

April 15, 2020

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

NCUA-2020-xxxx-xxxx

RIN 3133-AF15

Temporary Regulatory Relief in Response to COVID-19

AGENCY: National Credit Union Administration (NCUA).

ACTION: Temporary final rule.

SUMMARY: The NCUA Board (Board) is temporarily modifying certain regulatory requirements to help ensure that federally insured credit unions (FICUs) remain operational and liquid during the COVID-19 crisis. Specifically, the Board is temporarily raising the maximum aggregate amount of loan participations that a FICU may purchase from a single originating lender to the greater of \$5,000,000 or 200 percent of the FICU's net worth. The Board is also temporarily suspending limitations on the eligible obligations that a federal credit union (FCU) may purchase and hold. In addition, given physical distancing policies implemented in response to the crisis, the Board is tolling the required timeframes for the occupancy or disposition of

properties not being used for FCU business or that have been abandoned. These temporary modifications will be in place until December 31, 2020, unless extended.

DATES: This rule is effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: *Policy and Analysis:* Amanda Parkhill, Director, Policy Division, Office of Examination and Insurance, at (703) 518-6360; *Legal:* Ariel Pereira, Staff Attorney, Office of General Counsel, at (703) 518-6540; or by mail at: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

SUPPLEMENTARY INFORMATION

- I. Background
- II. Legal Authority
- III. Section-by-Section Analysis
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I. Background

The COVID-19 pandemic has created uncertainty for FICUs and their members. The Board is working with federal and state regulatory agencies, in addition to FICUs, to assist FICUs in managing their operations and to facilitate continued assistance to credit union members and communities impacted by the coronavirus. As part of these ongoing efforts, the Board is temporarily modifying certain regulatory requirements to help ensure that FICUs

remain operational and liquid during the COVID-19 crisis. The Board has concluded that the amendments will provide FICUs with necessary additional flexibility in a manner consistent with the NCUA's responsibility to maintain the safety and soundness of the credit union system. The temporary amendments are effective upon publication and will be in place through the end of calendar year 2020, unless the Board takes action to extend their effectiveness.

In general, two of the temporary amendments will expand the authority of FICUs to purchase loans and participations in loans, thereby enhancing their ability to meet liquidity needs. Specifically, the Board is temporarily raising the maximum aggregate amount of loan participations that a FICU may purchase from a single originating lender to the greater of \$5,000,000 or 200 percent of the credit union's net worth. The Board is also temporarily suspending certain limitations on the types of eligible obligations that a FICU may purchase and hold. The third regulatory amendment addresses a requirement that may be difficult, if not impossible, to meet during the pandemic. Given the physical distancing policies in effect, the Board is tolling the required timeframes for the occupancy or disposition of properties not being used for FCU business or that have been abandoned.

Section III of this preamble discusses the temporary regulatory amendments in greater detail.

II. Legal Authority

The Board is issuing this temporary final rule pursuant to its authority under the Federal Credit Union (FCU) Act.¹ The FCU Act grants the Board a broad mandate to issue regulations governing both FCUs and, more generally, all FICUs. For example, section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the act.² Section 209 of the FCU Act is a plenary grant of regulatory authority to issue rules and regulations necessary or appropriate to carry out its role as share insurer for all FICUs³ Other provisions of the act confer specific rulemaking authority to address prescribed issues or circumstances.⁴ Accordingly, the FCU Act grants the Board broad rulemaking authority to ensure that the credit union industry and the National Credit Union Share Insurance Fund (NCUSIF) remain safe and sound.

III. Section-by-Section Analysis

A. Aggregate limit on loan participation purchases (§ 701.22(b)(5)(ii)).

Section 107(5)(E) of the FCU Act authorizes an FCU to engage in participation lending with other credit unions, credit union organizations, or financial organizations in accordance with written policies of the FCU's board of directors.⁵ The NCUA has implemented this statutory provision in § 701.22 of its regulations, which applies to all FICUs. The statute contains no limitation on the amount of participations that an FCU may purchase from any single originating lender.

¹ 12 U.S.C. 1751 *et al.*

² 12 U.S.C. 1766(a).

³ 12 U.S.C. 1789.

⁴ An example of a provision of the FCU Act that provides the Board with specific rulemaking authority is section 207 (12 U.S.C. 1787), which is a specific grant of authority over share insurance coverage, conservatorships, and liquidations.

⁵ 12 U.S.C. 1757(5)(e).

