the compact commission documentation that the producer milk production during the refund year is less than or the increase is not more than 1% of the milk production of the preceding calendar year. Such documentation shall be filed with the commission not later than 45 days after the end of the refund year.

(b) The commission will make payment to all producers qualified pursuant to § 1309.1 and eligible pursuant to paragraph (a) of this section in the following manner:

(1) A per farm payment computed by dividing the amount subtracted pursuant to § 1309.2(b) by the total eligible producers; and

(2) The value determined by multiplying the supply management refund price computed pursuant to § 1309.2(e) by the producer's milk pounds, not to exceed $12,000.

Dated: May 24, 2000.

Kenneth M. Becker,

Executive Director.

[FR Doc. 00–13507 Filed 5–30–00; 8:45 am]

BILLING CODE 1650–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 714

Leasing

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The final leasing rule updates and redesignates NCUA's long-standing policy statement on leasing, Interpretive Ruling and Policy Statement (IRPS) 83–3, as an NCUA regulation. IRPS 83–3 authorizes federal credit unions (FCUs) to engage in either direct or indirect leasing and either open-end or closed-end leasing of personal property to their members if such leasing arrangements are the functional equivalent of secured loans. In addition, the final rule formalizes NCUA's position, set forth in legal opinion letters, that FCUs do not have to own the leased property in an indirect leasing arrangement if certain requirements are satisfied.

DATES: This rule is effective June 30, 2000.

FOR FURTHER INFORMATION CONTACT: Paul M. Peterson, Staff Attorney, Division of Operations, Office of the General Counsel, (703) 518–6555.

SUPPLEMENTARY INFORMATION:

A. Background

In 1983, the NCUA Board issued Interpretive Ruling and Policy Statement (IRPS) 83–3, Federal Credit Union Leasing of Personal Property to Members, 48 FR 52560 (November 21, 1983), stating that FCUs may lease personal property to their members if the leasing of the personal property is the functional equivalent of secured lending. In 1997, the NCUA Board determined that IRPS 83–3 would be better suited as a regulation. 62 FR 11773 (March 13, 1997). In 1998, the Board issued a notice of proposed rulemaking (NPRM) and request for comment on leasing. 63 FR 57950 (October 29, 1998). The Board evaluated the comments received and incorporated many of the suggested changes. Due to these changes to the original proposed leasing regulation, the Board issued a second NPRM and request for comment. 64 FR 55866 (October 15, 1999). The comment period for the second NPRM expired on December 17, 1999.

B. Comments

NCUA received twelve comments on the second proposed leasing regulation. Comments were received from three federal credit unions, two credit union trade associations, four credit union leagues, one bank trade association, one insurance company, and one leasing company. In general, the commenters support the rule, although most commenters suggest modifications. Those commenters who compared the second proposed rule to the first think the second proposal is an improvement. Specific comments are addressed in the section-by-section analysis below.

C. Format

In drafting the proposed leasing regulation, the NCUA Board chose to use a plain English, question and answer format. The Board supports plain English as a means to increase regulatory comprehension and improve compliance among those affected by the regulation. Plain English drafting emphasizes the use of informative headings (often written as a question), lists and charts where appropriate, non-technical language, and sentences in the active voice. The NCUA wrote this proposed regulation as a series of questions and answers. The word ''you'' in an answer refers to an FCU.

D. Section-by-Section Analysis

This analysis contains a section-by-section summary of the second proposed rule; discusses the comments received on each section, if any; and describes any changes made as a result of those comments. The phrase ''proposed section'' as used below refers to draft language in the second NPRM.

Section 714.1—What Does This Part Cover?

Proposed § 714.1 stated that part 714 covers the standards and requirements that an FCU must follow when engaged in the lease financing of personal property. We received no comments and made no changes in the final rule.

Section 714.2—What are the Permissible Leasing Arrangements?

Proposed § 714.2 stated that FCUs may engage in direct or indirect leasing, and closed-end or open-end leasing.

Proposed § 714.2(c) provides ''[i]n an open-end lease, your member assumes the risk and responsibility for any difference in the estimated residual value and the actual value of the property at lease end.'' Proposed § 714.2(d) provides that for a closed-end lease the FCU assumes the risk and responsibility for that same difference. Two commenters note that any excessive wear and tear on the leased property will be included in the difference between the estimated residual value and the actual value of the property at lease end so that the proposed rule apparently assigns the responsibility for excessive wear and tear differently depending on whether the lease is open-end or closed-end. One of these commenters suggests that § 714.2 be modified to place the risk and responsibility for excess wear and tear on the lessor FCU, regardless of the form of leasing. The other commenter suggests that the responsibility for excess wear and tear should always be with the member lessee.

