



WASHINGTON, D.C.

99 M Street SE
Suite 300
Washington, D.C. 20003-3799

Phone: 202-638-5777

Fax: 202-638-7734

September 27, 2019

Mr. Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Re: Exceptions to Employment Restrictions Under Section 205(d) of the Federal Credit Union Act; RIN 3133-AFO2

Dear Mr. Poliquin:

On behalf of America's credit unions, I am writing about the National Credit Union Administration's (NCUA) proposed interpretive ruling and policy statement (IRPS) regarding Exceptions to Employment Restrictions Under Section 205(d) of the Federal Credit Union (FCU) Act (referred to as the Second Chance IRPS). The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members.

Proposed IRPS

Section 205(d) prohibits, except with the prior written consent of the NCUA Board, any person who has been convicted of any criminal offense involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense, from participating in the affairs of an insured credit union. Recognizing that certain offenses are so minor and occurred so far in the past so as to not currently present a substantial risk to the insured credit union, the existing IRPS excludes certain *de minimis* offenses from the need to obtain consent from the Board.

Based on its experience with the existing IRPS in this area, the Board is proposing to replace the existing IRPS with a revised and updated IRPS to reduce regulatory burden. The Board is proposing to amend and expand the current *de minimis* exception to reduce the scope and number of offenses that would require an application to the Board. Specifically, the proposed IRPS would not require an application for certain insufficient funds checks, small dollar simple theft, false identification, simple drug possession, and isolated minor offenses committed by covered persons as young adults.

De minimis Offenses

The proposed IRPS is intended to reduce burden on credit unions and covered individuals by modifying the current exception for *de minimis* offenses: first, by updating the general criteria for the exception; and second, by substantially expanding the scope of the exception to include additional offenses to qualify as *de minimis* offenses. Where a covered offense is considered *de minimis*, approval is automatically granted and an application for the Board's consent is not required.

General Criteria

Under the NCUA's current policy, a covered offense is considered *de minimis* if it meets the following criteria:

- 1) There is only one conviction¹ for a covered offense;
- 2) The offense was punishable by imprisonment for less than one year and/or a fine of less than \$1,000, and the punishment imposed by the court did not include incarceration;
- 3) The conviction occurred at least five years prior to the date an application would otherwise be required;
- 4) The offense did not involve an insured depository institution or insured credit union; and
- 5) The Board or any other federal financial institution regulatory agency has not previously denied consent for the same conviction.

Under the proposed IRPS, the potential punishment and/or fine provision (criterion 2) would be updated as follows: The offense was punishable by imprisonment for one year or less and/or a fine of \$2,500 or less, and those punishable by three days or less of jail time.

We support this proposed update to the general criteria. We recognize that simply expanding criterion 2 from "less than one year" to "one year or less" will have an outsized impact on the number of potential applications that would otherwise need to come before the Board for review. Further, we support the increase to \$2,500, as the \$1,000 threshold has been in place since at least 2008 when the existing IRPS was adopted.

Additional Applications of the De minimis Exception

The proposed IRPS would also significantly expand the scope of the exception to include additional offenses to qualify as *de minimis* offenses. In general, we support the proposed expansion of offenses that qualify for the *de minimis* exception, thereby eliminating the need to submit an application for certain low-risk, isolated offenses. We agree with the Board that this expansion would result in a reduction in regulatory burdens to credit

¹ The IRPS addresses convictions *or* entries into a pretrial diversion program. For purposes of this letter, we refer to both of these simply as convictions.

unions, covered individuals, and the agency, while continuing to mitigate the risk to insured credit unions posed by convicted persons.

Age at time of covered offense:

Under the proposal, a person with a covered conviction that occurred when the individual was 21 years old or younger, and who otherwise meets the general *de minimis* criteria, will qualify for this *de minimis* exception if:

- 1) The conviction was entered at least 30 months prior to the date an application would otherwise be required, and
- 2) All sentencing requirements have been met prior to the date an application would otherwise be required.

We support this proposed change, as we agree with the Board that isolated, youthful mistakes may be worthy of forgiveness and second chances. Individuals who committed minor offenses when they were still at an impressionable age deserve a greater opportunity for redemption.

Convictions for insufficient funds checks:

The proposed IRPS would expand the *de minimis* exception to cover certain convictions for “bad” or insufficient funds checks. Under the proposal, convictions based on the writing of “bad” or insufficient funds checks will be considered a *de minimis* offense and will not be considered as having involved an insured depository institution or insured credit union if:

- 1) There is no other conviction subject to Section 205(d);
- 2) The aggregate total face value of all “bad” or insufficient funds check(s) cited across all the convictions is \$1,000 or less; and
- 3) No insured depository institution or insured credit union was a payee on any of the “bad” or insufficient funds checks that were the basis of the convictions.

We support this proposed change. We believe certain “bad” check offenses, such as those described above, generally are low-risk and should be treated as *de minimis*.

