

licensees. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (U.S. 1975) (absent statute or enforceable contract, litigants pay their own attorneys' fees). As section 115 does not contain an explicit provision for attorney's fees, the CRJs are unable to provide for awards of attorney's fees in actions to collect past due royalties.

The CRJs do not have the authority to issue rules setting forth the scope of activities covered by the license. However, the CRJs certainly have the authority to set rates for different types of DPDs. In so doing, they may have to make determinations to identify particular types of DPDs. Such determinations may implicate the question of what activity falls within the scope of the license. In instances where particular rates are being requested for the creation of particular types of DPDs and there is some question whether these DPDs fall within the scope of the license, those questions must be resolved in the proceeding. When such a question has not been determined before, it is a novel question of law which should be referred to the Register under section 802(f)(1)(B). In any event, any such determination by the CRJs will be subject to review for legal error by the Register under section 802(f)(1)(D).

NMPA has proposed that the CRJs determine that the license fee is to be calculated on the date of distribution, not the date of manufacture. The CRJs' authority to set rates and terms does appear to be sufficiently broad to include the authority to determine the date on which the mechanical license fee is to be calculated. However, we caution that the legislative history of section 115 suggests that the applicable rate should be the date the phonorecord is made. When the House Judiciary Committee considered the language that was to become section 115 of the 1976 Copyright Act in 1966 and 1967, it stated that "the committee believes that, unless a negotiated agreement provides otherwise, the liability for royalties should be fixed at the time phonorecords are made under a compulsory license." *Second Supplementary Register's Report on the General Revision of the U.S. Copyright Law* (1975) at 251. Moreover, it would most likely be beyond the power of the CRJs to provide that with respect to phonorecords that have already (*i.e.*, prior to the effective date of the current rate determination) been manufactured, the royalty fee is to be calculated as of the date of distribution rather than the date of manufacture. Such retroactive rulemaking is in most cases beyond the power of an agency. See *Bowen v.*

Georgetown University Hospital, 488 U.S. 204 (1988).

Finally, the CRJs request clarity regarding their authority over terms of late payments. Under section 803(c)(7), the CRJs have a clear authority to include terms with respect to late payments. However, the Register notes that this authority applies solely to payments that are in fact past due.

August 8, 2008

David O. Carson

Acting Register of Copyrights

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NATIONAL CREDIT UNION ADMINISTRATION

Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Interpretive Ruling and Policy Statement 08-1.

SUMMARY: The NCUA is issuing an Interpretive Ruling and Policy Statement (IRPS) regarding prohibitions imposed by Section 205(d) of the Federal Credit Union Act (FCU Act) (12 U.S.C. 1785(d)(1)). Section 205(d) of the FCU Act prohibits a person who has been convicted of any criminal offense involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense, from participating in the affairs of an insured credit union except with the prior written consent of the NCUA Board. This IRPS provides direction and guidance to federally-insured credit unions and those persons who may be affected by Section 205(d) because of a prior criminal conviction or pretrial diversion program participation by describing the actions that are prohibited under the statute and establishing the procedures for applying for NCUA Board consent on a case-by-case basis.

DATES: This IRPS is effective September 18, 2008.

FOR FURTHER INFORMATION CONTACT: Jon Canerday, Trial Attorney, Office of General Counsel, at the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, by e-mail at canerday@ncua.gov or by telephone at (703) 518-6548.

SUPPLEMENTARY INFORMATION:

A. Background

In April 2008, the NCUA Board published a proposed IRPS regarding the prohibition imposed by Section 205(d) of the FCU Act. 73 FR 18576 (April 4, 2008). Section 205(d) of the FCU Act prohibits, without the prior written consent of the NCUA Board, a person convicted of any criminal offense involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party, or otherwise participating, directly or indirectly, in the conduct of the affairs of an insured credit union. The comment period closed on June 3, 2008. NCUA received seven comments on the proposal. After consideration of the comments, NCUA is finalizing the IRPS, which generally adopts the guidance as proposed.

B. Public Comments

NCUA welcomed general comments on the proposed IRPS. In addition, the Board specifically sought comments as to whether the format of this guidance as an IRPS was appropriate or whether a regulation would be more suitable. The Board invited comments as to whether a specific form, similar to the form required by the FDIC in connection with a similar statute, should be used to request consent pursuant to Section 205(d).

NCUA received seven comment letters in response to the proposed IRPS: two from federal credit unions, two from national credit union trade organizations, and three from credit union leagues. The commenters generally supported the need for the guidance as contained in the proposed IRPS and offered several suggestions intended to assist the Board in improving the proposed IRPS.

Two commenters believed that a regulation was the more appropriate format for the guidance. One of the commenters who favored a regulation thought a regulation provided greater protection to a credit union that might be challenged by a prospective employee. Another commenter believed a regulation was preferable because it would help reinforce a credit union's right to appeal an adverse decision and subject future changes to public notice and comment. A third commenter suggested the guidance should take the form of a Letter to Credit Unions, believing that format was more familiar to credit union officials.

The Board appreciates the need to provide protection for credit unions that

seek to comply with the requirements of the IRPS. However, the Board concludes that the source of the requirement stems from federal statute, namely Section 205(d). Thus, the Board believes that the need to comply with federal law, as augmented by guidance in the form of an IRPS, should be sufficient to protect a credit union. The Board believes that credit union officials should be able to adequately understand and apply the guidance styled as an IRPS and that the right to request a hearing contained in the IRPS provide a credit union a sufficient right to appeal a denial of consent by the Board. Additionally, the Board does not amend its IRPS without providing the public notice and an opportunity to comment. For all of these reasons, the Board believes it appropriate to issue the final guidance in the form of an IRPS.

