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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 702

RIN 3133-AF01

Delay of Effective Date of the Risk-Based Capital Rules

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Rule.

SUMMARY: The NCUA Board (Board) is amending the NCUA's previously revised regulations regarding prompt corrective action (PCA). The final rule delays the effective date of both the NCUA's October 29, 2015 final rule regarding risk-based capital (2015 Final Rule) and the NCUA's November 6, 2018 supplemental final rule regarding risk-based capital (2018 Supplemental Rule), moving the effective date from January 1, 2020 to January 1, 2022. During the extended delay period, the NCUA's current PCA requirements will remain in effect.

DATES: The effective date of the final rules published on October 29, 2015 (80 FR 66626) and on November 6, 2018 (83 FR 55467) is delayed until January 1, 2022.

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SUPPLEMENTARY INFORMATION:

I. Introduction

At its October 2015 meeting, the Board issued the 2015 Final Rule to amend Part 702 of the NCUA's current PCA regulations to require credit unions taking certain risks hold capital commensurate with those risks.[1] The risk-based capital provisions of the 2015 Final Rule apply to only federally insured, natural-person credit unions (credit unions) with quarter-end total

[1] 80 FR 66626 (Oct. 29, 2015).

assets exceeding $100 million. The overarching intent of the 2015 Final Rule is to reduce the likelihood of a relatively small number of high-risk credit unions would exhaust their capital and cause large losses to the National Credit Union Share Insurance Fund (NCUSIF). Under the Federal Credit Union Act (FCUA), federally insured credit unions are collectively responsible for replenishing losses to the NCUSIF.[2]

The 2015 Final Rule restructures the NCUA's current PCA regulations and makes various revisions, including amending the agency's risk-based net worth requirement by replacing credit unions' risk-based net worth ratio with a new risk-based capital ratio. The risk-based capital requirements in the 2015 Final Rule are more consistent with the NCUA's risk-based capital ratio measure for corporate credit unions, and are more comparable to the risk-based capital measures implemented by the Federal Deposit Insurance Corporation (FDIC), Board of Governors of the Federal Reserve System, and Office of the Comptroller of Currency (other banking agencies) in 2013.[3] The 2015 Final Rule also eliminates several provisions in the NCUA's current PCA regulation, including provisions related to the regular reserve account, risk-mitigation credits, and alternative risk weights.

[2] *See* 12 U.S.C. 1782(c)(2)(A) (The FCUA requires that each federally insured credit union pay an insurance premium equal to a percentage of the credit union's insured shares to ensure that the NCUSIF has sufficient reserves to pay potential share insurance claims, and to provide assistance in connection with the liquidation or threatened liquidation of federally insured credit unions in troubled condition.)

[3] The Board and OCC issued a joint final rule on October 11, 2013 (78 FR 62018), and the FDIC issued a substantially identical interim final rule on September 10, 2013 (78 FR 55340). On April 14, 2014 (79 FR 20754), the FDIC adopted the interim final rule as a final rule with no substantive changes.

The Board originally set the effective date of the 2015 Final Rule for January 1, 2019 to provide credit unions and the NCUA with sufficient time to make the necessary adjustments—such as systems, processes, and procedures—and to reduce the burden on affected credit unions.

At its October 2018 meeting, the Board issued the 2018 Supplemental Rule to delay the effective date of the 2015 Final Rule for an additional year, moving the effective date from January 1, 2019 to January 1, 2020.[4] The 2018 Supplemental Rule also amended the definition of "complex" credit union, adopted in the 2015 Final Rule for risk-based capital purposes, by increasing the threshold level for coverage from $100 million to $500 million. Therefore, only credit unions with over $500 million in assets are now subject to the 2015 Final Rule ("covered credit unions"). These changes provided covered credit unions and the NCUA with additional time to prepare for the rule's implementation, and exempted an additional 1,026 credit unions from the risk-based capital requirements of the 2015 Final Rule without subjecting the NCUSIF to undue risk.

