

## PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 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 § 701.19 to read as follows:

### § 701.19 Benefits for Employees of Federal Credit Unions.

(a) *General authority.* A federal credit union may provide employee benefits, including retirement benefits, to its employees and officers who are compensated in conformance with the Act and the bylaws, individually or collectively with other credit unions. The kind and amount of these benefits must be reasonable given the federal credit union's size, financial condition, and the duties of the employees.

(b) *Plan trustees and custodians.* Where a federal credit union is the benefit plan trustee or custodian, the plan must be authorized and maintained in accordance with the provisions of part 724 of this chapter. Where the benefit plan trustee or custodian is a party other than a federal credit union, the benefit plan must be maintained in accordance with applicable laws governing employee benefit plans, including any applicable rules and regulations issued by the Secretary of Labor, the Secretary of the Treasury, or any other federal or state authority exercising jurisdiction over the plan.

(c) *Investment authority.* A federal credit union investing to fund an employee benefit plan obligation is not subject to the investment limitations of the Act and part 703 or, as applicable, part 704, of this chapter and may purchase an investment that would otherwise be impermissible if the investment is directly related to the federal credit union's obligation or potential obligation under the employee benefit plan and the federal credit union holds the investment only for as long as it has an actual or potential obligation under the employee benefit plan.

(d) *Defined benefit plans.* Under paragraph (c) of this section, a federal credit union may invest to fund a defined benefit plan if the investment meets the conditions provided in that paragraph. If a federal credit union invests to fund a defined benefit plan that is not subject to the fiduciary responsibility provisions of part 4 of the

Employee Retirement Income Security Act of 1974, it should diversify its investment portfolio to minimize the risk of large losses unless it is clearly prudent not to do so under the circumstances.

(e) *Liability insurance.* No federal credit union may occupy the position of a fiduciary, as defined in the Employee Retirement Income Security Act of 1974 and the rules and regulations issued by the Secretary of Labor, unless it has obtained appropriate liability insurance as described and permitted by Section 410(b) of the Employee Retirement Income Security Act of 1974.

(f) *Definitions.* For this section, defined benefit plan has the same meaning as in 29 U.S.C. 1002(35) and employee benefit plan has the same meaning as in 29 U.S.C. 1002(3).

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## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 741

#### Requirements for Insurance

**AGENCY:** National Credit Union Administration.

**ACTION:** Final rule.

**SUMMARY:** The National Credit Union Administration (NCUA) is adopting a final rule that establishes the requirements for federally insured credit unions to branch outside the United States. The final rule requires a credit union to develop a business plan and receive foreign government and NCUA approval before establishing a branch outside the United States.

**DATES:** This regulation is effective July 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Michael J. McKenna, Senior Staff Attorney, Division of Operations, Office of General Counsel, telephone: (703) 518–6540.

**SUPPLEMENTARY INFORMATION:** On September 7, 2000, the Board issued an advance notice of proposed rulemaking (ANPR). (65 FR 55464, September 14, 2000). The comment period for the ANPR ended on November 14, 2000. The key issues raised in the ANPR included: NCUA Board policy considerations, legal issues, supervision and examination considerations, options for insuring foreign branches of state-chartered credit unions, and options for restricting insurance coverage for state-chartered credit unions operating foreign branches.

On September 19, 2002, after carefully considering the comments and discussing the issue with state regulators, the NCUA Board issued a proposed rule that requires a credit union to obtain host country approval and develop a comprehensive business plan in order to obtain NCUA approval to establish a branch in a foreign country. (67 FR 60607, September 26, 2002). A federally insured, state-chartered credit union would also have to obtain state regulatory approval.

#### Comments

Twenty-one comments were received. Comments were received from eight federal credit unions, three state-chartered credit unions, four state leagues, three credit union trade associations, two attorneys, and one bank trade association. In general, most commenters support the proposal. Six commenters applauded the Board's decision to include federal credit unions in this proposal.