As stated in the preamble to IRPS 83–3, the lessee is always responsible for a decrease in value due to excessive wear and tear. The lessee, with possession of the leased property, is in the best position to protect the property from excess wear and tear regardless of whether the lease is open-end or closed end. Accordingly, the Board amends § 714.2(d) to clarify that, in closed-end leasing, the member lessee will be responsible for excessive wear and tear and the FCU will be responsible for the remainder of the difference between the estimated residual value and the actual value. Proposed § 714.2(c) on open-end leasing already places the responsibility for excessive wear and tear on the member lessee and needs no modification in the final rule.

The following example illustrates the allocation of risks in closed-end leasing. Assume you, an FCU, lease a $12,000 car under a closed-end leasing arrangement. At lease inception, the car has an estimated residual value of $3,000. The lease is not covered by any

residual value insurance or third-party guarantee. Assume further that, during the term of the lease, the used car market for this particular make and model softens. When the car is returned at the end of the lease, you sell it at public auction for only $2,000, which is $1,000 less than your estimated residual value. If the car suffers from normal wear and tear, you are responsible for the entire difference between the estimated residual value and the actual residual value. If, however, excess wear and tear reduced the car's actual residual value by $500, the member will be responsible for $500 and you will be responsible only for the remaining $500 of residual value loss.

Section 714.3—Must You Own the Leased Property in an Indirect Leasing Arrangement?

Proposed § 714.3 stated that an FCU does not have to own the leased property in an indirect leasing arrangement if the FCU: (1) Receives a full assignment of the lease; (2) is named as the sole lienholder of the property; (3) enters into a security agreement with the leasing company to protect the FCU's lien on the property; and (4) takes all necessary steps to record and perfect the security interest.

One commenter supports the full assignment requirement. Three other commenters believe that the full assignment of the lease is unnecessary and decisions about how much of the lease should be assigned are best left to the discretion of the FCU. One of these three commenters noted that the Office of the Comptroller of the Currency (OCC) has no full assignment requirement in its leasing rules for national banks, and another argued that full assignment was unnecessary if the FCU ''can protect its interest by possession.'' The commenters opposed to full assignment did not specify any particular harm to FCUs arising from the requirement. Also, the Board notes that the one leasing company that commented on the second NPRM stated that full assignment was ''unnecessary but not objectionable.'' (emphasis added).

The final rule leaves the full assignment requirement intact. The full assignment requirement stems from two main concerns. First, in the event of a leasing company's bankruptcy, the failure to obtain a complete assignment of the lease may permit the bankruptcy trustee to argue that the trustee owns the lease and can treat it as an executory contract subject to repudiation. Second, the Board is concerned that advancing the funds to allow a nonmember leasing company to purchase property for leasing, and then allowing that nonmember to retain both lease and title to the underlying property, is tantamount to making a loan to a nonmember. While banks regulated by the OCC may lend money to anyone, FCUs may only lend money to members. 12 U.S.C. 1757. The second NPRM contains additional discussion of these concerns. 64 FR 55866, 55867 (October 15, 1999). Also, with regard to the comment about protection of its interest by ''possession,'' the FCU may protect its lease assignment by possession of the original lease documents or by an appropriate filing. U.C.C. § 9–102(1)(b) (sale of chattel paper), § 9–304(1), § 9–305. However, the FCU must still obtain a full assignment.

Two commenters object to the following statement in the preamble to the proposed § 714.3: ''It (the security agreement) must set forth the terms and conditions upon which the leasing company or the member may be in default and thus entitle the FCU to take immediate possession of the property.'' These commenters read the quoted language as requiring the security agreement to contain an exhaustive list of every obligation under the lease and every possible form of default.

The Board does not intend to mandate that every leasing security agreement include an exhaustive listing of obligations and defaults on those obligations. The Board does believe that an FCU ''should consider the contingencies that may seriously affect (its) security and see that the security agreement specifies them as events of default.'' James J. White and Robert S. Summers, Uniform Commercial Code, § 34–2 (4th ed. 1995). Section 714.3 provides that the FCU must have the right to take possession and dispose of the leased property in the event of ''a default by the lessee, a default in the leasing company's obligations to you, or a material adverse change in the leasing company's financial condition.'' Ultimately, the FCU must determine for itself how much detail about these and other default contingencies is included in the security agreement.