II. Proposed Rule

At its June 2019 meeting, the Board approved a notice of proposed rulemaking (proposed rule) to delay the effective date of both the 2015 Final Rule and the 2018 Supplemental Final Rule for an additional two years, moving the effective date of both rules from January 1, 2020 to January 1,

[4] 83 FR 55467 (Nov. 6, 2018).

2022.[5] This proposed delay would provide the Board additional time to holistically and comprehensively evaluate the NCUA's capital standards for credit unions. The proposed rule provided several examples of issues the Board would consider during the delay, including asset securitization, subordinated debt, and a community bank leverage ratio analog.

The proposed rule stated the Board may reconsider how the 2015 Final Rule treats securitizations issued by credit unions.[6] The 2015 Final Rule does not sufficiently address the treatment of credit union issued securitizations. The proposed delay would provide the Board time to consider whether the 2015 Final Rule properly accounts for any asset securitization conducted by credit unions.

The proposed rule also stated the delay would provide time for the Board to consider whether the 2015 Final Rule should be amended to address subordinated debt.[7] The proposed delay would provide the Board additional time to make this decision and conduct the rulemaking. Should the Board finalize such a rule, the delay would also permit credit unions subject to the risk-based capital requirement time to consider the use of any authorized forms of subordinated debt before the risk-based capital rules go into effect.

[5] 84 FR 30048 (Jun. 26, 2019).
[6] See also, OGC Legal Op. 17-0670 (Jun. 21, 2017).
[7] The Board indicated in the 2015 Final Rule that it planned to examine additional forms of qualifying capital in a separate proposed rule. Then in February 2017, the NCUA issued an advance notice of proposed rulemaking for alternative capital. 82 FR 9691 (Feb. 8, 2017).

The proposed rule also stated the delay would provide the Board time to consider whether a community bank leverage ratio (CBLR) analog should be integrated into the NCUA's capital standards. The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 required the other banking agencies, to propose a simplified, alternative measure of capital adequacy for federally insured banks.[8] In February 2019, the other banking agencies issued a proposed rule that would provide qualifying community banks the option to comply with a simplified leverage measure of capital adequacy.[9] The delay in the effective date of the 2015 Final Rule would allow the Board time to examine the other banking agencies' recent CBLR proposal and consider whether adopting an equivalent provision for credit unions is appropriate and consistent with the FCUA.

The proposed rule also stated the delay would provide the NCUA with additional time to prepare for the 2015 Final Rule's implementation. The NCUA has several initiatives in process to improve and modernize how the agency conducts examinations and supervision. These initiatives include the Enterprise Solution Modernization, Call Report Modernization, and Virtual Examination programs. The proposed delay would enable the NCUA to direct additional time and resources toward modernizing examination systems, versus dedicating resources to end-of-life systems being retired.

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[8] Public Law 115–174 (May 24, 2018).
[9] 84 FR 3062 (Feb. 8, 2019).

Finally, the proposed rule stated a delay would further benefit credit unions as they work to implement the Financial Accounting Standards Board's final current expected credit loss (CECL) standard. The Board believes the proposed delay would allow credit unions additional time to allocate resources to the implementation of CECL.

The proposed rule provided for a 30-day comment period, which ended on July 26, 2019.

III. The Final Rule and Public Comments on the Proposed Rule

The NCUA received 29 comment letters in response to the proposed rule. These comment letters were received from credit union trade associations, credit unions, state and regional credit union leagues, bank trade organizations, consumer groups, and an individual. Nearly all commenters supported giving credit unions additional time to comply with the 2015 Final Rule's requirements. Most of these commenters also supported the Board's plan to consider credit union capital standards holistically. A few bank trade organization and consumer group commenters, however, opposed the delay, asserting generally delaying the 2015 Final Rule further would pose potential costs to the NCUSIF and to taxpayers. These commenters also opined the stated reasons for the proposed delay are insufficient and inconsistent with prior agency statements regarding the need for the 2015 Final Rule. The Board has not made any changes to the final rule in response to the comments received. A discussion of the final rule, including a discussion of the comments received, is below.

