

bank warranties set forth in and subject to the terms of § 229.34 of this chapter as if the electronic item were a check subject to that section.

(iii) *Warranties and indemnity for returned checks that are electronic items that are not representations of substitute checks.*

(A) If the returned check is an electronic item that is not a representation of a substitute check, the Reserve Bank warrants to the bank to which it sends the returned check that—

(1) The electronic image portion of the item accurately represents all of the information on the front and back of the original check as of the time that the original check was truncated; the information portion of the item contains a record of all MICR-line information required for a substitute check under § 229.2(aaa) of this chapter; and the item conforms with the technical standards for an electronic item set forth in an operating circular; and

(2) No person will receive a transfer, presentment, or return of, or otherwise be charged for, the electronic item, the original item, or a paper or electronic representation of the original item such that the person will be asked to make payment based on an item it already has paid.

(B) If the returned check is an electronic item that is not a representation of a substitute check—

(1) Except as provided in paragraph (e)(1)(iii)(B)(2) of this section, the Reserve Bank agrees to indemnify the bank to which it sends the returned check (the recipient bank) for the amount of any losses that the bank incurs under subpart D of part 229 of this chapter for an indemnity that the bank was required to make under subpart D of part 229 of this chapter in connection with a substitute check later created from the returned check.

(2) A Reserve Bank shall not be liable under paragraph (e)(1)(iii)(B)(1) of this section for any amount that the recipient bank pays under subpart D of part 229 of this chapter that is attributable to the lack of good faith or failure to exercise ordinary care of the recipient bank or a person that handled the item, in any form, after the recipient bank.

(2) A Reserve Bank shall not have or assume any other liability to any person except—

(i) As provided in paragraph (e)(1) of this section;

(ii) For the Reserve Bank's own lack of good faith or failure to exercise ordinary care as provided in subpart C of part 229 of this chapter; or

(iii) As provided in subpart D of part 229 of this chapter.

(f) * * *

(3) Any warranty or indemnity made by the Reserve Bank under paragraph (e) of this section or part 229 of this chapter,

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§ 210.13 [Amended]

■ 9. In § 210.13, remove the word “party” wherever it appears and add the word “person” in its place, and remove the citation “§ 210.9(a)(5)” and add the citation “§ 210.9(b)(5)” in its place.

By order of the Board of Governors of the Federal Reserve System, October 22, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Change in Official or Senior Executive Officer in Credit Unions That Are Newly Chartered or Are in Troubled Condition

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is amending its rule concerning the requirement that federally-insured credit unions that are newly chartered or troubled file notice with NCUA before adding or replacing a board or committee member or employing or changing the duties of a senior executive officer. The amendments clarify the relationship between the prior notice provision and the commencement of service provision, so as to eliminate any potential confusion. In addition, the amendments reorganize the requirements in the current rule to make it easier to understand.

DATES: This rule is effective on November 26, 2004.

FOR FURTHER INFORMATION CONTACT: Ross P. Kendall, Staff Attorney, Division of Operations, Office of General Counsel, at telephone: (703) 518-6562.

SUPPLEMENTARY INFORMATION:

Background

On June 24, 2004, the NCUA Board requested comment on proposed changes to § 701.14 of its regulations, clarifying the procedures that newly chartered or troubled federally-insured credit unions must follow to obtain NCUA approval before adding or replacing board or committee members

or changing the duties of a senior executive officer. 69 FR 39871 (July 1, 2004). The proposed amendments clarify the relationship between the prior notice provision and the commencement of service provision in the current rule to eliminate confusion and reorganize the requirements to make the rule easier to understand.

NCUA received comments regarding the proposed changes from two federal credit unions, two national credit union trade associations, one state credit union trade association and one state credit union supervisory association, for a total of six comments.

Summary of Comments

The comments were generally favorable and supportive of the amendments, and all but one commenter supported the efforts to clarify and reorganize the provisions of the rule. Two commenters supported the proposal as published without recommending any changes.

One commenter recommended that the revised rule include a specific reference to the role of the state supervisory authority (SSA) in cases involving state-chartered credit unions. The rule, however, implements authority in the Federal Credit Union Act specifically authorizing the NCUA to review and approve of the service of certain senior credit union officials and employees of federally-insured credit unions, including credit unions that are state-chartered. 12 U.S.C. 1790a. While the NCUA is the decision maker in these cases, the current rule does require a state-chartered, federally-insured credit union to provide a copy of the NCUA notice to its SSA. 12 CFR 701.14(d)(1). In addition, the Board notes that another provision of our regulations also requires NCUA to consult with the appropriate SSA and provide it with notice concerning NCUA's decision. 12 CFR 741.205. The Board has not adopted this recommendation to otherwise reference the role of SSAs.