Another commenter asked whether NCUA intended to require a detailed security agreement for each lease, or whether the substance of a well-drafted security agreement could be subsumed into a lease program agreement. The Board believes that obligations and defaults may be described in the security agreement itself or may be incorporated by clear reference to some other document such as the master leasing agreement or contract. Also, a single security agreement may cover multiple leases, so long as the agreement sufficiently describes which leases are covered.

One commenter suggests that the rule should reinstate the requirement for an irrevocable power of attorney contained in the first NPRM but dropped from the second. The NCUA Board believes that a power of attorney is unnecessary for an FCU holding a well-defined and perfected security interest in the leased property. In the event of a default by a leasing company or lessee, an FCU should be able to take possession and dispose of the collateral without the power of attorney. Accordingly, the final rule no longer contains any requirement for a power of attorney. The Board notes, however, that the final rule does not prohibit an FCU from employing a power of attorney, in addition to a security agreement.

Section 714.4—What Are the Lease Requirements?

Proposed § 714.4 stated that leases must be net, full payout leases, with a maximum estimated residual value of 25% of the original cost of the leased property unless guaranteed. In a full payout lease, the FCU must recoup its entire investment in the leased property, plus the cost of financing that investment, from the lessee's payments and the estimated residual value of the leased property.

Numerous comments were directed to the guarantee requirement. Some commenters want the requirement eliminated, some want the 25% threshold raised, and others want the requirement maintained at 25% or lowered.

The commenters who want to eliminate the guarantee requirement cite the authority of national banks and federal thrifts to engage in certain leasing transactions without any guarantee. As discussed below, however, the legal authority supporting FCU leasing varies from that for national banks and federal thrifts. Unlike banks and thrifts, which have express authority to lease, FCUs have no express authority.

Prior to 1982, all federal depository institutions relied on the same source of legal authority for leasing: their express authority to lend money and the argument that leasing is incidental to this express lending authority. A lease under this incidental authority must be the equivalent of a secured loan. Dependence on the residual value to recover the depository institution's costs involves risks that are unlike those of secured lending and, hence, the residual value must ''contribute insubstantially'' to the institution's recovery of its costs. *M&M Leasing Corporation* v. *Seattle*

First National Bank, 563 F.2d 1377, 1384 (9th Cir. 1977), *cert. denied,* 436 U.S. 956 (1978). For national banks, the OCC quantified *M&M Leasing*'s ''insubstantial'' contribution at 25%, and required any reliance above 25% be guaranteed. 12 CFR 23.21(a)(2). The NCUA adopted this same 25% limit on the unguaranteed portion of the residual value in IRPS 83–3.

In the 1980s, Congress provided national banks and federal thrifts with additional, express statutory authority to conduct leasing activities in an aggregate amount not to exceed ten percent of assets. See the Garn—St. Germain Depository Institutions Act of 1982, Pub. L. No. 97–320, § 330(3), codified at 12 U.S.C. 1464(c)(2)(A); and the Competitive Banking Equality Act of 1987 (CEBA), Pub. L. No. 100–86, § 108, codified at 12 U.S.C. 24(Tenth). This express leasing authority empowers national banks and federal thrifts to assume increased risks in areas unique to leasing, including residual value risk. For example, in the Senate Report accompanying CEBA's grant of express authority to national banks, the Senate Committee on Banking, Housing, and Urban Affairs stated its expectation that with the express authority to lease ''the Comptroller will relax or eliminate the residual value limitation [on national banks] in the Comptroller's regulation in a manner consistent with sound banking practices.'' S. Rep. No. 100–19, at 42 (1987). Accordingly, neither OCC nor OTS require residual value guarantees for leases aggregating less than ten percent of assets and so covered by express leasing authority. See 12 CFR part 23, subpart B; 12 CFR 560.41(d). However, both the OCC and OTS still require residual value guarantees for banks and thrifts for leases in excess of ten percent of assets and thus subject to the restrictions on residual value risk enunciated in M&M Leasing. See 12 CFR part 23, subpart C; 12 CFR 560.41(c), (b)(2).

One commenter that supported elimination of the guarantee requirement asks, in the alternative, if credit unions with a demonstrated ability to handle risk could set the unguaranteed portion of the residual at some level higher than 25% of original cost. Other commenters support the guarantee at its current 25% level or feel that the 25% level should be lowered. The Board has carefully considered whether it should set the unguaranteed portion of the residual at some level other than the 25% figure contained in IRPS 83–3. As discussed below, the Board is not inclined to vary from the long-standing 25% limitation.

