unions, like FHLBs, make long-term advances to members and may suffer opportunity or real losses from prepayments. Two commenters asked that the Board recognize the role of corporates, in the credit union movement and as liquidity providers for natural-person credit unions, by honoring their claims for prepayment fees.

The Board may consider the comments regarding extensions of credit by corporate credit unions in another rulemaking. The Board issued § 709.12 as an interim final rule based on having made the requisite findings for issuance of an interim final rule as required by the Administrative Procedure Act. 5 U.S.C. 553. The Board believes an amendment of Part 709 limiting the Board's authority as conservator or liquidating agent to repudiate corporate credit union advances would require an opportunity for public notice and comment.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. For purposes of this analysis, credit unions under $1 million in assets will be considered small entities.

The NCUA Board has determined and certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule allows FICUs that are members of Federal Home Loan Banks to receive advances at lower rates of interest for the benefit of their members without any additional regulatory burden or expense to credit unions. Accordingly, the NCUA has determined that a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined that this rule does not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) 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 determined that this is not a major rule.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This rule will apply to some state-chartered credit unions, but it will not have substantial 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. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

List of Subjects in 12 CFR Part 709

Credit unions, Liquidations.

By the National Credit Union Administration Board, on July 26, 2001.

Becky Baker,

Secretary of the Board.

For the reasons stated above, NCUA amends 12 CFR part 709 as follows:

PART 709—INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY-INSURED CREDIT UNIONS IN LIQUIDATION

1. The authority citation for part 709 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1767, 1786, 1787, 1788, 1789, 1789a.

2. Amend § 709.0 by revising the first sentence to read as follows:

§ 709.0 Scope.

The rules and procedures in this part apply to charter revocations of federal credit unions under 12 U.S.C. 1787(a)(1)(A), (B), the involuntary liquidation and adjudication of creditor claims in all cases involving federally-insured credit unions, the treatment by the Board as conservator or liquidating agent of financial assets transferred in connection with a securitization or participation or of public funds held by a federally-insured credit union, and the allowance of prepayment fees to Federal Home Loan Banks under specified conditions. * * *

3. Revise § 709.12 to read as follows:

§ 709.12 Prepayment fees to Federal Home Loan Bank.

The Board as conservator or liquidating agent of a federally-insured credit union in receipt of any extension of credit from a Federal Home Loan Bank will allow a claim for a prepayment fee by the Bank if:

(a) The claim is made pursuant to a written contract that provides for a prepayment fee but the prepayment fee allowed by the Board will not exceed the present value of the loss attributable to the difference between the contract rate of the secured borrowing and the reinvestment rate then available to the Bank; and

(b) The indebtedness owed to the Bank is secured by sufficient collateral in which a perfected security interest in favor of the Bank exists or as to which the Bank's security interest is entitled to priority under section 306(d) of the Competitive Equality Banking Act of 1987, 12 U.S.C. 1430(e), or otherwise so that the aggregate of the outstanding principal on the advances secured by the collateral, the accrued but unpaid interest on the outstanding principal and the prepayment fee applicable to the advances can be paid in full from the amounts realized from the collateral. For purposes of this paragraph, the adequacy of the collateral will be determined as of the date the prepayment fees are due and payable under the terms of the written contract.

[FR Doc. 01–19102 Filed 8–2–01; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 712

Credit Union Service Organizations (CUSOs)

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is revising its rule concerning federal credit union (FCU) investments in and loans to credit union service organizations (CUSOs). The first change clarifies that the list of permissible activities in the CUSO regulation is intended to establish broad categories of permissible activities. The listing of particular activities under these categories is for illustrative purposes and not exhaustive of activities that may be permissible. In conjunction with this change, the provision for adding new activities to the regulation is amended to encourage FCUs to seek an advisory opinion from

the Office of General Counsel on whether a proposed activity falls within one of the authorized categories before requesting a regulatory amendment. The final change adds a federally-chartered corporation to the category of permissible structures for CUSOs.

DATES: This rule is effective September 4, 2001.

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, Virginia 22314–3428 or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

Background

On February 15, 2001, the NCUA Board requested comment on proposed changes to part 712 of its regulations. 66 FR 11125 (February 22, 2001). Part 712 sets forth the requirements for FCUs investing or lending to CUSOs. The first proposed amendment was a clarification of an existing authority and the second proposed amendment was an expansion of an existing authority.

Summary of Comments

The NCUA Board received 26 comments on the proposal: 16 from credit unions; one from a CUSO; two from credit union trade groups; one from a CUSO trade group; five from credit union leagues; and one from a bank trade group. Below is a summary of the comments.

