

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133-AF20

Overdraft Policy

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim final rule.

SUMMARY: The NCUA Board (Board) is issuing this interim final rule to amend one of the requirements that a federal credit union (FCU) must adopt as a part of their written overdraft policy. Specifically, the interim final rule will modify the requirement that an FCU's written overdraft policy establish a time limit, not to exceed 45 calendar days, for a member to either deposit funds or obtain an approved loan from the FCU to cover each overdraft. The interim final rule removes the 45-day limit and replaces it with a requirement that the written policy must establish a specific time limit that is both reasonable and applicable to all members, for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft. Consistent with U.S. generally accepted accounting principles (GAAP), overdraft balances should generally be charged off when considered uncollectible. The Board believes that this change will improve a requirement that is not only overly prescriptive, but could be especially detrimental as FCUs take steps to provide their members the flexibility needed to cope with the impacts of COVID-19. The Board has found good cause to issue the interim final rule without advance notice-and-comment procedures and with an immediate effective date.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received on or before [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit written comments, identified by RIN 3133-AF20, by any of the following methods (**Please send comments by one method only**):

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: (703) 518-6319. Include “[Your Name]—Comments on Overdraft Policy” in the transmittal.
- 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: You may view all public comments on the Federal eRulemaking Portal at <http://www.regulations.gov> as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA’s law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518-6540 or e-mailing OGCMail@ncua.gov.

FOR FURTHER INFORMATION, CONTACT: *Policy and Analysis:* Alison Clark, Chief

Accountant, Office of Examination and Insurance, at (703) 518-6611; *Legal*: Marvin Shaw and Thomas Zells, Staff Attorneys, 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
- IV. Regulatory Procedures

I. Background

The COVID-19 pandemic has created uncertainty for federally insured credit unions (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 modifying the maximum time an FCU overdraft policy may allow for a member to cure an overdraft. The Board believes that this change will help ensure that FCUs have the additional flexibility necessary to provide relief to their members in a manner consistent with the NCUA's responsibility to maintain the safety and soundness of the credit union system.¹

¹ Federally insured, state-chartered credit unions (FISCU) are not subject to the overdraft policy requirements in 12 CFR 701.21(c)(3).

The NCUA first permitted FCUs to advance money to a member to cover his or her account deficit (overdraft) without having a credit application on file in 2000.² The Federal Credit Union Act (FCU Act) does not specifically address an FCU's authority to pay or honor a debit from a share account that will result in an overdrawn account. However, the NCUA's longstanding position has been that an overdraft, as a financial accommodation to a member constitutes a loan or line of credit to a member. The Board also believes that the authority to cover overdrafts is incidental³ to an FCU's authority to accept payment on shares.⁴ In particular, under the incidental powers test established by the courts⁵ and in the NCUA's regulations in part 721, covering overdrafts from such accounts: (1) is useful in carrying out FCU business because it facilitates ongoing maintenance of accounts that are temporarily overdrawn; (2) is the functional equivalent and indeed directly associated with other deposit account activity; and (3) involves risks similar to those FCUs assume in accepting payment on shares generally.⁶

When providing FCUs with this authority in 2000, the NCUA adopted a regulatory requirement that, in order for an FCU to advance money to a member to cover an account deficit without having a credit application from the borrower on file, the FCU must have a written overdraft policy that meets certain requirements. One of these requirements is that the FCU's written policy must establish a time limit not to exceed 45 calendar days for a member either to deposit funds or obtain an approved loan from the FCU to cover each overdraft. As described

² 65 FR 15224 (Mar. 22, 2000).

³ 12 U.S.C. 1757(17).

⁴ 12 U.S.C. 1757(6).

⁵ *Nations Bank of N. Carolina v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995).

⁶ See Overdraft Practices, Office of the Comptroller of the Currency, Interpretive Letter #1082 (May 17, 2007), available at <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2007/int1082.pdf>.

more fully in section III, the Board believes that this policy is overly prescriptive and potentially harmful to both FCUs and their members. The Board is especially concerned that the requirement will prevent FCUs from taking appropriate steps to provide their members the flexibility needed to cope with the impact of COVID-19. As such, the Board is removing the prescriptive 45-day limit and instead requiring that an FCU's written policy must establish a specific time limit that is both reasonable and applicable to all members for a member to cure their overdraft by either depositing funds or obtaining an approved loan. Consistent with U.S. GAAP, overdraft balances should generally be charged off when considered uncollectible. The Board is making no other changes to this provision.