Any increase in the unguaranteed residual value above 25% may cause the unguaranteed residual to ''contribute substantially'' to the recovery of an FCU's costs and thus render the FCU's leasing program illegal under *M&M Leasing*. The line between ''substantial'' and ''insubstantial'' is imprecise and not susceptible to exact quantification. Nevertheless, the Board considers a 25% contribution to cost recovery as insubstantial, and any figure larger than 25% as problematic. The OCC has used the current 25% figure for decades.

Also, the Board believes that the economic impact of the guarantee requirement is not significant. Insurance companies offer reasonably-priced residual value insurance that satisfies the current 25% requirement. In vehicle leasing, for example, a policy with a 25% deductible can generally be obtained for a small, one-time premium of between one-half to one percent of the estimated residual value. In addition, the Board is aware of FCUs that purchase residual insurance in coverage amounts exceeding the requirements of the rule and yet remain competitive in their vehicle leasing markets.

The Board also considered the possibility of tightening the 25% guarantee requirement. The Board notes that, with the authority to put up to 25% of the original cost at risk, credit unions may still suffer significant losses if actual residual values fall short of estimates. Nevertheless, in the past FCUs have handled this risk well. The Board is willing to allow FCUs to use their business judgment in deciding how to handle residual value risks up to the 25% level.

One commenter suggests that instead of tying the guarantee to 25% of the original cost, it should be tied to ''a certain percentage of the blue book value.'' The Board believes that the guarantee requirement is best tied to an FCU's actual investment in the property, as the key to loss avoidance in leasing is recovery of costs. Also, the leasing regulation covers leasing of all personal property, not just vehicles. No particular publication such as the ''blue book'' provides property values on every form of personal property. The leasing rule's guarantee requirement is stated in terms flexible enough to cover all personal property leasing.

Five commenters request that any guarantee requirement extend only to the amount of the estimated residual needed to satisfy the full payout test. These commenters believe that the proposed rule, which separates the residual value guarantee requirement from the full payout test, is inconsistent with the OCC leasing rule and IRPS 83–3. The Board concurs with these commenters. The full payout test requires that FCUs plan to recover all leasing costs from the combination of lease payments and the estimated residual value. The guarantee requirement is intended to protect an FCU against the possibility of excessive residual losses. The Board believes that an FCU should only be required to guarantee the portion of the estimated residual value that is above 25% of the original investment that is needed to meet the full payout requirement, meaning the amount an FCU relies on to recover its costs. The Board has changed the final rule to connect the guarantee requirement clearly with the full payout test. This connection results in a lesser guarantee requirement and a corresponding reduction in the burden on FCUs. An illustration of the effect of the final rule follows.

Assume you, an FCU, pay $12,000 for a car and lease it under a closed-end leasing arrangement. Assume that your internal cost of financing is $2,000 and that lease payments over the life of the lease will be $8,500. To meet the full payout requirement, you must recover $14,000 (your investment and the cost of financing) from the lease payments and your estimated residual value. Thus, in addition to the $8,500 in lease payments, you will be relying on $5,500 in residual value to meet the full payout requirement. You only have to guarantee the portion of the residual value on which you rely to meet the full payout requirement that exceeds 25% of the cost of the car, in this case, $3,000. Thus, the amount of the residual value that must be guaranteed will be $2,500 ($5,500–$3,000).

For leases with estimated residual values in excess of 25% of original cost and subject to the guarantee requirement, two commenters were uncertain whether an FCU may assume the first dollars of residual risk or must guarantee the first dollars. These commenters request clarification.

Neither the proposed rule nor the IRPS require that FCUs guarantee the first dollars of residual risk. Conversely, neither the rule nor the IRPS require that FCUs assume the first dollar of residual risk. FCUs are free to guarantee or assume the first dollars of residual risk as they deem appropriate. The Board is aware that insurers offer residual value policies with deductibles that place the first dollars of risk on the FCU. Such policies are an acceptable form of guarantee.

The Board also notes that residual value insurance policies offer different payout formulae. For example, one form

of insurance pays the difference between the estimated residual value and the actual sales price of the property at the time of disposition. Another, more common form pays the difference between the estimated residual value and the average price being obtained for the given type of property at the time of disposition. Either of these payout formulae, with appropriate deductibles, is permissible for FCUs. However, if the FCU elects to purchase residual insurance that relies on average sale prices rather than the specific sale proceeds from the property at lease end, the FCU should ensure the terms of insurance are reasonable in relation to the method the FCU uses to dispose of the leased property. For example, if the FCU expects to dispose of leased vehicles at wholesale auction, it should use residual insurance that pays based on wholesale prices. Likewise, if the FCU expects to get most of its leased vehicles back in ''average'' condition, it should look for insurance tied to that condition.

