



January 8, 2024

Ms. Melane Conyers-Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

RE: Fair Hiring in Banking (RIN 3133-AF55)

Dear Ms. Conyers-Ausbrooks,

On behalf of its member credit unions, the Cooperative Credit Union Association, Inc. ("Association") appreciates the opportunity to comment on the National Credit Union Administration's (NCUA) proposed rule to implement the Fair Hiring in Banking Act. The Association is the state trade association representing approximately 200 state and federally-chartered credit unions located in the states of Delaware, Massachusetts, New Hampshire, and Rhode Island, which further serve over 3.6 million consumer members. The Association has developed these comments in consultation with our members.

The Association's High-Level Comments

- The Association supports most aspects the NCUA Board's proposed rule to implement the Fair Hiring in Banking Act passed by Congress in 2022 to give federally insured credit unions the option to hire individuals with older criminal records that involve crimes of "dishonesty" following NCUA approval. We urge the Board to finalize the rule with the modifications outlined below.
- We urge the Board to clarify that expungements "by operation of law" include pardons by the President of the United States or the Governor of a state. A pardon should nullify an individual's conviction in all respects.
- We urge the Board to revise the definition of "de minimus" offenses from the proposed maximum \$2,500 fine to not more than \$5,000 because federal criminal sentencing laws provide a maximum \$5,000 fine even for infractions.
- The Association supports proposed Section 752.8(c) stating that individuals with "de minimus" convictions "shall be covered" by fidelity bond insurers, however, we are concerned that proposed Section 752.10(g) would not extend the same protections to individuals whom the NCUA has approved to work for an insured credit union following an individualized assessment. Without a mandate for fidelity bond coverage for individuals approved under Section 752.10, the proposed rule may not achieve Congress's policy goals.

The Association's Detailed Comments

The Association supports most aspects of the Board's proposal to implement the Fair Hiring in Banking Act. While this proposed rule is based on a broader statutory mandate than existed when the Board issued the "Second Chance IRPS" (IRPS 19-01) in 2020, the Board is proposing what amount to incremental changes to a policy that has been in place for over three years without negatively impacting safety and soundness. The fact NCUA would have to approve most individuals subject to this rule on a case-by-case basis (except with respect to "de minimus" convictions) provides a key safeguard.

1. Scope. Should the final rule include additional information on who may fall within the scope of section 205(d), including persons who participate in the conduct of the affairs of an insured credit union?

No, we believe that Section 752.2 ("Who is covered by section 205(d)?") as proposed is already sufficiently clear concerning who participates in the conduct of the affairs of an insured credit union by providing a principles-based definition, especially when read in conjunction with the statutory definition of "institution-affiliated party" (IAP) codified in Section 206(r) of the Federal Credit Union Act, 12 U.S.C. § 1786(r). To the extent there are any gray areas, we believe those can be resolved by legal opinions on a case-by-case basis concerning the specific circumstances at issue.

2. Offense date. Is the Board's interpretation of the phrases "offense occurred" and "offense committed" as the "last date of underlying misconduct" appropriate, or are there other interpretations the Board should consider? What support do commenters have for other interpretations given the language of the statute?

We believe that the Board's proposed definition of the "last date of underlying misconduct" is reasonable. Given that the relevant provision of the Fair Hiring in Banking Act reads "7 years or more since the offense occurred," 12 U.S.C. 1785(d)(4)(A), it is logical to begin counting this 7-year waiting period from the time the underlying misconduct ended.

3. "Sentencing occurred." The FHBA exempts offenses committed by individuals 21 years of age or younger if it has been more than 30 months since the sentencing occurred. However, the statute does not define the phrase "sentencing occurred." The Board proposes to interpret "sentencing occurred" to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed. The Board seeks public comment on the following topic: Is the Board's proposed interpretation of the phrase "sentencing occurred" appropriate?

The Association believes that the clearest definition of when “sentencing occurred” would be the date of the applicable sentencing order as it appears on the sentencing order itself, as opposed to the date the court’s clerk entered the sentencing order onto the docket in the criminal case (which typically occurs a few days after the judge signs the order) or another time period. The date on the order is the clearest date to use because it can be easily and definitively ascertained from the court’s records.

4. Foreign convictions. Does section 205(d) encompass foreign convictions and pretrial diversions? What support do commenters have for their position?

The Association agrees with the Board’s interpretation that the Act’s phrase “criminal offense involving dishonesty” should include foreign criminal convictions and pretrial diversions for crimes like fraud and embezzlement. While such individuals would still be eligible to be approved by NCUA at an insured credit union if enough time had passed, the propensity of an individual to engage in fraud or deceit, etc., as demonstrated by any conviction or pretrial diversion should not be ignored (unless of course the conviction has been expunged, dismissed, or pardoned). It would make little sense from an operational risk standpoint for a person convicted of a crime involving dishonesty in a foreign jurisdiction, such as Canada, to be able to work for a federally-insured credit union across the border in the United States without first receiving NCUA approval.