Clarification That the List of Permissible Activities Establishes Broad Categories and the Particular Activities Under These Broad Categories are for Illustrative Purposes

The first proposed change clarified that the list of permissible activities in § 712.5 is intended to establish broad categories of permissible activities and that the listing of particular activities under these broad categories is for illustrative purposes and not meant to be exhaustive. Nineteen commenters fully supported the proposed change; five commenters objected because they thought the change should be more expansive; and one commenter, the bank trade group, objected to the expansion. The commenters in support of the proposal noted that the amendment would allow the rule to accommodate technological advances and a broader scope of business practices, as well as allow CUSOs to offer a variety of new and innovative products that will fit within the general categories. One of those commenters noted that the proposal provides an adequate illustration of the types of activities that are permissible without the loss of flexibility that would result from a list of specific activities. One commenter noted that the approved list of activities is only the beginning of what a CUSO can do and with the test of ''relate to the routine daily operations'' there is sufficient guidance.

Some of the commenters in support of further expansion suggested using the same approach as the approach taken in the incidental powers proposal. This amendment, in fact, is modeled after the incidental powers proposal. One commenter suggested using the same test for permissibility of a CUSO activity as is used to determine permissibility of an incidental powers activity. This commenter fails to recognize that the legal authority for an incidental powers activity is different from the legal authority for a CUSO activity. Incidental powers activities are governed by § 1757(17) of the Federal Credit Union Act (Act) and CUSO activities are governed by § 1757(5)(D) and (7)(I) of the Act. The statute is clear that an activity that is necessary for a credit union to carry on effectively the business for which it is incorporated is a permissible incidental powers activity. This is different than the statutory standard for a permissible CUSO activity, which is limited to activities that relate to the routine daily operations of credit unions.

A few commenters suggested the list is too restrictive, should include more examples, and should be an appendix to the rule, rather than in the rule. When the Board revised the list of permissible CUSO activities in its 1998 overhaul of the CUSO rule, an effort was made to include all permissible activities relating to the routine operations of credit unions. 63 FR 10743 (March 5, 1998). The Board is not aware of any activities relating to the routine operations of credit unions that were not either, considered and rejected, or included at that time and so, it will not be revising the list.

One commenter suggested adding business loan origination and consumer loan origination to the list of permissible activities. The Board specifically addressed both business and consumer loan origination in its 1998 revisions to the CUSO regulation and has not changed its view as to the proper role of CUSOs in this area.[1] As it noted then, the Board believes that, while CUSOs are not authorized to originate consumer loans, other than mortgage loans, or business loans, they may provide support services to credit unions for both types of loan.

Suggestion To Seek an Advisory Opinion From the Office of General Counsel (OGC)

Fifteen of the 20 commenters that responded to this issue supported the proposal. One of those commenters noted that this provision is especially helpful because it does not require an opinion if the credit union believes the activity is within the stated categories and can justify it if challenged.

Only one of the five negative commenters, the bank trade group, objected to this provision because it is too permissive. Some of the negative commenters suggested that the decision of whether an activity falls within a broad category should be made by the credit unions and their attorneys, not NCUA. The Board agrees and states that the rule does not require a credit union to come to OGC for an opinion every time a CUSO wants to engage in an activity not specifically listed as an example under a broad category. An opinion from OGC is recommended if there is doubt as to whether a specific activity falls within one of the broad categories or a new broad category is being proposed. In those situations, an FCU that doesn't consult with OGC runs the risk of engaging in an impermissible activity and being subject to supervisory action.

One commenter suggested that if an activity is ''convenient and useful'' the credit union's attorney should decide if it is permissible. As noted above, the test for CUSOs is not the ''convenient and useful'' test associated with incidental powers activities. The test for CUSOs, as stated in the rule and the Act, is that the activity must relate to the ''routine, daily operations of credit

---

[1] Regarding consumer and business loan origination as a CUSO activity, the Board stated:

After due consideration of the comments, NCUA remains opposed to this addition [consumer loan origination]. Unlike consumer mortgage loan origination, which requires a specialized lending staff, must follow strict secondary mortgage market rules, and requires economies of scale in order to be viable, consumer loans are relatively easy to offer and process. In addition, NCUA is apprehensive in granting CUSOs the authority to provide consumer loans to the general public, as it may be perceived as a dilution of the common bond by Congress and the public.

* * * [W]hile CUSOs can only approve and fund consumer mortgages and student loans, CUSOs can engage in many back office aspects of lending * * *. In essence, CUSOs can provide back office underwriting, processing and servicing functions to enable a credit union to offer loans * * *. In other words, FCUs are permitted to leverage their member business loan expertise with CUSO business loan personnel. This clarification is made to assist FCUs in expanding the number and type of business loans made to its members in conjunction with the member business loan amendments proposed in 62 FR 41313 (August 1, 1997).

