

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 703 and 721

RIN 3133-AE17

Charitable Donation Accounts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is issuing a final rule to amend parts 703 and 721 of its regulations to clarify that federal credit unions are authorized to create and fund a charitable donation account, a hybrid charitable and investment vehicle, as an activity incidental to the business for which the credit union is chartered, provided the account is primarily charitable in nature and meets other regulatory conditions to ensure safety and soundness.

DATES: The effective date for this rule is [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Rick Mayfield, Senior Capital Markets Specialist, Office of Examination and Insurance, at 1775 Duke Street, Alexandria, VA 22314 or by telephone: (703) 518-6360; or Steven W. Widerman, Senior Staff Attorney, Office of General Counsel, at the above address or by telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Summary of Comments on Proposed Rule
- III. Regulatory Procedures

I. BACKGROUND

NCUA is amending parts 703 and 721 of its regulations to clarify that, under certain circumstances, federal credit unions (FCUs) are authorized to fund a charitable donation account (CDA), which may hold investments that are otherwise impermissible, as a charitable contribution or donation under its incidental powers authority.¹ This will help facilitate charitable activities for FCUs. To be considered an incidental powers activity, the rule requires a CDA to be primarily charitable in nature. Any investment feature benefitting the FCU must be incidental to the CDA's primary charitable purpose. The CDA must also be structured to preserve safety and soundness and to limit the FCU's exposure to the risks of otherwise impermissible investments.

¹ 12 CFR 721.3(b).

Summary of Proposed Rule

On September 12, 2013, the Board issued a Notice of Proposed Rulemaking (NPRM)² allowing FCUs to invest in CDAs while creating safeguards to ensure the donations are used for their intended charitable purposes. The Board proposed several requirements for FCUs that invest in these accounts, including:

- The primary purpose of a CDA must be to generate funds to donate to tax-exempt charities chosen by FCUs.
- The total investment in all such accounts, in the aggregate, must be limited to three percent of the FCU's net worth for the duration of the accounts.
- A minimum of 51 percent of the total return from such an account must be distributed to one or more qualified charities.
- Distributions must be made to qualified charities no less frequently than every five years, or in the event the account terminates in less than five years.
- Assets of these accounts must be held in segregated custodial accounts or special purpose entities specifically identified as a CDA.
- If the FCU structures its CDA using a trust, the trustee must be an entity regulated by the Office of the Comptroller of the Currency (OCC), the U.S. Securities and Exchange Commission (SEC) or another federal regulatory agency. The regulated trustee or other person who is authorized to make investment decisions for a CDA (manager) must be a Registered Investment Adviser (RIA) with the SEC.
- The terms and conditions controlling the account must be documented in a written agreement.

² 78 FR 57539 (Sept. 19, 2013).

- An FCU, upon termination of its CDA, may receive a distribution of the remaining assets in cash, or a distribution in kind of the remaining assets if those assets are permissible investments for FCUs.

Federal Credit Union Authority to Make Charitable Contributions

The Federal Credit Union Act (Act) provides that an FCU may “exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.”³ Under this authority, the Board has long recognized that making charitable contributions and donations is among an FCU’s incidental powers.⁴

Between 1999 and 2012, FCU donations were limited to two categories of charities: 1) non-profit organizations located or active in the community where the donor FCU had a place of business; and 2) tax-exempt organizations that “operated primarily to promote and develop credit unions.”⁵ An FCU’s donation to a charity in these categories was conditioned on a determination by its board of directors that the donation was in the best interests of the FCU and reasonable given its size and financial condition.⁶

In 2012, the Board repealed the restrictions on permissible charities and the conditions for making a donation.⁷ The Board then added charitable contributions and donations as a category of activities preapproved by regulation as “incidental powers necessary and requisite to carry on a credit union’s

³ 12 U.S.C. 1757(17).

⁴ 44 FR 56691 (Oct. 2, 1979); 64 FR 19441 (Apr. 21, 1999); 12 CFR 721.3.

⁵ 12 CFR 701.25(a) (2011).

⁶ *Id.* 12 CFR 701.25(b).

⁷ 77 FR 31981 (May 31, 2012).

business.”⁸ Activities in this preapproved category include donations to nonprofit organizations and credit union-affiliated causes, and to create charitable foundations.