5. Expungements, sealings, and dismissals. The FHBA establishes a new statutory exemption for expunged, sealed, and dismissed convictions (collectively, “expungements”). The statutory language does not mention expungements “by operation of law”—as opposed to through a court order. The proposed rule incorporates the new statutory language but also includes a broad interpretation of “expungement” to encompass covered offenses that have been expunged by operation of law. The Board seeks public comment on the following topic: Given the new statutory exemption for expunged offenses, is the Board’s more expansive proposed interpretation of expungement—which term includes records that have been expunged by application of law—appropriate?

Yes, the Association believes that the Board’s more expansive proposed interpretation of expungement to include expungements “by operation of law” is reasonable and supports the Board finalizing that phrase as proposed. We urge the Board, however, also to clarify in proposed Section 752.4 that pardons—whether Presidential pardons under federal law or pardons by state governors—should also qualify as an expungement “by operation of law”.

Black’s Law Dictionary defines “pardon” as “[t]he act or instance of officially nullifying punishment or other legal consequences of a crime”. Article II, Section 2 of the U.S. Constitution gives the President of the United States “Power to grant Reprieves and

Pardons for Offences against the United States, except in Cases of Impeachment.” President Biden has recently used his pardon power to address long-perceived inequalities in the federal criminal justice system that are relevant to the issue of fair hiring. See, e.g., “Granting Pardon for the Offense of Simple Possession of Marijuana, Attempted Simple Possession of Marijuana, or Use of Marijuana”, Proclamation 10688 of December 22, 2023, 88 Fed. Reg. 90,083 (Dec. 28, 2023).

Nevertheless, proposed Section 752.4(a) states that “[a] conviction for which a pardon has been granted will require a consent application,” which does not seem consistent with either Congress’s intent or with Article II, Section 2 of the U.S. Constitution. If a conviction has been officially nullified by operation of law via a pardon by the President of the United States or the Governor of a state, the individual in question should have that conviction officially nullified in all respects, including pursuant to NCUA regulations.

We urge the Board to delete the above-quoted final sentence of proposed Section 752.4(a). The Board instead should clarify in Section 754.2(c) that pardons shall be treated the same as expungements, dismissals, or sealing of a conviction.

6. Offenses involving controlled substances. Is the Board's interpretation of “offense[s] involving the possession of controlled substances” as applying, at a minimum, to simple possession and possession with intent to distribute appropriate?

We support the Board’s proposed interpretation of “offenses involving the possession of controlled substances” to exclude simple possession and possession with intent to distribute from the definition of “crime[s] for which dishonesty is an element.” *Merriam-Webster’s Dictionary* defines “dishonest” as “characterized by lack of truth, honesty, or trustworthiness.”

While illegal, drug possession or low-level drug sales do not typically involve an actual lack of truth or lack of honesty per se and are more similar to regulatory violations than to “dishonest” crimes such as fraud, deceit, embezzlement, breach of trust, and so forth. We agree with the proposal that an individual should only be disqualified based on a drug conviction if it is indeed a “crime for which dishonesty is an element” based on the particular facts and circumstances of the offense.

7. De minimis offenses. Is the Board's current approach to de minimis offenses appropriate? Are there additional offenses that the Board should consider de minimis under section 19? Commenters should provide support for such a designation.

The Association generally supports the Board’s proposal that NCUA will grant automatic approval for “de minimus” offenses such as those which had a maximum potential sentence of 3 years, however, we urge the Board to redefine the maximum

potential fine amount to \$5,000 from \$2,500 because of how the Sentencing provisions of Title 18 of the U.S. Code are drafted.

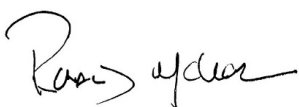
Under 18 U.S.C. § 3571 ("Sentence of Fine") even mere regulatory infractions are punishable by a fine of "not more than \$5,000," and the fines prescribed for Class B and C misdemeanors that do not result in death are similarly limited to "not more than \$5,000." 18 U.S.C. §§ 3571(b)(6), (7). There are few violations of federal criminal laws for which the potential fine for a violation would be less than \$5,000. We therefore urge the Board to revise the redefine the maximum potential fine amount for "de minimus" offenses to \$5,000 from the proposed \$2,500.

8. Conforming changes. The Board also requests comments on other conforming changes or updates that it should make to its regulations or guidance to implement the new statutory provisions.

The Association supports proposed Section 752.8(c) stating that individuals with "de minimus" convictions "shall be covered" by fidelity bond insurers, however, we are concerned that proposed Section 752.10(g) would not extend the same protections to individuals whom the NCUA has approved to work for an insured credit union following an individualized assessment. Without a mandate for fidelity bond coverage for individuals approved under Section 752.10, the proposed rule may not in practice achieve Congress's policy goal of promoting gainful employment for these individuals.

Thank you for the opportunity to comment on the NCUA's proposed rule to implement the Fair Hiring in Banking Act. If you have any questions or desire further information, please do not hesitate to contact the Association at (508) 481-6755 or govaff-reg@ccua.org.

Sincerely,



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