Four commenters believed that a form should be required in order to request consent. As one commenter observed, the use of a form "is necessary to ensure uniformity and consistency throughout the consent process." The commenters favoring a form suggested that the form required by the FDIC was a reasonable template that could be modified to fit the needs of credit unions. The Board concurs with the commenters and therefore the final IRPS contains a requirement that applications for consent under Section 205(d) must be presented on the form attached to this IRPS.

A majority of the commenters sought additional guidance from NCUA as to who comes within the prohibition of Section 205(d). In particular, commenters were concerned as to whether independent contractors of a credit union would come within the ambit of Section 205(d), thus requiring credit unions to make inquiry as to the past criminal history of such contractors.

Several commenters also expressed concern over the use of the term "de facto employee", believing it is confusing and has never been defined by NCUA. Another commenter believed use of the concept exceeded the statute and thus was an improper expansion of the scope of the prohibition imposed by Section 205(d). Still another commenter expressed the view that such expansive definitions could require credit unions "to perform background checks on any party with whom it has commercial dealings. * * *" This commenter also believed that Section 19 of the Federal Deposit Insurance Act was clearer and less subjective than the definition in the proposed IRPS. Further, another commenter believed the definition of independent contractor was

inconsistent with the FCU Act because the definition cited to Section 206(r), which contains the term "violation of any law or regulation."

The Board recognizes that the language of Section 205(d) creates uncertainty as to whom the section applies. The terms "institution-affiliated party", and "otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union" are terms dictated by Congress in the statute.¹ Those are terms that are used and defined in various other sections of the FCU Act, as well as in statutes applied by the other federal financial institution regulatory agencies. As a result, a body of case law has developed that further defines these terms. These definitions are fact dependent, making it difficult to provide easily understood, universal definitions. Neither the OTS nor the FDIC thought it advisable to define similar terms, and the Board is likewise reluctant to attempt to do so.

The Board recognizes that one common concern expressed by commenters was to what extent Section 205(d) applied to independent contractors, and thus required inquiry of such contractors by credit unions. The Board wishes to make clear that not all contractors are subject to the prohibition contained in Section 205(d). The crucial test is the degree or extent to which the contractor participates in the affairs of the credit union. As the proposed IRPS stated, "an independent contractor who influences or controls the management or affairs of an insured credit union, would be covered by Section 205(d)."

The FDIC addressed the issue of affiliated parties and independent contractors in the preamble to its Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act as follows:

Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured institution or its holding company will be covered if they are in a position to influence or control the management or affairs of the insured institution. In those cases in which such individuals exercise policymaking functions for the insured institution, they should be deemed "participants." For example, officers of an electronic data processing (EDP) affiliate would not typically exercise a controlling influence to the extent that the affiliate simply provides a processing service to the bank. On the other hand, if a mortgage banking affiliate sends loans to an insured institution that the institution is obligated to purchase, then the officers of the affiliate may be participants in the insured institution's affairs. Where an employee of an EDP service has access to sensitive bank

¹ These are virtually identical terms to those used in Section 19 of the Federal Deposit Insurance Act.

records and the ability to manipulate data so as to influence or control the management or affairs of an insured institution, that person will be covered by section 19. The degree of such influence may be controlled by reliance upon the safeguards and internal controls put in place by the affiliate and the bank. Insured depository institutions continue to out source increasing numbers of banking tasks. To the extent that independent contractors are utilized, an analysis similar to that for affiliates may be applied. Typically an independent contractor does not have a relationship with the insured institution other than the activity contracted for by the depository institution.

63 FR 66177, at 66178-66179 (December 1, 1998).

The Board agrees with the FDIC's analysis and believes it is applicable to the credit union community as well. Therefore, the Board is of the view that very few of the contractors who perform services for credit unions will be involved to such a degree that they could be said to be influencing or controlling the management or affairs of a credit union. Only when the involvement of affiliates or independent contractors rise to the level of influencing or controlling the management or affairs of a credit union does the credit union need to be concerned about the criminal past of the employees of the affiliate or independent contractor.

One commenter asked whether it would be sufficient to specify in contracts with vendors that no one who had been convicted of any criminal offense involving dishonesty or breach of trust would be allowed to have dealings with the credit union. The FDIC touched on this question in its preamble, stating that it "expects that the relationship between an independent contractor and an insured institution is to be governed by a written contract, through which the insured institution may require typical safeguards such as warranties and bond coverage." Id, at 66179. Though not required by the IRPS, the additional contractual restriction on a contractor to not use employees who would otherwise be prohibited under Section 205(d), as proposed by the commenter, would be a reasonable, additional safeguard.

Several commenters expressed concern about the use of the term de facto employee. This is a common employment law concept that was adopted by the FDIC in its Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act to prevent individuals from circumventing the requirements of the law by simply claiming to be an independent contractor. As the FDIC explained:

The FDIC is aware that an effort can be made to evade the coverage of section 19 by "converting" an employee to an independent contractor. In those cases, generally applicable standards of employment law will be used to identify such arrangements, and to find that the person is a "de facto" employee.

63 FR 66177, at 66179 (December 1, 1998).

Whether an individual is actually an independent contractor or an employee (a de facto employee) has profound implications with respect to tax and other employment matters. In determining whether a person must request consent pursuant to Section 205(d), the Board believes it is appropriate to consider what the employee actually does and their relationship to the credit union rather than simply whether they are called an independent contractor. Therefore, the final IRPS retains the concept that de facto employees, as determined by applying generally applicable standards of employment law, will also be subject to Section 205(d). Because it is not possible to provide more concrete definitions, the Board wants to emphasize that credit unions with any questions regarding whether a particular person comes within the scope of Section 205(d) may solicit guidance from NCUA's Office of General Counsel.

