

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3313-AF00

Public Unit and Nonmember Shares

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) is proposing to amend the NCUA's public unit and nonmember share rule, § 701.32, to allow federal credit unions (FCU) to receive public unit and nonmember shares up to 50 percent of the credit union's paid-in and unimpaired capital and surplus less any public unit and nonmember shares. Section 741.204 of the NCUA's regulations currently applies the NCUA's public unit and nonmember share rule to all federally insured credit unions (FICUs).

DATES: Comments must be received by [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on Public Unit and Nonmember Shares Proposed Rule” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

Public inspection: All public comments are available on the agency’s website at <http://www.ncua.gov/RegulationsOpinionsLaws/comments> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in

NCUA's law library, at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6540 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Benjamin M. Litchfield, Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, Virginia 22314, or by telephone at (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

II. Legal Authority

III. Summary of the Proposed Rule

IV. Section-by-Section Analysis

V. Regulatory Procedures

I. Background

Section 107(6) of the Federal Credit Union Act (FCU Act) permits an FCU to receive payment on shares from nonmembers under certain circumstances.¹ An FCU may receive payment on shares from nonmember credit unions.² An FCU may also receive

¹ 12 U.S.C. 1757(6).

² *Id.*

payment on shares from nonmember public units and their political subdivisions.³ The term “public unit” generally refers to “the United States, any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, any territory or possession of the United States, any county, municipality, or political subdivision thereof, or any Indian tribe as defined in section 3(c) of the Indian Financing Act of 1974.”⁴

Moreover, an FCU that predominantly serves low-income members may receive payment on shares from any source regardless of membership.⁵ Section 701.34 of the NCUA’s regulations defines a “low-income member” as, among other things, a member “whose family income is 80 [percent] or less than the median family income for the metropolitan area where [the member] live[s] or [the] national metropolitan area, whichever is greater.”⁶ Alternatively, a “low-income member” is a member “who earn[s] 80 [percent] or less than the total median earnings for individuals for the metropolitan area where [the member] live[s] or [the] national metropolitan area, whichever is greater.”⁷

Section 701.32 of the NCUA’s regulations limits the total amount of nonmember shares that an FCU may have to 20 percent of the credit union’s total shares, or \$3 million, whichever is greater, unless the shares are U.S. Treasury accounts or matching funds

³ *Id.*

⁴ 12 CFR 745.1(c).

⁵ 12 U.S.C. 1757(6).

⁶ 12 CFR 701.34(a)(2).

⁷ *Id.*

accounts required by the NCUA's Community Development Revolving Loan Fund Program.⁸ This limit also applies to public unit shares regardless of whether the public unit is a member of the credit union. The Board imposed this 20 percent limitation on both member public unit and nonmember shares because of the asset/liability management problems related to public unit and nonmember shares that arose at certain FCUs, which resulted in material losses for the National Credit Union Share Insurance Fund (NCUSIF).⁹

Regulatory Reform Agenda

Consistent with the spirit of Executive Order 13,777, entitled "Enforcing the Regulatory Reform Agenda,"¹⁰ the Board established a Regulatory Reform Task Force (Task Force) to identify NCUA regulations that the agency should repeal, replace, or modify. The Task Force performed an exhaustive review and submitted its first report to the Board in June 2017. In August 2017, the Board published the substance of the Task Force's first report in the Federal Register for public comment.¹¹ After the close of the public comment period, the Board published the Task Force's second and final report in the Federal Register in December 2018.¹²

⁸ 12 CFR 701.32(b), (c).

⁹ See Nonmember and Public Unit Accounts, 53 FR 50918 (Dec. 19, 1988).

¹⁰ See Enforcing the Regulatory Reform Agenda, E.O. 13,777, 82 FR 12285 (Mar. 1, 2017).

¹¹ See Regulatory Reform Agenda, 82 FR 39702 (Aug. 22, 2017).

¹² See Regulatory Reform Agenda, 83 FR 65926 (Dec. 21, 2018).