Another commenter suggested that the rule provide that a request for approval of an official's or employee's service to be deemed complete unless the regional office specifically requires additional information within ten days of its receipt of the request.

The current rule provides that the appropriate NCUA regional office will notify the credit union within ten days of its receipt of the request for approval either that the request is complete or that additional information is required and the Board is not aware of any instances of problems with the current procedure. The final rule retains this provision. The rule already calls for the

regional office to advise the credit union about whether the request is complete and providing an automatic determination that an application is deemed complete within ten days could create confusion with the provision in the rule providing for automatic approval if a Regional Director fails to issue a written decision within thirty days. In addition, the suggested revision could, in fact, delay processing. A regional office may determine that it wants to provide an applicant with an opportunity to supplement a submission after performing an initial review. A credit union will generally be willing to provide additional information if it is able since failure to do so would likely result in the disapproval of its request.

One commenter suggested that NCUA exclude service by employees from coverage of the rule. This commenter contends that selection and oversight of employees should be the exclusive province of the board of directors, absent some indication that the board has behaved unethically or is responsible for the credit union's unhealthy financial condition. The authority in the FCU Act for this rule specifically addresses senior executive employees as well as board and committee members. 12 U.S.C. 1790a(a). Senior executives are directly involved in and are responsible for the day-to-day operation of a credit union, and the Board believes their competence is as critical as that of the elected officers and board members. Accordingly, the Board has not adopted this recommended change.

One commenter noted its opposition to the proposal, contending that the current rule permits an officer or senior executive employee to commence service on an interim basis until such time as the credit union is notified in writing of NCUA's determination to disapprove such service. The commenter has mistakenly characterized the current rule, which only permits such interim service if NCUA grants a waiver from the otherwise mandatory thirty-day notice. The proposed amendments preserve the ability of a credit union to seek a waiver from the advance notice requirements in those cases in which the circumstances may warrant service to begin immediately. The final rule clarifies any ambiguity in the current rule between the operation of the prior notice and commencement of service provisions in the rule. The final rule retains the waiver provisions that provide sufficient flexibility where circumstances warrant immediate service yet permits the regional offices

to conduct the review contemplated by the Federal Credit Union Act.

Final Rule

In view of the comments, NCUA is adopting the proposed amendments as a final rule without change.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small entities. NCUA considers credit unions having less than ten million dollars in assets to be small for purposes of RFA. Interpretive Ruling and Policy Statement (IRPS) 87-2 as amended by IRPS 03-2. The amendment clarifies the relationship between the waiver of prior notice provision and the temporary service provision, so as to eliminate any potential confusion. The NCUA has determined and certifies that this amendment will not have a significant economic impact on a substantial number of small credit unions. Accordingly, the NCUA has determined that a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined that this amendment would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget (OMB). NCUA currently has OMB clearance for § 701.14's collection requirements (OMB No. 3133-0121).

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The amendment will apply to all federally-insured credit unions. NCUA has determined that the amendment will not have a substantial direct effect on the States, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this amendment does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this amendment will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act. 5 U.S.C. 551. The Office of Management and Budget has determined that this rule is not a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 12 CFR Part 701

Credit unions, Senior executive officials.

By the National Credit Union Administration Board on October 21, 2004.

Mary Rupp,

Secretary of the Board.

■ Accordingly, the National Credit Union Administration amends 12 CFR part 701 as follows:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789.

■ 2. Amend § 701.14 by removing paragraphs (c), (d) and (e), adding new paragraphs (c) and (d), and redesignating paragraph (f) as paragraph (e) to read as follows:

§ 701.14 Change in official or senior executive officer in credit unions that are newly chartered or in troubled condition.

* * * * *

(c) *Procedures for Notice of Proposed Change in Official or Senior Executive Officer—(1) Prior Notice Requirement.* An insured credit union must give NCUA written notice at least 30 days before the effective date of any addition or replacement of a member of the board of directors or committee member or the employment or change in responsibilities of any individual to a position of senior executive officer if:

(i) The credit union has been chartered for less than two years; or
 (ii) The credit union meets the definition of troubled condition in paragraph (b)(3) or (4) of this section.

(2) *Waiver of Prior Notice*—(i) *Waiver requests*. Parties may petition the appropriate Regional Director for a waiver of the prior notice required under this section. Waiver may be granted if it is found that delay could harm the credit union or the public interest.

