

I. CUNA's List of Credit Union Examination Rights (with Commentary)

1. Credit unions have the right to manage risk without being directed by examiners to eliminate it. Authorized by NCUA *Examiner's Guide* (NEG) page 1-3.

Commentary: As the *Examiner's Guide* points out, examiners should not “insist that a credit union eliminate risk but, instead, should ensure that credit unions identify and manage their risks. The desired reward for taking risk is stable profitability and increased net worth. Credit unions must balance risk and reward responsibly.”

2. Credit unions have the right to respectful conduct from the examiner. NEG pages 21-3 and 21-4.

Commentary: Credit unions, as well as regulators, expect examiners to act professionally—which they do most of the time, according to credit unions. However, if a credit union feels that an examiner has stepped over the line in terms of conduct involving the credit union, the credit union should report the incident to the supervisory examiner or regional office, without fear of retaliation.

3. Credit unions have the right to be examined by well-trained, competent examiners who understand the unique characteristics of credit unions. NCUA *Strategic Plan 2011-2016*, pages 1 and 2.

Commentary: Strong safety and soundness depends, in large measure, on capable supervision. Examiners who are well-suited for their jobs in terms of experience, expertise, and conduct help support safety and soundness and strengthen the credit union system.

4. Credit union officials have the right to meet and discuss examiner findings, conclusions, directives, and any administrative actions with the examiner, or privately among themselves without the examiner present. Credit union officials should be able to have management staff present at the officials' discretion. NEG pages 1-11, 1-15, 21-2, and 21-3.

Commentary: According to NCUA's *Examiner's Guide*, examiners are instructed to provide time throughout the examination process for discussion with management and officials regarding developments and findings in the examination. Examiners are encouraged to provide credit union officials with a draft copy of the examination report and give officials sufficient time to review it before the joint



conference or exit interview. As the *Examiner's Guide* notes, "Nothing presented at the joint conference, exit interview, or in the examination report should surprise the [credit union's] officials." It is equally important that credit union officials not surprise examiners and that they take advantage of opportunities to meet with examiners and discuss issues throughout the examination process.

5. Credit union officials have the right to question and seek corrections to examiner findings, conclusions, and directives. NEG page 1-15.

Commentary: Accuracy is an essential component of strong safety and soundness regulation. Examiners are human and all humans make mistakes. It is not only appropriate but very important that credit unions work with their examiner to ensure all reports are as accurate and timely as possible and that all directives are based on accurate information.

6. Credit union officials have the right to provide alternatives and/or additional data, conclusions, and solutions to address problems identified by the examiner. NEG pages 1-11, 2-3, 3-10, and 21-6.

Commentary: According to the *Examiner's Guide*, examiners are not expected to dictate credit union policies but rather should work with credit union officials to reach a favorable outcome. The *Examiner's Guide* emphasizes cooperation and coordination between examiners and credit union officials, which should include flexibility for credit union management to provide alternative perspectives and data as well as alternative solutions to problems—as long as such alternatives are factually based and appropriate for the situation.

7. Credit union officials have the right to know the specific authority or legal basis for an examiner's directive, and this authority should be provided by the examiner in the exam report or directive. NEG page 20-7.

Commentary: The *Examiner's Guide* makes it clear that examiners must be willing and able to provide to credit union officials the legal authority for the action they are suggesting or directing the credit union to take. In addition, examiners do not have flexibility to insist on actions or policies that are counter to or inconsistent with statutes, agency policy, or GAAP.

8. Credit union officials have the right to receive clearly written examination reports on a timely basis. Any other directives and



notices from the examiner should also be clearly communicated in writing. NEG page 20-1.

Commentary: Credit unions should not be expected to comply with directives that are not in writing. In order for the credit union's record of performance, including efforts to address problem areas, to be as accurate as possible, directives should be provided in writing to the credit union and included in the credit union's examination history.

9. Credit union officials have the right to have examination reports, findings, directives and administrative actions that are based on all relevant facts, including current data. NEG page 1-27.