Id. at 10752.

unions.'' 12 U.S.C. 1757(7)(I); 12 CFR 712.5.

Addition of a Federally-Chartered Corporation as a Permissible CUSO Structure

The 21 commenters that responded to this issue agreed with allowing a federally-chartered corporation as a permissible CUSO structure. A few of those commenters suggested that the Board define ''depository institution'' in the CUSO rule so as to exclude from the definition an institution principally engaged in the business of providing trust services that holds only such deposits as are required to qualify for FDIC insurance. The commenters requested this definition so that a CUSO could obtain a trust charter from the Office of Thrift Supervision (OTS).

While the Act prohibits an FCU from acquiring control directly or indirectly of a financial institution, trust services have been identified as a permissible activity for CUSOs for almost twenty years. 12 U.S.C. 1757(7)(I); 47 FR 30462 (July 14, 1982). The NCUA's long-standing interpretation of financial institution has been that it means a deposit taking institution. 51 FR 10353, 10354 (March 26, 1986). The CUSO regulation reflects this policy and states that FCUs may not acquire control of ''another depository financial institution.'' 12 CFR 712.6. Thus, NCUA has viewed trust companies as permissible CUSOs as long as they were not deposit taking organizations.

The OTS requires Federal Deposit Insurance Corporation (FDIC) insurance for all institutions it charters. 12 CFR 543.2. Under the Federal Deposit Insurance Act (FDI Act), an applicant for insurance must be ''engaged in the business of receiving deposits other than trust funds.'' 12 U.S.C. 1815(a)(1). In March 2000, the FDIC interpreted this requirement in General Counsel Opinion No. 12, stating that this requirement can be satisfied if an institution maintains one or more non-trust deposit accounts in the aggregate amount of $500,000. 66 FR 20102, Appendix (April 19, 2001). The opinion was intended to clarify the meaning of the requirement, particularly in the context of the FDIC's long-standing interpretation of non-traditional depositories such as trust companies.

Recently, the FDIC issued a proposed rule that would incorporate its General Counsel Opinion No. 12. 66 FR 20102. The proposed rule contains an extensive discussion of the ambiguity of the FDI Act and various factors that led to issuance of the legal opinion. The impetus for the proposed rule is a recent federal court decision, discussed in the preamble to the proposed rule, in which the court disagreed with the FDIC's interpretation of this requirement. The FDIC states that the inconsistency between its interpretation and that of the court could have harmful results and has determined to address the issue in a rulemaking. *Id.* at 20105.

While the Board agrees with the commenters that ''depository financial institution'', as used in 12 CFR 712.6, should not include a financial institution principally engaged in the business of providing trust services, and which holds only such deposit as is required for FDIC insurance, the Board is not inclined to include a definition in the regulation at this time. A regulatory definition adopted now might not adequately address issues that will be considered in the FDIC's rulemaking or in the pending litigation. Further, the Board does not believe it is necessary to include a definition as part of the regulation but, as necessary, NCUA's Office of General Counsel may provide further interpretation, in addition to that stated in this preamble.

One commenter suggested an FCU's trust powers be expanded in NCUA's incidental powers rule and that the Act be amended to allow NCUA to charter trust companies. Another commenter suggested adding a new structure that would allow a CUSO to be established under foreign law so that it could serve foreign nationals. These suggestions are outside the scope of this rulemaking process.

Final Amendments

Section 712.3(a)

The Board is revising this provision to include federally-chartered corporations as a permissible CUSO structure.

Section 712.5

The Board is adding a sentence to this section to state plainly that the listings under the broad categories are for illustrative purposes and not intended to be an exclusive or exhaustive list of permissible activities.

Section 712.7

The Board is amending the provision for adding new activities to the regulation to advise FCUs to seek an advisory opinion from OGC as to whether a proposed activity fits into one of the authorized categories before requesting a regulatory change to add a new activity. An FCU is not required to seek an advisory opinion if a proposed activity, not listed as an example, clearly falls within one of the broad categories approved by the Board.

This amendment in conjunction with the change to § 712.5 will reduce regulatory burden by allowing the rule to expand as technology expands.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities (primarily those under 1 million in assets). The amendments will not have a significant economic impact on a substantial number of small credit unions and, therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

NCUA has determined that this final rule does not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1966 (SBREFA) (Pub. L. 104–121) 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 is reviewing this rule to determine if it is a major rule for purposes of SBREFA.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This rule will apply only to federally-chartered credit unions. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposal does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—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 section 654 of the

Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We requested comments on whether the proposed rules were understandable and minimally intrusive if implemented as proposed. We received three comments on this issue. Two commenters did not address the proposal, but rather stated that the question and answer format of the CUSO rule is confusing. One commenter stated that the proposal does meet the agency's regulatory goal.

