCUA with respect to the use of supervisory guidance in the supervisory process.

"A law or regulation has the force and effect of law.[] Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the NCUA do [sic] not take enforcement actions based on supervisory guidance."[12] Given the weight of this Appendix, we urge the NCUA to ensure examination staff are fully aware of the preceding language. All too often we hear of instances of credit unions being reprimanded—both formally and informally—in the examination context based on guidance or other best practices not grounded in law or regulation. Such activity is clearly contrary to Part 791, and is unfair to credit unions since they are unable to properly prepare for an examination when directives lack legal basis.

Appendix A to Subpart D also includes the statement that "[t]he NCUA intends to limit the use of numerical thresholds or other 'bright-lines' in describing expectations in supervisory guidance."[13] With respect to field of membership guidance, the NCUA has not always adhered to this principle. The NCUA's 2024 Annual Performance Plan lists a goal for the Office of Credit Union Resources and Expansion (CURE) related to approvals for underserved area expansion requests. However, the approval target is conditioned on applicants having "intended offices or service facilities located no more than 25 miles from any point within the area."[14] This explicit numerical threshold for assessing reasonable proximity to service facilities appears nowhere in the NCUA's Chartering and Field of Membership Manual, which is regarded as the most authoritative statement on the NCUA's requirements for underserved area expansions.[15] Given the absence of any explicit numerical threshold for assessing reasonable proximity in the Federal Credit Union (FCU) Act and the NCUA's regulations, we recommend closer adherence to the principle expressed in Appendix A.

Process for Identifying Rules for Review and Soliciting Public Input

We appreciate the agency permitting us to provide comments as it considers its 2024 regulatory agenda. However, as we have stated numerous times, we believe the process for seeking comments on regulations included in the NCUA's Regulatory Review could be improved. For example, some of the rules included for review may already be the subject of proposed changes or recent modifications. In such instances, it is unclear the extent to which further amendments to those regulations will be contemplated by the agency.

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[12] 12 C.F.R. Part 791, Appendix A to Subpart D.
[13] *Id*.
[14] NCUA, 2024 Annual Performance Plan, 19.
[15] *See* 12 C.F.R. Part 701, Appendix B.

In addition, since the notice of the regulatory review is not required to comply with the APA, and is therefore not published in the *Federal Register*, potential commenters may be unaware of its issuance. To ensure adequate input is received, we ask the NCUA to consider ways to better highlight its request for comments on the regulatory review, including through a press release or alert shared with credit unions.

Since the regulatory review process is outside the APA, comments are not made available for public inspection. In addition, the NCUA does not publicly respond to commenters' suggestions. While not required to do so, it would be very useful if the NCUA were to choose to not only post public comments on its website but also publicly respond to input received, as is done for formal rulemakings. Doing so would permit America's Credit Unions, and credit unions alike, to identify patterns and/or trends within the regulations included in the review. This would allow for more effective and efficient advocacy, and ideally result in an improved operating environment for credit unions.

Conclusion

America's Credit Unions appreciates the opportunity to comment on the OGC's annual regulatory review. Should you have any questions or require any additional information, please contact Luke Martone, Regulatory Advocacy Senior Counsel at LMartone@americascreditunions.org or (202) 508-6743.

Sincerely,

Luke Martone
Regulatory Advocacy Senior Counsel