

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 704 and 713

RIN 3133-AE87

Fidelity Bonds

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) is seeking comment on a proposed rule that would amend its regulations regarding fidelity bonds under Part 704 for corporate credit unions and under Part 713 for natural person credit unions. The proposed rule would accomplish four objectives. First, it would strengthen a board of directors' oversight of a credit union's fidelity bond coverage. Second, it would ensure that there is an adequate period to discover and file fidelity bond claims following a credit union's liquidation. Third, it would codify a 2017 NCUA Office of General Counsel legal opinion that permits a natural person credit union's fidelity bond to include coverage for certain credit

union service organizations (CUSOs). Fourth, it would clarify the documents subject to Board approval and require that all bond forms receive Board approval every ten years.

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

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

- NCUA Web Site: http://www.ncua.gov/news/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on Notice of Proposed Rulemaking (Fidelity Bonds)” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, 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/RegulationsOpinionsLaws/comments> 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 the NCUA’s law library, 1775 Duke Street, Alexandria, Virginia 22314, by appointment

weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6540 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Rob Robine, Trial Attorney, or Rachel Ackmann, Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, VA 22314-3428 or telephone (703) 548-2601.

SUPPLEMENTARY INFORMATION

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- V. Regulatory Procedures**

I. Introduction

a. Background and Legal Authority

The Federal Credit Union Act (FCU Act) requires that certain credit union employees and appointed and elected officials be subject to fidelity bond coverage.¹ The FCU Act directs the Board to promulgate regulations concerning both the amount and

¹ 12 U.S.C. 1761a, 1761b, and 1766.

character of fidelity bond coverage and to approve bond forms.² The pertinent portion of the FCU Act provides:

The Board is ... directed to require that every person appointed or elected by any Federal credit union to any position requiring the receipt, payment, or custody of money or other personal property owned by a Federal credit union or in its custody or control as collateral or otherwise, give bond in a corporate surety company holding a certificate of authority from the Secretary of Treasury ... as an acceptable surety on Federal bonds. Any such bond or bonds shall be in a form approved by the Board with a view to providing surety coverage to the Federal credit union with reference to loss by reason of acts of fraud or dishonesty including forgery, theft, embezzlement, wrongful abstraction, or misapplication on the part of the person, directly or through connivance with others, and such other surety coverages as the Board may determine to be reasonably appropriate. Any such bond or bonds shall be in such an amount in relation to the ... assets of the Federal credit union as the Board may from time to time prescribe by regulation[.]³

Parts 704 and 713 of the NCUA's regulations implement the requirements of the FCU Act regarding fidelity bonds.⁴ Parts 704 and 713 reiterate the statutory requirement that certain credit union employees and appointed and elected officials are subject to fidelity bond coverage. The parts also establish the requirements for a fidelity bond, the acceptable bond forms, and the minimum permissible coverage. Both parts require a credit union's board of directors to review annually its fidelity bond coverage to ensure it is adequate in relation to the potential risks facing the credit union and the minimum requirements set by the Board. Part 713 is made applicable to all federally insured, state-chartered credit unions (FISCUs) through §741.201 of the NCUA's regulations.⁵

² The FCU Act also grants the Board the powers to require such other surety coverage as the Board may determine to be reasonably appropriate; to approve a blanket bond in lieu of individual bonds; and to approve bond coverage in excess of minimum surety coverage.

³ 12 U.S.C. 1766(h).

⁴ 12 CFR pts. 704 and 713.

⁵ 12 CFR 741.201.

Part 704 was recently revised to amend the provision that determines the maximum amount a credit union may pay for a covered loss, or deductible, before the fidelity bond insurer makes a payment. The NCUA restricts the deductible a corporate credit union may pay to limit the potential losses to it if there is a covered claim. The maximum deductible allowed is a percentage of a corporate credit union's capital based on its leverage ratio. For example, if a corporate credit union has a greater than 2.25 leverage ratio then it may have a maximum deductible that is 15 percent of its tier 1 capital. The recent final rule updated this provision to reference tier 1 capital instead of core capital.⁶ Part 713, however, has not been substantively revised since 2005 when the NCUA issued a final rule modernizing Part 713.⁷

b. Regulatory Reform Task Force

In August 2017, the Board published and sought comment on the NCUA's regulatory reform agenda (Agenda).⁸ The Agenda identifies those regulations the Board intends to amend or repeal because they are outdated, ineffective, or excessively burdensome. This is consistent with the spirit of Executive Order 13777.⁹ Although the NCUA, as an independent agency, is not required to comply with Executive Order 13777, the Board has chosen to comply with it in spirit and has reviewed all of the NCUA's regulations to that end. One of the items in the Agenda is related to the NCUA's

⁶ 80 FR 25932 (May 6, 2015).

⁷ 70 FR 61713 (Oct. 26, 2005). In 2012, the NCUA revised Part 713 by removing reference to the agency's former Regulatory Flexibility Program. 77 FR 74112 (Dec. 13, 2012).

⁸ 82 FR 39702 (Aug. 22, 2017).