Two commenters expressed a desire for a more comprehensive definition of what offenses qualify as de minimis. One commenter proposed that the Board provide a comprehensive listing of offenses that involve dishonesty or breach of trust. Another commenter noted that almost every criminal offense could be said to involve dishonesty or breach of trust in some form, and asked whether virtually all convictions would be subject to Section 205(d).

The Board understands the desire by credit unions for more certainty regarding when an application under Section 205(d) is required. However, considering the number of potential jurisdictions that have criminal statutes containing offenses involving dishonesty or breach of trust, it is simply not possible to provide an exhaustive list of such offenses. Thus, it remains the responsibility of each credit union to examine the elements of the statute under which an individual was convicted in order to determine whether it constitutes a crime involving dishonesty or breach of trust.

Another commenter urged the Board to not simply provide the statutory cite to those offenses that qualify for the ten year limitation on the Board providing consent (found at Section 205(d)(2)), but rather to list such offenses separately. The Board is not inclined to provide an

exhaustive list. Congress could amend the provision, resulting in the list becoming outdated and inaccurate until the IRPS is appropriately modified. The Board believes the better approach is to cite the reader to the exact statutory provision that contains the most current list of offenses Congress has made subject to the ten year ban.

Five commenters expressed concerns as to whether the proposed IRPS would operate to require credit unions to conduct background checks or other inquiries of existing employees or institution-affiliated parties, if such investigations were not performed at the time those persons became affiliated with the credit union. In that regard, the Board would note that the prohibition of Section 205(d) has existed in some form since 1970. Since that date, credit unions have been required to make a diligent inquiry as to whether prospective employees or institution-affiliated parties came within the prohibition imposed by Section 205(d). Section 205(d)(1)(B) contains a criminal provision that applies to credit unions and therefore, credit unions should determine for their own protection whether they have sufficiently examined the background of those previously allowed to serve as employees or institution-affiliated parties.

Another commenter requested the Board to make clear that credit unions need not conduct background checks of prospective employees, but rather permit reliance on answers given by applicants. As stated in the proposed IRPS, "The NCUA believes that at a minimum, each insured credit union should establish a screening process which provides the insured credit union with information concerning any convictions or pretrial diversion programs pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions and pretrial diversion programs." The Board is cognizant that background checks are costly and time-consuming. Therefore, the Board agrees with the commenter that credit unions are normally justified in relying on a job applicant's answers regarding past criminal history. However, if a credit union has reason to believe that an applicant was not being truthful, further inquiry into the person's past might be necessary under the circumstances.

In order to provide more guidance to credit unions regarding screening of prospective employees, one commenter suggested the Board issue guidance similar to that published by the FDIC on the same topic. We understand the

guidance referenced in the comment letter is FDIC's Financial Institution Letter FIL-46-2005, dated June 1, 2005, and entitled "Pre-Employment Background Screening." The guidance in FIL-46-2005, while perhaps useful, is beyond the scope of this IRPS. However, the agency will consider addressing the subject in another forum in the future.

One commenter asked for guidance as to whether "good faith compliance with a similar state law may satisfy the requirements under" Section 205(d). The statute cited by the commenter was a New York law that prevented denial of employment because of a prior criminal conviction unless certain other factors were met. The Board disagrees that reliance on a state law that conflicts with the prohibition imposed by Section 205(d) satisfies the requirements of the federal statute. The Board believes that in this circumstance, Section 205(d), as a federal statute, pre-empts any state law that conflicts with it.² Consequently, federally insured credit unions must comply with Section 205(d), even if doing so would appear to be in conflict with a state employment law.

Two commenters suggested that the IRPS specify the length of time the Board would take to act on an application submitted for consent under Section 205(d). One commenter suggested the Board should be able to act on an application within fourteen business days; another suggested within five days. The Board appreciates the credit union community's desire for certainty as to how quickly applications under Section 205(d) will be processed. However, each application is fact specific and varies in complexity. For that reason, the Board concludes that it is impracticable to set a time table for action on such applications. Past applications that have been submitted to the Board have generally been adjudicated within 60 days from submission. In most cases, the time was significantly less. The Board is committed to deciding applications for consent in the future as quickly as possible.

² "Federal preemption of state laws stems from the supremacy clause, U.S. Const., art. V, cl. 2, which provides that the laws of the United States shall be the supreme law of the land, notwithstanding any state laws to the contrary. Preemption may be * * * implied by the nature of federal legislation and the subject matter, even absent a declaration of preemptive intent. *Meyers v. Beverly Hills Federal Savings and Loan Ass'n*, 499 F.2d 1145, 1146 (9th Cir. 1974)." Opinion letter from Hattie M. Ulan, Associate General Counsel to Peter J. Liska, dated June 11, 1992, subject, Iowa Credit Card Registration Law.

With respect to the factors the Board will consider when evaluating an application under Section 205(d), one commenter suggested the IRPS include two provisions contained in FDIC's regulatory list of factors. Specifically, one of the suggested additions was a provision that would require the Board to consider whether a person's participation in the affairs of the credit union would constitute a threat to its safety or soundness or the interest of its members, or would threaten to impair public confidence in the credit union. The other suggested addition would address whether the person would be eligible for bond coverage.