Commentary: The examination report should present a current, factual picture of the credit union's financial performance and risk management. When material problems arise that the examiner expects the credit union to correct, the record must include a complete and well-documented accounting of the problems and the efforts by the credit union and the examiner to address them fully.

10. Credit union officials have the right to be evaluated on their own strengths and weaknesses and not solely on the basis of regulator concerns about trends or general problems in the credit union system or within their peer group. NEG page 3-5.

Commentary: While examiners must be mindful of problems and conditions in their regions and even across the country, it is essential for the accuracy of each credit union's examination report that the examiner's assessment of a credit union reflects an accurate depiction of the performance and operations of the credit union under review.

11. Credit union officials have the right to be evaluated for progress toward objectives that are realistic and achievable, proportionate to the risk presented and the resources of the credit union, and in the timeframe established with the credit union. NEG page 3-11.

Commentary: Goals and directives that are not realistic are counterproductive and undermine safety and soundness. Examiners should not arbitrarily set requirements that the credit union cannot meet but rather there should be coordination and cooperation between the credit union's officials and the examiner regarding goals



that are achievable within an acceptable amount of time for both the examiner and the credit union.

12. Credit unions have the right for their examination findings and directives to be risk prioritized. NEG pages 1-1 and 20-1.

Commentary: Examiners are directed to focus their reviews and reports on applicable risks, and those activities that present the greatest risk receive the most attention. A standard procedure that the examination findings and directives must be listed in order of their importance based on the amount of risk presented is fully consistent with the risk-focused examination process.

13. Credit union officials have the right to appeal examiner findings, conclusions, or directives without fear of retaliation from their regulator.¹

Commentary: It is clear that under the *FCU Act*, agency policy and practice, credit unions have the right to appeal “material supervisory determinations, including decisions to require prompt corrective action” to the NCUA Board. As discussed in this Section, matters that may be appealed include, for example, cease and desist orders, removal of officials, and conservatorships. Credit unions also have the right to appeal material examination report findings, conclusions, and directives from the examiner. Documents of Resolution and LUAs are not generally “appealable” because they are technically voluntary agreements, but the credit union should be able to appeal to the regional director as part of the DoR or LUA negotiation process.

14. Instructions on how to appeal examiner findings, conclusions, or directives should be detailed on every examination report form that is provided to credit unions. NEG page 17-1.

Commentary: NCUA’s process for allowing an appeal is far from clear. NCUA and state regulators should ensure that all examination report forms which examiners provide to credit unions include sufficiently detailed information as to which issues may be appealed

¹ See, e.g., 12 U.S.C. §1790d(k) (addressing PCA appeals); NCUA, Interpretive Ruling and Policy Statement (IRPS) 02-1 (“Supervisory Review Committee”), available at <http://ncua.gov/Resources/RegulationsOpinionsLaws/IRPS/2002/IRPS02-1.html>; NCUA, IRPS 95-1 (“Guidelines for the Supervisory Review Committee”), available at <http://ncua.gov/Resources/RegulationsOpinionsLaws/IRPS/1995/IRPS95-1.html>.



or challenged and the process for making such an appeal. CUNA and the Leagues are pursuing greater transparency in the appeals process.

15. Credit union officials have the right to record meetings with examiners and other agency personnel and other regulatory proceedings related to the examination (subject to confidentiality). NEG page 21-2.

Commentary: The *Examiner's Guide* states that credit unions often use tape recorders to record their meetings at the joint conference, and that the NCUA examiners usually agree to the request, and may request a copy of the tape or transcript. A recorded meeting provides an objective transcript of the discussion between the examiner and the credit union officials.

16. Credit union officials have the right to have a representative, such as an attorney or League representative, present during meetings with the examiner and other regulatory personnel. NEG page 21-6.

Commentary: The *Examiner's Guide* states that credit union officials have the right to invite other persons to the joint conference, and that an examiner will rarely object to the attendance of any outside individual. Proper communication about the attendees in advance will facilitate the meeting.