The regulation limits the aggregate amount of loan participations that a FICU may purchase from any one originating lender to the greater of \$5,000,000 or 100 percent of the FICU's net worth.⁶ As explained in the preamble to the final rule that established the limitation, the purpose of the provision is to mitigate the exposure of FICUs to concentration risk.⁷ The preamble explained that in prescribing concentration limits on loan participations, the Board's goal was "to strike an appropriate balance between mitigating risk and fostering the industry's growth and stability."⁸

The Board continues to believe that a cap is an important protection against FICU insolvency. However, consistent with the NCUA's 2018 Regulatory Reform Agenda, the Board also believes that, as currently formulated, the limitation may be overly prescriptive.⁹ Additional regulatory flexibility is especially warranted during the present COVID-19 crisis when many FICUs are seeking to maintain adequate liquidity. Accordingly, the Board believes that temporarily raising the cap is necessary to strike the balance it sought in originally promulgating the rule and encourages FICUs to engage in appropriate due diligence in this context.

Under the temporary final rule, the aggregate limit below which a waiver from the appropriate NCUA regional director is not required will be raised to the greater of \$5,000,000 or 200 percent of the FICU's net worth. The increase will help safeguard the stability of FICUs during the crisis, without undue additional risk to the safety and soundness of the credit union system. Subsequent to the temporary rule's expiration at the close of December 31, 2020, a

⁶ 12 CFR 701.22(b)(5)(ii).

⁷ 78 FR 37946 (June 25, 2013).

⁸ *Id.* at 37951.

⁹ 83 FR 65926, 65946–65947 (Dec. 21, 2018).

FICU must return into compliance with the current limitation (that is, the greater of \$5,000,000 or 100 percent of its net worth) by either ceasing to purchase loan participations from the originating lender or requesting a waiver as provided in the regulation.

B. Purchase, sale, and pledge of eligible obligations (§ 701.23(b)).

Section 107(13) of the FCU Act authorizes an FCU, “in accordance with rules and regulations prescribed by the Board,” to purchase, sell, or pledge all or part of an eligible obligation to one of its own members.¹⁰ The NCUA has implemented this authority in its regulations at § 701.23(b)(1)(i) and § 703.21(b)(2)(i), which provides that an FCU may purchase an eligible obligation from any source, provided the FCU is empowered to grant the loan or the loan is refinanced within 60 days following its purchase so that it is a loan the FCU is empowered to grant.

The purpose of the refinancing requirement is to help ensure that loans *purchased* by an FCU comply with the statutory and regulatory requirements applicable to loans *made* by the FCU. Although the Board’s longstanding policy is that all eligible obligations of an FCU, whether made or purchased, comply with the requirements and goals of the FCU Act, the explicit statutory language of the FCU Act does not necessarily compel this. Given the COVID-19 emergency, the Board believes that the balance weighs in favor of adopting a closer reading of the text of the statute and suspending the refinancing requirement for a temporary period to promote the extension of credit and flow of liquidity in the credit union system generally.

¹⁰ 12 U.S.C. 1757(13).

As noted, the FCU Act and § 701.23 generally do not authorize an FCU to purchase a loan unless the person liable on the loan is a member of that credit union. The Board's publicly articulated interpretation since the 1979 rulemaking that implemented section 107(13), is that Congress did not intend section 107(13) to be an express prohibition on purchases of obligations made to non-members provided they are authorized by other sections of the FCU Act.¹¹

The Board's regulations in 12 CFR 701.23 generally require that purchased eligible obligations be obligations of the purchasing FCU's members. However, § 701.23(b)(2) provides certain limited exceptions to the general requirements for well-capitalized FCUs with composite CAMEL ratings of "1" or "2."¹² The regulations authorize these FCUs to purchase the eligible obligations of any FICU or of any liquidating credit union without regard to whether they are obligations of the purchasing FCU's members. As the Board has previously noted, these types of purchases could be construed as being made under section 107(14) of the FCU Act, which does not impose a membership requirement, as opposed to under section 107(13).¹³ Section 107(14) authorizes FCUs to "purchase all or part of the assets of another credit union and to assume the liabilities of the selling credit union and those of its members." This statutory interpretation is consistent with the general principle that the more specific provision or authority applies in favor of the more general provision.

¹¹ 44 FR 27068, 27069 (May 9, 1979).

¹² Section 701.23 also contains exceptions to the membership requirement for certain purchases of student loans and real estate loans that an FCU purchases to complete a pool for sale. The Board established this exception in the 1979 final rule discussed above. 44 FR 27068 (May 9, 1979).

¹³ Section 107(14) is codified in 12 U.S.C. 1757(14). For the Board's prior statements on this matter, please refer to 66 FR 58656, 58660 (Nov. 23, 2001); 51 FR 15055, 15059 (Mar. 15, 2001), and 76 FR 81421, 81426 (Dec. 28, 2011).