⁹ E.O. 13771 (Jan. 30, 2017).

regulations on fidelity bonds. The Agenda supports exploring ways to implement the requirements of the FCU Act in this context in the least costly way possible. The Agenda further notes that while the FCU Act mandates fidelity bond coverage, the NCUA's objective should be to allow a credit union to make a business decision based on its own circumstances and needs. This would effectively reduce the NCUA's involvement in a credit union's operational decisions while remaining consistent with the FCU Act.

c. The 2017 Legal Opinion

As discussed above, Part 713 establishes the minimum requirements for a fidelity bond for a natural person credit union. One such requirement under Part 713 is that fidelity bonds be purchased in an "individual policy."¹⁰ The "individual policy" provision was intended to prevent multiple credit unions from being insured under one fidelity bond policy. The Board prohibited such joint coverage because the loss suffered by one or two of the joint policyholders could reduce the amount of available coverage for the other policyholders to below the required minimum amount.¹¹ Before 2017, the NCUA's Office of General Counsel (OGC) had issued legal opinions stating that a credit union may not include one or more CUSOs or other parties as additional insureds under its fidelity bond because of the "individual policy" limitation.¹² It came to OGC's attention, however, that some bond issuers may have been interpreting their policies to permit the issuance of bonds that covered credit unions and their CUSOs, despite OGC's

¹⁰ 12 CFR 713.3(a). There is not an analogous provision for corporate credit unions under Part 704, therefore, the legal opinion relates only to fidelity bonds for natural person credit unions under Part 713.

¹¹ 64 FR 28178 (May 27, 1999).

¹² OGC Legal Op. 14-0311 (Mar. 21, 2014); see also OGC Legal Op. 04-0744 (Sept. 21, 2004).

opinions to the contrary. This prompted OGC to review the regulation and approved bond forms. As a result of that review, OGC issued another legal opinion in September 2017 that rescinded and replaced all previous legal opinions that addressed the “individual policy” requirement.¹³ The 2017 opinion concluded that the “individual policy” requirement of §713.3(a) of the NCUA’s regulations generally prohibits joint coverage under fidelity bonds, but does not prohibit a credit union from purchasing a fidelity bond that covers both the credit union and certain of its CUSOs, as discussed more fully below.

II. Proposed Rule

OGC’s review of Part 713 extended beyond the issue of joint coverage and revealed several inconsistencies between the regulation and approved bond forms. The review also revealed several outdated provisions the Board now seeks to update to ensure the safe and sound operation of credit unions and to protect the National Credit Union Share Insurance Fund (NCUSIF). The Board believes that many of the concerns identified by OGC, as discussed more fully below, are also relevant for corporate credit unions. Therefore, where appropriate, the Board is also proposing amendments to the NCUA’s corporate credit union regulations under Part 704. The specific details of the proposed amendments are discussed below.

III. Section-by-Section Analysis

¹³ OGC Legal Op. 17-0959 (Sept. 26, 2017).

Part 704

In general, Part 704 applies to all federally insured corporate credit unions. Section 704.18 provides the fidelity bond requirements for such credit unions. Proposed changes to the specific subparagraphs of §704.18 are discussed below.

§704.18 Fidelity bond coverage.

18(a)

The proposed rule would not make any changes to paragraph (a).

18(b)

The proposed rule would amend current §704.18(b) by dividing paragraph (b) into two subparts. Current paragraph (b) would remain unchanged and be designated paragraph (b)(1). The proposed rule would add a new paragraph as (b)(2). Proposed paragraph (b)(2) would require that a corporate credit union's board of directors and supervisory committee must review all applications for purchase or renewal of its fidelity bond coverage. After review, the corporate credit union's board must pass a resolution approving the purchase or renewal of fidelity bond coverage and delegate one member of the board, who is not an employee of the corporate credit union, to sign the purchase or renewal agreement and all attachments. No board members may be a signatory on consecutive purchase or renewal agreements for the same fidelity bond coverage policy. This proposed amendment is identical to proposed changes to Part 713 for natural person

credit unions. For additional background, see the discussion below for proposed changes to §713.2(b).

18(c)

The proposed rule would make significant revisions to current §704.18(c). In the proposed rule, §704.18(c) is split into five new subparagraphs, each of which is described in more detail below.

18(c)(1)

The proposed rule would state that a corporate credit union's fidelity bond coverage must be purchased from a company holding a certificate of authority from the Secretary of the Treasury. This is not a substantive change from the current requirements and has only been amended to reflect the comparable language in Part 713.

18(c)(2)

Proposed §704.18(c)(2) would state that fidelity bonds must provide coverage for the fraud and dishonesty of all employees, directors, officers, and supervisory and credit committee members. This is not a substantive change from the current requirements.

18(c)(3)

The proposed rule would substantively amend the requirements for a corporate credit union's approved bond forms. The revised requirements reflect the changes proposed for natural person credit unions in Part 713. The proposed rule would require

the Board to approve all bond forms before a corporate credit union may use them. In addition, a credit union may not use any bond form that has been amended since receiving Board approval or any rider, endorsement, renewal, or other document that limits coverage of approved bond forms without first receiving approval from the Board. As would be required under proposed Part 713, approval of all bond forms expires 10 years after the date the Board approved or reapproved use of the bond form. Any currently approved bond forms would expire on January 1, 2029. For additional background, see the discussion below for proposed changes to §713.4.

