

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 703, 704, 709, and 742

RIN 3133-AD86

Removing References to Credit Ratings in Regulations; Proposing Alternatives to the Use of Credit Ratings

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: NCUA is proposing rules to implement certain statutory provisions in Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). The proposed rules replace or remove references to credit ratings in NCUA regulations.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

NCUA website:

<http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx>.

Follow the instructions for submitting comments.

E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on “Notice of Proposed Rulemaking – Removing References to Credit Ratings” in the e-mail subject line.

Fax: (703) 518-6319. Use the subject line described above for e-mail.

Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

Hand Delivery/Courier: Same as mail address.

PUBLIC INSPECTION: All public comments are available on the agency’s website at <http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA’s law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Mark Vaughan, Director, Division of Capital Markets, or Dale Klein, Senior Capital Markets Specialist, at the address above or telephone (703) 518-6620; or Lisa Henderson, Staff Attorney, or Frank Kressman, Staff Attorney, at the address above or telephone (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

Section 939A of the Dodd-Frank Act requires each Federal agency to review (1) any regulation issued by such agency that requires the use of an assessment of the creditworthiness of a security or money market instrument; and (2) any references to or

requirements in such regulations regarding credit ratings.¹ Section 939A further requires each agency to modify any such regulations identified by the review to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standards of creditworthiness as each respective agency shall determine as appropriate for such regulations. In developing substitute standards of creditworthiness, an agency shall seek to establish, to the extent feasible, uniform standards of creditworthiness for use by the agency, taking into account the entities it regulates that would be subject to such standards.²

NCUA has identified 24 general areas of its regulations that contain references to nationally recognized statistical rating organization (NRSRO)³ credit ratings. Eight are found in part 703 of the regulations governing the investment activities of natural person federal credit unions (FCUs). 12 CFR part 703. Fourteen are found in part 704 of the regulations governing the operations, investment activities, and capital risk-weighting of corporate credit unions. 12 CFR part 704. There is also one reference to credit ratings in part 709 of the regulations governing the involuntary liquidation of federal credit unions and one reference in part 742 of the regulations governing NCUA's regulatory flexibility program. 12 CFR parts 709 and 742.

II. General Approach

The proposed rule generally handles NRSRO ratings three different ways, depending on the manner in which the rating is used in the regulations. For investments, the proposal generally replaces the minimum credit rating requirement with a requirement that the credit union do an internal credit analysis of the investment pursuant to a particular narrative standard. For counterparty transactions, the proposal generally

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, §939A (2010).

² *Id.*

³ An NRSRO is an entity registered with the U.S. Securities and Exchange Commission (SEC) under section 15E of the Securities Exchange Act of 1934. See 15 U.S.C. 78o-7, as implemented by 17 CFR 240.17g-1.

replaces the minimum credit rating requirement with a requirement that the credit union do an internal credit analysis of the counterparty pursuant to an internal standard set by the credit union's board. For ratings usage outside of investment and counterparty suitability, the proposal generally removes the ratings reference without requiring some substitute analysis. These three approaches are discussed in more detail below and in Section III.

a. Investment Authority

Where the regulations require that a security have particular rating in order for it to be a permissible investment for a credit union, the proposed rule replaces the minimum rating with a narrative standard that is focused primarily on credit quality. The proposal generally requires a credit union to conduct and document an internal analysis demonstrating that the issue or issuer of a security has a certain, specified capacity to meet its financial commitments.

For each section of the rule, the necessary capacity to meet financial commitments is correlated to narrative descriptions provided by the NRSRO rating agencies. For example, two of the larger NRSROs, Standard and Poor's and Fitch, state that a AA issuer rating (e.g., "in one of the two highest ratings categories") means the obligor has a very strong capacity to meet its financial commitments. Accordingly, where the NCUA regulations currently require an investment to have a AA rating or equivalent, the proposal generally requires the credit union to determine that the issuer of the security has a very strong capacity to meet its financial commitments. The proposal contains similar translations for other ratings (e.g., a rating of BBB is equivalent to adequate capacity, and a rating of A is equivalent to strong capacity).

The Board believes that this approach to replacing credit ratings is consistent with both the letter and spirit of the Dodd-Frank Act. The legislative history of Dodd-Frank indicates that Congress was concerned not with any particular rating level, or associated narrative standard, but rather, with the NRSROs' failure to apply the

narrative standard accurately and consistently to certain securities.⁴ The Dodd-Frank Act was intended to reduce over-reliance on ratings and encourage investors to conduct their own analyses.⁵ This proposal furthers those aims by requiring that credit unions conduct their own analyses using long-standing, and accepted, narrative standards.