The Board believes the first suggested provision is a valuable factor to be considered and accordingly will add the additional criteria to the final IRPS. Regarding the second suggestion, the Board notes that the proposed IRPS contained a similar provision to that suggested ("(6) The applicability of the insured institution's fidelity bond coverage to the person;"). Thus, because of the similarity of the two provisions, the Board will retain the criteria unmodified from the proposed IRPS.

Accordingly, and except as discussed above, the Board adopts IRPS 08-1 as proposed.

C. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires that NCUA prepare an analysis describing any significant economic impact agency rulemaking may have on a substantial number of small credit unions. 5 U.S.C. 601 *et seq.* For purposes of this analysis, NCUA considers credit unions under \$10 million in assets as small credit unions. Since the requirements in this IRPS are generally restatements of requirements in other laws, NCUA does not believe this IRPS will have a significant economic impact on a substantial number of small credit unions.

Paperwork Reduction Act

This IRPS contains an application requirement. As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), NCUA submitted a copy of the proposed IRPS to the Office of Management and Budget (OMB) for its review and approval. OMB approval of the Collection of Information is still pending.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to

fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This IRPS applies to all federally-insured credit unions, but does not have substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this IRPS does not constitute a policy that has federalism implications for purposes of the executive order.

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

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

By the National Credit Union Administration Board, on July 24, 2008.

Paul M. Peterson,

Acting Secretary of the Board.

Authority: 12 U.S.C. 1752a, 1756, 1766, 1785.

Interpretive Ruling and Policy Statement 08-1

Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act

I. Background

This Interpretive Ruling and Policy Statement (IRPS) provides requirements, direction, and guidance to federally-insured credit unions (insured credit unions) and individuals regarding the prohibition imposed by operation of law by Section 205(d) of the Federal Credit Union Act (FCU Act) (12 U.S.C. 1785(d)). Section 205(d)(1) provides that, except with the prior written consent of the National Credit Union Administration (NCUA) Board, a person who has been convicted of any criminal offense involving dishonesty or breach of trust, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense may not:

- Become, or continue as, an institution affiliated party with respect to any insured credit union; or
- Otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union.

Section 205(d)(1)(B) further provides that an insured credit union may not allow any person described above to

engage in any conduct or to continue any relationship prohibited by Section 205(d). The statute imposes a ten-year ban against the NCUA Board granting consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code. In order for the NCUA Board to grant consent during the ten-year period, the NCUA Board must file a motion with, and obtain the approval of, the sentencing court. (Section 205(d)(2)). Finally, Section 205(d)(3) states that "whoever knowingly violates" (d)(1)(A) or (d)(1)(B) is committing a felony, punishable by up to five years in jail and a fine of up to \$1,000,000 a day.

This IRPS provides guidance to credit unions and individuals regarding who is subject to the prohibition provision of Section 205(d). The IRPS defines what offenses come within the prohibition provision of Section 205(d) and thus require an application for the NCUA Board's consent to participate in the affairs of an insured credit union. The IRPS also identifies certain offenses that will be excluded from Section 205(d) and do not require the NCUA Board's consent. In order to assist those who may need the consent of the NCUA Board to participate in the affairs of an insured credit union, the IRPS explains the procedures to request such consent, specifies the application form that must be used, clarifies the duty imposed on credit unions by Section 205(d), and identifies the factors the NCUA Board will consider in deciding whether to provide such consent. Finally, the IRPS explains how an applicant could appeal a decision by the NCUA Board denying an application for its consent.

II. Policies and Procedures Regarding Prohibitions Imposed by Section 205(d)

A. Scope of Section 205(d) of the FCU Act

1. Persons Covered by Section 205(d)

(a) Institution-affiliated parties.

Section 205(d) of the FCU Act applies to institution-affiliated parties, as defined by Section 206(r) of the FCU Act (12 U.S.C. 1786(r)), and others who are participants in the conduct of the affairs of an insured institution.

Institution-affiliated party means:

(1) Any committee member, director, officer, or employee of, or agent for, an insured credit union;

(2) Any consultant, joint venture partner, and any other person as determined by the Board (by regulation or on a case-by case basis) who participates in the conduct of the affairs of an insured credit union; and

(3) Any independent contractor (including any attorney, appraiser, or

accountant) who knowingly or recklessly participates in—

(i) Any violation of any law or regulation;

(ii) Any breach of fiduciary duty; or

(iii) Any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured credit union. (Section 206(r)).

All officials, committee members and employees of an insured credit union fall within the scope of Section 205(d) of the FCU Act. Additionally, anyone NCUA determines to be a de facto employee, applying generally applicable standards of employment law, will also be subject to Section 205(d).

Under Section 206(r), independent contractors are considered institution-affiliated parties if they knowingly or recklessly participate in violations, unsafe or unsound practices or breaches of fiduciary duty which are likely to cause significant loss to, or a significant adverse effect on, an insured credit union. As a general rule, an independent contractor who influences or controls the management or affairs of an insured credit union, would be covered by Section 205(d). In addition, a “person” for purposes of Section 205(d) means an individual, and does not include a corporation, firm or other business entity.