Seven commenters object to language in the preamble to the second NPRM on the financing of certain costs associated with the lease. The preamble states that the financing of mechanical breakdown protection, credit life and disability premiums, and license and registration fees raised safety and soundness concerns and these services should not be financed. The preamble cites a specific concern that an FCU will have little or no value in the collateral to secure the financing of the additional costs. The commenters generally recognized the problem with undercollateralization but do not believe a blanket prohibition on the financing of particular items was the best response. As one commenter put it, ''the problem of undercollateralization is best determined by how much is financed relative to the collateral, not by what expenses are financed.'' Some commenters note that the current industry practice among banks and credit unions is to finance some or all of these costs in particular cases. Some commenters suggest that FCUs should adopt lease-to-value guidelines similar to the loan-to-value guidelines used in lending programs, such as a maximum lease investment (or loan investment) of 110% of the vehicle's MSRP.

The Board remains concerned that FCUs not overextend themselves but recognizes that a blanket prohibition on the financing of certain enumerated services is not the best approach to this issue. Instead, the Board recommends that FCUs take appropriate measures to ensure that their leases are properly collateralized and their leasing programs remain the functional equivalent of secured lending.

Section 714.5—What is Required if You Rely on an Estimated Residual Value Greater than 25% of the Original Cost of the Leased Property?

Proposed § 714.5 provided that an estimated residual value greater than 25% of the original cost of the leased property may be used if a financially capable party guarantees the amount above 25% of the original cost of the property. If the guarantor is an insurance company, the guarantor must have an A.M. Best rating of at least a B+ or the equivalent from another major rating company. The FCU must have financial documentation on hand demonstrating that the guarantor has the resources to meet the guarantee.

Two commenters object to the establishment of a minimum rating for insurance companies. One of these commenters cites state regulation of insurance companies as sufficient to establish any particular company's soundness. A third commenter agreed with the concept of a minimum rating but thought it should be tougher than B+, such as a minimum ''A'' or ''AA'' rating.

The NCUA Board believes that establishing a minimum rating standard ensures that an insurance company guarantor will have the resources to meet the guarantee. A Best's rating of B+ is the lowest rating that is considered by Best to be ''secure,'' while any rating lower than a B+ is considered to be ''vulnerable.'' FCUs that satisfy the guarantee requirement through residual insurance are dependent on the insurance company's ability to pay residual claims when the leases end, often years into the future. The Board believes that FCUs should not use insurers who are identifiable as financially vulnerable.

The requirement for a residual insurer to maintain a B+ rating also makes it easier for an FCU using an insurance company to satisfy the financial documentation requirement of § 714.5. An FCU that maintains a recent report indicating that their residual insurer is rated B+ or better would meet the minimum documentation requirements. If the FCU desires to use the Internet, an up-to-date rating can be obtained at any time both cheaply and quickly.

One commenter, citing IRPS 83–3 and current OCC rules, requests that § 714.5 be amended to specifically exclude an affiliate of the FCU from acting as residual value guarantor. The Board notes that credit union service organizations (CUSOs) have specified, limited powers. 12 CFR part 712. Although CUSOs may engage in insurance brokerage or agency activities, they have no authority to assume insurable risks, such as residual value risk, for FCUs or other entities. 12 U.S.C. 1757(7); 12 CFR 712.5, 712.6; 51 FR 10353, 10357 (March 26, 1986). The Board does not believe a modification to § 714.5 is necessary.

Section 714.6—Are You Required to Retain Salvage Powers Over the Leased Property?

Proposed § 714.6 states that an FCU must retain salvage powers over the leased property. NCUA received no comments on this section, and it remains unchanged.

Section 714.7—What are the Insurance Requirements Applicable to Leasing?

Proposed § 714.7 provides that the FCU must maintain a contingent liability insurance policy with an endorsement for leasing or be named as the co-insured. The insurance company must have a rating of at least B+. The lessee must carry the normal liability and collateral protection insurance on the leased property, and the FCU must be named as an additional insured on the liability insurance policy and as the loss payee on the collateral protection insurance policy.

Two commenters suggest that the phrase ''collateral protection insurance'' be replaced with ''physical damage'' or ''property insurance'' to more accurately reflect the type of insurance a lessee would purchase. The Board concurs with these commenters. The Board replaced the phrase ''collateral protection insurance'' with ''property insurance,'' which would include protection from physical damage, loss, or theft.