The Board believes that this approach does not present a significant change for most credit unions. NCUA already requires natural person FCUs and corporates to have credit risk management policies that go beyond simple reliance on credit ratings. Section 703.6 requires an FCU to conduct and document a credit analysis on any non-guaranteed or insured investment. 12 CFR 703.6. Section 704.6 requires a corporate to operate according to a credit risk management policy that is commensurate with the investment risks and activities it undertakes, and the corporate's policy must address credit limit approval processes, due diligence analysis requirements, maximum credit limits with each obligor and transaction counterparty, and concentrations of credit risk. 12 CFR 704.6. Accordingly, credit unions that purchase investments with some credit risk should already have in place robust processes -- including internal testing and assessment and/or reviewing reports, analyses, opinions, and other assessments issued by third parties -- analyzing the risk that an issue or issuer will fail to perform on its obligation. NCUA will provide additional supervisory guidance on the indicators that support a determination that an issue or issuer has the necessary capacity (e.g., adequate, strong, very strong, etc.) to meet its financial commitments.

b. Counterparties

⁴ With respect to the financial crisis, the Senate Report stated that "erroneous credit ratings" caused serious and far reaching problems. See S. Rep. No. 111-176, p. 36 (2010). Report of the Committee on Banking, Housing, and Urban Affairs. The Senate Report attributed the errors to the overreliance by the NRSROs on mathematical risk models and to conflicts of interest in the ratings process, not to incorrect standards. See Dodd-Frank Wall Street Reform: Conference Report Summary. Similarly, the House Report on H.R. 3890, the rating agency reform legislation later incorporated into H.R. 4173 as passed by the House, notes that NRSROs issued ratings based upon unsatisfactory credit analyses. See H. Rep. No. 111-685, Part I, p. 19 (2010). Report of the Committee on Financial Services.

⁵http://banking.senate.gov/public/files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf.

Where the regulations require that a transaction counterparty have a particular rating, the proposed rule substitutes a requirement that the counterparty meet minimum credit quality standards as established by the credit union's board of directors. In developing and applying credit quality standards, the board of directors may incorporate external ratings, reports, analyses, opinions, and other assessments issued by third-parties. Since counterparty risk is more akin to loan than investment risk, a credit union would be expected to document its credit assessment and analysis using a system similar to its internal loan grading system. These internal processes would be subject to examiner review and classification, similar to the process used for credit union loan classification.

Sections 703.6 and 704.6, noted above, also require credit unions to establish appropriate processes to evaluate the creditworthiness of securities counterparties. Any credit union doing business with a counterparty should already consider a counterparty's financial statements, its general reputation, and whether there have been any formal enforcement actions against the counterparty or its affiliates by state or federal securities regulators. A credit union should know the counterparty's character, integrity of management, activities, and financial markets in which it deals.

c. Removal Without Replacement

Where NCUA has determined that a provision that references NRSRO ratings is no longer necessary, the proposed rule deletes or substantially modifies the provision.

d. Other Approaches

As discussed below, in Section IV, the Board is not wedded to these proposed alternatives to credit ratings in the investment and counterparty contexts. Commenters who believe a different approach (or approaches) is warranted should describe their alternatives and give a supporting justification.

III. Specific Proposed Amendments

a. Part 703 – Investment and Deposit Activities

Definitions

Section 703.2 contains definitions of terms related to the investment activities of natural person FCUs. Three of the definitions make reference to credit ratings.

Section 703.2 defines “deposit note” as an obligation of a bank that is similar to a certificate of deposit “but is rated.” The NCUA Board is proposing to delete the definition of “deposit note” entirely, as the term is standard in the securities industry.

Part 703 permits FCUs to invest in Collateralized Mortgage Obligations (CMOs), and CMOs are defined in §703.2 as multiclass mortgage related securities. An FCU’s authority to purchase mortgage related securities comes from §107(15)(b) of the Act, 12 U.S.C. 1757(15)(b), which defines mortgage related security by cross reference to the same phrase in §3(a)(41) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(41) (Exchange Act). The pre-Dodd-Frank Exchange Act definition included a reference to NRSRO ratings, but Dodd-Frank Act eliminated the NRSRO reference in §3(a)(41) of the Exchange Act, substituting the language: “meets standards of creditworthiness as established by the [Securities and Exchange] Commission (SEC).”⁶ The Dodd-Frank Act requires the SEC to establish those standards by July 21, 2012.⁷

Section 703.2 defines mortgage related security by using the language found in the pre-Dodd Frank Act definition in §3(a)(41) of the Exchange Act, including the reference to NRSRO ratings. This proposal removes the reference to NRSRO ratings from §703.2,

⁶ Dodd-Frank Act, §939.

⁷ Id.

and replaces it with a short cross reference to §3(a)(41). Under the proposal, FCUs that wish to purchase mortgage related securities, including CMOs, must determine and document that the security is, in fact, a mortgage related security as defined by the SEC. In the time period before the SEC moves to specify “standards of creditworthiness” for mortgage related securities, an FCU is prohibited from purchasing a CMO or other mortgage related security unless the FCU has specific evidence that the SEC considers that security to meet the requirements of §3(a)(41).