(ii) *Automatic waiver*. In the case of the election of a new member of the board of directors or credit committee member at a meeting of the members of a federally insured credit union, the prior 30-day notice is automatically waived and the individual may immediately begin serving, provided that a complete notice is filed with the appropriate Regional Director within 48 hours of the election. If NCUA disapproves a director or credit committee member, the board of directors of the credit union may appoint its own alternate, to serve until the next annual meeting, contingent on NCUA approval.

(iii) *Effect on disapproval authority*. A waiver does not affect the authority of NCUA to issue a Notice of Disapproval within 30 days of the waiver or within 30 days of any subsequent required notice.

(3) *Filing procedures*—(i) *Where to file*. Notices will be filed with the appropriate Regional Director or, in the case of a corporate credit union, with the Director of the Office of Corporate Credit Unions. All references to Regional Director will, for corporate credit unions, mean the Director of Office of Corporate Credit Unions. State-chartered federally insured credit unions will also file a copy of the notice with their state supervisor.

(ii) *Contents*. The notice must contain information about the competence, experience, character, or integrity of the individual on whose behalf the notice is submitted. The Regional Director or his or her designee may require additional information. The information submitted must include the identity, personal history, business background, and experience of the individual, including material business activities and affiliations during the past five years, and a description of any material pending legal or administrative proceedings in which the individual is a party and any criminal indictment or conviction of the individual by a state or federal court. Each individual on whose behalf the notice is filed must attest to the validity of the information filed. At the option of the individual,

the information may be forwarded to the Regional Director by the individual; however, in such cases, the credit union must file a notice to that effect.

(iii) *Processing*. Within ten calendar days after receiving the notice, the Regional Director will inform the credit union either that the notice is complete or that additional, specified information is needed and must be submitted within 30 calendar days. If the initial notice is complete, the Regional Director will issue a written decision of approval or disapproval to the individual and the credit union within 30 calendar days of receipt of the notice. If the initial notice is not complete, the Regional Director will issue a written decision within 30 calendar days of receipt of the original notice plus the amount of time the credit union takes to provide the requested additional information. If the additional information is not submitted within 30 calendar days of the Regional Director's request, the Regional Director may either disapprove the proposed individual or review the notice based on the information provided. If the credit union and the individual have submitted all requested information and the Regional Director has not issued a written decision within the applicable time period, the individual is approved.

(d) *Commencement of Service*. A proposed director, committee member, or senior executive officer may begin service after the end of the 30-day period or any other additional period as provided under paragraph (c)(3)(iii) of this section, unless the NCUA disapproves the notice before the end of the period.

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 723

Member Business Loans

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is amending the collateral and security requirements of its member business loans (MBL) rule to enable credit unions subject to the rule to participate more fully in Small Business Administration (SBA) guaranteed loan programs.

DATES: This final rule is effective November 26, 2004.

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Staff Attorney, Office of General Counsel, at (703) 518-6540.
SUPPLEMENTARY INFORMATION:

A. Background

In 2003, NCUA amended its MBL rule and other rules related to business lending to enhance credit unions' ability to meet their members' business loans needs. 68 FR 56537 (October 1, 2003). In addition to comments on those amendments, NCUA received other suggestions on how it could improve the MBL rule. Among the most significant of these, commenters suggested NCUA amend the MBL rule "so that it could be better aligned with lending programs offered by the Small Business Administration," such as the SBA's Basic 7(a) Loan Program. *Id.* at 56538. While NCUA recognized the merits of this suggestion, NCUA could not include it in the final rulemaking because it addressed issues outside the scope of the rulemaking. The Administrative Procedure Act generally prohibits Federal Government agencies from adopting rules without affording the opportunity for public comment. 5 U.S.C. 553. NCUA noted in the final rule, however, that it would review this suggestion to determine if it would be appropriate to act on it in a subsequent rulemaking.

As a result of that review, NCUA issued a proposed amendment to its MBL rule in June 2004 to permit credit unions to make SBA guaranteed loans under SBA's less restrictive lending requirements instead of under the more restrictive MBL rule's lending requirements. 69 FR 39873 (July 1, 2004). NCUA reviewed the SBA's loan programs in which credit unions can participate and determined they provide reasonable criteria for credit union participation and compliance within the bounds of safety and soundness. Additionally, these SBA programs are ideally suited to the mission of many credit unions to satisfy their members' business loans needs.

NCUA noted in the proposal that it recognizes NCUA's collateral and security requirements for MBLs, including construction and development loans, are generally more restrictive than those of the SBA's guaranteed loan programs and could hamper a credit union's ability to participate fully in SBA loan programs. As a result, the MBL rule's collateral and security requirements could prevent a credit union from making a particular loan that it could otherwise make under SBA's requirements. NCUA issued the proposal to provide relief from these more restrictive requirements and to