(b) *Participants in the affairs of an insured credit union.*

A person who does not meet the definition of institution-affiliated party is nevertheless prohibited by Section 205(d) if he or she is considered to be participating, directly or indirectly, in the conduct of the affairs of an insured credit union. Whether persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured institution. Those who exercise major policymaking functions of an insured institution would be deemed participants in the affairs of that institution and covered by Section 205(d). Participants in the affairs of a credit union is a term of art and is not capable of more precise definition. As the OTS stated in the preamble to its regulation regarding Section 19 of the FDIA:

Given the changes in banking, including financial modernization and the rapid pace of technology, a regulatory listing of activities that constitute participation is neither practical nor advisable. Accordingly, like FDIC's [Statement of Policy], the interim final rule does not define precisely what activities constitute “participation.” Rather, agency and court decisions will provide the guide as to what standards will be applied. As a

general proposition, however, participation will depend upon the degree of influence or control over the management or affairs of the [insured credit union]. Those who exercise major policymaking functions at [an insured credit union] would fall within this category. 72 FR 25948, at 25949 (May 8, 2007).

NCUA agrees with that view and will not define what constitutes participation in the conduct of the affairs of an insured credit union but rather will analyze each individual's conduct on a case-by-case basis and make a determination.

2. Offenses Covered by Section 205(d)

Except as indicated in paragraph (3), below, an application requesting the consent of the NCUA Board under Section 205(d) is required where any adult, or minor treated as an adult, has received a conviction by a court of competent jurisdiction for any criminal offense involving dishonesty or breach of trust (a covered offense), or where such person has entered a pretrial diversion or similar program regarding a covered offense. The following definitions apply:

(a) *Conviction.* There must be a conviction of record. Section 205(d) does not apply to arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal. A conviction with regard to which an appeal is pending will require an application until or unless reversed. A conviction for which a pardon has been granted will require an application.

(b) *Pretrial Diversion or Similar Program.* A pretrial diversion program, whether formal or informal, is characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternatives. Whether a program constitutes a pretrial diversion is determined by relevant federal, state or local law, and will be considered by the NCUA Board on a case-by-case basis.

(c) *Dishonesty or Breach of Trust.* The conviction or entry into a pretrial diversion program must have been for a criminal offense involving dishonesty or breach of trust.

“Dishonesty” means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may

include crimes which federal, state or local laws define as dishonest.

“Breach of trust” means a wrongful act, use, misappropriation or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the crime itself. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances shall require an application for the NCUA Board's consent under Section 205(d).

3. Offenses Not Covered by Section 205(d)

(a) *De minimis Offenses.* Approval is automatically granted and an application for the NCUA Board's consent under Section 205(d) will not be required where the covered offense is considered de minimis, because it meets all of the following criteria:

- (1) There is only one conviction or entry into a pretrial diversion program of record for a covered offense;
- (2) The offense was punishable by imprisonment for a term of less than one year and/or a fine of less than \$1,000, and the punishment imposed by the court did not include incarceration;
- (3) The conviction or pretrial diversion program was entered at least five years prior to the date an application would otherwise be required;
- (4) The offense did not involve an insured depository institution or insured credit union; and
- (5) The NCUA Board or any other federal financial institution regulatory agency has not previously denied consent under Section 205(d) of the FCU Act or Section 19 of the FDIA, respectively, for the same conviction or participation in a pretrial diversion program.

Any person who meets the foregoing criteria must be covered by a fidelity bond to the same extent as other employees in similar positions. An insured credit union may not allow any person to participate in its affairs, even if that person has a conviction for what would constitute a de minimis covered offense, if the person cannot obtain required fidelity bond coverage.

Any person who meets the foregoing criteria for a de minimis offense shall disclose the presence of the conviction or pretrial diversion program to all insured credit unions or other insured

institutions in the affairs of which he or she intends to participate.

(b) *Youthful offender adjudgments.* An adjudgment by a court against a person as a "youthful offender" under any youth offender law, or any adjudgment as a "juvenile delinquent" by any court having jurisdiction over minors as defined by state law does not require an application for the NCUA Board's consent under Section 205(d). Such adjudgments will not be considered convictions for criminal offenses.

(c) *Expunged convictions.* A conviction which has been completely expunged is not considered a conviction of record and will not require an application for the NCUA Board's consent under Section 205(d).

B. Duty Imposed on Credit Unions

Section 205(d) imposes a duty upon every insured credit union to make a reasonable inquiry regarding the history of every applicant for employment. NCUA believes that inquiry should consist of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or participation in a pretrial diversion program for a covered offense. The NCUA believes that at a minimum, each insured credit union should establish a screening process which provides the insured credit union with information concerning any convictions or pretrial diversion programs pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions and pretrial diversion programs. When the credit union learns that a prospective employee has a prior conviction or entered into a pretrial diversion program for a covered offense, the credit union must submit an application requesting the NCUA Board's consent under Section 205(d) prior to hiring the person or otherwise permitting him or her to participate in its affairs.

If an insured credit union discovers that an employee, official, or anyone else who is an institution-affiliated party or who participates, directly or indirectly, in its affairs, is in violation of Section 205(d), the credit union must immediately place that person on a temporary leave of absence from the credit union and file an application seeking the NCUA Board's consent under Section 205(d). The person must remain on such temporary leave of absence until such time as the NCUA Board has acted on the application. When NCUA learns that an institution-

affiliated party or a person participating in the affairs of an insured credit union should have received the NCUA Board's consent under Section 205(d) but did not, NCUA will look at the circumstances of each situation to determine whether the inquiry made by the credit union was reasonable under the circumstances.