18(c)(4)

The proposed rule would add a new §704.18(c)(4) to ensure there is an adequate discovery period, the period to discover and file a claim, following a corporate credit union's liquidation. The revised requirements reflect the changes proposed for natural person credit unions in Part 713. The proposed rule would require fidelity bonds to include an option for the liquidating agent to purchase coverage in the event of an involuntary liquidation that extends the discovery period for a covered loss for at least two years after liquidation. In the case of a voluntary liquidation, fidelity bonds would be required to remain in effect, or provide that the discovery period is extended, for at least four months after the final distribution of assets. For additional background, see the discussion below for proposed changes to §§713.3(a)(3) and (4).

18(c)(5)

The proposed rule would require corporate credit union bonds to include a provision requiring written notification by surety to the NCUA when a credit union's bond is terminated or when the coverage of an employee, director, officer, supervisory or credit committee member has been terminated. The NCUA also must be notified in writing by surety if a deductible is increased above permissible limits. This is not a substantive change from the current requirements.

18(d) - 18(f)

The proposed rule would not make any changes to paragraphs (d), (e), and (f).

Part 713

In general, Part 713 applies to all federally insured natural person credit unions and provides the fidelity bond requirements for them. Proposed changes to the specific subsections of Part 713 are discussed below.

§713.1 What is the scope of this section?

The proposed rule would retain most of the current §713.1 without change, with the following exceptions. The proposed rule would add the words "federally insured" before the words "credit union" to more precisely describe which credit unions are subject to the section. The current rule uses the term "credit union" and "federal credit union" interchangeably to mean "federal credit union." As discussed in the background section, the requirements in Part 713 are applicable to both federal credit unions and

FISCUs.¹⁴ For clarity, the proposed rule would cross reference the requirement in Part 741 that FISCUs must comply with Part 713 and would refer to federally insured credit unions (FICUs) throughout the rule instead of federal credit unions. The Board does not intend any substantive changes by this amendment and only intends to increase the clarity and internal consistency of Part 713.

The proposed rule would also include a cross reference for corporate credit unions and would state that corporate credit unions must comply with §704.18 instead of Part 713.

§713.2 What are the responsibilities of a federally insured credit union's board of directors under this section?

2(a)

The proposed rule would amend current §713.2 by dividing the section into two subparagraphs. Current §713.2 would become paragraph (a). The proposed rule would retain most of the current §713.2 without change, with the following exception. For consistency with the rest of Part 713, the term “Federal credit union” would be revised to “federally insured credit union.”

2(b)

¹⁴ Part 713 is applicable to all FISCUs through §741.201 of the NCUA's regulations, which states that any credit union which makes application for share insurance must have the minimum fidelity bond coverage stated in Part 713 in order for its application to be approved and for such share insurance coverage to continue.

The proposed rule would add a new paragraph (b) to §713.2. Proposed paragraph (b) increases a board of directors' oversight responsibility of its FICU's fidelity bond coverage. Specifically, the Board is proposing to require a FICU's board, and, if applicable, a FICU's supervisory committee, to review all applications for purchase or renewal of bond coverage and to pass a board resolution approving the purchase or renewal. The proposed rule would also require a FICU's board to delegate one board member, who is not an employee of the FICU, to sign the attestation for bond purchase or renewal. This proposal would prohibit the same board member from signing the attestation for renewal in consecutive years.

The Board notes the current rule already requires a FICU's board to annually review its fidelity bond and other insurance coverage to ensure it is adequate. The proposed rule would take that review a step further and require a FICU's board, and, if applicable, its supervisory committee, to review all applications for purchase or renewal of fidelity bond coverage. The Board believes this change will help ensure the board is addressing the adequacy of the coverage at all stages, rather than at an annual point in time that may be retrospective, and require additional steps by the FICU to remedy a deficiency.

The Board is also proposing to require a FICU's supervisory committee to conduct a review of all applications for purchase or renewal of fidelity coverage, in addition to the board. The Board believes this is a function within the responsibilities of a FICU's supervisory committee and will add an additional layer of review. For FISCUs

operating without a supervisory committee, its board should implement controls or establish procedures for conducting their own analysis of the FISCU's fidelity bond coverage, as opposed to relying on recommendations from the FISCU's officers.

As noted, the proposed rule would also require a FICU's board to, after conducting its review, pass a resolution approving the purchase or renewal of fidelity coverage and designating a member of the board, who is not an employee of the FICU, to sign applications for purchase, bond renewals, and any accompanying attestations. Also as mentioned, the Board is proposing to require that the member of the board acting as signatory rotate each time the FICU purchases or renews fidelity coverage. The purpose of these requirements is to address the issue of rescission of fidelity coverage when the signatory to the application to purchase or renew coverage is knowledgeable of fraudulent activity. If the signatory to the application for purchase or renewal is knowledgeable of fraudulent activity, the bond issuer may void the policy and not make a payout when losses are discovered. The NCUA believes that a non-employee board member, who would not be involved in the day-to-day operations of a FICU, is less likely to be responsible for a fraudulent activity than an employee. The NCUA also believes that rotating signatories would reduce the potential for the signatory to be knowledgeable of the fraudulent activity.

