

## § 746.201

the merits of the request for review before making a determination, and notify the State supervisory authority of the Director's determination.

(b) *Coordination when appeal to Supervisory Review Committee filed.* In the event that a material supervisory determination appealed to the Committee is the joint product of NCUA and a State supervisory authority, the Committee will promptly notify the State supervisory authority of the appeal, provide the State supervisory authority with a copy of the appeal and any other related materials, solicit the State supervisory authority's views regarding the merits of the appeal before making a determination, and notify the State supervisory authority of the Committee's determination. Once the Committee has issued its determination, any other issues that may remain between the insured credit union and the State supervisory authority will be left to those parties to resolve.

(c) *Coordination when appeal to board filed.* In the event that a material supervisory determination appealed to the Board is the joint product of NCUA and a State supervisory authority, the Board will promptly notify the State supervisory authority of the appeal, provide the State supervisory authority with a copy of the appeal and any other related materials, solicit the State supervisory authority's views regarding the merits of the appeal before making a determination, and notify the State supervisory authority of the Board's determination. Once the Board has issued its determination, any other issues that may remain between the insured credit union and the State supervisory authority will be left to those parties to resolve.

### Subpart B—Appeals Procedures That Do Not by Law Require a Board Hearing

SOURCE: 82 FR 50294, Oct. 30, 2017, unless otherwise noted.

#### § 746.201 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to sections 120, 207, and 209 of the Federal Credit Union Act (12 U.S.C. 1766, 1787, and 1789).

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(b) *Purpose.* This subpart provides generally uniform procedures by which petitioners may appeal initial agency determinations to the NCUA Board under this part.

(c) *Scope.* This subpart covers the appeal of initial agency determinations by a program office which the petitioner has a right to appeal to the NCUA Board under the following regulations: §§ 701.14(e), 701.21(h)(3), 701.22(c), 701.23(h)(3), 701.32(b)(5), and 701.34(a)(4), appendix A to part 701 of this chapter, appendix B to part 701 of this chapter, Chapters 1–4, §§ 703.20(d), 703.111(d), 703.112(c), 703.114(c), 705.10(a), 708a.108(d), 708a.304(h), 708a.308(d), 709.7, 741.11(d), and 745.201(c), subpart J to part 747 of this chapter, and § 750.6(b).

(d) *Exclusions.* This subpart does not apply to:

(1) Actions by the agency to develop regulations, policy statements, or guidance documents;

(2) Formal enforcement actions, the review of material supervisory determinations that come under the jurisdiction of NCUA's Supervisory Review Committee, or the appeal of any agency determination made pursuant to part 792 of this chapter;

(3) Challenges to determinations under the prompt corrective action regime in parts 702 and 704 of this chapter and subparts L and M to part 747 of this chapter; and

(4) Creditor claims arising from the liquidation of an insured credit union to the extent that the creditor has requested, and the NCUA Board has agreed, for the claim to be handled through a hearing on the record pursuant to 12 U.S.C. 1787(b)(7)(A) and subpart A of part 747 of this chapter.

[82 FR 50294, Oct. 30, 2017, as amended at 84 FR 53302, Oct. 4, 2019]

#### § 746.202 Definitions.

For purposes of this subpart:

*Appeal* means a process by which a petitioner may obtain the review by the Board of an initial agency determination.

*Board* means the NCUA Board.

*Initial agency determination* means an agency action taken at a level below the Board with respect to an application, request, claim, or other matter in

which a determination of rights or resolution of issues is rendered and the party affected by the determination has been provided with a right to appeal the determination to the NCUA Board. The initial agency determination shall notify the Petitioner of the right to request reconsideration or to file an appeal with the Board, and shall include a description of applicable filing deadlines and time frames for agency responses. Agency determinations involving the formulation of a regulation, guidance document, or policy statement are excluded from this definition.

*Oral hearing* means an opportunity, granted at the sole discretion of the Board, by which a petitioner may make an oral presentation to the Board concerning issues pertinent to an appeal.

*Petitioner* means the person or entity seeking Board review of an initial agency determination.

*Program office* means the office within NCUA responsible for making an initial agency determination.

*Special Counsel to the General Counsel* means an individual (referred to herein as the "Special Counsel") within NCUA's Office of General Counsel charged with administering appeals in accordance with the procedures set forth in this part.

#### § 746.203 Request for reconsideration.

(a) *Reconsideration.* Prior to submitting an appeal in accordance with § 746.204, the petitioner may in its sole discretion make a written request to the appropriate program office to reconsider the initial agency determination.

(b) *Deadline to file.* A request for reconsideration must be sent to the appropriate program office within 30 calendar days of the date of the initial agency determination. A petitioner who does not file a request for reconsideration in a timely manner is considered to have waived the right to request reconsideration.

(c) *Special rule regarding change in officials.* Notwithstanding paragraph (a) of this section, a request for reconsideration of an initial agency determination disapproving an individual serving as a director, committee member or senior executive officer pursuant to

§ 701.14 of this chapter must be sent to the appropriate program office within 15 calendar days of the date of the initial agency determination.

