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October 21, 2013

Mr. Gerard Poliquin  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314-3428

RE: 12 CFR Parts 703 and 721, Charitable Donation Accounts

Dear Mr. Poliquin:

The National Credit Union Foundation (NCUF) appreciates the opportunity to submit comments on the National Credit Union Administration's notice of proposed rulemaking for Parts 703 and 721, Charitable Donation Accounts. By way of background, NCUF is a 501(c)(3) tax-exempt charitable organization governed by a volunteer Board of Directors comprised of executives from the credit union movement as well as an at-large representative and serves as the philanthropic arm for the nation's credit unions.

NCUF's mission is making financial freedom achievable through credit unions. NCUF delivers on its mission by providing unique resources credit unions can use to create greater access to affordable financial services, provide widespread financial education, and empower more consumers to save, build assets, and own homes.

NCUF strongly supports the creation of hybrid charitable and investment vehicles, and commends NCUA's willingness to develop a regulatory framework to support this structure. In this low interest rate environment, all charitable organizations are seeking steady streams of funding for their impactful activities. NCUF is no different in that regard.

NCUF has a series of observations and recommendations regarding the proposal that it believes will balance the intent of credit unions to support charitable activities and the safety and soundness concerns that NCUA necessarily has in its role as regulator and deposit insurer.

**Observation:** The rule for CDA accounts should not be associated with other tools currently in use by the credit union movement to provide for charitable purposes that only use 703 qualifying investments. These solutions are differentiated as they strictly use 703 qualifying investments. NCUF funding currently relies on a mechanism called the Community Investment Fund or CIF. The nature of this mechanism leverages all components of the credit union system to benefit NCUF and state credit union foundations for important financial capability work. As originally conceived, a credit union may purchase a 703 qualifying investment such as an agency, and may then establish formal instructions with the safekeeping agent to direct that the interest payments be split based on their instructions, and settled by the agent to both the credit union and to the charitable organization. In the CIF's case, the earnings that are donated are split between the NCUF and the state credit union foundations.



bbb.org/charity

Another example of this type of activity in use today involves a credit union that purchases a Certificate of Deposit at a corporate credit union, and then provides instructions to the corporate to do the administrative work of splitting the interest, between the credit union and the charitable organization. Again, in the case of the CIF, the donated earnings are split between NCUF and the state credit union foundations. Neither of these types of activities should be included or brought in under the definition of a CDA, as they are simply administrative activities.

**Recommendation:** Clearly separate out those programs defined as administrative in nature and restricted to 703 qualifying investments from the definition of a CDA.

### **Section 721.3(b)(2)(i) -- Charitable Donation Accounts (CDAs) maximum aggregate funding**

**Observation:** The proposal calls for a maximum aggregate funding of 3% of net worth at all times. As the regulation contemplates a total return concept and as it also provides for up to a five (5) year period for distribution, the CDA may actually grow above the 3% over time. That would certainly be the desired goal of all involved. In years in which the investments generate sizeable gains, a credit union may be forced to reduce its holdings in its CDA(s) prematurely if the 3% net worth cap has been exceeded. As growth is anticipated, and a potential time frame of five (5) years is present between distributions, the 3% limitation is not an effective tool and actually will have unintended negative outcomes for a successful investor.

**Recommendation:** NCUF suggests specifying the 3% limitation be measured at the time of purchase or placement of the investment in the CDA and at the time of any subsequent additional investment.

Also rather than a limit of 3% of net worth, federal credit unions should be allowed to invest a greater amount, perhaps up to 5% of their net worth, in CDA investments. This higher level will allow more flexibility for federal credit unions and will minimize unintended negative outcomes for successful investing.

### **Section 721.3(b)(2)(iii) – Regulatory oversight**

**Observation:** The proposed rule allows credit unions to make their own investment decisions; however, the proposal provides that if another entity is managing the account, that entity must be a Registered Investment Advisor with the Securities and Exchange Commission (SEC).