In the case where the NCUA is a liquidating agent of a FICU, the NCUSIF would suffer losses due to the fidelity bond being voided. In recent years, the NCUSIF has sustained increased losses due to voided fidelity bond coverage. Before 2010, bond

rescission was not a material concern for the NCUA. Since 2010, however, the NCUA has had at least three claims denied due to rescinded fidelity bond coverage and the NCUA is concerned that the frequency of rescinded coverage will continue to increase. As of June 2018, the NCUSIF has already lost in excess of \$10 million from fidelity bonds that were voided due to the signatory being aware of the fraudulent activities and litigation related to denied claims is ongoing and may result in additional expenses.

The Board believes the proposed changes are only a minimal increase in regulatory burden as the FICU's board is already required to annually review its fidelity bond coverage, but would meaningfully mitigate the risk to the NCUSIF associated with fidelity bond coverage rescission. The Board notes that this proposed requirement is also advantageous to individual FICUs, as this will help prevent them from losing coverage absent involuntary liquidation.

§713.3 What bond coverage must a federally insured credit union have?

The proposed rule would amend current §713.3 by renumbering and revising the section. Current §713.3 would become paragraph (a), current paragraphs (a) and (b) would be renumbered as paragraphs (a)(1) and (a)(2), and two new subparagraphs would be added as (a)(3) and (a)(4). Finally, a new paragraph (b) would also be added.

3(a)(2)

Current paragraph (b) of §713.3 states that, at a minimum, a credit union’s fidelity bond coverage must include fidelity bonds that cover fraud and dishonesty. The proposed rule would remove the redundant phrase “[i]nclude fidelity bonds that” in current paragraph (b). The proposed rule would read “At a minimum, your bond coverage must: . . . Cover fraud and dishonesty by all employees, directors, officers, supervisory committee members, and credit committee members;”. The change is non-substantive and only intended to remove the unnecessary language and clarify the requirement.

3(a)(3)

The proposed rule would add a new paragraph (a)(3) to §713.3. Proposed paragraph (a)(3) would require a FICU to have fidelity bond coverage that includes an option for the liquidating agent to purchase coverage that extends the discovery period, the period to discover and file a claim, for at least two years after liquidation. Fidelity bonds mitigate the risk presented by fraudulent and other dishonest acts to the NCUSIF and have served as a significant source of recovery in liquidations caused by fraud. However, the NCUA, as liquidating agent, can only file a claim if it discovers the loss during the contractual period permitted for filing a claim. Historically, it had been standard for fidelity bonds to permit a reasonable period for discovery and filing a claim following a FICU’s involuntary liquidation. The NCUA has identified approximately \$1 million in claims paid to the NCUSIF that were identified during an extended discovery period from 2006 to 2013. Since then, however, insurers have removed standard discovery coverage provisions from fidelity bond contracts. Currently, most fidelity

bonds provide that the bond's coverage terminates immediately upon a credit union's liquidation and that the ability to purchase an additional period to discover loss is at the *sole discretion of the insurer*.

Under such contracts, the NCUA, as liquidating agent, would not have authority to extend the discovery period following a FICU's closure. There are some instances when liquidation occurs unexpectedly and there is insufficient time to discover a claim before liquidation, or where there is a covered loss, but it is unknown with the specificity required for filing a claim. In such a case, even if the liquidating agent subsequently discovers a covered loss, the fidelity bond issuer may deny the claim. If this happens when the NCUA is liquidating agent, the NCUA would either be forced into litigation to receive payment for the covered loss or not recover for the loss. In either situation, the NCUSIF bears additional losses than if the fidelity bond permitted a reasonable period of discovery. In addition to reducing losses to the NCUSIF, any funds recovered due to an extended discovery period may also be available to pay the failed FICU's creditors and uninsured depositors.¹⁵

In an attempt to address this gap in coverage, it has been the NCUA's practice to provide notice that there may be a potential claim before a liquidation. This informal solution, however, lacks legal clarity and results in unnecessary risk that an insurer may deny a claim following an involuntary liquidation. The proposed rule would provide the

¹⁵ For the priority of payment following a liquidation, see 12 U.S.C. 1787(b)(11).

NCUA with an explicit right to extend the discovery period, which should prevent unnecessary losses to the NCUSIF due to contract technicalities.

The proposed rule would require that fidelity bond coverage provide a discovery period of *two years* because the FCU Act provides members with 18 months after the appointment of a liquidating agent to claim their insured accounts.¹⁶ Therefore, the Board is providing six months to discover and make a claim for fidelity bond coverage following the end of the 18-month statutory period for unclaimed accounts. Further, in the Board's experience, most liquidations are resolved within two years. The Board considers two years a reasonable period to resolve the FICU's affairs, discover any losses from fraudulent or dishonest acts, and file a claim under the fidelity bond. The Board does not expect this proposed requirement to result in any additional cost or burden on FICUs. The liquidating agent would bear the cost of any extension of a discovery period following an involuntary liquidation.