C. Procedures for Requesting the NCUA Board's Consent Under Section 205(d)

Section 205(d) of the FCU Act serves, by operation of law, as a statutory bar to participation in the affairs of an insured credit union, absent the written consent of the NCUA Board. When an application for the NCUA Board's consent under Section 205(d) is required, the insured credit union must file a written application using the attached form with the appropriate NCUA Regional Director. The purpose of an application is to provide the applicant an opportunity to demonstrate that, notwithstanding the bar, the person is fit to participate in the conduct of the affairs of an insured credit union without posing a risk to its safety and soundness or impairing public confidence in that institution. Such an application should thoroughly explain the circumstances surrounding the conviction or pretrial diversion program. The applicant may also address the relevant factors and criteria the NCUA Board will consider in determining whether to grant consent, specified below. The burden is upon the applicant to establish that the application warrants approval.

The application must be filed by an insured credit union on behalf of a person unless the NCUA Board grants a waiver of that requirement and allows the person to file an application in their own right. Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown.

D. Evaluation of Section 205(d) Applications

The essential criteria used by the NCUA Board in assessing an application for consent under Section 205(d) are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an insured credit union, and whether the employment, affiliation, or participation by the person in the conduct of the affairs of the insured credit union may constitute a threat to the safety and soundness of the institution or the interests of its members or threaten to impair public confidence in the insured credit union.

In evaluating an application, the NCUA Board will consider:

1. The conviction or pretrial diversion program and the specific nature and circumstances of the covered offense;

2. Evidence of rehabilitation, including the person's reputation since the conviction or pretrial diversion program, the person's age at the time of conviction or pretrial diversion program, and the time which has elapsed since the conviction or pretrial diversion program;

3. Whether participation, directly or indirectly, by the person in any manner in the conduct of the affairs of the insured credit union constitutes a threat to the safety or soundness of the insured credit union or the interest of its members, or threatens to impair public confidence in the insured credit union;

4. The position to be held or the level of participation by the person at the insured credit union;

5. The amount of influence and control the person will be able to exercise over the management or affairs of the insured credit union;

6. The ability of management of the insured credit union to supervise and control the person's activities;

7. The applicability of the insured institution's fidelity bond coverage to the person;

8. For state chartered, federally insured credit unions, the opinion or position of the state regulator; and

9. Any additional factors in the specific case that appear relevant.

The foregoing criteria will also be applied by the NCUA Board to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban for certain enumerated offenses in violation of Title 18 of the United States Code prior to its expiration date. NCUA believes such requests will be extremely rare and will be made only upon a showing of compelling reasons.

Some applications can be approved without an extensive review because the person will not be in a position to present any substantial risk to the safety and soundness of the insured credit union. Persons who will occupy clerical, maintenance, service or purely administrative positions, generally fall into this category. A more detailed analysis will be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured credit union. Approval by the NCUA Board will be subject to the condition that the person shall be covered by a fidelity bond to

the same extent as others in similar positions.

In cases in which the NCUA Board has granted a waiver to allow a person to file an application in their own right, approval of the application will be conditioned upon that person disclosing the presence of the conviction to all insured credit unions or other insured financial institutions in the affairs of which he or she wishes to participate. When deemed appropriate, approval may also be subject to the condition that the prior consent of the NCUA Board will be required for any proposed significant changes in the person's duties and/or responsibilities. Such proposed changes may, in the discretion of the appropriate Regional Director, require a new application for the NCUA Board's consent. When approval has

been granted for a person to participate in the affairs of a particular insured credit union and subsequently that person seeks to participate in the affairs of another insured credit union, approval does not automatically follow. In such cases, another application must be submitted. Moreover, any person who has received consent from the NCUA Board under Section 205(d) and subsequently wishes to become an institution affiliated party or participate in the affairs of an FDIC-insured institution, he or she must obtain the prior approval of the FDIC pursuant to Section 19 of the FDIA.

E. Right To Request a Hearing Following the Denial of an Application Under Section 205(d)

If the NCUA Board withholds consent under Section 205(d), the insured credit

union (or in the case where a waiver has been granted, the individual that submitted the application) may request a hearing by submitting a written request within 30 days following the date of the NCUA Board's action. The NCUA Board will apply the process contained in regulations governing prohibitions based on felony convictions, found at part 747, subpart D of Title 12, Code of Federal Regulations, to any request for a hearing. The insured credit union (or in the case where a waiver has been granted, the individual that submitted the application) may also waive a hearing and request that the NCUA Board determine the matter on the basis of written submissions.

BILLING CODE 7535-01-P

OMB No.:
Expiration Date:

NATIONAL CREDIT UNION ADMINISTRATION

APPLICATION TO REQUEST CONSENT PURSUANT TO SECTION 205(d)

Public reporting burden for this collection of information is estimated to average 2 hours for biographical information. This estimate includes time to gather and maintain data in the required form, to review instructions, and to complete the information collection. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314 and to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503. An organization or a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Section 205(d)(1) of the Federal Credit Union Act (12 U.S.C. § 1785(d)(1)), provides that, except with the prior written consent of the National Credit Union Administration (NCUA) Board, a person who has been convicted of any criminal offense involving dishonesty or breach of trust, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense may not:

- become, or continue as, an institution affiliated party with respect to any insured credit union; or
- otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union.

Section 205(d)(1)(B) further provides that an insured credit union may not allow any person described above to engage in any conduct or to continue any relationship prohibited by Section 205(d). Section 205(d)(3) states that "whoever knowingly violates" (d)(1)(A) or (d)(1)(B) is committing a felony, punishable by up to five years in jail and a fine of up to \$1,000,000 a day. The statute also prescribes a minimum ten-year prohibition period for certain offenses.