Similarly, §703.2 cross-references the definition of “small business related security” with its definition in §3(a)(53) of the Exchange Act, 15 U.S.C. 78c(a)(53), and then repeats that definition verbatim. Again, this flows from the authority in the FCU Act, 12 U.S.C. 1757(15)(C), and its cross reference to the definition of small business security in the Exchange Act. As with the definition of “mortgage related security,” discussed above, the definition of “small business related security” prior to the Dodd-Frank Act included a reference to NRSRO ratings. The Dodd-Frank Act eliminated that reference, substituting instead creditworthiness standards to be established by the SEC, and providing the SEC with two years to establish such standards.⁸ This proposed rule removes the language of the former Exchange Act definition and redefines “small business related security” by a short cross-reference to the Exchange Act provision. An FCU wishing to purchase a small business related security must demonstrate that it meets the §3(a)(53) requirements, as determined by the SEC. The proposed rule retains the exemption for Small Business Administration securities permissible under §107(7) of the Federal Credit Union Act, 12 U.S.C. 1757(7).

Broker-dealers and safekeepers

Sections 703.8(b)(3) and 703.9(d) list a number of factors that FCUs should consider when evaluating the reliability of broker-dealers and investment safekeepers, respectively. One factor is NRSRO reports. The proposed rule replaces the NRSRO

⁸ Id.

reference with “external assessments of creditworthiness.” FCUs may obtain these assessments from various sources.

Permissible investments

Section 703.14 establishes standards for permissible investments for FCUs.

Section 703.14(e) provides that an FCU may purchase a municipal security (muni) that an NRSRO has rated in one of the four highest rating categories. The proposed rule removes the minimum rating requirements, providing instead that for an investment to be permissible, it must be originated by an issuer that has at least an adequate capacity to meet its financial obligations, even under adverse conditions, for the projected life of the security. As noted above, an FCU may evaluate the financial strength of an issuer by conducting internal assessments and/or reviewing assessments issued by third-parties.

To further limit the risk associated with the purchase of munis, the proposal adds new concentration limits on such holdings. Specifically, an FCU must limit its aggregate muni holdings to no more than 75 percent of the credit union’s net worth and limit its holdings of munis issued by any single issuer to no more than 25 percent of net worth. Since most munis are exempt from income taxation, and FCUs are tax exempt entities that cannot take full advantage of the tax exempt status of munis, it is unlikely that any particular FCU would desire to purchase or hold municipal securities in amounts that would exceed these proposed limits.

Section 703.14(g) permits an FCU to purchase a European financial options contract for the purpose of hedging the risk associated with issuing share certificates with dividends tied to an equity index. Two of the requirements of the current 703.14(g) are that the counterparty meets certain NRSRO ratings requirements and that the aggregate amount of such index-linked certificates not exceed the credit union’s net worth. The proposal removes the reference to the NRSRO ratings and instead requires that the

counterparty meet credit standards set by the board. To mitigate any risk associated with the removal of credit ratings in this context, the proposal tightens the concentration limit in equity indexed certificates from 100 percent of the credit union's net worth to 50 percent of the credit union's net worth.

Section 703.14(h) permits an FCU to invest in Mortgage note repurchase transactions. Three of the requirements of the current §703.14(h) are that (1) the counterparty meets certain NRSRO ratings requirements, (2) the aggregate amount of the investments with any one counterparty be limited to 25 percent of the credit union's net worth, and (3) the aggregate amount of the investments with all counterparties be limited to 100 percent of net worth. The proposal removes the reference to the NRSRO ratings and instead requires that the counterparty meet credit standards set by the board. To mitigate any risk associated with the removal of credit ratings in this context, the proposal tightens the aggregate concentration limit from 100 percent of net worth to 50 percent of net worth.

b. Part 704 – Corporate Credit Unions

Definitions

Section 704.2 contains definitions of terms related to the investment activities of corporate credit unions. Four of the definitions refer to credit ratings.

The proposed rule eliminates the definition of “NRSRO” as irrelevant, given that the proposed rule eliminates references to NRSROs.

The definition of “asset-backed commercial paper (ABCP) program” states that it is a program that has received a credit rating from an NRSRO. The proposed rule deletes that element of the definition as unnecessary. A corporate that is authorized to invest in ABCPs is expected to conduct due diligence on an ABCP investment just as any other investment.

The definition of “eligible ABCP liquidity facility” provides that if the assets that the facility is required to fund against have received an NRSRO rating at the time of the inception of the facility, the facility can be used to fund only those assets that are rated investment grade by an NRSRO at the time of funding. The proposed rule removes the NRSRO references, providing instead that a facility can be used to fund only those assets or exposures that demonstrate adequate capacity to meet their financial obligations, even under adverse economic conditions, for the projected life of the asset or exposure. A corporate may base its evaluation of the financial strength of an asset or exposure on internal and external assessments.

The definition of “small business related security” in §704.2 is different from that in §703.2, discussed above. When NCUA comprehensively revised part 704 in September 2010, the Board noted that Congress had already passed the Dodd-Frank Act, amending the Exchange Act’s definition of small business related security.⁹ The Board stated that it wanted to continue to use the old Exchange Act definition and therefore retained the description of the security¹⁰ while removing the reference to the Exchange Act. The definition retained an NRSRO reference, however, and the proposed rule removes that reference. As is the case with §703.2, the proposed rule retains the exemption for Small Business Administration securities permissible under §107(7) of the Federal Credit Union Act, 12 U.S.C. 1757(7).