Three commenters opposed the proposal. Two of these commenters believe foreign branches inherently carry more risk than domestic branches. They believe that although the proposal minimizes risk, it is not eliminated. They suggest that foreign branches would be prime targets for money laundering. Finally, they believe that foreign branches will be costly to the National Credit Union Share Insurance Fund (NCUSIF) and, thus, federally insured credit unions.

#### Discussion

The NCUA Board proposed a three-step process to branch outside the United States. Most commenters supported the three-step process but suggested some changes to the proposal.

First, under the proposal, a credit union must receive written approval from the host country to establish the branch that explicitly recognizes NCUA's authority to examine and take any enforcement action with regard to that branch office, including conservatorship and liquidation actions. If a credit union is state-chartered, it must also obtain written approval from its state supervisory agency and submit the approval with the application.

Three commenters did not support this first requirement. One commenter believes it may be difficult for a credit union to obtain host country approval recognizing NCUA's authority. All three commenters believe this is an issue that should be worked on between NCUA and the various host countries.

One commenter requested that the rule language on host country approval should read "that explicitly recognizes

NCUA's authority, in consultation with the host country, to examine and take mutually agreeable enforcement action with regard to that branch office." One commenter stated that it recognizes that NCUA is not seeking exclusive authority over the branch and anticipates the host country also will be in a position to exercise regulatory authority under its own regulatory framework and believes this should be stated in the rule. Another commenter believes NCUA should regulate the foreign branches of credit unions jointly with the foreign banking regulators. One commenter believes an enforcement conflict might occur if a host country requires the branch to have host country deposit insurance.

The NCUA Board believes, for safety and soundness reasons, it is critical for a credit union to obtain host country approval and recognition of NCUA's authority. To require less would pose an undue risk to the NCUSIF. The Board is not requiring exclusive authority over a foreign branch and recognizes that a host country also will have some regulatory authority over a foreign branch office. NCUA, however, must have the right to examine a foreign branch and take any necessary enforcement actions. Finally, NCUA does not have the legal authority to engage in discussions or enter into agreements with foreign governments on the establishment of branches. The Board believes the proper party to obtain host country approval is the credit union seeking NCUA's approval. Credit unions wishing to engage in this activity also might want to obtain the assistance of their trade associations and state leagues in communicating with foreign governments.

Second, under the proposal, a credit union must develop a detailed business plan that addresses the following: (1) Analysis of market conditions in the area where the branch is to be established; (2) the credit union's plan for addressing foreign currency risk; (3) operating facilities, including office space, equipment and supplies; (4) safeguarding of assets, insurance coverage, and records preservation; (5) written policies regarding the branch (shares, lending, capital, charge-offs, collections); (6) the field of membership or portion of the field of membership to be served through the foreign branch and the financial needs of the members to be served and services and products to be provided; (7) detailed *pro forma* financial statements for branch operations (balance sheet and income and expense projections) for the first and second year, including assumptions; (8) internal controls,

including cash disbursement procedures for shares and loans at the branch; (9) accounting procedures used to identify branch activity and performance; and (10) foreign income taxation.

Four commenters agreed with the business plan requirement. Four commenters stated that the services offered through the foreign branch should be limited to those approved by NCUA. Two commenters that believe all assets of a foreign branch should be required to be denominated in U.S. dollars stated that, if all the assets of the foreign branch were U.S. dollar denominated, there would be no need to address currency risk in the business plan. The Board is not mandating that all assets be denominated in U.S. dollars to provide flexibility in establishing a branch; however, as discussed below, if a credit union wants federal share insurance for the deposits in a foreign branch, then assets must be denominated in U.S. dollars.

One commenter stated the business plan requirement should only be for federal credit unions. Four commenters believe the business plan requirements are excessive and suggested that it be streamlined. Another commenter also believes the business plan is excessive and should only consider the overall strength of the credit union (CAMEL 1 or CAMEL 2) and the competency of the credit union's management. Two commenters stated that field of membership should not be addressed in the business plan. One commenter would delete the requirement for a market analysis. A few commenters suggested that regional directors should be encouraged to consider relevant employment laws of the host country and whether an applicant credit union is fully aware of the impact of such laws.