Because the Office of Comptroller of Currency (OCC) supervises national banks, federal savings banks or federal thrifts engaged in trust and investment activities, these institutions have been exempted by Congress from registration as a registered investment advisor with the SEC, with certain exceptions. As a potential recipient of charitable donations under the proposed rule's Charitable Donation Accounts, NCUF is deeply concerned that for trust companies that are also banks, federal savings banks or federal thrifts, the proposed SEC oversight is redundant. Moreover, meeting SEC application and registration requirements as well as examination responsibilities will be costly, particularly for such institutions that are not already registered.

NCUF believes it is unlikely that an institution already regulated by the OCC will undertake the actions and expenses necessary to receive SEC registration in order to be eligible to manage CDAs for credit unions. This requirement for SEC registration will likely limit credit union options and likely minimize the utility of CDAs, thereby defeating the intent of providing another mechanism for credit unions to make charitable donations.

**Recommendation:** To the extent that the SEC registration process places additional burdens which may result in the abandonment of the CDA product, we would ask that you strongly consider the perspective and concerns of those financial entities that would be required to register.

**Section 721.3(b)(2)(v) – Minimum distribution to charities**

**Observation:** The proposal currently requires credit unions to distribute to one or more qualified charities “no less frequently than every 5 years, or upon termination of a CDA in less than 5 years, a minimum of 51 percent of the account’s total return on assets over the period of up to 5 years. You may choose how frequently distributions will be made during each period of up to 5 years.”

For any charitable organization, including NCUF, certainty of cash flow and the ability to appropriately account for expected income are key considerations. The proposed rule language makes it difficult for a beneficiary organization like NCUF to plan on receipt of funds particularly in a fluctuating market. For example, if a CDA earns a positive reasonable rate of return for the first four years of its existence, the charity has likely accrued the income on its financial statements (as permitted under Generally Accepted Accounting Principles), but if there is a market decline during the fifth year, it could result in a significant reduction or elimination of any accrued income from previous years gains. Cash flow would be adversely affected and it is possible the charity has already expended the funds in anticipation of their receipt. The charities ability to plan for programmatic expenditures would be challenged.

**Recommendation:** NCUF urges the language cited above to be amended to require a credit union to distribute no less frequently than once every year to avoid this misalignment between the intent of a CDA and the charitable organization’s ability to plan for and utilize the donation.

**Section 721.3(b)(2)(vii)(d) – Definition of “total return”**

**Observation:** Creating and managing a trust can be expensive. The trust may be professionally managed and require legal documents or agreements to be developed, which impacts the total return for the credit union. We do not see where the rule has addressed the recoupment of certain costs by the credit union in creating or maintaining the CDA. Even though NCUF welcomes “in kind” donations of the cost to create, maintain and manage accounts like a CDA, NCUF does not believe it is fair to credit unions to assume that these costs will be donated on top of the credit union’s investment commitment. In addition, NCUF must strike a balance between attracting investors to this new product and the cost efficiency for investors to invest in a CDA versus another investment not designated for charitable purpose.

**Recommendation:** The “total return” definition should be modified to permit a credit union to recoup, if so desired, certain administrative costs associated with the creation, maintenance of, and any professional management fees incurred as a reduction of the total return.

**704 Limitations for Corporate Credit Unions**

**Observation:** As written, the rule does not address part 704 or contemplate a corporate seeking to create a CDA. As mentioned above, NCUF’s Community Investment Fund represents the best in collaboration between all segments of the credit union system: credit unions, corporate credit unions, state leagues and CUNA. NCUF believes our regulated system partners should have as much flexibility, within the appropriate bounds of safety and soundness, to create CDAs for the benefit of NCUF or other charitable causes as federal savings banks or federal thrifts would under the proposal.

**Recommendation:** As several corporate credit unions have in the past contributed to organizations such as the NCUF, and may desire to do so in the future in support the charitable activities of the members they serve, providing a similar opportunity would be appropriate. The rule should include 704 exclusions as well as to allow corporate participation in CDAs.

Thank you for the opportunity to comment on the proposal. If you have any questions about our letter, please do not hesitate to give me a call at (202) 824-6282.

Sincerely,

A handwritten signature in cursive script, reading "Christiane G. Hyland".

Christiane Gigi Hyland  
Executive Director

cc: The Honorable Debbie Matz, Chairman, NCUA  
The Honorable Rick Metsger, Board Member, NCUA  
The Honorable Michael E. Fryzel, Board Member, NCUA