3(a)(4)

The Board is also proposing to add a new paragraph (a)(4) to §713.3 to include a requirement that, for voluntary liquidations, a FICU's fidelity bond coverage remain in effect, or provide that the discovery period is extended, for at least four months after the final distribution of assets. The Board notes that this is currently required for federal credit unions in Part 710, the NCUA's voluntary liquidation regulations, and that this proposed change only reflects that requirement, and does not impose an additional burden

¹⁶ 12 U.S.C. 1787(o).

for federal credit unions.¹⁷ This requirement would represent a new burden, however, for FISCUs. The Board believes that this requirement would impose only a minor burden for FISCUs, and would be beneficial to its members, as any recovery following a voluntary termination would flow through to members.

3(b)

The Board is proposing to amend §713.3 to allow a FICU to have a fidelity bond that covers both it and certain of its CUSOs, as more fully discussed below. Section 713.3 requires that a bond, at a minimum, must be purchased in “an individual policy.”¹⁸ The NCUA added this section to Part 713 in a 1999 final rule in response to a commenter who pointed out that there had been instances of FICUs jointly purchasing fidelity bonds with each other.¹⁹ The commenter was concerned that a loss caused by one or two of the joint policyholders could reduce the amount of available coverage for the other policyholders to below the required minimum amount. In addressing this comment, the Board provided in §713.3 that a FICU must purchase its own individual policy.²⁰ The regulation did not, however, define “individual policy.”

Since inclusion of this provision in the NCUA’s regulations, OGC has issued two public legal opinions interpreting the meaning of “individual policy” and opining on the type of coverage that is prohibited under §713.3(a).²¹ A 2014 OGC legal opinion states

¹⁷ 12 CFR 710.2(c).

¹⁸ 12 CFR 713.3.

¹⁹ 64 Fed. Reg. 28718, 28719 (May 27, 1999).

²⁰ *Id.* at 28719.

²¹ OGC Legal Op. 04-0744 (Sep. 21, 2004); and OGC Legal Op. 14-1013 (Mar. 21, 2014).

that a FICU may not include one or more of its CUSOs or other parties as additional insureds under its fidelity bond.²² In a 2004 legal opinion, OGC opined that a CUSO that provides management services for multiple credit unions could not purchase a single fidelity bond with each credit union named as an insured.²³ In both letters, OGC explained the purpose of the individual policy requirement is to avoid diluting the individual credit union's coverage.

As noted above, OGC issued a third legal opinion on the "individual policy" requirement in 2017 (2017 legal opinion). The 2017 legal opinion rescinded and replaced the previous two opinions and expanded the permissibility for certain joint coverage provisions under the "individual policy" requirement. OGC and the NCUA's Office of Examination and Insurance determined this broader interpretation was both within the NCUA's legal authority under the FCU Act and a safe and sound practice for FICUs. For clarity and ease of reference, the Board now seeks to incorporate the 2017 legal opinion into Part 713.

The Board, therefore, is proposing to amend §713.3 to permit a FICU to have a fidelity bond that also covers its CUSO(s). This is permissible if the FICU owns greater than 50 percent of a CUSO it wishes to cover, or a covered CUSO is organized by the FICU for the purpose of handling certain of its business transactions and composed exclusively of its employees. The 50 percent threshold reflects the standard for accounting consolidation under generally accepted accounting principles, or GAAP. A

²² OGC Legal Op. 14-1013 (Mar. 21, 2014).

²³ OGC Legal Op. 04-0744 (Sep. 21, 2004).

FICU would directly benefit from any fidelity bond insurance proceeds collected by a consolidated CUSO.²⁴ This proposed rule, however, would not eliminate the prohibition against joint coverage of entities not majority owned by the FICU, such as other credit unions or non-majority-owned CUSOs. The Board believes this amendment will provide greater flexibility to FICUs without affecting safety and soundness.²⁵

§713.4 What bond forms may a federally insured credit union use?

The current rule provides that the NCUA will maintain a current list of bond forms approved by the Board for use by FICUs. The rule also states that a FICU must obtain the approval of the Board before it can use any other basic bond form or any rider or endorsement that limits coverage of an approved bond form. The Board is proposing to amend §713.4 to make several changes to reflect the practices of the NCUA, clarify the list of documents that must have Board approval, and address the expiration and continuing review of approved bond forms. Any questions regarding the NCUA's approval of fidelity bond forms can be directed to the NCUA's OGC, (703) 518-6540, or the Office of Examination and Insurance, (703) 518-6360.

4(a)

²⁴ As discussed in the 2017 legal opinion, the NCUA has previously approved certain nominee provisions that included limited joint coverage. For example, a nominee provision may state that a loss sustained by any "nominee" organized by the insured for the purpose of handling certain of its business transactions and composed exclusively of its employees shall be deemed to be loss sustained by the insured.

²⁵ Note, the proposal is not making a comparable amendment to Part 704. Corporate credit unions are not required to purchase fidelity bonds subject to an individual policy requirement. Therefore, the proposed amendment to clarify the individual policy requirement is only applicable to natural person credit unions.