Comments Supporting the Proposed Delay

The credit unions, credit union leagues, credit union trade associations, and one individual who commented all supported the delay. These commenters generally reiterated the Board's reasons for the proposed delay, including the plan to review credit union capital standards holistically and evaluate rulemaking or guidance options relating to subordinated debt, asset securitization, and an analog to the CBLR. Several commenters also mentioned CECL as support for the delay, which was scheduled to become effective for credit unions in January 2022.[10]

Comments Opposing the Proposed Delay

Two banking trade organizations, as well as two consumer groups, opposed the delay. These commenters discussed several reasons why they believe the 2015 Final Rule, as modified by the 2018 Supplemental Rule, should go into effect on January 1, 2020.

One of the primary concerns expressed was the Board has not adequately explained why a delay is necessary. Specifically, the commenters did not believe the Board sufficiently explained why last year a one-year delay was sufficient and this year an additional two-year delay is necessary,

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[10] In November 2019, the FASB finalized a one-year delay in this effective date, which would cause the new CECL standard to go into effect in January 2023 for credit unions. See, https://www.fasb.org/cs/Satellite?c=FASBContent_C&cid=1176173179331&pagename=FASB%2FFASBContent_C%2FNewsPaghttps://www.fasb.org/cs/ContentServer?c=FASBContent_C&cid=1176173776362&d=&pagename=FASB%2FFASBContent_C%2FNewsPage (Nov. 15, 2019).

particularly when the factors cited in the proposed rule for supporting the delay, asset securitization, subordinated debt, and the CBLR, were all known to the Board before the 2018 Supplemental Rule. The Board has reconsidered its position on when to implement the 2015 Final Rule for a few reasons.

As discussed in the proposed rule, the Board is now considering a holistic review of the 2015 Final Rule and its risk-based capital standards. When issuing the 2018 Supplemental Rule, the Board was primarily concerned with ensuring credit unions and the NCUA were prepared to implement the 2015 Final Rule in its current form. The Board has reconsidered its position and is now considering whether to make more substantive revisions to the 2015 Final Rule. The Board does not believe it is prudent to allow the 2015 Final Rule to become effective as the Board considers substantive modifications to the rule.

The Board is aware a few of its identified concerns, including asset securitization and subordinated debt were present when it finalized the 2018 Supplemental Rule. The Board, however, has reconsidered the extent of changes those issues may require to the 2015 Final Rule. The Board also notes while the statutory requirement to implement a CBLR had been enacted when the Board finalized the 2018 Supplemental Rule, the other banking agencies had not yet issued their final rule.[11] When issuing the 2018 Supplemental Rule, the Board was not aware of the extent of changes that would be proposed to the other banking agencies' 2013 risk-based capital rule.

[11] 84 FR 61776 (Nov. 13, 2019).

The Board believes the reasons stated in the proposal and discussed above, both individually and collectively, sufficiently support the delay. The Board, however, also notes other factors have occurred after the adoption of the 2018 Supplemental Rule that suggest an additional two-year delay is prudent. Other banking agencies are currently reconsidering several fundamental aspects of their 2013 risk-based capital rule, which influenced the adoption of the 2015 Final Rule.[12] The other banking agencies recently stated in a joint rulemaking since the issuance of their 2013 risk-based capital rule, community banking organizations have raised concerns regarding the regulatory burden, complexity, and costs associated with certain aspects of their capital rule.[13] A community banking organization is a depository institution or depository institution holding company with total consolidated assets of less than $10 billion. Additionally, in their Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) report, the other banking agencies stated they are considering simplifications to their capital rule with the goal of meaningfully reducing regulatory burden on community banking organizations.[14] Since the issuance of the 2018 Supplemental Rule, the Board is aware of at least eight rulemakings undertaken by the other banking agencies to amend their 2013 risk-based capital rule.[15] The Board notes one of the rulemakings could provide a simplified capital framework for over 90 percent of small FDIC-insured banks from their 2013 risk-based capital rule.[16] Given the extent

[12] The Board and OCC issued a joint final rule on October 11, 2013 (78 FR 62018), and the FDIC issued a substantially identical interim final rule on September 10, 2013 (78 FR 55340). On April 14, 2014 (79 FR 20754), the FDIC adopted the interim final rule as a final rule with no substantive changes.