Section 714.8—What Rate of Interest May be Charged Under a Lease?

Proposed § 714.8 stated that the interest rate provisions of the NCUA lending rule are not applicable to lease transactions. Proposed § 714.8 also exempted lease transactions from the NCUA lending rules on early payment. NCUA received no comments on this section, and it remains unchanged in the final version.

Section 714.9—When Engaged in Indirect Leasing, Must You Comply With the Purchase of Eligible Obligation Rules Set Forth in § 701.23 of This Chapter?

Proposed § 714.9 provided that indirect leasing arrangements are not subject to the purchase of eligible obligation rules set forth in § 701.23 if the lease complies with the FCU's

leasing polices and the FCU receives a full assignment of the lease no more than five business days after it is signed by the member and the leasing company.

Two commenters object to the five-business-day requirement. One commenter believes the time required to transfer paper in indirect lending is similar to that required in indirect leasing and states that many retail installment contracts are not received within five days. This commenter recommends changing the five-business-day requirement to thirty business days. The other commenter states that the five-day language does not mirror the ''very soon'' language employed in the eligible obligations rule and that the difference may cause confusion. The eligible obligations rule has a provision specifying which indirect lending and indirect leasing obligations will be classified as loans and not as eligible obligations for purposes of the aggregate 5% limitation imposed on eligible obligations. 12 CFR 701.23(b)(3)(iv). One of the specified criteria for excluding indirect leasing arrangements from this 5% limitation is that the ''lease contract [be] assigned to the federal credit union very soon after it is signed.'' The latter commenter prefers that the ''very soon'' language of the eligible obligations rule be used in § 714.9, the corresponding provision of the leasing rule. For consistency between the leasing rule and the eligible obligations rule and to maintain flexibility, the Board has replaced the language of the proposed § 714.9 with a direct reference to § 701.23(b)(3)(iv) including a restatement of its requirements.

Section 714.10—What Other Laws Must You Comply With When Engaged in Leasing?

Proposed § 714.10 set forth the additional laws with which an FCU must comply when engaged in leasing. One commenter notes that national bank and federal thrift leasing activities are subject to lending limits and recommends that our regulatory limits on loans to one borrower and loans to officials limitations be incorporated into the final leasing regulation. The Board notes that the proposed § 714.10 already required FCUs engaged in leasing to comply with the greater part of the NCUA lending rule, § 701.21, including the lending limits found at §§ 701.21(c)(5) and (d). Accordingly, no change to § 714.10 was made in the final rule.

E. Other Comments

Two commenters ask that we address the risks of balloon lending in the leasing regulation. Assured-value balloon loans, or ''lease-look-alike'' loans, allow the borrower to return the financed property at the end of the loan term in lieu of making the remaining balloon payment. The commenters argue that these loans carry residual risks for FCUs very similar to those in traditional closed-end leasing and should be regulated similarly.

As was discussed in the preamble to the second NPRM, the primary distinction between a loan and a lease is who owns the underlying property. In a loan, the borrower owns the property and the lender is a lienholder. In a lease, the borrower-lessee has no ownership or lienhold interest in the property. Accordingly, it is the NCUA Board's position that programs, which involve loans and not leases, are significantly different from leasing arrangements, and should not be addressed in a leasing regulation.

F. Regulatory Procedures

Paperwork Reduction Act

The NCUA Board determined that the requirement in § 714.5 that an FCU must obtain or have on file statistics documenting that a guarantor has the resources to meet an estimated residual value guarantee constitutes a collection of information under the Paperwork Reduction Act. Both NPRMs contained a description of the requirement and an estimate of the associated workload. No comments were received on the estimated workload. OMB assigned control number 3133–0151 to this collection. 12 CFR part 795.

Regulatory Flexibility Act

The NCUA Board certifies that the proposed regulation will not have a significant economic impact on a substantial number of small credit unions. Small credit unions are defined by NCUA, pursuant to its authority to define ''small organizations,'' as those credit unions with assets of $1 million or less. 5 U.S.C. 601(4), (6); NCUA IRPS 81–4, 46 FR 29248 (1981); NCUA IRPS 87–2, 12 CFR 791.8(a). As of December 31, 1999, there were 1,069 FCUs that met the small organization standard. Of these 1,069 FCUs, only seven report any leasing activity, with a total of only 66 leases amongst these credit unions. Accordingly, a regulatory flexibility analysis is not required.