Current §713.4(a) states that a current listing of basic bond forms that may be used without prior Board approval is on the NCUA's website. The Board is proposing to clarify this requirement by dividing paragraph (a) into two paragraphs. Proposed paragraph (a) would explicitly state that "the NCUA Board must approve all bond forms before federally insured credit unions may use them."

4(b)

Proposed paragraph (b) would state that approved bond forms are listed on the NCUA's website and may be used by a FICU without further NCUA approval. If a FICU is unable to access the NCUA's website, it can get a current listing of approved bond forms by contacting the NCUA's Office of Public and Congressional Affairs. The proposed rule would rewrite this provision for clarity, but would not make any substantive changes.

4(c)

Current paragraph (b), renumbered as paragraph (c), sets forth which fidelity bonds and fidelity bond documents require Board approval. The proposed rule also would set forth which fidelity bonds and fidelity bond documents require Board approval, but would rewrite this provision for clarity. The proposed rule states in paragraph (c) that "Credit unions may not use any of the following without first receiving approval from the NCUA Board." No substantive changes are intended by this revision, and the revision is only intended to clarify the Board's expectation for FICUs.

4(c)(1)

The Board is clarifying that any bond form that has been amended or changed since the Board approved it requires new approval from the Board. The Board notes that this policy is the current practice whereby bond issuers submit amended bond forms to the Board for approval under current §713.4(b)(1). This proposed change is only intended to make the regulation clearer with respect to this requirement.

4(c)(2)

Current §713.4(b)(2) requires any rider or endorsement that limits coverage of approved basic bond forms to be approved by the Board. The proposed rule would clarify the list of documents that must receive Board approval. The Board is proposing to state explicitly that renewal forms (and any other document) that limit the coverage of approved bond forms must also receive Board approval. The Board is clarifying the list of documents subject to approval because the Board is aware of instances where the renewal or continuation of coverage forms included language affecting the bond coverage, including language that limited the bond coverage. As such, it is the Board's belief that the renewal form is an extension of the bond form and thus this is not an additional burden but further clarification of what constitutes the bond form.

4(d)

The Board is proposing to add a new paragraph (d) to sunset its approval on all bond forms ten years after the form is approved. The impetus for this provision is the discovery that Board approved-bond forms were being interpreted in a way that was

contrary to the NCUA's understanding of how the bond forms would be used. In addition, a review of previously approved bond forms, as part of issuing the 2017 legal opinion, revealed several instances of outdated provisions, additions that had not been approved by the Board, and some forms that contained provisions that were contrary to the FCU Act and Part 713 of the NCUA's regulations. To avoid instances of this in the future, the Board is proposing to sunset its approval of a bond form after a period of ten years. This ten-year period will begin on the date the Board approves a bond form. The Board notes, however, that the ten-year period will not toll or start over when a bond carrier submits a revision to an approved bond. For example, if the Board approves a bond form on January 1, 2020, and that bond form is subsequently amended and approved by the Board on January 1, 2021, then the bond form will still expire on January 1, 2030, ten years from the date the Board issued its initial approval.

The Board believes this ten-year sunset provision will provide a definitive date at which an approved bond form will be reviewed by the Board to determine if it is still in compliance with the NCUA's regulations. While this provision will require expired bond forms to be resubmitted to the Board, having a clear date upon which the Board's approval will sunset will help all interested parties prepare to resubmit the bond form to ensure continuity in coverage and operations. The Board also notes that should it determine, upon re-review, that a bond form does not comply with the NCUA's regulations, the Board would not require FICUs with coverage under that bond to seek new coverage. In these situations, the Board would require FICUs to seek new coverage

under an approved bond form after its current coverage expires per the terms of the contract between the FICU and the bond issuer.

With respect to bond forms that the Board has approved before 2019, the Board is proposing to allow its approval on these forms to continue until January 1, 2029. The Board believes this date for sunset of its approval will provide all currently approved bonds with at least ten years before they must be submitted for review and re-approval. The Board believes this will achieve the goal of ensuring all approved bond forms comply with the NCUA's regulations without imposing unnecessary burden on FICUs or bond issuers.

In addition to including a sunset provision, the Board is also proposing to clarify its right and ability to review a bond form at any time. The Board notes that if it does undertake a review of an approved bond form during the ten-year period, this will not re-start or toll the expiration period and the Board's approval of that form will still sunset ten years from the date the Board issued its original approval.

§713.5 - §713.7

As discussed above, the proposed rule would use the term federally insured credit union instead of federal credit union in each of §§713.5, 713.6, and 713.7 for consistency and clarity.

IV. REQUEST FOR COMMENT

The Board invites comment on all aspects of this proposed rulemaking. In particular, the Board seeks comment on whether FICUs anticipate any increase in compliance burden under the proposed rule.