Credit risk management

⁹ 75 FR 64786, 64789 (Oct. 20, 2010).

¹⁰ Prior to the Dodd-Frank Act, Section 3(a)(53) of the Exchange Act defined a “small business related security” as “a security that is rated in 1 of the 4 highest rating categories by at least one nationally recognized statistical rating organization and represents an interest in one or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company.”

Section 704.6(f) establishes minimum credit quality standards for corporate credit union investments. 12 CFR 704.6(f). The standards include that each investment must have an NRSRO rating and that at least 90 percent of a corporate's investment portfolio must have at least two such ratings. The standards further require that long-term investments be rated at least AA- (or equivalent) and short-term investments be rated at least A- (or equivalent). Finally, §704.6(f) requires a corporate to monitor NRSRO ratings as long as it holds a rated investment and to develop an action plan, pursuant to §704.10, for any investment subject to a ratings downgrade below AA- for a long-term investment or A- for a short-term investment.

The proposed rule removes the minimum rating requirements, providing instead that for an investment to be permissible, it must be originated by an issuer that has at least a very strong capacity to meet its financial obligations, even under adverse conditions, for the projected life of the security. This standard would apply to both long-term and short-term investments. As discussed above, a corporate may base its evaluation of the financial strength of an issuer on internal and external assessments. Under the proposed rule, a corporate must monitor any changes in credit quality of the investment as long as it owns the investment and develop an action plan, under §704.10, if there is reason to believe that the obligor no longer has a very strong capacity to meet its financial obligations for the remaining projected life of the security.

Section 704.6(g) requires a corporate credit union to maintain documentation for each credit limit with each obligor or transaction counterparty, including rating agency information. The proposed rule deletes the reference to rating agency information.

Expanded authorities

Appendix B to Part 704 sets out expanded authorities for corporates that have met certain requirements.

Part I of Appendix B authorizes corporates to purchase investments with long-term ratings no lower than A- (or equivalent) and short-term ratings no lower than A-2 (or equivalent). The proposed rule removes the rating requirements, providing instead that for an investment to be permissible, it must be originated by an issuer that has at least a strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security. Again, this standard would apply to both long-term and short-term investments. As in other parts of the proposed rule that substitute ratings with multi-faceted issuer evaluations, a corporate may consider a variety of sources in making that evaluation.

Part II of Appendix B authorizes a corporate to purchase a foreign investment provided, among other things, that the sovereign issuer, and/or the country in which the obligor is organized, has a long-term foreign currency debt rating no lower than AA- (or equivalent). The proposed rule deletes the NRSRO reference, providing instead that a corporate may purchase a foreign investment only pursuant to an explicit policy established by the board of directors. Further, any foreign issue or issuer must have a very strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security.

Part III of Appendix B provides that, for derivative transactions, domestic counterparties must be rated at least A- (or equivalent). Part III also requires a corporate to monitor the ratings as long as a contract remains open and to develop an action plan, pursuant to §704.10, for any counterparty downgraded below the minimum rating requirements. The proposed rule removes the rating requirements, mandating instead that the counterparty meet minimum credit quality standards as established by the corporate's board of directors. A corporate must identify the criteria relied upon to determine that the standards are met at the time the transaction is entered into and monitor those criteria for as long as the contract remains open. Finally, a corporate must develop a §704.10 action plan if the credit quality of the counterparty deteriorates below the standards established by the corporate's board.

Risk-based capital

Appendix C to Part 704 explains how a corporate must compute its risk-weighted assets for purposes of determining its capital ratios. Appendix C contains several references to NRSRO ratings.

In the definitions section of Appendix C, “traded position” is defined with reference to an NRSRO rating. The proposed rule removes the definition of “traded position,” as the term is used only in paragraphs II(c)(3) and (4), which are proposed to be deleted, as discussed below.

Paragraph II(a)(2)(viii) provides that claims on qualifying securities firms, if rated in one of the three highest investment grade categories by an NRSRO, may be risk-weighted at 20 percent. The proposed rule removes the ratings references, requiring instead that, for a 20 percent risk weighting, a qualifying securities firm must either meet minimum credit quality standards as established by the corporate credit union’s board of directors or demonstrate at least a strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the exposure. The corporate will use whichever requirement is more stringent. The board of directors must explicitly accept the regulatory minimum credit quality standard or establish a higher standard to be applied by management.

Paragraph II(a)(2)(viii) also provides that a qualifying securities firm may rely on the rating of its parent consolidated company if the parent consolidated company guarantees the claim. The proposed rule removes the rating reference, providing instead that a qualifying securities firm may rely on the creditworthiness of its parent consolidated company if the parent consolidated company guarantees the claim. The parent company’s creditworthiness is measured by the same standards as that of the qualifying securities firm.

Paragraph II(b) addresses the risk-weighting of off-balance sheet assets. Certain assets relating to asset backed commercial paper (ABCP) facilities are weighted “based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph II(c)(3).” See paragraphs II(b)(1)(iv), II(b)(2)(ii), and II(b)(4). The proposed rule also deletes the phrase “or external credit ratings under paragraph II(c)(3)” for each of these three paragraphs, as paragraph II(c)(3) itself will be deleted under this proposal.