Federal Credit Union Investment Authority

The Act grants FCUs the express power to invest in certain enumerated categories of investments.⁹ FCUs may invest only in those investments expressly authorized by the Act. Further, part 703, NCUA’s investment regulation, limits or prohibits FCUs from purchasing certain investments, otherwise permitted by the Act, for safety and soundness reasons.¹⁰ Investments authorized by the Act and not prohibited or limited by part 703 constitute the universe of permissible investments for FCUs.

II. SUMMARY OF COMMENTS ON PROPOSED RULE

NCUA received a total of 26 comments on the NPRM: 13 from credit union leagues, four from FCUs, three from credit union-related foundations, two from credit union trade associations, and one comment each from a federally insured, state-chartered credit union, a corporate credit union, a bank trade association, and a federal savings bank. Of the 26 comments received, 18 commenters supported the proposal expressly, and none opposed it. Most commenters recommended changes, as outlined below.

1. Net Worth Cap

⁸ 12 CFR 721.3(b); see also 12 CFR 721.2.

⁹ 12 U.S.C. 1757(7) & (15).

¹⁰ 12 CFR part 703.

Seventeen commenters supported applying the net worth cap only when a CDA is initially and subsequently funded, rather than over the life of the account. One commenter asked to make the rule explicit on whether the net worth cap applies to a CDA's initial funding or its future investment value. The Board believes that applying the net worth cap for the duration of an account will help to preempt unsafe or unsound concentrations in otherwise non-permissible investments. Accordingly, the final rule explicitly clarifies that the aggregate value of an FCU's CDAs must remain within the net worth cap for the life of the accounts.

Thirteen commenters advocated raising the net worth cap on aggregate CDAs from three to five percent of net worth. The Board adopts the suggestion to raise the existing net worth cap, concurring that a modest increase would benefit both FCUs and charities. The final rule increases the existing cap on aggregate funding of CDAs from three to five percent of an FCU's net worth for the duration of the accounts, aligning with the net worth cap that applies to public welfare investments by banks.¹¹

2. *Account Fees and Expenses*

Sixteen commenters contended that account fees and expenses should reduce the total return that is apportioned to determine the amount of a CDA's mandatory donations to charity. The Board agrees with the commenters and has adopted this recommendation, with certain conditions. The final rule allows account fees and expenses to be deducted from the actual rate of return to the extent the fees and expenses were *not* paid to the FCU that established the CDA or to its affiliates. An affiliate is an entity in which the FCU has any direct or indirect ownership interest.

¹¹ 12 CFR 24.4(a).

3. Minimum Periods for Distributions

Four commenters advocated reducing the minimum period for distributions to charity to one year, two commenters supported reducing the period to less than five years, and one commenter proposed eliminating the five-year minimum. The Board maintains that the five-year minimum period is appropriate. The final rule clarifies that FCUs may choose to make CDA distributions more frequently than once in five years, provided there is a final distribution when the account terminates, regardless of the length of the period preceding termination.

4. Minimum Amount of Distributions

One commenter asked NCUA to require an FCU to make minimum annual charitable donations equal to one percent of a CDA's market value. The Board has decided against mandating a fixed minimum percentage distribution of a CDA's market value because that could force an FCU to donate at times when its CDA investment is producing negative returns. Another commenter wanted NCUA to allow CDAs to make charitable donations in a fixed dollar amount, rather than as a percent proportion of the total return. The Board finds that charitable donations of a fixed amount, not reflecting a CDA's investment performance, tends to portray a CDA as primarily an investment vehicle benefitting the FCU, representing a breach of one of the guiding principles used in proposing this rule. The final rule requires a CDA to be primarily charitable in structure, thus allowing it to be preapproved as an incidental powers activity. Any investment feature benefitting the FCU must be incidental to the primary, charitable purpose of its CDA.

5. Regulatory Oversight

Eighteen commenters supported permitting entities regulated by the OCC to manage CDA funds without also having to register as an RIA with the SEC. Two commenters contended that non-

depository, state-chartered trust companies should be permitted to serve as CDA trustees. The Board agrees with both recommendations.

Neither the NPRM nor the final rule requires a CDA to be structured as a trust. As a measure to enhance safety and soundness when a CDA *is* established as a trust, however, the final rule provides that the trustee of a CDA must be regulated by the OCC, the SEC, another federal regulatory agency, or a state financial regulatory agency. A regulated trustee or other person or entity that is authorized to make investment decisions for a CDA (manager), other than the FCU itself, must either be an RIA or be regulated by the OCC.