V. Regulatory Procedures

a. 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. For purposes of the PRA, a paperwork burden may take the form of a reporting, disclosure, or recordkeeping requirement, each referred to as an information collection. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

A proposed change to Part 713 would require NCUA approval on all bond forms expired after a period of 10 years from the date of NCUA approval or reapproved of its use. The bond company would be required to seek NCUA approval before a bond form may be used by a FICU. The information collection burden associated with this proposed new requirements is minimal, only affecting an estimated two entities annually; for an increase of two hours to the currently approved OMB control number 3133-0170.

Title of Information Collection: Fidelity Bond and Insurance Coverage for Federal Credit Unions, 12 CFR Part 713.

OMB Control Number: 3133-0170.

Estimated Number of Respondents: 10.

Estimated Annual Frequency of Response: 1.

Estimated Total Annual Responses: 10.

Estimated Hours per Response: 1.

Estimated Total Annual Burden Hours: 10.

Affected Public: Private Sector: Not-for-profit institutions; Businesses and other for-profits.

The NCUA invites comments on: (a) whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments are a matter of public record. Comments regarding the information collection requirements of this rule should be sent to (1) Dawn Wolfgang, NCUA PRA Clearance Officer, National Credit Union Administration, 1775 Duke Street, Suite 5080, Alexandria, Virginia 22314, or Fax No. 703-519-8572, or Email at *PRAcomments@ncua.gov* and the (2) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for NCUA, New Executive

Office Building, Room 10235, Washington, DC 20503, or email at
OIRA_Submission@OMB.EOP.gov.

b. *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include credit unions with assets less than \$100 million) and publishes its certification and a short, explanatory statement in the Federal Register together with the rule.

The Board does not believe that the proposed rule would have a significant economic impact on a substantial number of small entities. Any increased costs for the bond insurer to resubmit their forms every ten years would be spread out among all FICUs and the cost to each FICU would be negligible. Additionally, the proposed requirement that boards, and if applicable, supervisory committees, must approve purchases and renewals would impose no direct cost on FICUs. Accordingly, the NCUA certifies that the proposed rule will not have a significant economic impact on a substantial number of small FICUs.

c. *Executive Order 13132*

Executive Order 13132 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 to fundamental federalism principles. This proposed rule will not have a direct effect 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 NCUA has therefore determined that this proposed 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 proposed rule would 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 in

12 CFR Parts 704 and 713

Bonds, Credit unions, Insurance

By the National Credit Union Administration Board on November 15, 2018.

Gerard Poliquin
Secretary of the Board

For the reasons discussed above, the NCUA is proposing to amend 12 CFR parts 704 and 713 as follows:

PART 704 – CORPORATE CREDIT UNIONS

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

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

2. Section 704.18 is amended by revising paragraphs (b) and (c) to read as follows:

§704.18 Fidelity bond coverage.

* * * * *

(b) *Review of bond coverage.*

(1) The board of directors of each corporate credit union shall, at least annually, carefully review the bond coverage in force to determine its adequacy in relation to risk exposure and to the minimum requirements in this section.

(2) The board of directors and the supervisory committee of each corporate credit union must review all applications for purchase or renewal of its fidelity bond coverage. After review, the credit union's board must pass a resolution approving the purchase or renewal of fidelity bond coverage and delegate one member of the board, who is not an employee of the credit union, to sign the purchase or renewal agreement and all attachments. Provided, however, that no board members may be a signatory on consecutive purchase or renewal agreements for the same fidelity bond coverage policy.

(c) *Minimum coverage; approved forms.*

(1) The fidelity bond coverage must be purchased from a company holding a certificate of authority from the Secretary of the Treasury.

(2) Fidelity bonds must provide coverage for the fraud and dishonesty of all employees, directors, officers, and supervisory and credit committee members.

(3) The NCUA Board must approve all bond forms before a corporate credit union may use them. Corporate credit unions may not use any bond form that has been amended since the time the NCUA Board approved the form or any rider, endorsement, renewal, or other document that limits coverage of approved bond forms without receiving approval from the NCUA Board. Approval on all bond forms expires 10 years after the date the NCUA Board approved or reapproved use of the bond form; provided, however, that any

bond forms approved before 2019 will expire on January 1, 2029 and an NCUA Board-approved amendment to a bond form does not toll or cause the 10-year period to restart. The NCUA reserves the right to review a bond form at any point after its approval.

(4) Fidelity bonds must include an option for the liquidating agent to purchase coverage in the event of an involuntary liquidation that extends the discovery period for a covered loss for at least two years after liquidation. In the case of a voluntary liquidation, fidelity bonds must remain in effect, or provide that the discovery period is extended, for at least four months after the final distribution of assets.

(5) Notwithstanding the foregoing, all bonds must include a provision, in a form approved by the NCUA Board, requiring written notification by surety to NCUA:

(i) When the fidelity bond of a credit union is terminated in its entirety;

(ii) When fidelity bond coverage is terminated, by issuance of a written notice, on an employee, director, officer, supervisory or credit committee member; or

(iii) When a deductible is increased above permissible limits. Said notification shall be sent to NCUA and shall include a brief statement of cause for termination or increase.