17. Credit unions have the right to have any published orders—at least consent orders—address only facts and not conjecture or speculation by the examiner. NEG pages 20-1, 20-6, and 30-3.

Commentary: Any published orders must be based on the facts in an examination report that are reviewed by the credit union. The *Examiner's Guide* states that the examination report must have proper documentation to support an examiner's findings and conclusions. For the confidential section of the report, examiners should only cover pertinent matters that are based on fact, and not "statements based on gossip or hearsay."

18. Credit unions have the right to confidential, non-discoverable communication with their legal counsel regarding examination issues.

Commentary: There are longstanding legal principles in this country regarding attorney-client privilege that also apply to a credit union's



management and officials in regard to examination and supervisory issues.²

19. Credit unions have the right to develop and use “high-level” policies, which should be separate and distinct from detailed procedures. NEG page 21-5.

Commentary: Examiners should not dictate broader credit union policies, but rather should lead and persuade officials to proper action. Credit union management and officials have the right to use business judgment in developing their policies.

20. State credit unions have the right to a lead examiner that is a state regulator, consistent with the credit union’s charter type. NEG page 22B-3.

Commentary: NCUA appears to be compelled to accompany state regulators during the examination of state-chartered credit unions, particularly on federal “hot button” issues such as MBL and indirect lending. Thus, it is important that the lead examiner be comparable to the credit union’s charter type. It is also important that the state regulator—not NCUA—be responsible for assigning the credit union’s CAMEL rating during an examination.

21. Credit union officials have the right to know the timing of when their regulators, such as NCUA, will publish an LUA. NEG page 29-10.

Commentary: This right does not address whether NCUA should publish an LUA, it simply addresses the need for notification of when the LUA will be published. Currently, credit unions are learning about publication by either checking NCUA’s website or, more likely, via NCUA’s mass emails—which can be unintentionally inflammatory. NCUA should follow the lead of a number of state regulators that inform the credit union on when publication will occur.

22. Credit union officials have the right to defer to their certified public accountant (CPA) if there is a disagreement between the officials and

² See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 386-99 (1981); *Clarke v. Am. Commerce Nat ’l Bank*, 974 F.2d 127, 129-30 (9th Cir. 1992); 12 C.F.R. § 747.24(c) (“Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government’s or government agency’s deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.”).



their regulator regarding issues related to U.S. generally accepted accounting principles.³ NEG pages 5A-4 and 7-28.

Commentary: Credit unions over \$10 million in assets are required to follow GAAP and a credit union's CPA is responsible for ensuring that the credit union's activities and financial statements are in compliance with GAAP. Therefore, rather than the regulator becoming involved in the specific accounting issues of numerous credit unions, the examiner should not seek to override the credit union's CPA when disagreement on accounting issues arise, absent clearly erroneous guidance from the CPA. Such practice will benefit not only the credit union but also the regulator by freeing up its resources.

23. Credit union officials have the right to communication (i.e., discussion of draft findings) with their examiner prior to final issuance of the examination report. NEG page 21-1.

Commentary: The NCUA *Examiner's Guide* states that examiners should set aside "time periodically to discuss with management and officials developments in the examination." NEG page 21-1. In addition, an examiner should provide "credit union officials and management sufficient time to review it before the joint conference or exit interview." NEG page 20-1.

24. Credit unions have the right for directives from examiners (including verbal and written comments) to be consistent with agency policy, such as NCUA's letters to credit unions. NEG pages 3-1, 6-15, 6-16, 6-20, 7-35, 9A-18, and 10-1 - 10-14.

Commentary: While this seems like an obvious right, this is frequently raised by credit unions across the country. NCUA examiners must follow the guidelines in the Letters to Credit Unions. For example, the *Examiner's Guide* states that credit unions must follow Letters to Credit Unions in areas such as CAMEL ratings, risk-based lending, and risk management.

³ See U.S.C. 1782(a)(6).