[13] 84 FR 3062 (Feb. 8, 2019).

[14] Joint Report to Congress, Economic Growth and Regulatory Paperwork Reduction Act (Mar. 2017), available at https://www.ffiec.gov/pdf/2017_FFIEC_EGRPRA_Joint-Report_to_Congress.pdf.

[15] See, https://www.fdic.gov/regulations/laws/federal/index.html.

[16] 84 FR 3062, 3078 (Feb. 8, 2019). Small federally insured banks include banking organizations with total assets less than or equal to $550 million. The Board notes that its current risk-based net worth requirement is applicable to credit unions with quarter-end assets exceeding $50 million and with a risk-based net worth requirement exceeding six percent. 12 CFR 702.103(b).

of the proposed changes to the other banking agencies' 2013 risk-based capital rule, and that the Board adopted the 2015 Final Rule, in part, to make its capital framework more comparable to the other banking agencies' 2013 capital rule, the Board believes it is sensible to reconsider the 2015 Final Rule before its effective date of January 1, 2020.

One commenter suggested the Board implement the 2015 Final Rule and then amend it as necessary, instead of allowing the existing risk-based net worth framework to remain in effect. The commenter stated the NCUA has previously noted the current framework has severe weaknesses and was subject to criticism from both the Government Accountability Office (GAO) and the NCUA's Inspector General.[17] The Board continues to believe the current risk-based net worth system has weaknesses and requires risk weights that correspond better to assets' credit risk, as stated in the 2015 Final Rule. The Board, however, does not believe the agency's current risk-based net worth rule is so deficient that the Board should implement the 2015 Final Rule even as the Board considers holistic changes to it. Further, implementing the 2015 Final Rule will impose compliance costs and a substantial regulatory burden on covered credit unions. To comply with the 2015 Final Rule, credit unions are required to update internal policies, software, and train employees, among other things. The Board does not want to impose unnecessary compliance costs to implement a rule and then, shortly thereafter, possibly make substantial amendments to the rule. The Board believes the more sensible and balanced approach is to extend the effective date of the 2015 Final Rule as the Board considers holistic revisions to the 2015 Final Rule.

[17] 80 FR 66626 (Oct. 29, 2015).

Other commenters expressed concerns the two-year delay would occur when there is a possibility the economy is weakening. One commenter opined delaying the 2015 Final Rule would threaten the financial security of credit unions, which may harm consumers. Two commenters generally expressed concern about the credit union system not being subject to more stringent capital standards. A commenter stated the Congressional Budget Office has estimated, if the 2015 Final Rule is further delayed, the NCUA will be expected to spend $26 million to resolve failed credit unions from 2020-2022.

The Board agrees higher capital levels keep credit unions from becoming undercapitalized during periods of economic stress. The Board, however, believes the credit union industry is healthy, well capitalized, and most credit unions currently hold capital well beyond the minimum required by the 2015 Final Rule. As stated in the 2018 Supplemental Rule, complex credit unions already hold, on average, more than 17 percent capital, or 70 percent more than the 10 percent required to be well-capitalized under the 2015 Final Rule.[18] Additionally, approximately 99 percent of complex credit unions are holding enough capital to meet the risk-based capital requirements in the 2015 Final Rule.[19] Therefore, implementing the 2015 Final Rule would not require credit unions to raise a significant amount of capital at this time. The NCUA also will continue to address any deficiencies in the capital levels of individual credit unions through the supervision process and through the existing PCA framework. Furthermore, credit unions are expected to incorporate provisions for maintaining prudent levels of capital into their business models and strategic plans.

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[18] 83 FR 55467, 55469 (Nov. 6, 2018). Complex credit unions are credit unions with over $500 million in assets.
[19] Id.