Convictions for small-dollar, simple theft:

Under the proposed IRPS, a conviction based on a simple theft of goods, services and/or currency is considered *de minimis* if:

- 1) The aggregate value of the currency, goods, and/or services taken was \$500 or less;
- 2) The person has no other conviction described in Section 205(d);

- 3) It has been five years since the conviction (or 30 months in the case of a person 21 years or younger at the time of the conviction); and
- 4) It does not involve an insured depository institution or insured credit union.

We support this proposed change. As noted by the Board, a substantial number of applications that have come before the Board since 2008 have involved convictions or program entries for relatively minor, low-risk, small-dollar, simple theft (for example, shoplifting, retail theft, etc.). The Board subsequently granted consent to the vast majority of individuals convicted of such offenses. Therefore, we believe treating this category of offenses as *de minimis* would streamline the application process without creating undue or substantial risk to insured credit unions.

However, while it is our understanding that for purposes of the exception, simple theft does not include the offenses of burglary, forgery, robbery, identity theft, or fraud, we ask the Board to state explicitly in the final IRPS that these crimes would continue to require an application for the Board's consent.

In addition, we ask the Board to explicitly state that each of the four criteria must be satisfied for such offenses to be considered *de minimis*. While there are instances where simple theft should appropriately be considered *de minimis*, instances of theft from an insured depository institution or credit union should automatically be excluded from the *de minimis* exception and require approval by the Board.

Convictions for the use of a fake identification card:

Under the proposed IRPS, the use of a fake, false, or altered identification card by a person under the legal age to purchase alcohol, or to enter a premises where alcohol is served and age appropriate identification is required, would be considered *de minimis*, provided there is no other conviction for the covered offense.

We support this proposed change. We believe covered individuals with convictions for the use of fake identification in this instance pose little risk to insured credit unions.

Convictions for simple misdemeanor drug possession:

The proposed IRPS would classify as *de minimis* those convictions for drug offenses meeting the following conditions:

- 1) The person has no other conviction described in Section 205(d);
- 2) The single conviction for simple possession of a controlled substance was classified as a misdemeanor and did not involve the illegal distribution, sale, trafficking, or manufacture of a controlled substance or other related offense; and

- 3) It has been five years since the conviction (or 30 months in the case of a person 21 years or younger at the time of the conviction).

We support the proposed change. We agree with the Board's position that there are a number of significant extrajudicial consequences for individuals with nonviolent drug possession convictions, such as employment bans, the loss of federal financial aid, eviction from public housing, disqualification from occupational licenses, loss of voting rights, and denial of public assistance. Further, as noted by the Board, research shows that drug convictions are a disproportionate burden on people of color. In addition, there is currently some uncertainty and confusion with respect to marijuana-related offenses, with marijuana now legal in many states but still illegal at the federal level. We believe that covered persons with single convictions for simple drug possession pose minimal risk to insured credit unions.

Expunged Convictions

Under the NCUA's current policy, a conviction that has been "completely expunged" is not considered a conviction of record and will not require an application for the NCUA Board's consent under Section 205(d). The proposed IRPS would clarify the circumstances under which a conviction would be deemed expunged for purposes of Section 205(d).

We support this proposed change, as it is sometimes unclear whether certain state set-aside provisions constitute a complete expungement for purposes of Section 205(d).

Duty Imposed on Credit Unions

Under the NCUA's current policy, federally insured credit unions should, at a minimum, establish a screening process to obtain information about convictions from job applicants. However, the current policy is unclear as to what steps a credit union should or must take when it learns about a job applicant's *de minimis* offense. Thus, the proposed IRPS would clarify that when a credit union learns that a prospective employee has a prior conviction for a *de minimis* offense, the credit union should document in its files that an application is not required because the covered offense is considered *de minimis* and meets the criteria for the exception.

We support the idea of this requirement since we believe maintaining a record of why an application was not sent to the Board could help protect the credit union if the NCUA questions the credit union's hiring practices related to the covered individual. However, we believe this record keeping requirement should be a suggested best practice rather than a strict requirement. Keeping a record of such decisions is in the credit union's best interest, but failing to maintain such a record should not be a reason for action by the NCUA in the context of an examination.

Insurance Cost / Insurability

During the July Board meeting, Chairman Hood raised the potential issue of increased insurance costs as a result of the expanded *de minimis* exception included in the proposed IRPS. We appreciate the Chairman's recognition that increasing the number of offenses that do not require Board approval could result in increased insurance costs borne by credit unions and ultimately their members.

While we have some concern that insurance costs could increase, after discussing the issue with industry partners, we understand no immediate premium increases are likely to result from the proposed IRPS. However, there is the possibility that such costs could increase if the expanded *de minimis* exception included in the IRPS ultimately leads to increased fraud at credit unions. If such a result occurs, we urge the NCUA Board to review the IRPS to determine how it can be further modified to eliminate any spike in fraudulent activity (that is tied to changes included within the IRPS).

Conclusion

On behalf of America's credit unions and their 115 million members, thank you for the opportunity to share our comments on the proposed Second Chance IRPS. If you have questions about our comments, please do not hesitate to contact me at (202) 508-6743.

Sincerely,

A handwritten signature in cursive script that reads "Luke Martone".

Luke Martone
Senior Director of Advocacy & Counsel