The Task Force's final report recommends that the Board increase the public unit and nonmember share limit in § 701.32 of the NCUA's regulations.¹³ The Task Force stated that public unit and nonmember shares are the functional equivalent of borrowings and, therefore, should be subject to the borrowing limit for FCUs set out in the FCU Act. Section 107(9) of the FCU Act permits an FCU to borrow from any source up to 50 percent of the credit union's paid-in and unimpaired capital and surplus subject to such rules and regulations as the Board may prescribe.¹⁴ However, this limitation does not apply to discounts or sales of eligible obligations to any federal intermediate credit bank or loans from the Central Liquidity Facility.¹⁵ The proposed rule implements the essence of the Task Force's recommendation.

II. Legal Authority

The Board has issued this proposed rule pursuant to its authority under the FCU Act. Under the FCU Act, the NCUA is the chartering and supervisory authority for FCUs and the federal supervisory authority for FICUs.¹⁶ The FCU Act grants the NCUA a broad mandate to issue regulations governing both FCUs and all FICUs. 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 FCU Act.¹⁷ Section 207 of the FCU

¹³ 12 CFR 701.32.

¹⁴ 12 U.S.C. 1757(9).

¹⁵ *Id.* For rules governing loans from the Central Liquidity Facility *see* 12 CFR 725.

¹⁶ 12 U.S.C. 1752-1775

¹⁷ 12 U.S.C. 1766(a).

Act is a specific grant of authority over share insurance coverage, conservatorships, and liquidations.¹⁸ Section 209 of the FCU Act is a plenary grant of regulatory authority to the Board to issue rules and regulations necessary or appropriate to carry out its role as share insurer for all FICUs.¹⁹ Accordingly, the FCU Act grants the Board broad rulemaking authority to ensure that the credit union industry and the NCUSIF remain safe and sound.

III. Summary of the Proposed Rule

The proposed rule amends § 701.32 of the NCUA's regulations to allow an FCU to receive payment on shares from public unit and nonmember shares up to 50 percent of the credit union's paid-in and unimpaired capital and surplus less any public unit and nonmember shares from public units and nonmembers without requesting a waiver from the appropriate regional director. As discussed below, the proposed rule does not allow a waiver process for an FCU to exceed this 50 percent limit as a matter of safety and soundness. The proposed rule also requires an FCU to develop and maintain a written plan if its public unit and nonmember shares, taken together with borrowings, exceed 70 percent of paid-in and unimpaired capital and surplus. Finally, the proposed rule makes conforming amendments to § 741.204, which applies to all FICUs, to reflect the changes to § 701.32.

¹⁸ 12 U.S.C. 1787(b)(1).

¹⁹ 12 U.S.C. 1789(a)(11).

IV. Section-by-Section Analysis

Section 701.32(b) – Limitations

Current § 701.32(b) limits the amount of public unit and nonmember shares that an FCU may have to 20 percent of total shares, or \$3 million dollars, whichever is greater, and sets forth procedures that an FCU must follow if it wishes to receive from the appropriate regional director a waiver to accept additional public unit or nonmember shares.

Before accepting any public unit or nonmember shares in excess of 20 percent of total shares, the credit union's board of directors "must adopt a specific written plan concerning the intended use of these shares and forward a copy of the plan to the [r]egional [d]irector."²⁰ The plan must include a "statement of the credit union's needs, sources and intended uses of public unit and nonmember shares."²¹ The plan must also make provision for "matching maturities of public unit and nonmember shares with corresponding assets" and "adequate income spread between public unit and nonmember shares and corresponding assets."²² If there is any mismatch between maturities of public unit and nonmember shares with corresponding assets, the credit union must justify the mismatch.²³

²⁰ 12 CFR 701.32(b)(2).

²¹ 12 CFR 701.32(b)(2)(i).

²² 12 CFR 701.32(b)(2)(ii)-(iii).