II. Legal Authority

The Board is issuing this final rule pursuant to its authority under the FCU Act.⁷ 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.⁸ 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 FICUs.⁹ Other provisions of the act confer specific rulemaking authority to address prescribed issues or circumstances.¹⁰ Accordingly, the FCU Act grants the Board broad rulemaking authority to

⁷ 12 U.S.C. 1751 *et al.*

⁸ 12 U.S.C. 1766(a).

⁹ 12 U.S.C. 1789.

¹⁰ 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.

ensure that the credit union industry and the National Credit Union Share Insurance Fund (NCUSIF) remain safe and sound.

III. The Interim Final Rule

Section 701.21(c)(3) of the NCUA's regulations provides that a credit union can advance money to a member to cover his or her account deficit without having a credit application on file if the credit union had a written overdraft policy. Specifically, § 701.21(c)(3) requires that a credit union's written overdraft policy must: (1) set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union's ability to absorb losses; (2) establish a time limit not to exceed 45 calendar days for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft; (3) limit the dollar amount of overdrafts the credit union will honor per member; and (4) establish the fee and interest rate, if any, the credit union will charge members for honoring overdrafts.

As previously noted, the Board is concerned that the requirement that an FCU's overdraft policy establish a time limit not to exceed 45 calendar days for a member to cure their overdraft is unnecessarily prescriptive during normal times, but could be especially detrimental as FCUs and their members face challenges imposed by COVID-19. The Board believes it is imperative that FCUs have the flexibility to work with their members to take positive and proactive actions that can manage or mitigate adverse impacts on members while maintaining safe-and-sound operations. As such, the Board is amending § 701.21(c)(3) to remove the prescriptive 45-day limit for curing an overdraft and replacing it with a requirement that an FCU's written overdraft policy must establish a specific time limit that is both reasonable and applicable to all members

for a member to either deposit funds or obtain an approved loan from the FCU to cover each overdraft. Consistent with U. S. GAAP, overdraft balances should generally be charged off when considered uncollectible.

This change will also remedy a discrepancy between the current 45-day limit imposed on FCUs for curing an overdraft and NCUA-adopted interagency guidance on overdraft protection programs that suggests a maximum of 60 days before an overdraft is charged-off.¹¹ The Board emphasizes that the recommended maximum of 60-days for charging off an overdraft in the interagency guidance is a suggestion derived from general safety and soundness considerations and U. S. GAAP for generally charging off overdraft balances when they are considered uncollectible¹². The Board expects that FCUs will exercise their good, professional judgment when working with members and determining when overdraft balances are deemed uncollectible. This professional judgment is especially important as FCUs help their members deal with the impacts of COVID-19.

The Board is also amending § 701.21(c)(3) to add a cross-reference to Regulation E. Regulation E sets forth other requirements applicable to certain overdraft services and was amended in 2009, after the adoption of § 701.21(c)(3).¹³ This addition imposes no new or

¹¹ In February 2005, the NCUA, along with the Federal Reserve Board, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, published guidance on overdraft protection programs in response to concerns about aspects of the growing marketing, disclosure, and implementation of overdraft services. 70 FR 9127 (February 24, 2005) (Joint Guidance) (“[O]verdraft balances should generally be charged off when considered uncollectible, but no later than 60 days from the date first overdrawn.”), available at <https://www.ncua.gov/files/letters-credit-unions/LCU2005-03Encl.pdf>.

¹² Overdraft balances should be charged off against the allowance for loan and lease losses or allowance for credit losses, if applicable. Any payments received after the account is charged off, up to the amount charged off against the allowance should be reported as a recovery.

¹³ 12 CFR part 1005.

additional requirements on FCUs, nor does this rule supersede, or relieve FCUs from complying with, any provisions of Regulation E.

IV. Regulatory Procedures

A. Administrative Procedure Act

The Board is issuing this interim final rule without prior notice and the opportunity for public comment and the 30-day delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).¹⁴ Pursuant to the APA, general notice and the opportunity for public 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.”¹⁵

The Board believes that the public interest is best served by implementing the interim final rule as soon as possible. As discussed above, recent events have suddenly and significantly affected global economic activity, increasing businesses’ and households’ need to have timely access to liquidity. This relief will allow FCUs greater flexibility to work with their members to cure overdrafts. This flexibility will be crucial as many FCU members are forced to adjust to

¹⁴ 5 U.S.C. 553.