The NCUA Board believes that the business plan requirements are prudent and the minimum a credit union should consider before establishing a foreign branch. The Board agrees that knowledge of foreign employment laws is also an important component in determining whether to establish a foreign branch and has added that to the business plan. The Board also clarified in the final rule that credit unions need to address the issue of bond coverage in the business plan.

Third, under the proposal, a state-chartered credit union must submit documentation showing state regulator approval. One commenter supported this requirement. Four commenters believe that NCUA should not be involved in the approval process for state-chartered credit unions. Three of these commenters believe NCUA should

not approve a branch, but only approve insurance coverage for a branch. They believe that, once NCUA has approved a country for federal insurance, then no further NCUA approval should be necessary for federally insured state-chartered credit unions.

A foreign branch poses significantly greater risk to the NCUSIF than a domestic branch. Although this rule minimizes risk, it certainly does not eliminate it. Therefore, whether a credit union is state-chartered or federally-chartered, the risk to the NCUSIF is the same, and NCUA must have the final authority to approve or disapprove a foreign branch.

Under the proposal, the regional director has 60 days to approve the application, but may extend the time period for good cause. The regional director may revoke approval of a foreign branch office for failure to follow the business plan in any material respect or for substantive and documented safety and soundness reasons. If the credit union wants to make a material deviation from its previously approved business plan, it must submit a new business plan for approval. If the regional director revokes the approval, a credit union has six months from the date of the revocation letter to terminate the operations of the branch. The credit union can appeal this revocation directly to the NCUA Board. One commenter fully supported the revocation process.

Four commenters requested that the central office, not the regional directors, process the approval and revocation of foreign branches because they believe central office staff will be more knowledgeable about the issues. Two commenters request that NCUA state that the six-month revocation period starts to run only after the regional director decision or after a decision on an appeal to the NCUA Board has been rendered, whichever is later.

The NCUA Board is retaining in the final rule the revocation process as proposed. It is anticipated that regional offices will consult with central office staff when they believe it is necessary. The Board is not changing the six-month time frame for the closing of a branch while a decision is under appeal because of safety and soundness considerations. If a credit union files an appeal after receiving a notice of revocation from a regional director, it must continue to plan on closing the branch within six months. Filing an appeal will not toll the running of the six-month period for closure of a foreign branch. The Board believes it will be able to consider appeals of a revocation expeditiously and notes that a credit

union that has received a revocation and wishes to appeal to the Board must submit its appeal within 30 days of the revocation letter.

Three commenters believe that the state regulator should have unilateral authority to approve and revoke foreign branch activity. One commenter wondered how coordination with the state regulator would occur in the event the state regulator wishes to revoke approval of the branch office. The NCUA Board wishes to clarify that if a state regulator wishes to revoke approval of a foreign branch, NCUA's concurrence is not necessary. The Board, however, has added a sentence to the rule requiring the state regulator to notify NCUA after it issues a notice of revocation.

The NCUA Board decided not to propose any field of membership restrictions on the foreign branch or capital requirements above those required by NCUA's prompt corrective action rule. 12 CFR part 702. Three commenters agreed with the Board's decision not to propose field of membership restrictions or impose additional capital requirements for credit unions that want to branch in foreign countries. One commenter requested that the final rule address how a credit union can expand its field of membership in the foreign country. A federal credit union can expand its field of membership in the manner set forth in NCUA's Chartering and Field of Membership Manual. A state chartered credit union should look to applicable state law.

The Board clarified in the proposal that a representation office or a liaison office is not a branch office for purposes of this regulation. NCUA's understanding is that such offices do not engage in processing loan applications and do not disburse loans. Rather loan documents are transferred from the liaison office to the credit union's main office in the United States where loan decisions are made and loan disbursements are made in U.S. dollars. Two commenters appreciated and supported this clarification. The Board concurs with the commenter who stated that an ATM is not a branch for purposes of this rule.