The Board notes the current health and capitalization levels of the credit union industry are not sufficient justification for rescinding the 2015 Final Rule, as some commenters suggested. The Board, however, is clarifying that the current capitalization of the industry provides time for the Board to consider modifications to the 2015 Final Rule and alleviate the need to immediately implement the 2015 Final Rule. The robust capital levels in the credit union industry, however, do not negate the weaknesses in the current capital standards, and having a strong capital framework with enhanced risk sensitivity is an integral part of the NCUA's supervision of credit unions. The Board believes it is sound regulatory practice to ensure credit unions choosing to hold higher risk assets and liabilities on their balance sheets are required to hold appropriate levels of corresponding capital. The Board also notes repealing the 2015 Final Rule is outside the scope of the proposed rule.

A few commenters stated delaying the effective date of the 2015 Final Rule conflicts with the congressional mandate that the NCUA capital rules adequately address risks and harmonize with the other banking agencies' framework. Specifically, the commenters stated the FCU Act requires the Board to adopt a system of PCA for credit unions that is "comparable to" section 38 of the Federal Deposit Insurance Act (FDI Act).[20] The Board believes the current rule meets the statutory requirement for the Board to implement a PCA framework that is comparable to the PCA framework for insured banking organizations in the FDI Act. Additionally, the FCUA requires the Board to adopt a PCA framework comparable to the PCA framework in the FDI Act.

[20] 12 U.S.C. 1831o.

The FCUA, however, does not require the Board to adopt a system of risk-based capital identical to the risk-based capital framework for federally insured banking organizations.

Commenters also questioned the need for additional time to prepare for the 2015 Final Rule. The Board would have been prepared to implement the 2015 Final Rule. The Board, however, does not want to allocate the necessary additional resources to implement the 2015 Final Rule, given its decision to comprehensively evaluate the 2015 Final Rule. The Board believes it is more prudent to allocate resources to other priorities that may not require substantial amendment, including several initiatives to improve and modernize how the agency conducts examinations and supervision. The goals of these initiatives are to replace outdated, end-of-life examination systems, streamline processes, adopt enhanced examination techniques, and leverage new technology and data to maintain high quality supervision of federally-insured credit unions with less onsite presence. These initiatives include the Enterprise Solution Modernization, Call Report Modernization, and Virtual Examination programs. The delay enables the NCUA to direct additional time and resources toward modernizing examination systems, versus dedicating resources to end-of-life systems being retired. One commenter noted supervisory guidance has yet to be issued to examiners and the industry to assist in implementing the risk-based capital rules and changes to the Call Report are necessary to capture risk-based capital related information. The NCUA intends to issue additional guidance and make necessary changes to the Call Report prior to the effective date of the risk-based capital rule.

One commenter stated the 2015 Final Rule should be implemented immediately due to concerns with the treatment of goodwill in the agency's current risk-based capital rule. Currently, goodwill is not deducted from capital, however, intangible assets such as goodwill are generally deducted from regulatory capital from the other banking agencies' capital rules. The commenter stated that this preferential treatment of goodwill promotes the acquisition of other credit unions and community banks, which has allowed certain credit unions to expand in size and reach unmanageable level of assets. The Board disagrees that the regulatory capital treatment of goodwill has a material effect on credit union merger activity. As stated in the 2018 Supplemental Rule, the 2015 Final Rule provides credit unions with 13 years to write down, or otherwise adjust their balance sheets, to account for goodwill and other intangible assets acquired through a supervisory merger or combination before December 28, 2015. As of December 31, 2018 Call Report data, only 8 credit unions with assets greater than $500 million, report total goodwill and intangible assets of more than 1 percent of assets, and the valuation under Generally Accepted Accounting Principles (GAAP) of these existing assets is likely immaterial by the end of the extended sunset date. Accordingly, the Board continues to believe 13 years to respond to this change is more than sufficient for credit unions impacted.[21]

The same commenter expressed concerns about the agency's ability to properly identify potential concentration risks present in credit unions and believed the 2015 Final Rule may have addressed recent losses related to taxi medallions. Risk-based capital is designed to mitigate losses to the

[21] The 2015 Final Rule grandfathers goodwill originating from a supervisory merger or combination that was completed on or before December 28, 2015. The two-year delay in the effective date does not affect the 2015 Final Rule's treatment of goodwill or the date for excluded goodwill. Therefore, any supervisory merger or combination completed after December 28, 2015 could not count as goodwill when the 2015 Final Rule becomes effective.