Paragraphs II(c)(1) and (c)(2) provide a general approach to risk-weighting recourse obligations, direct credit substitutes, and residual interests. Paragraphs II(c)(3) and (c)(4) provide alternative methods for calculating the risk weights of certain recourse obligations, direct credit substitutes, and residual interests. Since these alternative methods involve reliance on NRSRO ratings, the proposed rule deletes these paragraphs. The proposed rule adds a new paragraph II(c)(3) which allows a corporate with advanced risk management and reporting systems to seek NCUA approval to use an internal ratings-based approach to risk-weight those positions.¹¹

c. Part 709 – Involuntary Liquidation of Federal Credit Unions and Adjudication of Creditor Claims Involving Federally Insured Credit Unions in Liquidation

Part 709 governs the involuntary liquidation of FCUs and the adjudication of creditor claims involving federally insured credit unions (FICUs). Section 709.10(b) provides

¹¹ Acceptable internal credit risk rating systems typically: 1) are an integral part of the corporate's risk management system that explicitly incorporates the full range of risks arising from the corporate's participation in securitization activities; 2) link internal credit ratings to measurable outcomes; 3) separately consider the risk associated with the underlying loans or borrowers and the risk associated with the structure of the particular securitization transaction; 4) identify gradations of risk; 5) use clear, explicit criteria to classify assets into each internal rating grade; 6) employ independent credit risk management or loan review personnel to assign or review the credit risk ratings; 7) include an internal audit procedure to periodically verify that internal risk ratings are assigned in accordance with the corporate's established criteria; 8) monitor the performance of the assigned internal credit risk ratings over time to determine the appropriateness of the initial credit risk rating assignment, and adjust individual credit risk ratings or the overall internal credit risk rating system, as needed; and 9) make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

that NCUA will not use its authority to repudiate contracts under 12 U.S.C. 1787(c) to reclaim, recover, or recharacterize financial assets transferred by a FICU in connection with a securitization or in the form of a participation. Section 709.10(f) provides that NCUA will not attempt to avoid an otherwise legally enforceable securitization or participation agreement solely because the agreement does not meet the contemporaneous requirement of sections 207(b)(9) and 208(a)(3) of the FCU Act.

Section 709.10(a)(5) includes a definition of “securitization” that includes a reference to NRSRO ratings. The proposed rule deletes the definition of securitization in paragraph (a)(5) and the references to securitization in paragraphs (b), (f), and (g), as credit unions do not securitize assets within the meaning of Part 709. In addition, the proposal deletes the definition of “special purpose entity” in paragraph (a)(6), as this phrase is only used in the definition of “securitization.”

d. Part 742 – Regulatory Flexibility Program

Part 742 provides an exemption from certain regulatory restrictions for credit unions that have demonstrated sustained superior performance. Pursuant to §742.4(a)(9) a credit union is exempt from the prohibition in §703.13(d)(3) against the purchase of a commercial mortgage related security provided, among other things, that the security is rated in one of the two highest rating categories by at least one NRSRO. The proposed rule removes the NRSRO requirement, replacing it with the requirement that the issuer have very strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security.

IV. Request for Comment

As discussed above, this proposal removes the references to NRSRO credit ratings from NCUA regulations. In some places, the proposal replaces these references with alternative standards of creditworthiness. In other places, the Board believes that no alternative is necessary.

The Board realizes there are many possible alternative standards of creditworthiness, including some alternatives not used by the Board in this proposal. For example, some other banking regulators, and third-party commenters on proposals published by those regulators, have suggested alternatives based on criteria such as macro-economic factors, minimum probabilities of defaults, permitting the purchase of only high quality and highly liquid investments, and other criteria.¹²

NCUA is open to the use of alternatives other than those contained in this proposal. Accordingly, commenters are encouraged to address the specific questions set forth below in addition to providing general comments.

Are there some other alternative standards of credit worthiness that are better, or more appropriate, than those proposed by NCUA? If so, please specify:

- What the alternative standards are;
- The sections(s) of NCUA regulations in which the alternative(s) should be employed; and Why the alternative(s) are better than the standards used in this proposal.

In proposing alternative standards of creditworthiness, please specifically address whether and how the standards:

- Provide for a reasonable and objective assessment of the likelihood of full repayment of principal and interest over the life of the security and in stressed market and economic scenarios;

¹² See Advanced Notice of Proposed Rulemaking on Alternatives to the Use of External Credit Ratings in the Regulations of the OCC, issued by the Office of the Comptroller of the Currency, 75 FR 49423 (Aug. 13, 2010); Advanced Notice of Proposed Rulemaking on Alternatives to the Use of External Credit Ratings in the Regulations of the OTS, issued by the Office of Thrift Supervision, 75 FR 63107 (Oct. 14, 2010); <http://www.regulations.gov/#!searchResults;dct=PS;rpp=10;so=DESC;sb=postedDate;po=0;s=OC C-2010-0017>; <http://www.regulations.gov/#!searchResults;dct=PS;rpp=10;so=DESC;sb=postedDate;po=0;s=OTS-2010-0029>

- Foster prudent risk management;
- Are transparent, replicable, and well defined;
- Allow for supervisory review;
- Differentiate among investments in the same asset class with different credit risk;
- Provide for the timely and accurate measurement of negative and positive changes in investment quality over time, to the extent practicable;
- Strike the appropriate balance between the cost of the credit risk assessment, the risk of an incorrect assessment, and the burden of the assessment; and
- Provide for a lesser burden (if appropriate), on smaller credit unions.