On the issue of insurance, the NCUA Board stated that if there are no changes to NCUA's insurance regulation, a federally insured credit union that opens a branch office outside the United States would have its member share accounts at that branch federally insured. The NCUA Board also stated that the credit union's business plan would be required to address the insured status of member accounts and,

in any event, accounts would be insured by the NCUSIF only if denominated in U.S. dollars and only if payable, by the term of the account agreement, at a U.S. office of the credit union. If the host country requires insurance from its own system, accounts would not be insured by the NCUSIF. The NCUA Board also requested specific comment on the insurance issue.

Ten commenters agreed with NCUA's view on insurance coverage. Two of these commenters believe the proposal mitigates the additional risk to the NCUSIF that accompany foreign branch activity. One commenter believes that insuring accounts in branches that are not located either on military installations or U.S. embassies is entirely inappropriate.

One commenter does not believe the NCUSIF should cover foreign branch deposits unless that is part of an agreement between the two countries' regulatory and insurance authorities. One commenter stated that NCUA should insure deposits up to the U.S. limit except in those countries where the NCUA has specifically negotiated other arrangements with the foreign government. One commenter believes NCUSIF coverage should be mandatory for accounts opened at the foreign branch of a federally-insured credit union but believes that NCUSIF coverage should only be secondary if the foreign branch also carries foreign share insurance.

The NCUA Board believes that the proposed insurance treatment of foreign branches is reasonable, mitigates risks, and provides credit unions with significant flexibility.

Therefore, to receive NCUA's approval for a foreign branch, a credit union must address in its business plan how accounts will be insured and agree that accounts would be insured by the NCUSIF only if denominated in U.S. dollars and only if payable, by the terms of the account agreement, at a U.S. office of the credit union. If the host country requires insurance from its own system, accounts will not be insured by the NCUSIF. To avoid any confusion on this issue the NCUA Board is adding a section (e) to the rule to address insurance treatment at foreign branches.

#### *Miscellaneous*

One commenter encouraged the Board to amend Part 703 to allow additional investment tools to hedge currency risk via derivative instruments. Proposed revisions to Part 703 have been issued for comment and the NCUA Board will consider such recommended changes in the context of finalizing that rule. One commenter thought the phrase "take

action" in § 741.11(a) was ambiguous and should be rephrased. Although the Board did not find the phrase ambiguous, it changed the term to "approve or deny" to avoid any confusion.

Four commenters stated that credit unions with foreign branches should pay for any additional cost NCUA or NCUSIF might incur in examining their foreign branches. A few commenters believe that NCUA should mandate that its examiners routinely inspect the foreign branches at the expense of the credit unions with those branches. Two commenters asked for more clarification on how NCUA will carry out its regular examination functions of a credit union branch located in a foreign country. At this time, the NCUA Board is not planning on imposing any additional fees on credit unions with foreign branches and is not planning on any significant changes in the examination process. NCUA will continue to monitor the establishment of foreign branches and will revisit both issues after gaining some experience with this activity.

#### **Regulatory Procedures**

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any final regulation may have on a substantial number of small entities (those under one million dollars in assets). The NCUA Board has determined and certifies that the final rule will not have a significant economic impact on a substantial number of small credit unions. The reason for this determination is that the Board believes it is very unlikely that small credit unions have the financial capability and experience to establish a branch in a foreign country. Accordingly, the NCUA Board has determined that a Regulatory Flexibility Analysis is not required.

##### *Paperwork Reduction Act*

The paperwork requirements in § 741.11 have been submitted to the Office of Management and Budget. NCUA will publish the OMB control number as soon as it is issued. Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless NCUA displays a valid OMB number. The control number will be displayed in the table at 12 CFR part 795.