6. Corporate Credit Unions

Nine commenters requested that corporate credit unions (CCUs) be given authority similar to that of natural person FCUs to create and fund CDAs. They contend that CCUs should have the same flexibility as the final rule gives FCUs to support charitable activities. That request is beyond the scope of this rulemaking.

7. Miscellaneous Comments

Eight commenters wanted more explicit confirmation that the NPRM's requirements would not apply to an FCU's other investments that are compliant with part 703. The Board confirms that the final rule does not apply to part 703-compliant investments.

One commenter requested that multiple small FCUs be permitted to form a common trust CDA. Because the final rule does not require a CDA to be held in a trust, FCUs, large or small, do not need to rely on a common trust to participate in purchasing a CDA.

Another commenter requested that NCUA grandfather existing non-CDA hybrid accounts that invest in otherwise impermissible investments for FCUs until those accounts mature. The final rule does not address such grandfathering in the regulatory text. Rather, NCUA has instructed regional staff not to require divestiture of such accounts as NCUA expects all such accounts will terminate by their own original terms.

Finally, a commenter asked NCUA to amend part 703 to expand the investment authority for all FCUs, regardless of funding a CDA. This request is beyond the scope of this rulemaking.

Except as otherwise discussed above, the Board adopts the rule as proposed.

III. REGULATORY PROCEDURES

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact agency rulemaking may have on a substantial number of small credit unions (primarily those under \$50 million in assets). This final rule does not impose any mandatory requirements on small credit unions, and NCUA does not anticipate that many small credit unions

will fund CDAs with significant amounts of money. NCUA has determined this rule will not have a significant economic impact on a substantial number of small credit unions.

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.¹² 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. NCUA identified and described several information collection requirements in the proposed rule. As required by the PRA, NCUA submitted a copy of the proposed rule to the Office of Management and Budget (OMB) for its review and approval. Persons interested in submitting comments with respect to the information collection aspects of the proposed rule were invited to submit them to OMB (with a copy to NCUA) at the addresses noted in the preamble to the proposed rule.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. This final rule applies only to federally chartered credit unions. Accordingly, the 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

¹² 44 U.S.C. 3507(d).

levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

Treasury and General Government Appropriations Act, 1999

NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act.¹³

Small Business Regulatory Enforcement Act Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) 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.¹⁴ NCUA does not believe this final rule is a “major rule” within the meaning of the relevant sections of SBREFA. As required by SBREFA, NCUA has filed the appropriate reports so that this final rule may be reviewed.

Immediate Effective Date

NCUA is issuing this final rule to be effective upon publication. The Administrative Procedure Act, 5 U.S.C. §553, requires that, once finalized, a rulemaking must have a delayed effective date of 30 days from the date of publication, except for good cause. NCUA invokes this exception for this rule, believing that good cause exists to waive the customary 30-day delayed effective date. The

¹³ Pub. L. 105-277, 112 Stat. 2681 (1998).

¹⁴ 5 U.S.C. 551.

final rule does not impose any regulatory burden; rather, it will help to facilitate the charitable activities of federal credit unions.

List of Subjects

12 CFR Part 703

Credit unions, investments.

12 CFR Part 721

Credit unions, functions, implied powers.

By the National Credit Union Administration Board on December 12, 2013.

Gerard Poliquin

Secretary of the Board

For the reasons set forth above, NCUA amends 12 CFR parts 703 and 721 as follows:

PART 703 – INVESTMENTS

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

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

2. Amend §703.1 as follows:

- a. In paragraph (b)(5) by removing the word “or”;
- b. In paragraph (b)(6) by removing the period at the end of the paragraph and adding “; or” in its place; and
- c. By adding paragraph (b)(7) to read as follows:

§703.1 Purpose and Scope.

* * * * *

(b) * * *

(7) Funding a Charitable Donation Account pursuant to § 721.3(b) of this chapter.

* * * * *

PART 721 – INCIDENTAL POWERS

3. The authority citation for part 721 continues to read as follows:

Authority: 12 U.S.C. 1757(17), 1766, 1789.