Although the Board continues to believe that this exception should generally be limited to FCUs with CAMEL 1 or 2 composite ratings, it also recognizes the urgent need to support the extension of credit and facilitate downstream loan purchases as a tool to manage liquidity. The Board, therefore, is temporarily amending its regulations to authorize FCUs with CAMEL composite ratings of 1, 2, or 3 to purchase eligible obligations of FICUs and liquidating credit unions irrespective of whether the obligation belongs to the purchasing FCU's members.¹⁴ FCUs may continue to hold obligations purchased pursuant to this temporary final rule subsequent to the rule's expiration at the close of December 31, 2020.

The Board notes that the restrictions temporarily relieved in § 701.23 do not apply to state-chartered, federally insured credit unions. Any such restrictions applicable to state-chartered credit unions would be based on state laws or regulations. The Board also notes that this temporary final rule does not modify the current authority of FCUs under § 701.23 to purchase the obligations of a liquidating credit union without regard to whether the obligations belong to the purchasing FCU's members.

C. FCU occupancy and disposal of acquired premises (§ 701.36(c)).

Section 107(4) of the FCU Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations.¹⁵ The Board has implemented and interpreted this provision of the FCU Act in its regulation at 12 CFR 701.36. In general, an FCU may invest in property only that it intends to use to transact credit union business or in property that supports

¹⁴ Generally, credit unions with a CAMEL composite rating lower than 3 are considered to be in "troubled condition" under the NCUA's regulations. 12 C.F.R. 700.2.

¹⁵ 12 U.S.C. 1757(4).

its internal operations or serves its members. Among other provisions, § 701.36: (1) limits FCU investments in fixed assets; and (2) establishes occupancy, planning, and disposal requirements for acquired and abandoned premises.

The regulation provides that if an FCU acquires premises, including unimproved land or unimproved real property, it must partially occupy them “no later than six years after the date of acquisition,” subject to the NCUA granting a waiver.¹⁶ Further, an FCU must make diligent efforts to dispose of abandoned premises and any other real property it does not intend to use in transacting business. Additionally, the FCU must advertise for sale premises that have been abandoned for four years.¹⁷ The specific terms of these requirements do not stem directly from the FCU Act but instead reflect the Board’s judgment in implementing the general statutory provision.

In response to the COVID-19 crisis, many state and localities have implemented physical distancing measures to arrest the spread of the disease.¹⁸ These health-related restrictions on the mobility of individuals make the changes in occupancy and dispositions required by § 701.36 extremely difficult. Accordingly, the Board is temporarily tolling the regulatory mandated timeframes. This temporary change appropriately reflects the unique circumstances while maintaining consistency with the statutory provision as interpreted and implemented by the Board. Any days that fall within the period commencing on [insert date of publication in the *Federal Register*] and concluding at the close of December 31, 2020, shall not be counted for

¹⁶ 12 CFR 701.36(c)(1).

¹⁷ 12 CFR 701.36(c)(2).

¹⁸ See, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>. (“[A] vast majority of Americans — nine in 10 United States residents — are now or will soon be under instructions to stay at home.”)

purposes of determining an FCU's compliance with the regulatory time periods. This temporary deferral will provide FCUs with additional flexibility to comply with the prescribed time periods, while still complying with the statutory and regulatory goals of ensuring that properties acquired or held by FCUs are used for credit union business.

Example One: An FCU closed on the purchase of an office building 30 days before [insert date of publication in the Federal Register] (that is, the temporary final rule is published on the 31st day following acquisition). Under the temporary regulatory amendment, January 1, 2021 would be deemed the 31st day following acquisition for purposes of calculating the six-year deadline for partial occupancy.

Example Two: An FCU has an abandoned parcel of land that, under § 701.36(c)(2), it is required to advertise for sale no later than November 9, 2020 (i.e., that fourth year anniversary of the date the parcel was abandoned). Under this temporary final rule, the FCU would have an additional amount of time to meet this requirement equal to the number of days between the publication date and January 1, 2021.