²³ 12 CFR 701.32(b)(2)(ii).

In addition to the written plan adopted by the FCU's board of directors, the FCU also must submit a written request for a waiver of the 20 percent limit to the appropriate regional director.²⁴ The waiver request must include: (1) the new level of public unit and nonmember shares requested (either as a dollar amount or a percentage of total shares); (2) the current plan adopted by the FCU's board of directors regarding the use of new public unit and nonmember shares; (3) a copy of the FCU's latest financial statements; and (4) a copy of the FCU's loan and investment policies.²⁵ If the FCU's financial condition and management are sound, and the credit union's plan for the funds is reasonable, § 701.32 establishes a presumption in favor of granting a waiver.²⁶

The regional director will typically grant a waiver for a two-year period unless the regional director believes that a lesser time is appropriate.²⁷ Upon expiration of the waiver, the NCUSIF will continue to insure public unit and nonmember shares currently held in the FCU within applicable limits.²⁸ However, an FCU may not accept any new public unit or nonmember shares or rollover existing public unit or nonmember share certificates in excess of the 20 percent of total shares limit.²⁹

²⁴ 12 CFR 701.32(b)(3).

²⁵ 12 CFR 701.32(b)(3)(i)-(iv).

²⁶ 12 CFR 701.32(b)(4).

²⁷ *Id.*

²⁸ 12 CFR 701.32(b)(6). *See* 12 CFR 745 on share insurance limits.

²⁹ *Id.*

The 20 percent total shares limit and the procedures set out in § 701.32(b) do not apply to treasury tax and loan (TT&L) remittance accounts, TT&L note accounts, U.S. Treasury general accounts, and U.S. Treasury time deposit-open accounts, which are all subject to the requirements of § 701.37 of the NCUA's regulations.³⁰ Section 701.32 also does not apply to matching fund accounts required by the NCUA's Community Development Revolving Loan Program unless the credit union has already repaid the loan granted under that program that required matching funds.³¹

Aggregate Limit on Public Unit and Nonmember Shares

The proposed rule simplifies the current regulatory framework in § 701.32(b). In establishing the 20 percent of total shares limit in current § 701.32(b), the Board relied heavily on industry practices in 1988.³² The credit union industry has undergone significant changes in the intervening 31 years since this limit was adopted, including credit unions' growing need for additional sources of funding to serve their members. To respond to these changes, the proposed rule increases the current 20 percent of total shares limit to 50 percent of paid-in and unimpaired capital and surplus less any public unit and nonmember shares.

³⁰ 12 CFR 701.32(c). *See* 12 CFR 701.37.

³¹ *Id.* For information on the Community Development Revolving Loan Program, *see* 12 CFR 705.

³² 53 FR 50918, 50919 (Dec. 19, 1988).

The change in standard from “total shares” to “paid-in and unimpaired capital and surplus less any public unit and nonmember shares” provides credit unions with greater ability to accept public unit and nonmember deposits because undivided earnings are included in the measurement of a credit union’s paid-in and unimpaired capital and surplus. The proposed rule does not include public unit and nonmember shares in the calculation of its unimpaired capital and surplus for purposes of this 50 percent limit. This restriction provides a meaningful limit on the ability of a credit union to increase its leverage indefinitely, which could pose a clear risk to credit unions and the NCUSIF. The Board believes that this balanced approach provides an FCU with greater flexibility to determine an appropriate funding structure to support ongoing credit union operations in a prudent manner.

While the Board recognizes that public unit and nonmember shares are unique in some respects, particularly with respect to their sensitivity to interest rate fluctuations,³³ these shares are in many other respects the functional equivalent of other types of short-term borrowings. Accordingly, the Board believes that allowing an FCU to receive public unit and nonmember shares up to 50 percent of paid-in and unimpaired capital and surplus, less any public unit and nonmember shares, similar to the borrowing limit set out in § 107(9) of the FCU Act, is a preferable approach to the current 20 percent of total shares limit set out in § 701.32(b). The Board also believes that the proposed 50 percent of paid-in and unimpaired capital and surplus less any public unit and nonmember shares

³³ *Id.*

regulatory limit is sufficiently high that an alternative \$3 million dollar limit will be unnecessary.