¹⁵ 5 U.S.C. 553(b)(B).

dramatically changed financial conditions as a result of COVID-19. 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.¹⁶

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.¹⁷ Because the rule relieves a restriction, the interim final rule is exempt from the APA's delayed effective date requirement.¹⁸ Additionally, as an independent basis, the Board finds good cause to publish the interim final rule with an immediate effective date for the same reasons set forth above under the discussion of 5 U.S.C. 553(b)(B).

While the Board believes that there is good cause to issue the rule without advance notice and comment and with an immediate effective date, it is interested in the views of the public and requests comment on the interim final rule.

B. Congressional Review Act

For purposes of the Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a “major” rule. If a rule is deemed a “major rule” by the Office of Management and Budget (OMB), the Congressional Review Act generally provides that the

¹⁶ 5 U.S.C. 553(b)(B); 553(d)(3). For the same reasons, the Board is not providing the usual 60-day comment period before finalizing this rule. *See* NCUA Interpretive Ruling and Policy Statement (IRPS) 87-2, as amended by IRPS 03-2 and IRPS 15-1. 80 FR 57512 (Sept. 24, 2015), *available at* <https://www.ncua.gov/files/publications/irps/IRPS1987-2.pdf>.

¹⁷ 5 U.S.C. 553(d).

¹⁸ 5 U.S.C. 553(d)(1).

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 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.¹⁹

For the same reasons set forth above, the Board is adopting the interim 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.²⁰ As discussed above, the Board has concluded there is good cause to issue the interim final rule without notice-and-comment procedures.

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

¹⁹ 5 U.S.C. 804(2).

²⁰ 5 U.S.C. 808.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden (44 U.S.C. 3507(d)). For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or a third-party disclosure requirement, 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 valid OMB control number.

The interim final rule will modify the requirements of an FCU's written overdraft policy by removing the 45-day overdraft limit requirement and replacing it with a requirement that the policy establish a specific time limit that is, reasonable, applicable to all members, and consistent with U.S. GAAP. The information collection requirement of this part to retain and maintain a written overdraft policy is currently covered by OMB control number 3133-0092. The rule will not result in a change in burden and there is no new information collection requirements associated with the rule.

D. 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 interim final rule does 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 NCUA has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

E. Assessment of Federal Regulations and Policies on Families

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

F. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the APA²¹ or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the *Federal Register*.²² Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers credit unions with assets less than \$100 million to be small

²¹ 5 U.S.C. 553(b).

²² 5 U.S.C. 603, 604.

entities.²³

As discussed previously, consistent with the APA,²⁴ the Board has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the Board is not issuing a notice of proposed rulemaking. Rules that are exempt from notice and comment procedures are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

Nevertheless, the Board seeks comment on whether, and the extent to which, the interim final rule would affect a significant number of small entities.

List of Subjects in 12 CFR Part 701

Credit, Credit unions, Reporting and recordkeeping requirements.

By the NCUA Board on May , 2020.

Gerard Poliquin
Secretary of the Board

²³ NCUA IRPS 15-1. 80 FR 57512 (Sept. 24, 2015).

²⁴ 5 U.S.C. 553(b)(3)(B).

For the reasons discussed above, the Board amends part 701 of chapter VII of title 12 of the Code of Federal Regulations to read as follows:

PART 701 – ORGANIZATION AND OPERATION OF FEDERAL CREDIT

UNIONS

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. Amend § 701.21 by revising paragraph (c)(3) to read as follows:

§ 701.21 Loans to Members and lines of credit to members.

* * * * *

(c) * * *

(3) *Credit applications and overdrafts.* Consistent with policies established by the board of directors, the credit committee or loan officer shall ensure that a credit application is kept on file for each borrower supporting the decision to make a loan or establish a line of credit. A credit union may advance money to a member to cover an account deficit without having a credit

application from the borrower on file if the credit union has a written overdraft policy. The policy must: set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union's ability to absorb losses; establish a specific time limit that is reasonable and universally applicable for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft; limit the dollar amount of overdrafts the credit union will honor per member; and establish the fee and interest rate, if any, the credit union will charge members for honoring overdrafts. Consistent with U.S. GAAP, overdraft balances should generally be charged off when considered uncollectible. In addition, overdraft services covered by Regulation E, 12 CFR part 1005, are subject to applicable requirements set forth in that regulation.

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