IV. Regulatory Procedures

A. Administrative Procedure Act

The Board is issuing the temporary final rule without prior notice and the opportunity for public comment and the delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).¹⁹ Pursuant to the APA, general notice and the opportunity for public

¹⁹ 5 U.S.C. 551 *et seq.*

comment are not required with respect to a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”²⁰

The Board believes that the public interest is best served by implementing the temporary final rule immediately upon publication in the *Federal Register*. The Board notes that the COVID-19 crisis is unprecedented. It is a rapidly changing situation and difficult to anticipate how the disruptions caused by the crisis will manifest themselves within the financial system and how individual credit unions may be impacted. Because of the widespread impact of a pandemic and the speed with which disruptions have transmitted throughout the United States, the Board believes it is has good cause to determine that ordinary notice and public procedure are impracticable and that moving expeditiously in the form of a temporary final rule is in the best of interests of the public and the FICUs that serve that public. The temporary regulatory changes are proactive steps that are designed to alleviate potential liquidity strains and are undertaken with expedience to ensure the maximum intended effects are in place at the earliest opportunity.

The Board values public input in its rulemakings and believes that providing the opportunity for comment enhances its regulations. Accordingly, the Board often solicits comments on its rules even when not required under the APA, such as for the rules it issues on an interim-final basis. The Board, however, notes that the provisions in this rule are temporary in nature, and designed specifically to help credit unions affected by the COVID-19 pandemic.

²⁰ 5 U.S.C. 553(b)(3).

The amendment made by the temporary final rule will automatically expire at the close of December 31, 2020, and are limited in number and scope. For these reasons, the Board finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.

The APA also requires a 30-day delayed effective date, except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.²¹ Because the rule relieves currently codified limitations and restrictions, the temporary final rule is exempt from the APA's delayed effective date requirement. As an alternative basis to make the rule effective without the 30-day delayed effective date, the Board finds there is good cause to do so for the same reasons set forth above regarding advance notice and opportunity for comment.

B. Congressional Review Act.

For purposes of the Congressional Review Act²², the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a “major” rule. If the OMB deems a rule to be a “major rule,” the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.

The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase

²¹ 5 U.S.C. 553(d).

²² 5 U.S.C. 801-808.

in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.²³

For the same reasons set forth above, the Board is adopting the temporary final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.²⁴ In light of current market uncertainty, the Board believes that delaying the effective date of the rule would be contrary to the public interest for the same reasons discussed above.

As required by the Congressional Review Act, the Board will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

C. Executive Order 13132, on Federalism

Executive Order 13132²⁵ encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency, as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere

²³ 5 U.S.C. 804(2).

²⁴ 5 U.S.C. 808.

²⁵ Executive Order 13132 on Federalism, was signed by former President Clinton on August 4, 1999, and subsequently published in the *Federal Register* on August 10, 1999 (64 FR 43255).

to fundamental federalism principles. The temporary final rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The Board has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

D. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this temporary final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.²⁶

By the National Credit Union Administration Board, this 16th day of April 2020.

Gerard Poliquin
Secretary of the Board

For the reasons discussed above, the NCUA amends part 701 as follows:

PART 701 – ORGANIZATION AND OPERATION OF CREDIT UNIONS

²⁶ Public Law 105–277, 112 Stat. 2681 (1998).

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

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.*; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Add § 701.22(e) to read as follows:

§ 701.22 Loan participations.

* * * * *

(e) *Temporary regulatory relief in response to COVID-19.* Notwithstanding paragraph (b)(1)(ii) of this section, during the period commencing on [insert date of publication in the *Federal Register*] and concluding on December 31, 2020, the aggregate amount of loan participations that may be purchased from any one originating lender shall not exceed the greater of \$5,000,000 or 200 percent of the federally insured credit union's net worth.

3. Add § 701.23(i) to read as follows:

§ 701.23 Purchase, sale, and pledge of eligible obligations.

* * * * *

(i) *Temporary regulatory relief in response to COVID-19.* Notwithstanding § 701.23(b), during the period commencing on [insert date of publication in the *Federal Register*] and concluding on December 31, 2020, a Federal credit union may:

(1) Purchase, in whole or in part, and within the limitations of the board of directors' written purchase policies, any eligible obligations pursuant to paragraph (b)(1)(i) and (b)(2)(i) of this section without regard to whether they are loans the credit union is empowered to grant or are refinancing to ensure the obligations are ones the purchasing credit union is empowered to grant; and

(2) Purchase and hold the obligations described in § 701.23(b)(2)(i) through (iv) if the Federal credit union's CAMEL composite rating is "1," "2," or "3".

4. Amend § 701.36 by adding paragraph (c)(3), to read as follows

§ 701.36 Federal credit union occupancy and disposal of acquired and abandoned properties.

* * * * *

(c) * * *

(3) *Temporary regulatory relief in response to COVID-19.* Any days that fall within the period commencing on [insert date of publication ion the Federal Register] and concluding on December 31, 2020, shall not be counted for purposes of determining a federal credit union's compliance with the required time periods described in paragraphs (c)(1) and (c)(2) of this section.

* * * * *