NCUSIF; however, it is not meant to protect the NCUSIF from outside systemic risks such as severe disruptions in a particular market. The Board believes credit unions need to hold capital commensurate with the level and nature of the risks to which they are exposed. The NCUA will continue to address, through the examination process and the agency's various enforcement authorities, any safety and soundness concerns related to deficiencies in capital levels relative to all of the credit union's risk, inclusive of concentration risk.

The Board notes the risk-based capital framework is generally designed and calibrated to reflect risks across the industry and may not always require a specific credit union to hold capital commensurate with its credit, market, operational, or other risks. Thus, even though the 2015 Final Rule imposes higher capital requirements for credit unions with significant concentrations of residential real estate and commercial loans, that framework was broadly based on the credit union industry, and not for specific credit union portfolios, such as those with a high concentration in taxi medallions. The Board also notes the other banking agencies' 2013 risk-based capital rule does not address concentration risk even though both the NCUA's current rule and 2015 Final Rule impose higher capital requirements for credit unions with a significant concentrations of residential real estate and commercial loans.

Other Comments beyond the Scope of the Proposed Rule

Many commenters also offered recommendations that went beyond the scope of the proposed delay. For example, several commenters recommended the Board consider rescinding the 2015

Final Rule. The Board continues to believe the current risk-based net worth standards have weaknesses and revised standards with enhanced risk sensitivity are appropriate for covered credit unions. In addition, a few commenters recommended the Board change the definition of complex and consider applying the 2015 Final Rule only to credit unions with assets of $10 billion or more. The Board believes this recommendation is beyond the scope of the proposed rule.

Two credit union-affiliated commenters provided suggestions on potential amendments to the 2015 Final Rule. Specifically, a credit union trade association discussed why it supports a more flexible threshold for applying the 2015 Final Rule, as well as how it would envision the Board implementing an analog to the CBLR. The commenter also suggested that the Board consider recalibrating certain risk weights and permanently grandfather excluded goodwill. Separately, an attorney who represents credit unions provided a detailed proposal on how the Board could authorize all credit unions to issue perpetual capital shares that could constitute regulatory capital. The Board believes these comments go beyond the scope of the proposed rule, but will consider them as it undergoes a substantive reevaluation of the NCUA's capital standards.

One commenter noted the 2015 Final Rule eliminates several provisions in the NCUA's current PCA regulations, including provisions related to the regular reserve account, risk mitigation credits, and alternative risk weights. This commenter recommended the Board separately consider addressing these issues in a more immediate timeframe than on the extended timeframe necessary to holistically consider the NCUA's risk-based capital framework. The Board believes

these comments are outside the scope of this rule, as they address changes to the current PCA framework, but will consider them as part of their holistic review of the NCUA's capital standards.

Finally, one commenter also asserted the agency's administrative record to support the proposed delay is not sufficient. The commenter attached a study, which only contained a brief discussion of capital, without explaining its relevance. The brief discussion of capital in the study was also reflected in other comment letters and has been addressed by the Board. The commenter also posed numerous questions that it asserts the Board must address in the final rule to comply with the Administrative Procedure Act (APA). The Board disagrees. An agency is not required to include a response to every comment received nor is an agency required to discuss every item of fact or opinion included in the comments.[22] A final rule must summarize the significant comments received and include a response to such comments. A significant comment generally is one that raises a point relevant to the agency's decision and which, if adopted, requires a change in an agency's proposed rule.[23] The Board believes it has addressed the significant points raised by the commenters, even if it has not explicitly addressed each question asked by one commenter.

The Final Rule

[22] Resolute Forest Prod., Inc. v. U.S. Dep't of Agric., 130 F. Supp. 3d 81, 93 (D.D.C. 2015)(citing Pub. Citizen, Inc. v. F.A.A., 988 F.2d 186, 197 (D.C.Cir.1993) (quoting Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C.Cir.1968)).