V. Regulatory Procedures

a. Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small entities (those under \$10 million in assets). The proposed rule would remove NRSRO ratings from NCUA's regulations. Generally, credit unions with under \$10 million in assets do not engage in investment activities that are affected by those portions of the NCUA rules that refer to NRSRO ratings. Accordingly, the proposed amendments will not have a significant economic impact on a substantial number of small credit unions and, therefore, a regulatory flexibility analysis is not required.

b. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 USC 3507(d); 5 CFR part 1320. For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or disclosure requirement, each referred to as an information collection. The Office of Management and Budget (OMB) has approved the current information collection requirements in part 703 and

assigned them control number 3133-0133. OMB has approved the current information collection requirements in part 704 and assigned them control number 3133-0129.

The proposed rule would potentially modify credit unions' existing practices to impose record-keeping burdens. The proposed amendments would replace NRSRO ratings-based criteria for evaluating creditworthiness with new subjective standards based on the credit union's own evaluation of creditworthiness. The credit union would have to be able to explain how the securities it purchased or counterparties with which it did business meet the standards set forth in the proposed amendments. As such, we believe that some credit unions may be required to develop additional criteria for assessing the creditworthiness of securities and counterparties and apply those criteria.

We believe that all of the corporate credit unions already have policies and procedures in place for evaluating the credit risk of securities activities, but the proposed amendments may require additional analysis of credit risk and thus result in additional burdens on some natural person FCUs. We estimate that approximately 750 natural person FCUs may need to develop or augment a system for evaluating creditworthiness. We estimate that, on average, the FCUs will spend 20 hours on such a system, resulting in an initial aggregate burden of 15,000 hours. This estimate is based on our belief that many of these FCUs already have some criteria in place for evaluating creditworthiness.

We further estimate that, on average, each of those FCUs will spend an additional 10 hours each year reviewing, adjusting, and applying its system for evaluating creditworthiness, for a total of 7,500 hours across the industry. Once again, this estimate reflects our belief that many of these FCUs already are applying a system of evaluating creditworthiness.

As required by the PRA, NCUA is submitting a copy of this proposal to OMB for its review and approval. Persons interested in submitting comments with respect to the

information collection aspects of the proposed rule should submit them to OMB at the address noted below.

The NCUA considers comments by the public on this proposed collection of information in:

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the NCUA, including whether the information will have a practical use;
- Evaluating the accuracy of the NCUA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

The Paperwork Reduction Act requires OMB to make a decision concerning the collection of information contained in the proposed regulation between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the NCUA on the proposed regulation.

Comments on the proposed information collection requirements should be sent to: Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Washington, DC 20503; Attention: NCUA Desk Officer, with a copy to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

c. 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 proposed rule would not have substantial direct effects 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 proposal does not constitute a policy that has federalism implications for purposes of the executive order.

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

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

List of Subjects

12 CFR part 703

Credit unions, Investments, Reporting and Recordkeeping requirements.

12 CFR part 704

Credit unions, Investments, Reporting and recordkeeping requirements.

12 CFR part 709

Bank deposit insurance, Credit unions.

12 CFR part 742

Credit unions, Investments, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on February 17, 2011.

Mary F. Rupp
Secretary of the Board.

For the reasons stated in the preamble, the National Credit Union Administration proposes to amend 12 CFR parts 703, 704, 709, and 742 as set forth below:

PART 703--INVESTMENTS AND DEPOSIT ACTIVITIES

1. The authority citation for part 703 continues to read as follows:

Authority: 12 U.S.C. 1757(7), 1757(8), 1757(15).

2. In §703.2 remove the definition of Deposit note, and revise the definitions of Mortgage related security and Small business related security to read as follows:

* * * * *

Mortgage related security means a security as defined in Section 3(a)(41) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(41)).

* * * * *

Small business related security means a security as defined in Section 3(a)(53) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(53)). This definition does not include Small Business Administration securities permissible under §107(7) of the Act.

* * * * *

3. In §703.8, revise paragraph (b)(3) to read as follows:

§703.8 Broker-dealers.

* * * * *

(b) * * *

(3) If the broker-dealer is acting as the Federal credit union's counterparty, the ability of the broker-dealer and its subsidiaries or affiliates to fulfill commitments, as evidenced by capital strength, liquidity, and operating results. The Federal credit union should consider current financial data, annual reports, external assessments of creditworthiness, relevant disclosure documents, and other sources of financial information.

4. In §703.9, revise paragraph (d) to read as follows:

§703.9 Safekeeping of investments.