(d) *Content of request.* Any request for reconsideration must include:

(1) A statement of the facts on which the request for reconsideration is based;

(2) A statement of the basis for the initial agency determination to which the petitioner objects and the alleged error in such determination; and

(3) Any other support or evidence relied upon by the petitioner which was not previously provided to the appropriate program office.

(e) *Determination of program office.* The appropriate program office will review its initial agency determination and reconsider the position initially taken in the light of the arguments and additional materials provided in the request for reconsideration. Within 30 calendar days of its receipt of a request for reconsideration, the appropriate program office shall issue its determination either affirming in whole or in part the initial agency determination or rejecting it.

(f) *Notice of determination.* The appropriate program office shall provide its decision concerning the reconsideration request to the petitioner in writing, stating the reasons for the decision. The decision shall be treated as an initial agency determination for purposes of § 746.204(a).

(1) In addition to a written statement of reasons for the decision, the appropriate program office shall provide the petitioner with written notice of the right to appeal the decision, in whole or in part, to the Board in accordance with the procedures set forth in § 746.204.

(2) For creditor claims brought pursuant to sec. 207 of the Federal Credit Union Act (12 U.S.C. 1787), the appropriate program office shall provide the petitioner with written notice of the right, in the alternative to filing an appeal with the Board, to file suit or continue an action commenced before the appointment of the liquidating agent in the district or territorial court of the United States for the district within which the credit union's principal place of business was located or the

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United States District Court for the District of Columbia. For such claims, the 60-day period for filing a lawsuit in United States district court provided in 12 U.S.C. 1787(b)(6) shall be tolled from the date of the petitioner's request for reconsideration to the date of a determination pursuant to paragraph (e) of this section.

(3) Upon a showing of extenuating circumstances, as determined by the program office in its reasonable judgment, a petitioner may be allowed to submit a second reconsideration request before filing an appeal with the Board. In such cases, the deadline for filing an appeal with the Board shall begin to run from the earlier of the date of the decision of the program office regarding the second reconsideration request or thirty calendar days from the date the second reconsideration request was accepted by the program office.

(g) *Failure to make a determination.* Failure by the appropriate program office to issue a decision within the timeframe specified in paragraph (e) of this section shall be an affirmation of the original initial agency determination and shall be treated as an initial agency determination for purposes of § 746.204(a).

(h) *Burden of proof.* The burden of proof to lead the appropriate program office to modify or reverse an initial agency determination shall rest solely upon the petitioner.

### § 746.204 Appeal to the Board.

(a) *Filing.* Within 60 calendar days of the date of an initial agency determination, or, as applicable, a determination by the program office on any request for reconsideration, a petitioner may file an appeal seeking review of the determination by the Board. The request must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Special rule regarding change in officials.* Notwithstanding paragraph (a) of this section, an appeal of an initial agency determination disapproving an individual serving as a director, committee member or senior executive officer pursuant to § 701.14 of this chapter

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must be filed with the Secretary of the Board within 15 calendar days of the date of the initial agency determination.

(c) *Failure to file a timely appeal.* Absent extenuating circumstances, as determined by the Board in its sole discretion, a petitioner who fails to file an appeal within the specified 60-day period shall be deemed to have waived all claims pertaining to the matters in issue.

(d) *Content of request.* Any appeal filed with the Board must include:

(1) A statement summarizing the underlying facts that form the basis of the appeal, together with copies of all pertinent documents, records, and materials on which the petitioner relies in support of the appeal.

(2) A statement outlining why the petitioner objects to the conclusions in the initial agency determination, including any errors alleged to have been made by the program office in reaching its determination.

(3) Any other materials or evidence relied upon by the petitioner that were not previously provided to the appropriate program office.

(e) *Burden of proof.* The burden of proof to lead the Board to modify or reverse an initial agency determination shall rest solely upon the petitioner.

(f) *Amending or supplementing the appeal.* Within 45 calendar days from the date the Secretary of the Board receives an appeal, the petitioner may amend or supplement the appeal in writing.

(g) *Request for oral hearing.* In accordance with § 746.207, the petitioner may request an opportunity to appear before the Board, in person, or via teleconference or videoconference, to make an oral presentation in support of the appeal.

### § 746.205 Preliminary considerations regarding the appeal.

(a) *Initial review.* The Special Counsel shall review all appeals filed with the Secretary of the Board for conformance with the rules set forth in this subpart, including deadlines for submission of an appeal. The Special Counsel shall also make an evaluation concerning whether an appeal is moot or is otherwise not in good order, and shall make

a recommendation for the disposition of all such appeals to the Board. The Special Counsel shall have the authority to dismiss an appeal upon the request of the petitioner.