However, the Board is aware that some small FCUs, particularly low-income credit unions that rely on large volumes of nonmember shares as a necessary source of funding or newly chartered credit unions, may be adversely impacted by the elimination of the \$3 million dollar limit. Consequently, the Board seeks specific comments on whether it should retain the \$3 million dollar limit or provide a special exemption for small low-income credit unions that demonstrate a need for large volumes of nonmember shares above the 50 percent paid-in and unimpaired capital and surplus limit and for newly chartered credit unions. The Board is actively considering these alternatives and may adopt one of these approaches based on the persuasiveness of the comments.

Because an FCU may currently borrow up to 50 percent of paid-in and unimpaired capital and surplus under § 107(9) of the FCU Act, the Board believes that providing credit unions with the proposed ability to accept a comparable amount of public unit and nonmember shares will not present an undue risk to credit unions or the NCUSIF. The Board recognizes that in some instances public unit and nonmember shares can be a more stable and cost-effective source of funding than borrowing. Additionally, public unit and nonmember shares have other benefits for credit unions and their communities, such as developing or enhancing an FCU's relationship with political subdivisions, public units,

or in the case of low-income designated credit unions, other charitable or economic development organizations.

However, the Board notes that an FCU should continue to manage its balance sheet in a prudent manner. The NCUA will continue to review an FCU's business model and asset-liability management to ensure the credit union is operating in a safe and sound manner. Unsafe or unsound funding sources or utilization of funds in an unsafe and unsound manner may affect an FCU's CAMEL and risk ratings even if the credit union is within the aggregate 50 percent limit.

Waiver from the Appropriate Regional Director

The proposed rule also eliminates the procedures that an FCU must follow to obtain a waiver from its appropriate regional director. Although the Board seeks to provide FCUs with greater flexibility, it also believes that the NCUA should not allow an FCU to have public unit and nonmember shares in excess of 50 percent of paid-in and unimpaired capital and surplus less any public unit and nonmember shares. Allowing an FCU to exceed this limit could lead to safety and soundness concerns and unnecessary risk for the NCUSIF. As a result, the proposed rule does not establish a procedure for an FCU to request a waiver of the proposed aggregate 50 percent limit.

Requirement to Maintain a Plan Regarding Use of Funds

Furthermore, the proposed rule modifies key safeguards in current § 701.32(b) designed to ensure that an FCU's board of directors conducts adequate due diligence before receiving payment on a significant amount of public unit and nonmember shares. Under the proposed rule, an FCU must develop and maintain for review by NCUA examiners a specific plan regarding the intended use of any borrowings, public unit, or nonmember shares that, taken together, exceed 70 percent of the credit union's paid-in and unimpaired capital and surplus. The proposed rule does not require FCUs to submit the plans to the NCUA for prior approval.

This approach provides an FCU with significant flexibility to adopt a prudent funding structure without the regulatory burden of developing a plan regarding the intended use of those funds unless the credit union borrows a significant amount of funds or accepts a significant number of public unit and nonmember shares. Requiring a plan for material levels of external funding sources is prudent due diligence and the Board expects FCUs that accept elevated levels of public unit and nonmember shares to document how the credit union will use those funds consistent with prudent risk management principles.

Even though the Board expects that most FCUs will not need to develop a specific plan regarding the use of external funds under the proposed rule, it still believes that an FCU should continue to manage its balance sheet in a prudent manner. As noted above, the NCUA will continue to review an FCU's business model and asset-liability management

to ensure the FCU is operating in a safe and sound manner. Unsafe or unsound funding sources or utilization of funds in an unsafe and unsound manner may affect a credit union's CAMEL and risk ratings and could result in regulatory action.

V. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)³⁴ requires the 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 \$100 million in assets).³⁵ This rule will provide a limited number of FCUs receiving public unit and nonmember share with additional flexibility. Accordingly, the Board believes that the rule will not have a significant economic impact on a substantial number of small credit unions. Therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. For purposes of the PRA, a paperwork burden may take the form of a reporting,

³⁴ 5 U.S.C. 601 *et seq.*

³⁵ 5 U.S.C. 603(a).

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

This rule will amend § 701.32 to eliminate the waiver requirements for those seeking an exemption to the current 20 percent limit of the total amount of nonmember shares that an FCU may issue; due to the proposed increased limit of 50 percent, with no exceptions to this limit. This will eliminate the existing burden to submit a waiver.

Under the proposed rule, a credit union must develop a specific plan regarding the intended use of any borrowings, public unit, or nonmember shares that, taken together, exceed 70 percent of the credit union's paid-in and unimpaired capital and surplus. The increased limit of public unit and nonmember shares could potentially see an increase in the number of respondents required to develop a plan from 20 to 50 FICUs at an estimated burden of 2 hours to comply annually, per respondent.

These program changes would revise the information collection requirement under currently approved OMB number 3133-0114, as follows:

Title of Information Collection: Payments on Shares by Public Units and Nonmembers, 12 CFR 701.32.

OMB Control Number: 3133–0114.

Estimated Number of Respondents: 50.

Estimated Annual Frequency of Response: 1.

Estimated Total Annual Responses: 50.

Estimated Hours per Response: 2.

Estimated Total Annual Burden Hours: 100.

Affected Public: Private Sector: Not-for-profit institutions.

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

All comments are a matter of public record. Comments regarding the information collection requirements of this rule should be sent to (1) Dawn Wolfgang, NCUA PRA Clearance Officer, National Credit Union Administration, 1775 Duke Street, Alexandria,

Virginia 22314, or Fax No. 703–519–8572, or Email at *PRAComments@ncua.gov* and the (2) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for NCUA, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission,@OMB.EOP.gov*.

Executive Order 13132

Executive Order 13,132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests.³⁶ 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. The proposed rule 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. The Board has therefore determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

³⁶ 64 FR 43255 (Aug. 4, 1999).

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

List of Subjects

12 CFR Part 701

Credit unions, Public units, Nonmember accounts.

12 CFR Part 741

Bank deposit insurance, Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on May 23, 2019.

Gerard S. Poliquin
Secretary of the Board

For the reasons stated above, NCUA proposes to amend 12 CFR §§ 701.32 and 741.204 as follows:

**PART 701 – ORGANIZATION AND OPERATION OF FEDERAL CREDIT
UNIONS**

1. The authority 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, 1786, 1787, 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. Revise § 701.32(b) to read as follows:

§ 701.32 Payment on shares by public units and nonmembers.

* * * * *

(b) *Limitations.*

(1) *Aggregate limit on public unit and nonmember shares.* Except as permitted under paragraph (c) of this section, a federal credit union may not accept public unit and nonmember shares in excess of 50 percent of the difference of paid-in and unimpaired

capital and surplus and any public unit and nonmember shares, as measured at the time of acceptance of each public unit or nonmember share.

(2) *Required due diligence.* Before accepting public unit or nonmember shares that, taken together with any borrowings, exceed 70 percent of paid-in and unimpaired capital and surplus, the board of directors must adopt a specific written plan concerning the intended use of these funds that is consistent with prudent risk management principles.

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PART 741 – REQUIREMENTS FOR INSURANCE

3. The authority for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766(a), 1781-1790, and 1790d; 31 U.S.C. 3717.

4. Revise § 741.204(a) to read as follows:

§ 741.204 Maximum public unit and nonmember accounts, and low-income designation.

* * * * *

(a) Adhere to the requirements of § 701.32 of this chapter regarding public unit and nonmember accounts, provided it has the authority to accept such accounts.

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DRAFT