4. Amend §721.3 to redesignate paragraph (b) as paragraph (b)(1) and to add paragraph (b)(2) to read as follows:

§721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

* * * * *

(b) * * *

(b)(2) *Charitable Donation Accounts.* A charitable donation account (CDA) is a hybrid charitable and investment vehicle, satisfying the conditions in paragraphs (b)(2)(i) through (vii) of this section, that you may fund as a means to provide charitable contributions and donations to qualified charities. If you fund a CDA that satisfies all of the conditions in paragraphs (b)(2)(i) through (vii) of this section, then you may do so free from the investment limitations of the Federal Credit Union Act and part 703 of this chapter.

(i) *Maximum aggregate funding.* The book value of your investments in all CDAs, in the aggregate, as carried on your statement of financial condition prepared in accordance with generally accepted accounting principles, must be limited to 5 percent of your net worth at all times for the duration of the accounts, as measured every quarterly Call Report cycle. This means that regardless of how many CDAs you invest in, the combined book value of all such investments must not exceed 5 percent of your net worth. You must bring your aggregate accounts into compliance with the maximum aggregate funding limit within 30 days of any breach of this limit.

(ii) Segregated account. The assets of a CDA must be held in a segregated custodial account or special purpose entity and must be specifically identified as a CDA.

(iii) Regulatory oversight. If you choose to establish a CDA using a trust vehicle, the trustee must be regulated by the Office of the Comptroller of the Currency (OCC), the U.S. Securities and Exchange Commission (SEC), another federal regulatory agency, or a state financial regulatory agency. A regulated trustee or other person or entity that is authorized to make investment decisions for a CDA (manager), other than the credit union itself, must be either a Registered Investment Adviser or regulated by the OCC.

(iv) Account documentation and other written requirements. The parties to the CDA, typically the funding credit union and trustee or other manager of the account, must document the terms and conditions controlling the account in a written agreement. The terms of the agreement must be consistent with this section. Your board of directors must adopt written policies governing the creation, funding, and management of a CDA that are consistent with this section, must review the policies annually, and may amend them from time to time.

(A) Your CDA agreement and policies must at a minimum:

(1) Provide that the CDA will make charitable contributions and donations only to charities you name therein that are exempt from taxation under section 501(c)(3) of the Internal Revenue Code;

(2) Document the investment strategies and risk tolerances the CDA trustee or other manager must follow in administering the account;

(3) Provide that you will account for all aspects of the CDA, including distributions to charities and liquidation of the account, in accordance with generally accepted accounting principles; and

(4) Indicate the frequency with which the trustee or manager of the CDA will make distributions to qualified charities as provided in paragraph (b)(2)(v) of this section;

(v) Minimum distribution to charities. You are required to distribute to one or more qualified charities, no less frequently than every 5 years, and upon termination of a CDA regardless of the length of its term, a minimum of 51 percent of the account's total return on assets over the period of up to 5 years. Other than upon termination, you may choose how frequently CDA distributions to charity will be made during each period of up to 5 years. For example, you may choose to make periodic distributions over a period of up to 5 years, or only a single distribution as required at the end of that period. You may choose to donate in excess of the minimum distribution frequency and amount;

(vi) Liquidation of assets upon CDA termination. Upon termination of the CDA, you may receive a distribution of the remaining account assets in cash or you may receive a distribution in kind of the remaining account assets but only if those assets are permissible investments for federal credit unions under the Federal Credit Union Act and part 703 of this chapter; and

(vii) Definitions. For purposes of this section, the following definitions apply:

(A) *Distribution in kind* is your acceptance of remaining CDA assets, upon termination of the account, in their original form instead of in cash resulting from the liquidation of the assets.

(B) *Qualified charity* is a charitable organization or other non-profit entity recognized as exempt from taxation under section 501(c)(3) of the Internal Revenue Code.

(C) *Registered Investment Adviser* is an investment adviser registered with the SEC pursuant to the Investment Advisers Act of 1940.

(D) *Total return* is the actual rate of return on all investments in a CDA over a given period of up to 5 years, including realized interest, capital gains, dividends, and distributions, but exclusive of account fees and expenses provided they were not paid to the credit union that established the CDA or to any of its affiliates.

(E) *Affiliate* is an entity in which the credit union has any ownership interest directly or indirectly. This would not apply to ownership due to the funding of employee benefits.

* * * * *