[23] City of Portland, Oregon v. E.P.A., 507 F.3d 706, 715 (D.C. Cir. 2007) (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 n. 58 (D.C.Cir.1977)). Essentially, an agency must state the main reasons for its decision and indicate that it has considered the most important objections.

The Board is finalizing the two-year delay as proposed. Under the final rule, the NCUA's current PCA regulation remains in effect until the 2015 Final Rule and the 2018 Supplemental Rule's effective date, January 1, 2022. The NCUA will continue to enforce the capital standards currently in place and address any supervisory concerns through existing regulatory and supervisory mechanisms. The Board believes, given the discussion above, extending the implementation period of the 2015 Final Rule and 2018 Supplemental Rule until January 1, 2022 is reasonable and does not pose undue risk to the NCUSIF.

IV. Legal Authority

In 1998, Congress enacted the CUMAA.[24] Section 301 of CUMAA added section 216 to the FCUA,[25] which required the Board to adopt by regulation a system of PCA to restore the net worth of credit unions that become inadequately capitalized.[26] Section 216(b)(1)(A) requires the Board to adopt by regulation a system of PCA for federally insured credit unions "consistent

[24] Public Law 105–219, 112 Stat. 913 (1998).
[25] 12 U.S.C. 1790d.
[26] The risk-based net worth requirement for credit unions meeting the definition of "complex" was first applied on the basis of data in the Call Report reflecting activity in the first quarter of 2001. 65 FR 44950 (July 20, 2000). The NCUA's risk-based net worth requirement has been largely unchanged since its implementation, with the following limited exceptions: revisions were made to the rule in 2003 to amend the risk-based net worth requirement for MBLs, 68 FR 56537 (Oct. 1, 2003); revisions were made to the rule in 2008 to incorporate a change in the statutory definition of "net worth," 73 FR 72688 (Dec. 1, 2008); revisions were made to the rule in 2011 to expand the definition of "low-risk assets" to include debt instruments on which the payment of principal and interest is unconditionally guaranteed by NCUA, 76 FR 16234 (Mar. 23, 2011); and revisions were made in 2013 to exclude credit unions with total assets of $50 million or less from the definition of "complex" credit union, 78 FR 4033 (Jan. 18, 2013).

with" section 216 of the FCUA and "comparable to" section 38 of the FDI Act.[27] Section 216(b)(1)(B) requires that the Board, in designing the PCA system, also take into account the "cooperative character of credit unions" (i.e., credit unions are not-for-profit cooperatives that do not issue capital stock, must rely on retained earnings to build net worth, and have boards of directors that consist primarily of volunteers).[28] The Board initially implemented the required system of PCA in 2000,[29] primarily in Part 702 of the NCUA's Regulations, and most recently made substantial updates to the regulation in October 2015.[30]

The purpose of section 216 of the FCUA is to "resolve the problems of [federally] insured credit unions at the least possible long-term loss to the [NCUSIF]."[31] To carry out that purpose, Congress set forth a basic structure for PCA in section 216 that consists of three principal components: (1) a framework combining mandatory actions prescribed by statute with discretionary actions developed by the NCUA; (2) an alternative system of PCA to be developed by the NCUA for credit unions defined as "new;" and (3) a risk-based net worth requirement to apply to credit unions the NCUA defines as "complex."

Among other things, section 216(c) of the FCUA requires the NCUA to use a credit union's net worth ratio to determine its classification among five "net worth categories" set forth in the

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[27] 12 U.S.C. 1790d(b)(1)(A); see also 12 U.S.C. 1831o (Section 38 of the FDI Act setting forth the PCA requirements for banks).
[28] 12 U.S.C. 1790d(b)(1)(B).
[29] 12 CFR Part 702; see also 65 FR 8584 (Feb. 18, 2000) and 65 FR 44950 (July 20, 2000).
[30] 80 FR 66626 (Oct. 29, 2015).
[31] 12 U.S.C. 1790d(a)(1).