* * * * *

(d) Annually, the Federal credit union must analyze the ability of the safekeeper to fulfill its custodial responsibilities, as evidenced by capital strength, liquidity, and operating results. The Federal credit union should consider current financial data, annual reports, external assessments of creditworthiness, relevant disclosure documents, and other sources of financial information.

* * * * *

5. In §703.14, revise paragraphs (e), (g)(9), (g)(11), (h)(1) and (h)(2) to read as follows:

§703.14 Permissible investments.

* * * * *

(e) Municipal security. A federal credit union may purchase and hold a municipal security, as defined in Section 107(7)(K) of the Act, only if the issuer has at least adequate capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security. The credit union must prepare and document an internal analysis that evaluates the capacity of the issuer to meet its financial obligations, assuming adverse conditions, for the projected life of the security. The credit union must also limit its aggregate municipal securities holdings to no more than 75 percent of the credit union's net worth and limit its holdings of municipal securities issued by any single issuer to no more than 25 percent of the credit union's net worth.

* * * * *

(g) * * *

(9) The counterparty to the transaction meets the minimum credit quality standards as established by the federal credit union's board of directors.

* * *

(11) The aggregate amount of equity-linked member share certificates does not exceed 50 percent of the credit union's net worth;

* * *

(h) * * *

(1) The aggregate of the investments with any one counterparty is limited to 25 percent of the credit union's net worth and 50 percent of its net worth with all counterparties;

(2) At the time the federal credit union purchases the securities, the counterparty, or a party fully guaranteeing the counterparty, must meet the minimum credit quality standards as established by the federal credit union's board of directors.

* * * * *

PART 704--CORPORATE CREDIT UNIONS

6. The authority citation for part 704 continues to read as follows:

Authority: 12 U.S.C. 1762, 1766(a), 1772a, 1781, 1789, and 1795e.

7. In §704.2, remove the definition of Nationally Recognized Statistical Rating Organization, and revise the definitions of Asset-backed commercial paper program, Eligible ABCP liquidity facility, and Small business related security to read as follows:

§704.2 Definitions.

* * * * *

Asset-backed commercial paper program (ABCP program) means a program that primarily issues commercial paper and that is backed by assets or other exposures held in a bankruptcy-remote special purpose entity. The term *sponsor of an ABCP program* means a corporate credit union that:

- (1) Establishes an ABCP program;
- (2) Approves the sellers permitted to participate in an ABCP program;
- (3) Approves the asset pools to be purchased by an ABCP program; or
- (4) Administers the ABCP program by monitoring the assets, arranging for debt placement, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

* * * * *

Eligible ABCP liquidity facility means a legally binding commitment to provide liquidity support to asset-backed commercial paper by lending to, or purchasing assets from any structure, program or conduit in the event that funds are required to repay maturing asset-backed commercial paper and that meets the following criteria:

(1)(i) At the time of the draw, the liquidity facility must be subject to an asset quality test that precludes funding against assets that are 90 days or more past due or in default; and

(ii) The facility can be used to fund only those assets or exposures that demonstrate adequate capacity to meet their financial obligations, even under adverse economic conditions, for the projected life of the asset or exposure; or

(2) If the assets that are funded under the liquidity facility do not meet the criteria described in paragraph (1) of this definition, the assets must be guaranteed, conditionally or unconditionally, by the United States Government, its agencies, or the central government of an Organization for Economic Cooperation and Development (OECD) country.

* * * * *

Small business related security means a security that represents an interest in one or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company. This definition does not include Small Business Administration securities permissible under §107(7) of the Act.

* * * * *

8. In §704.6, revise paragraphs (f) and (g)(2)(iii), to read as follows:

§704.6 Credit Risk Management.

* * * * *

(f) Credit ratings.—

(1) At the time of purchase, each investment must be originated by an issuer that has at least a very strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security.

(2) A corporate credit union must obtain and retain appropriate documentation supporting the purchase of an investment. This documentation must include the criteria, information, and analysis relied upon to determine the credit quality of the investment, including the capacity of the issuer to meet its obligations under adverse economic conditions. A corporate credit union must identify and monitor any changes in credit quality of the investment and retain appropriate supporting documentation as long as the corporate owns the investment.

(3) An investment is subject to the requirements of §704.10 if:

(i) There is reason to believe that the obligor no longer has a very strong capacity to meet its financial obligations for the remaining projected life of the security;
or

(ii) The investment is part of an asset class or group of investments that exceeds the sector or obligor concentration limits of this section.

(g) Reporting and documentation.

* * *

(2) * * *

(iii) The latest available financial reports, industry analyses, and internal and external analyst evaluations sufficient to support each approved credit limit.

9. In Appendix B, delete Part I(a)(2) and Part II(b)(2); redesignate Part I (a)(3), (4), and (5) as Part I(a)(2), (3), and (4), respectively, and Part II(b)(3), (4), and (5) as Part II(b)(2), (3), and (4), respectively; and revise Part I(a)(1), Part II(b)(1), and Part III(b) as follows:

Appendix B to Part 704—Expanded Authorities and Requirements

* * * * *

Part I

* * *

(a) * * *

(1) Purchase investments originated by an issuer that has at least a strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security;

* * *

Part II

* * *

(b) * * *

(1) Investments must be made pursuant to an explicit policy established by the corporate credit union's board of directors. Any foreign issue or issuer must have at least a very strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security.