The NCUA Board issued Interpretive Ruling and Policy Statement 08-1 (IRPS 08-1), entitled *Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act*, to assist the credit union community in requesting the NCUA Board's consent pursuant to Section 205(d). IRPS 08-1 is available on NCUA's website at <http://www.ncua.gov/RegulationsOpinionsLaws/IRPS/IRPS.html>, by contacting NCUA's Publications Department at 703-518-6340 or from any NCUA Regional Office.

All requests for the NCUA Board's consent pursuant to Section 205(d) should be submitted using the attached form. Please consult IRPS 08-1 prior to completing the attached application, as not all criminal convictions require an application to be submitted. IRPS 08-1 also lists the factors the NCUA Board will consider when evaluating any application for consent.

Any questions regarding the process to request the NCUA Board's consent pursuant to Section 205(d), including whether an application is required, may be directed to NCUA's Office of General Counsel at 703-518-6540 or by email at ogcmail@ncua.gov.

Completed applications should be sent to the appropriate NCUA Regional Office.

NATIONAL CREDIT UNION ADMINISTRATION**APPLICATION PURSUANT TO SECTION 205(d) OF THE FEDERAL CREDIT UNION ACT****SECTION A – APPLICANT CREDIT UNION INFORMATION**

1. Name of Credit Union:

2. Date of Application:

3. Address of Credit Union: (Street, City, County, State and Zip Code)

We have, in connection with preparing this Application, read Sections 205(d)(1) & (3) of the Federal Credit Union Act (12 U.S.C. §§ 1785(d)(1) & (3)) which governs requests by insured credit unions for the consent of the National Credit Union Administration Board for a person who has been convicted of a crime involving dishonesty or breach of trust, or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, to become or continue as an institution-affiliated party, or otherwise participate, directly or indirectly, in the conduct of the affairs of an insured credit union,

In support of this Application, the following statements, representations and information are submitted for the purpose of inducing the National Credit Union Administration Board to grant its written consent to the person identified below (hereinafter, the prohibited person), who has been convicted of a crime involving dishonesty or breach of trust or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, to become or continue as an institution-affiliated party, or otherwise participate, directly or indirectly, in the conduct of the affairs of this credit union.

SECTION B - BIOGRAPHICAL INFORMATION CONCERNING THE PROHIBITED PERSON

1 Name:

2. Address: (Street, City, County, State and Zip Code)

3. Date of Birth: (Month, day, year)

4. Place of Birth: (City and State)

5. Social Security Number (see Privacy Act Notice on page 4).

6. Name and Address of Present or Most Recent Employer: (Street, City, County, State and Zip Code)

SECTION C - INFORMATION RELATIVE TO THE PROHIBITED PERSON'S CONVICTIONS

1. Description or nature of crime:

a. Date of conviction :

b. Name and address of court:

c. Disposition of the charges:

NOTE: Additional conviction(s) for a crime involving dishonesty or breach of trust discovered subsequent to approval of this Application will require the submission of another application.

2. Briefly describe the nature of the offense and the circumstances surrounding it. Include age of the prohibited person at the time of conviction, date of the offense, and any mitigating circumstances (parole, suspension of sentence, pardon, etc.) Attach additional pages if necessary.

3. Briefly describe the extent of rehabilitation the prohibited person completed (attach supporting documents, if any.)

4. Attach documentation of the Indictment, Information, or Complaint and Final Decree of Judgment, if available. (Normally these can be obtained from the clerk of the court. If not provided, explain reasons for unavailability).

5. List any other pertinent facts relative to the crime which are not disclosed in the indictment or other court documents. Attach additional pages if necessary.

I do hereby certify that the Biographical Information Concerning the Prohibited Person (Section B) and Information Relative to the Prohibited Person's Convictions (Section C) are true and correct to the best of my knowledge and belief.

SIGNATURE OF THE PROHIBITED PERSON

DATE SIGNED

PRIVACY ACT NOTICE

The Privacy Act of 1974 (Public Law 93-579) requires that you be advised as to the legal authority, purpose and uses of the information solicited by this form. Pursuant to Section 205(d) of the Federal Credit Union Act (12 U.S.C. § 1785(d)), the information in this form is requested for the purpose of evaluating an application for the consent of the NCUA Board to allow a prohibited person to participate in the affairs of an insured credit union. NCUA may conduct a more involved background check as part of the approval process. This form may be disclosed to any of the following sources: any appropriate Federal or State credit union regulatory agencies and law enforcement or other governmental agencies for identity verification purposes; a congressional office in response to your inquiry to that office; an appropriate federal, state, or local authority in the investigation or enforcement of a statute or regulation, or employees of a federal agency for audit purposes. In addition, in the event of litigation, the application may be presented to the appropriate court as evidence and to counsel in the course of discovery. Failure to complete this form or omission of any item of information, except for disclosure of your social security number, may result in a delay in the processing of this application. In accordance with Section 792.68 of NCUA's regulations, you are not required to furnish your social security number on this form. Your social security number, if voluntarily provided, will be used to more easily verify the information required by this form. No penalty will result to you or to the credit union if you do not provide your social security number. Falsification of any of the information may serve as a basis for removal of the prohibited person if employed by the credit union and as grounds for criminal charges.

SECTION D - POSITION TO BE OCCUPIED BY THE PROHIBITED PERSON

1. Title or Position:

2. Describe the duties and responsibilities of the prohibited person. Include extent of supervision exercised over others and/or by others. Attach additional pages if necessary.

NOTE. Should this request be approved, any significant change in the duties and/or responsibilities of the prohibited person which occurs subsequent to approval by the NCUA Board must be reported in writing to the Regional Director of the NCUA Regional Office in which the credit union is located.