##### *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. The executive order states that: "National action limiting the policymaking discretion of the states shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance." The risk of loss to federally insured credit unions and the NCUSIF caused by the establishment of foreign branches is a concern of national scope. The final rule helps assure that proper safeguards are in place to ensure the safety and soundness of federally insured credit unions that establish branches in foreign countries.

The final rule applies to all federally insured credit unions. NCUA believes that the protection of those credit unions, and ultimately the NCUSIF, warrants application of the final rule to all federally insured credit unions. The final rule does not impose additional costs or burdens on the states or affect the states' ability to discharge traditional state government functions. NCUA has determined that this rule may have an occasional 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. The potential risk to the NCUSIF without the rule justifies this action.

*The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families*

The NCUA has determined that 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) 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.

**List of Subjects in 12 CFR Part 741**

Bank deposit insurance, Credit unions.

By the National Credit Union Administration Board on April 24, 2003.

**Becky Baker,**

*Secretary of the Board.*

■ For the reasons set forth in the preamble, the National Credit Union Administration amends 12 CFR part 741 as follows:

**PART 741—REQUIREMENTS FOR INSURANCE**

■ 1. The authority citation for part 741 continues to read as follows:

**Authority:** 12 U.S.C. 1757, 1766(a), and 1781-1790; Pub. L. 101-73.

■ 2. Add §741.11 to subpart A to read as follows:

**§ 741.11 Foreign branching.**

(a) *Application and Prior NCUA Approval Required.* Any credit union insured under Title II of the Act must apply for and receive approval from the regional director before establishing a credit union branch outside the United States unless the foreign branch is located on a United States military installation or embassy outside the United States. The regional director will have 60 days to approve or deny the request.

(b) *Contents of Application.* The application must include a business plan, written approval by the state supervisory agency if the applicant is a state-chartered credit union, and documentation evidencing written permission from the host country to establish the branch that explicitly recognizes NCUA's authority to examine and take any enforcement action, including conservatorship and liquidation actions.

(c) *Contents of Business Plan.* The written business plan must address the following:

- (1) Analysis of market conditions in the area where the branch is to be established;
- (2) The credit union's plan for addressing foreign currency risk;
- (3) Operating facilities, including office space/equipment and supplies;
- (4) Safeguarding of assets, bond coverage, insurance coverage, and records preservation;
- (5) Written policies regarding the branch (shares, lending, capital, charge-offs, collections);
- (6) The field of membership or portion of the field of membership to be served through the foreign branch and the financial needs of the members to be served and services and products to be provided;

(7) Detailed *pro forma* financial statements for branch operations (balance sheet and income and expense projections) for the first and second year including assumptions;

(8) Internal controls including cash disbursement procedures for shares and loans at the branch;

(9) Accounting procedures used to identify branch activity and performance; and

(10) Foreign income taxation and employment law.

(d) *Revocation of Approval.* A state regulator that revokes approval of the branch office must notify NCUA of the action once it issues the notice of revocation. The regional director may revoke approval of the branch office for failure to follow the business plan in a material respect or for substantive and documented safety and soundness reasons. If the regional director revokes the approval, the credit union will have six months from the date of the revocation letter to terminate the operations of the branch. The credit union can appeal this revocation directly to the NCUA Board within 30 days of the date of the revocation letter.

(e) *Insurance Coverage.* Accounts at foreign branches are insured by the NCUSIF only if denominated in U.S. dollars and only if payable, by the terms of the account agreement, at a U.S. office of the credit union. If the host country requires insurance from its own system, accounts will not be insured by the National Credit Union Share Insurance Fund.

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**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 199**

RIN 0720-AA66

**TRICARE Program; Eligibility and Payment Procedures for Civilian Health and Medical Program of the Uniformed Services Beneficiaries Age 65 and Over**

**AGENCY:** Office of the Secretary, DoD.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements section 712 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. Section 712 extends TRICARE eligibility to beneficiaries age 65 and over who would otherwise have lost their TRICARE eligibility due to attainment of entitlement to hospital