List of Subjects in 12 CFR Part 712

Administrative practices and procedure, Credit, Credit unions, Investments, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on July 26, 2001.

Becky Baker,

Secretary of the Board.

Accordingly, NCUA amends 12 CFR part 712 as follows:

PART 712—CREDIT UNION SERVICE ORGANIZATIONS (CUSOs)

1. The authority citation for part 712 continues to read as follows:

Authority: 12 U.S.C. 1756, 1757(5)(D), and (7)(I), 1766, 1782, 1784, 1785 and 1786.

2. Amend § 712.3 by revising the third sentence of paragraph (a) to read as follows:

§ 712.3 What are the characteristics of and what requirements apply to CUSOs?

(a) *Structure.* * * * For purposes of this part, ''corporation'' means a legally incorporated corporation as established and maintained under relevant federal or state law. * * *

* * * * *

4. Amend § 712.5 by revising the second sentence and adding a third sentence to the introductory paragraph to read as follows:

§ 712.5 What activities and services are preapproved for CUSOs?

* * * Otherwise, an FCU may invest in, loan to, and/or contract with only those CUSOs that are sufficiently bonded or insured for their specific operations and engaged in the preapproved activities and services related to the routine daily operations of credit unions. The specific activities listed within each preapproved category are provided in this section as illustrations of activities permissible under the particular category, not as an exclusive or exhaustive list.

* * * * *

5. Add a sentence to the end of § 712.7 to read as follows:

§ 712.7 What must an FCU do to add activities or services that are not preapproved?

* * * Before you engage in the petition process, you should seek an advisory opinion from NCUA's Office of General Counsel as to whether a proposed activity is already covered by one of the authorized categories without filing a petition to amend the regulation.

[FR Doc. 01–19106 Filed 8–2–01; 8:45 am]

BILLING CODE 7535–01–U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 749

Records Preservation Program

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is revising its regulation establishing standards for vital record preservation. The revised regulation clarifies that a credit union may preserve records in electronic form, as authorized by the Electronic Signatures in Global and National Commerce Act. The revision permits a credit union's board of directors to determine which employee will be responsible for storing vital records under the record preservation program, in contrast to the current regulation which names the credit union's financial officer. It also incorporates an appendix to provide suggested guidelines to credit unions on retention periods for various types of records.

EFFECTIVE DATE: This rule is effective September 4, 2001.

FOR FURTHER INFORMATION CONTACT: Dianne M. Salva, Staff Attorney, Division of Operations, Office of General Counsel, at 1775 Duke Street, Alexandria, Virginia 22314, or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

Background

NCUA published a proposal to revise its regulation governing the preservation of vital records. 66 FR 11239, February 23, 2001. At the end of the sixty-day public comment period, NCUA had received eleven comment letters. After carefully considering the comments, the NCUA Board is publishing this final rule, which is substantially identical to the proposal. Only one minor change was made to the appendix to the regulation: the reference to 5300 financial reports as semiannual and annual filings has been omitted since some credit unions now file such reports quarterly.

The revision makes three substantive modifications to the regulation and changes the format to question and answer. First, the revision clarifies that credit unions may store records in any format that is accurate, accessible and capable of being reproduced by printing, transmittal or other methods, as permitted by the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001. Second, it permits a credit union's board of directors to determine which employee will be responsible for carrying out the vital record preservation duties. The current regulation requires that the credit union's financial officer be designated as responsible for those duties. Third, to address the need for guidance about record retention, the revision incorporates an appendix on recommended retention periods for various types of credit union records.

Comments

NCUA received eleven comment letters, all of which expressed general support for the proposal. Four comments letters were from credit unions; two were from national credit union trade associations; four were from state credit union leagues; and one was from a credit union service provider.

Eight commenters strongly supported the change to the regulation to clarify that credit unions may retain records electronically.

Five commenters expressed approval for the addition of the appendix containing record retention guidelines. Of these, three suggested various changes in the guidance for retention periods and types of records that must be retained. The NCUA Board notes that the record retention guidelines are merely recommendations and credit unions may adopt other retention periods for these or other types of records.

Five commenters strongly supported the change to the regulation permitting a credit union's board of directors to determine which employee will be responsible for vital record preservation. Two commenters favored eliminating the requirement that the credit union's financial officer be responsible for vital records preservation but suggested that the credit union manager, rather than the board should determine which employee to designate. The NCUA Board did not adopt that suggestion in