(b) *Supplemental materials.* Within 30 calendar days from the date the Secretary of the Board receives an appeal, the Special Counsel may request in writing that the petitioner submit additional evidence in support of the appeal. If additional evidence is requested, the petitioner shall have 30 calendar days from the date of issuance of such request to provide the requested information. Failure by the petitioner to provide such information may result in denial of the petitioner's appeal. The Special Counsel shall have the authority to request additional information from any other relevant source in order to provide the Board with a full and complete administrative record. All requests by the Special Counsel pursuant to this section must be reasonable and designed to facilitate the processing of the appeal, not to delay it.

#### § 746.206 Administration of the appeal.

(a) *De novo review by Special Counsel.* After receipt of a timely appeal, the Special Counsel shall contact the relevant NCUA program office and request a complete set of all pertinent materials, including internal memoranda, correspondence, and records having a bearing on the initial agency determination being appealed. The Special Counsel will conduct an independent review of these materials, along with all materials submitted by the petitioner in support of the appeal. The Special Counsel will make a recommendation to the Board as to the appropriate disposition of the appeal after having evaluated the applicable legal arguments and considered the facts and circumstances that pertain to the appeal. As directed by the Board, the Special Counsel may provide his or her recommendation in writing to the Board and may make an oral presentation before the Board.

(b) *Determination on appeal.* Within 90 calendar days from the date of receipt of an appeal by the Secretary of the Board, or within any extension of time as established by the Chairman, the

Board shall issue a decision allowing, in whole or in part, or disallowing the petitioner's appeal. The decision by the Board shall be in writing, stating the reasons for the decision, and shall constitute a final agency action for purposes of chapter 7 of title 5 of the United States Code. Failure by the Board to issue a decision on an appeal within the 90-day period or within any extension of time as established by the Chairman shall be deemed to be a denial of the appeal.

(c) *Extension of time.* In the discretion of the Chairman, the time frame for the Board's decision may be extended as the Chairman may consider necessary or appropriate for a full and fair consideration of the issues. For purposes of this paragraph (c), the Special Counsel is authorized to act on behalf of the Chairman and may, in that capacity, grant an extension of time.

#### § 746.207 Procedures for oral hearing.

(a) *Request for oral hearing.* The petitioner may request to appear before the Board to make an oral presentation in support of the appeal. The request must be submitted with the initial appeal documents and should be in the form of a separate written document titled "Request for Oral Hearing." The request must show good cause for an oral presentation and state reasons why the appeal cannot be presented adequately in writing.

(b) *Action on the request.* The Board shall determine whether to grant the request for oral hearing and shall direct the Special Counsel to serve notice of the Board's determination in writing to the petitioner. A request for oral hearing shall be granted with the approval of any Board member. The determination by a Board member approving an oral hearing must be taken within 20 days of the Board Secretary's receipt of the appeal.

(c) *Effect of denial.* In the event no Board member approves of holding an oral hearing, the request for an oral hearing is deemed to be denied, and the appeal shall be reviewed and determined by the Board on the basis of the written record.

(d) *Procedures for oral hearing.* The following procedures shall govern the conduct of any oral hearing:

(1) *Scheduling of oral hearing; location.* The Special Counsel shall notify the petitioner and the program office of the date and time for the oral hearing, making sure to provide reasonable lead time and schedule accommodations. The oral hearing will be held at NCUA headquarters in Alexandria, Virginia; *provided, however*, that on his or her own initiative or at the request of the petitioner, the Chairman may in his or her sole discretion allow for a hearing to be conducted via teleconference or video conference facilities.

(2) *Appearances; representation.* The petitioner and the NCUA program office shall submit a notice of appearance identifying the individual(s) who will be representing them at the oral presentation. The petitioner shall designate not more than two officers, employees, or other representatives (including counsel), unless otherwise authorized by the Chairman. The NCUA program office shall designate not more than two individuals (one of whom may be a litigation and enforcement attorney from NCUA's Office of General Counsel), unless otherwise authorized by the Chairman.

(3) *Conduct of oral hearing.* The oral hearing shall consist entirely of oral presentations. The introduction of written evidence or witness testimony at the hearing shall not be permitted. The petitioner shall present first, followed by the NCUA program office. Each side shall be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Board and will be based on the complexity of the appeal. Members of the Board may ask questions of any individual appearing before the Board.

(4) *Transcript.* The oral hearing shall be on the record and transcribed by a stenographer, who will prepare a transcript of the proceedings. The stenographer will make the transcript available to the petitioner upon payment of the cost thereof.

(e) *Confidentiality.* An oral hearing as provided for herein constitutes a meeting of the Board within the meaning of the Government in the Sunshine Act (5 U.S.C. 552b). The NCUA Chairman shall preside over the conduct of the oral

hearing. The meeting will be closed to the public to the extent that one or more of the exemptions from public meetings apply as certified by NCUA's Office of General Counsel. The Board shall maintain the confidentiality of any information or materials submitted or otherwise obtained in the course of the procedures outlined herein, subject to applicable law and regulations.

(f) *Conclusion of the oral hearing.* The Board shall take the oral presentations under advisement. The Board shall render its decision on the appeal in accordance with § 746.206.

## PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

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