SECTION E - NOTIFICATION OF FIDELITY INSURER

The credit union's fidelity insurer is to be notified of all pertinent information regarding the conviction of the prohibited person. Assurances from the insurer must be obtained, in writing, stating that the prohibited person will be covered by the credit union's fidelity bond. This application and the information requested herein may be submitted prior to notification of the bonding company. However, the NCUA Board's consent will be subject to a condition that written assurance of fidelity coverage to the same extent as others in similar positions be obtained by the Credit Union.

SECTION F - ADDITIONAL INFORMATION IN SUPPORT OF THIS REQUEST

List any other appropriate information that may be relevant to the NCUA Board's evaluation of this Application. Attach additional pages if necessary.

I do hereby certify that the board of directors of the credit union adopted a resolution which delegated the undersigned the authority to make applications pursuant to Section 205(d) of the Federal Credit Union Act or have adopted a resolution authorizing this application pursuant to Section 205(d) of the Federal Credit Union Act.

SIGNATURE OF CREDIT UNION OFFICIAL

TITLE

DATE SIGNED

This is an official document of the National Credit Union Administration. Providing false information may be grounds for prosecution under the provisions of Title 18, Sections 1001 to 1007, of the United States Code and may be punishable by fine or imprisonment.

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, August 21, 2008 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552(b)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, August 21, 2008 will be:

Formal orders of investigation; institution and settlement of injunctive actions; institution and settlement of administrative proceedings of an enforcement nature; and adjudicatory matters.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551-5400.

Dated: August 14, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8-19214 Filed 8-18-08; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58345; File No. SR-DTC-2007-16]

Self-Regulatory Organizations; The Depository Trust Company; Order Granting Approval of a Proposed Rule Change Relating to the Admission of Foreign Entities as Direct Depository Participants

August 12, 2008.

I. Introduction

On November 16, 2007, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") and on February 5, 2008, amended proposed rule change SR-DTC-2007-13 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").¹ Notice of the proposal was published in the **Federal Register** on March 7, 2008.² No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change as modified by Amendment No. 1.

II. Description

The proposed rule change amends DTC's policy statement regarding the admission of participants to permit entities that are organized in a foreign country and are not subject to U.S. federal or state regulation ("foreign entities") to become eligible to become direct DTC participants ("Foreign Entity Policy Statement").³

In 1990, DTC adopted a Policy Statement on the Admission of Participants ("1990 Policy Statement") to make clear that in determining whether to grant access to its services, DTC regards as a critical factor that an applicant is subject to comprehensive U.S. federal or state regulation relating to, among other things, capital adequacy, financial reporting and recordkeeping, operating performance, and business conduct.⁴ Generally under the 1990 Policy Statement, unless an applicant is subject to U.S. federal or state regulatory agency oversight, the

applicant would not be eligible to become a DTC participant.⁵ Since 1990, DTC has admitted a small number of foreign entities where their obligations to DTC have been guaranteed by creditworthy DTC participants.

The purpose of the proposed Foreign Entity Policy Statement is to establish admissions criteria that will permit well-qualified foreign entities to become participants of DTC and to obtain direct access to DTC's services while assuring that the unique risks associated with the admission of foreign entities are adequately addressed.⁶

The admission of foreign entities as participants raises a number of unique risks and issues, including that (1) the entity is not subject to U.S. federal or state regulation, (2) that the operation of the laws of the entity's home country and time zone differences⁷ may impede the successful exercise of DTC's rights and remedies particularly in the event of the entity's failure to settle, and (3) financial information about the foreign entity made available to DTC for monitoring purposes may be less adequate than the financial information about U.S.-based entities.

The Foreign Entity Policy Statement requires that in addition to executing the standard DTC Participation Agreement the foreign entity enter into a series of undertakings and agreements that are designed to address jurisdictional concerns and to assure that DTC is provided with audited financial information that is acceptable to DTC.⁸ The proposed policy statement would also require that the foreign entity (1) be subject to regulation in its home country and (2) be in good

⁵ DTC recognized, however, that any person designated by the Commission pursuant to Section 17A(b)(3)(B)(vi) of the Act, even if not subject to such regulatory oversight, would be eligible for admission. The 1990 Policy Statement was approved by the Commission on January 8, 1991.

⁶ DTC's proposed "Policy Statement on the Admission of Non-U.S. Entities as Direct Depository Participants" is attached as Exhibit 5 to its filing, which can be found at http://www.dtcc.com/downloads/legal/rule_filings/2007/dtc/2007-16.pdf.

⁷ Time zone differences may complicate communications between a foreign participant and its U.S. Settling Bank with respect to the timely payment of the participant's net debit to DTC including intraday demands for payment. These differences may also delay DTC's receipt of information available in the foreign participant's home country to others including its other creditors about the foreign participant's financial condition on the basis of which DTC would have taken steps to protect the interests of DTC and its participants.

⁸ In the Foreign Entity Policy Statement, DTC has reserved the right to waive certain of these criteria where such criteria are inappropriate to a particular applicant or class of applicants (e.g., a foreign government or international or national central securities depositories).

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 57392 (February 27, 2008), 73 FR 12485.

³ The National Securities Clearing Corporation ("NSCC") filed and the Commission has approved a similar proposed rule change that would permit NSCC to adopt a similar policy statement with respect to the admission of foreign entities as members. Securities Exchange Act Release No. 58344 (August 12, 2008) (File No. SR-NSCC-2007-15).

⁴ Securities Exchange Act Release No. 28754 (January 8, 1991), 56 FR 1548 (January 15, 1991) (File No. SR-DTC-90-01).