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December 15, 2020

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

Re: Role of Supervisory Guidance; RIN 3133–AF28

Dear Ms. Conyers-Ausbrooks:

On behalf of America's credit unions, I am writing to the National Credit Union Administration (NCUA) in support of the interagency proposal on the Role of Supervisory Guidance. The Credit Union National Association (CUNA) represents America's credit unions and their 120 million members.

### **Proposed Rulemaking**

Along with the other federal financial regulators (the agencies),<sup>1</sup> the NCUA has issued a proposed rule to codify the Interagency Statement Clarifying the Role of Supervisory Guidance issued by the agencies in 2018 (2018 Statement).<sup>2</sup> By codifying the 2018 Statement, the proposed rule is intended to confirm that the agencies will continue to follow and respect the limits of administrative law in carrying out their supervisory responsibilities. The 2018 Statement reiterated well-established law by stating that, unlike a law or regulation, supervisory guidance does not have the force and effect of law. As such, supervisory guidance does not create binding legal obligations for the public. The proposal would also clarify that the 2018 Statement, as amended, is binding on the agencies.

The 2018 Statement was intended to explain the role of supervisory guidance. As noted in the 2018 Statement, the agencies issue various types of supervisory guidance, such as interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions. These types of materials are not always supervisory guidance. They may, for example, be interpretive rules addressing regulatory requirements or clarifications on how rules could apply to various fact patterns.

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<sup>1</sup> Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); National Credit Union Administration (NCUA); and Bureau of Consumer Financial Protection (CFPB).

<sup>2</sup> Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018), *available at* <https://www.ncua.gov/files/press-releases-news/interagency-statement-role-supervisory-guidance.pdf>.

We believe it is critical that the NCUA appreciate the significant differences between regulation and guidance. Regulations create binding legal obligations. Supervisory guidance is issued by an agency to “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power” and does not create binding legal obligations.<sup>3</sup>

Supervisory guidance outlines the agencies’ supervisory expectations or priorities and articulates the agencies’ general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that mitigate risks, or that the agencies generally consider to be consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers.

The 2018 Statement restates existing law and reaffirms the agencies’ understanding that supervisory guidance does not create binding, enforceable legal obligations. The 2018 Statement reaffirms that the agencies do not issue supervisory criticisms for “violations” of supervisory guidance and describes the appropriate use of supervisory guidance by the agencies.

We believe it is important that the NCUA refrain from using supervisory guidance as a basis for an adverse finding during an examination. Examiners must clearly identify where a requirement or prohibition is in an established law or regulation. With that said, we urge the NCUA to continue examiner engagement in productive discussions with credit union staff regarding supervisory guidance. Such discussion is particularly helpful when there is confusion regarding a specific regulation and its application to the issue at hand. Further, codifying the 2018 Statement could also help credit unions avoid unnecessary legal exposure.

We appreciate the role of supervisory guidance and support the proposal to codify the 2018 Statement. Doing so not only ensures credit unions know exactly where an examiner is basing its decisions on but also ensures the basis for such decisions is well-founded, given statutes must go through the legislative process and regulations through the rulemaking process under the Administrative Procedure Act.<sup>4</sup>

## **Conclusion**

On behalf of America’s credit unions and their 120 million members, thank you for considering our comments in response to the proposed rule on the Role of Supervisory Guidance. If you have questions about our comments, please do not hesitate to contact me at (202) 508-6743 or LMartone@cuna.coop.

Sincerely,



Luke Martone  
Senior Director of Advocacy & Counsel

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<sup>3</sup> 85 Fed. Reg. 70,512, 70,514 (Nov. 5, 2020).

<sup>4</sup> 5 U.S.C. § 551.