* * *

Part III

* * *

(b) Credit Quality:

(1) All derivative transactions are subject to the following requirements:

(i) If the intended counterparty is domestic, the counterparty must meet minimum credit quality standards as established by the corporate's board of directors;

(ii) If the intended counterparty is foreign, the corporate must have Part II expanded authority and the counterparty must meet minimum credit quality standards as established by the corporate's board of directors;

(iii) The corporate must identify the criteria relied upon to determine that the counterparty meets the credit quality requirements of this part at the time the transaction is entered into and monitor those criteria for as long as the contract remains open; and

(iv) The corporate must comply with §704.10 of this part if the credit quality of the counterparty deteriorates below the minimum credit quality standards established by the corporate's board of directors.

* * *

10. In Appendix C, remove the definition of Traded position from paragraph I(b); remove paragraphs II(c)(3) and (4); add new paragraph II(c)(3); and revise paragraph II(a)(2)(viii)(A), the introductory sentence of paragraph II(a)(2)(viii)(B), paragraph II(b)(1)(iv), paragraph II(b)(2)(ii), and paragraph II(b)(4) to read as follows:

Appendix C to Part 704 – Risk-Based Capital Credit Risk-Weight Categories

* * * * *

Part II: Risk-Weightings

(a) * * *

(2) * * *

(viii) * * *

(A) A qualifying securities firm must meet the minimum credit quality standards as established by the corporate credit union's board of directors or demonstrate at least a strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the exposure, whichever requirement is more stringent. Alternatively, a qualifying securities firm may rely on the creditworthiness of its parent consolidated company, if the parent consolidated company guarantees the claim.

(B) A collateralized claim on a qualifying securities firm does not have to comply with the requirements of paragraph (a) if the claim arises under a contract that:

* * *

(b) * * *

(1) * * *

(iv) Unused portions of ABCP liquidity facilities that do not meet the definition of an eligible ABCP liquidity facility. The resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees.

* * *

(2) * * *

(ii) Unused portions of commitments (including home equity lines of credit and eligible ABCP liquidity facilities) with an original maturity exceeding one year except those listed in paragraph II(b)(5) of this Appendix. For eligible ABCP liquidity facilities, the resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees.

* * *

(4) 10 percent credit conversion factor (Group D). Unused portions of eligible ABCP liquidity facilities with an original maturity of one year or less. The resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be

funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees.

* * *

(c) * * *

(3) Internal ratings-based approach –

(i) Calculation. Corporate credit unions with advanced risk management and reporting systems may seek NCUA approval to use credit risk models to calculate risk-weighted asset amounts for positions described in paragraphs II(c)(1) and (2) of this section. In determining whether to grant approval, NCUA will consider the financial condition and risk management sophistication of the corporate credit union and the adequacy of the corporate’s risk models and supporting management information systems.

(ii) Consistent use of internal ratings-based approach. A corporate credit union that has been granted NCUA approval to use an internal ratings-based approach and that has determined to use such an approach must do so in a consistent manner for all securities so rated.

PART 709—INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY INSURED CREDIT UNIONS IN LIQUIDATIONS

11. The authority citation for part 709 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1767, 1786(h), 1787, 1788, 1789, 1789a.

12. In §709.10, remove paragraphs (a)(5) and (a)(6), and revise the section title and paragraphs (b), (f), and (g) to read as follows:

§709.10 Treatment by conservator or liquidating agent of financial assets transferred in connection with a participation.

* * * * *

(b) The Board, by exercise of its authority to disaffirm or repudiate contracts under 12 U.S.C. 1787(c), will not reclaim, recover, or recharacterize as property of the credit union or the liquidation estate any financial assets transferred to another party by a federally-insured credit union in connection with a participation, provided that the transfer meets all the conditions for sale accounting treatment under generally accepted accounting principles, other than the “legal isolation” condition addressed by this section.

* * * * *

(f) The Board will not seek to avoid an otherwise legally enforceable participation agreement executed by a federally-insured credit union solely because such agreement does not meet the “contemporaneous” requirement of sections 207(b)(9) and 208(a)(3) of the Federal Credit Union Act.

(g) This section may be repealed by the NCUA upon 30 days notice and opportunity for comment provided in the FEDERAL REGISTER, but any such repeal or amendment will not apply to any transfers of financial assets made in connection with a participation that was in effect before such repeal or modification. For purposes of this paragraph, a participation would be in effect on the date that the parties executed the participation agreement.

PART 742—REGULATORY FLEXIBILITY PROGRAM

13. The authority citation for part 742 continues to read as follows:

Authority: 12 U.S.C. 1756, 1766.

14. In §742.4, revise paragraph (a)(9)(i) to read as follows:

(a) * * *

(9) * * *

(i) The issuer has at least a very strong capacity to meet its financial obligations, even under adverse economic conditions, for the projected life of the security;

* * *