Executive Order 13132

Executive Order 13132, Federalism, dated August 4, 1999, prescribes certain requirements for executive branch policies ''that have federalism implications.'' Policies that have federalism implications include any regulations that 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. Independent regulatory agencies, such as NCUA, are not required to follow EO 13132 but are encouraged to do so, and NCUA voluntarily complies with EO 13132. The final leasing rule, however, will only apply to federally-chartered credit unions. The rule has no substantial direct effects on States or on the relationship or distribution of power and responsibility between the national government and the States. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

NCUA has determined that this rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. No. 104–21) 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 Procedures Act. 5 U.S.C. 551. The Office of Management and Budget has reviewed this rule and has determined that for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 it is not a major rule.

List of Subjects in 12 CFR Part 714

Credit unions, Leasing.

By the National Credit Union Administration Board on May 24, 2000.

Becky Baker,

Secretary to the Board.

For the reasons set forth above, NCUA adds 12 CFR part 714 to read as follows:

PART 714—LEASING

Sec.

Authority: 12 U.S.C. 1756, 1757, 1766, 1785, 1789.

§ 714.1 What does this part cover?

This part covers the standards and requirements that you, a federal credit union, must follow when engaged in the leasing of personal property.

§ 714.2 What are the permissible leasing arrangements?

(a) You may engage in direct leasing. In direct leasing, you purchase personal property from a vendor, becoming the owner of the property at the request of your member, and then lease the property to that member.

(b) You may engage in indirect leasing. In indirect leasing, a third party leases property to your member and you then purchase that lease from the third party for the purpose of leasing the property to your member. You do not have to purchase the leased property if you comply with the requirements of § 714.3.

(c) You may engage in open-end leasing. In an open-end lease, your member assumes the risk and responsibility for any difference in the estimated residual value and the actual value of the property at lease end.

(d) You may engage in closed-end leasing. In a closed-end lease, you assume the risk and responsibility for any difference in the estimated residual value and the actual value of the property at lease end. However, your member is always responsible for any excess wear and tear and excess mileage charges as established under the lease.

§ 714.3 Must you own the leased property in an indirect leasing arrangement?

You do not have to own the leased property in an indirect leasing arrangement if:

(a) You obtain a full assignment of the lease. A full assignment is the assignment of all the rights, interests, obligations, and title in a lease to you, that is, you become the owner of the lease;

(b) You are named as the sole lienholder of the leased property;

(c) You receive a security agreement, signed by the leasing company, granting you a sole lien in the leased property and the right to take possession and dispose of the leased property in the event of a default by the lessee, a default in the leasing company's obligations to you, or a material adverse change in the leasing company's financial condition; and

(d) You take all necessary steps to record and perfect your security interest in the leased property. Your state's Commercial Code may treat the automobiles as inventory, and require a filing with the Secretary of State.

§ 714.4 What are the lease requirements?

(a) Your lease must be a net lease. In a net lease, your member assumes all the burdens of ownership including maintenance and repair, licensing and registration, taxes, and insurance;

(b) Your lease must be a full payout lease. In a full payout lease, you must reasonably expect to recoup your entire investment in the leased property, plus the estimated cost of financing, from the lessee's payments and the estimated residual value of the leased property at the expiration of the lease term; and

(c) The amount of the estimated residual value you rely upon to satisfy the full payout lease requirement may not exceed 25% of the original cost of the leased property unless the amount above 25% is guaranteed. Estimated residual value is the projected value of the leased property at lease end. Estimated residual value must be reasonable in light of the nature of the leased property and all circumstances relevant to the leasing arrangement.

§ 714.5 What is required if you rely on an estimated residual value greater than 25% of the original cost of the leased property?

If the amount of the estimated residual value you rely upon to satisfy the full payout lease requirement of § 714.4(b) exceeds 25% of the original cost of the leased property, a financially capable party must guarantee the excess. The guarantor may be the manufacturer. The guarantor may also be an insurance company with an A.M. Best rating of at least a B+, or with at least the equivalent of an A.M. Best B+ rating from another major rating company. You must obtain or have on file financial documentation demonstrating that the guarantor has the resources to meet the guarantee.

§ 714.6 Are you required to retain salvage powers over the leased property?

You must retain salvage powers over the leased property. Salvage powers protect you from a loss and provide you with the power to take action if there is an unanticipated change in conditions that threatens your financial position by significantly increasing your exposure to risk. Salvage powers allow you:

(a) As the owner and lessor, to take reasonable and appropriate action to salvage or protect the value of the property or your interests arising under the lease; or

(b) As the assignee of a lease, to become the owner and lessor of the leased property pursuant to your contractual rights, or take any reasonable and appropriate action to salvage or protect the value of the property or your interests arising under the lease.