FCUA.[32] Section 216(o) generally defines a credit union's "net worth" as its retained earnings balance,[33] and a credit union's "net worth ratio," as the ratio of its net worth to its total assets.[34] As a credit union's net worth ratio declines, so does its classification among the five net worth categories, thus subjecting it to an expanding range of mandatory and discretionary supervisory actions.[35]

Section 216(d)(1) of the FCUA requires that the NCUA's system of PCA include, in addition to the statutorily defined net worth ratio requirement applicable to federally insured natural-person credit unions, "a risk-based net worth[36] requirement for insured credit unions that are complex, as defined by the Board . . . ."[37] The FCUA directs the NCUA to base its definition of "complex" credit unions "on the portfolios of assets and liabilities of credit unions."[38] It also requires the NCUA to design a risk-based net worth requirement to apply to such "complex" credit unions.[39]

V. Regulatory Procedures

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[32] 12 U.S.C. 1790d(c).
[33] 12 U.S.C. 1790d(o)(2).
[34] 12 U.S.C. 1790d(o)(3).
[35] 12 U.S.C. 1790d(c) – (g); 12 CFR 702.204(a) – (b).
[36] For purposes of this rulemaking, the term "risk-based net worth requirement" is used in reference to the statutory requirement for the Board to design a capital standard that accounts for variations in the risk profile of complex credit unions. The term "risk-based capital ratio" is used to refer to the specific standards established in the 2015 Final Rule to function as criteria for the statutory risk-based net worth requirement. The term "risk-based capital ratio" is also used by the other banking agencies and the international banking community when referring to the types of risk-based requirements that are addressed in the 2015 Final Rule. This change in terminology throughout the Proposal would have no substantive effect on the requirements of the FCUA, and is intended only to reduce confusion for the reader.
[37] 12 U.S.C. 1790d(d)(1).
[38] 12 U.S.C. 1790d(d).
[39] *Id.*

Effective Date

The final rule delays the effective date of the 2015 Final Rule and the 2018 Supplemental Rule from January 1, 2020 until January 1, 2022. The previous effective date, January 1, 2020, is less than thirty days after the publication of the final rule. Under the APA, a final rule cannot be effective until 30 days after its publication, however, there is an exception for rules that grant or recognize an exemption or relieve a restriction.[40] Such rules can be effective immediately upon publication.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of the final rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include credit unions with assets less than $100 million)[41] and publishes its certification and a short, explanatory statement in the *Federal Register* together with the rule.

The delay of the 2015 Final Rule and 2018 Supplemental Rule affects only complex credit unions, which are those with greater than $500 million in assets under the 2018 Supplemental

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[40] 5 U.S.C. § 553(d).
[41] *See* 80 FR 57512 (Sept. 24, 2015).

Rule. As a result, credit unions with $100 million or less in total assets are not affected by this final rule. Accordingly, the NCUA certifies this final rule will not have a significant economic impact on a substantial number of small credit unions.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number.

The information collection requirements prescribed by § 702.101(b) were set-out in the August 8, 2018 (83 FR 38997), proposed rule and assigned OMB control number 3133–0191. There is no new collection of information contained in this final rule that is subject to the PRA. The rule only extends the effective date.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the principles of the executive order to adhere to fundamental federalism principles. This final rule extends the effective date of the 2015 Final Rule and the 2018 Supplemental Rule for two additional years, until January 1, 2022.

Therefore, this final rule does not have a direct effect on the states, on the relationship between the national government and the states, and on the distribution of power and responsibilities among the various levels of government.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined this final 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).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) generally provides for congressional review of agency rules.[42] A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by Section 551 of the APA.[43] An agency rule, in addition to being subject to congressional oversight, may also be subject to a delayed effective date if the rule is a "major rule."[44] The NCUA does not believe this rule is a "major rule" within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA submitted this final rule to the Office of Management and Budget (OMB) for it to determine if the final rule is a "major rule" for purposes of SBREFA.

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[42] 5 U.S.C. 801-804.
[43] 5 U.S.C. 551.
[44] 5 U.S.C. 804(2).

OMB determined the final rule was not a major rule. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

List of Subjects

12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on December 12, 2019.

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Gerard Poliquin,

Secretary of the Board.