* * * * *

PART 713 – FIDELITY BOND AND INSURANCE COVERAGE FOR FEDERAL CREDIT UNIONS

3. The authority citation for Part 713 continues to read as follows:

Authority: 12 U.S.C. 1761a, 1761b, 1766(a), 1766(h), 1789(a)(11).

4. Revise the title and table of contents for this section to read as follows:

PART 713 – FIDELITY BOND AND INSURANCE COVERAGE FOR FEDERALLY INSURED CREDIT UNIONS

§713.1 What is the scope of this section?

§713.2 What are the responsibilities of a federally insured credit union's board of directors under this section?

§713.3 What bond coverage must a federally insured credit union have?

§713.4 What bond forms may a federally insured credit union use?

§713.5 What is the required minimum dollar amount of coverage?

§713.6 What is the permissible deductible?

§713.7 May the NCUA Board require a federally insured credit union to secure additional insurance coverage?

5. Revise §713.1 to read as follows:

§ 713.1 What is the scope of this section?

This section provides the requirements for fidelity bonds for federally insured credit union employees and officials and for other insurance coverage for losses such as theft, holdup, vandalism, etc., caused by persons outside the credit union. Federally insured, state-chartered credit unions are required by § 741.201 of this chapter to comply with the fidelity bond coverage requirements of this part. Corporate credit unions must comply with § 704.18 of this chapter in lieu of this part.

6. Revise §713.2 to read as follows:

§713.2 What are the responsibilities of a federally insured credit union's board of directors under this section?

(a) The board of directors of each federally insured credit union must at least annually review its fidelity and other insurance coverage to ensure that it is adequate in relation to the potential risks facing the federally insured credit union and the minimum requirements set by the NCUA Board; and

(b) The board of directors, and, if applicable, the supervisory committee of each federally insured credit union, must review all applications for purchase or renewal of its fidelity bond coverage. After review, the federally insured credit union's board must

pass a resolution approving the purchase or renewal of fidelity bond coverage and delegate one member of the board, who is not an employee of the federally insured credit union, to sign the purchase or renewal agreement and all attachments; provided, however, that no board members may be a signatory on consecutive purchase or renewal agreements for the same fidelity bond coverage policy.

7. Revise §713.3 to read as follows:

§713.3 What bond coverage must a federally insured credit union have?

(a) At a minimum, your bond coverage must:

(1) Be purchased in an individual policy from a company holding a certificate of authority from the Secretary of the Treasury;

(2) Cover fraud and dishonesty by all employees, directors, officers, supervisory committee members, and credit committee members;

(3) Include an option for the liquidating agent to purchase coverage in the event of an involuntary liquidation that extends the discovery period for a covered loss for at least two years after liquidation; and

(4) In the case of a voluntary liquidation, remain in effect, or provide that the discovery period is extended, for at least four months after the final distribution of assets, as required in § 710.2(c) of this chapter.

(b) The requirement in subsection (a) of this section does not prohibit a federally insured credit union from having a fidelity bond that also covers its credit union service organization (CUSO(s)), provided the federally insured credit union owns more than 50 percent of the CUSO(s) or the CUSO(s) is organized by the federally insured credit union for the purpose of handling certain of its business transactions and composed exclusively of the federally insured credit union's employees.

8. Revise §713.4 to read as follows:

§713.4 What bond forms may a federally insured credit union use?

(a) The NCUA Board must approve all bond forms before federally insured credit unions may use them.

(b) Bond forms the NCUA Board has approved for use by federally insured credit union are listed on the NCUA's website, <http://www.ncua.gov>, and may be used by federally insured credit unions without further NCUA approval. If you are unable to access the NCUA's website, you can obtain a current listing of approved bond forms by contacting the NCUA's Office of Public and Congressional Affairs.

(c) Federally insured credit union unions may not use any of the following without first receiving approval from the NCUA Board:

(1) Any bond form that has been amended or changed since the time the NCUA Board approved the form; and

(2) Any rider, endorsement, renewal, or other document that limits coverage of approved bond forms.

(d) Approval on all bond forms expires after a period of 10 years from the date the NCUA Board approved or reapproved use of the bond form. Provided, however, that:

(1) Any bond forms approved before 2019 will expire on January 1, 2029.

(2) An NCUA Board-approved amendment to a bond form does not toll or cause the 10-year period to restart; and

(3) The NCUA reserves the right to review a bond form at any point after its approval.

9. In §§713.5(a) and (b) remove the word “federal” before the words “credit union’s” and add in its place the words “federally insured” each place they appear.

10. In § 713.5(c) add the words “federally insured” before the words “credit union,” “credit unions,” or “credit union’s” each place they appear.

11. In § 713.5(e) replace the word “your” with the words “a federally insured credit union’s”.

12. In § 713.6 remove the word “federal” before the words “credit union’s” or “credit unions” and add the words “federally insured” before the words “credit union’s,” “credit unions,” and “credit union” each place they appear.

13. Revise § 713.7 to read as follows:

§713.7 May the NCUA Board require a federally insured credit union to secure additional insurance coverage?

The NCUA Board may require additional coverage when the NCUA Board determines that a federally insured credit union’s current coverage is inadequate. The federally insured credit union must purchase this additional coverage within 30 days.