§ 714.7 What are the insurance requirements applicable to leasing?

(a) You must maintain a contingent liability insurance policy with an endorsement for leasing or be named as the co-insured if you do not own the leased property. Contingent liability insurance protects you should you be sued as the owner of the leased property. You must use an insurance company with a nationally recognized industry rating of at least a B+.

(b) Your member must carry the normal liability and property insurance on the leased property. You must be named as an additional insured on the liability insurance policy and as the loss payee on the property insurance policy.

§ 714.8 Are the early payment provisions, or interest rate provisions, applicable in leasing arrangements?

You are not subject to the early payment provisions set forth in § 701.21(c)(6) of this chapter. You are also not subject to the interest rate provisions in § 701.21(c)(7).

§ 714.9 Are indirect leasing arrangements subject to the purchase of eligible obligation limit set forth in § 701.23 of this chapter?

Your indirect leasing arrangements are not subject to the eligible obligation limit if they satisfy the provisions of § 701.23(b)(3)(iv) that require that you make the final underwriting decision and that the lease contract is assigned to you very soon after it is signed by the member and the dealer or leasing company.

§ 714.10 What other laws must you comply with when engaged in leasing?

You must comply with the Consumer Leasing Act, 15 U.S.C. 1667–67f, and its implementing regulation, Regulation M, 12 CFR part 213. You must comply with state laws on consumer leasing, but only to the extent that the state leasing laws are consistent with the Consumer

Leasing Act, 15 U.S.C. 1667e, or provide the member with greater protections or benefits than the Consumer Leasing Act. You are also subject to the lending rules set forth in § 701.21 of this chapter, except as provided in § 714.8 and § 714.9 of this part. The lending rules in § 701.21 address the preemption of other state and federal laws that impact on credit transactions.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 173

[Docket No. 00F–0786]

Secondary Direct Food Additives Permitted in Food for Human Consumption

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of chlorine dioxide produced by treating an aqueous solution of sodium chlorite with hydrogen peroxide in the presence of sulfuric acid. This action is in response to a petition filed by Eka Chemicals, Inc.

DATES: This rule is effective May 31, 2000. Submit written objections and requests for a hearing by June 30, 2000.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Robert L. Martin, Center for Food Safety and Applied Nutrition (HFS–215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204–0001, 202–418–3074.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of March 2, 2000 (65 FR 11319), FDA announced that a food additive petition (FAP 0A4716) had been filed by Eka Chemicals, Inc., c/o Keller and Heckman LLP, 1001 G St. NW., suite 500 West, Washington, DC 20001. The petition proposed to amend the food additive regulations in § 173.300 *Chlorine dioxide* (21 CFR 173.300) to provide for the safe use of chlorine dioxide produced by treating an aqueous solution of sodium chlorite with hydrogen peroxide in the presence of sulfuric acid.

FDA has evaluated data in the petition and other relevant material. Based on this information, the agency concludes that the proposed use of the additive is safe, that the additive will achieve its intended technical effect, and, therefore, that the regulation in § 173.300 should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

In the notice of filing, FDA gave interested parties an opportunity to submit comments on the petitioner's environmental assessment. FDA received no comments in response to that notice.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

Any person who will be adversely affected by this regulation may at any time file with the Dockets Management Branch (address above) written objections by June 30, 2000. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents are to be submitted and are to be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 173

Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 173 is amended as follows:

PART 173—SECONDARY DIRECT FOOD ADDITIVES PERMITTED IN FOOD FOR HUMAN CONSUMPTION

1. The authority citation for 21 CFR part 173 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348.

2. Section 173.300 is amended by revising paragraph (a) to read as follows:

§ 173.300 Chlorine dioxide.

* * * * *

(a) The additive is generated by one of the following methods: Treating an aqueous solution of sodium chlorite with either chlorine gas or a mixture of sodium hypochlorite and hydrochloric acid, or treating an aqueous solution of sodium chlorate with hydrogen peroxide in the presence of sulfuric acid. In either case, the generator effluent contains at least 90 percent (by weight) of chlorine dioxide with respect to all chlorine species as determined by Method 4500–ClO_2 E in the ''Standard Methods for the Examination of Water and Wastewater,'' 18th ed., 1992, or an equivalent method. Method 4500–ClO_2 E is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the Center for Food Safety and Applied Nutrition (HFS–200), Food and Drug Administration, 200 C St. SW., Washington, DC 20204–0001, and the American Public Health Association, 1015 Fifteenth St. NW., Washington, DC 20005, or may be examined at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

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