

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 585

[Docket No. OTS–2010–0036]

RIN 1550–AC14

Prohibited Service at Savings and Loan Holding Companies; Reinstatement of Expiration Date of Temporary Exemption

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Final rule.

SUMMARY: OTS is revising its rules implementing section 19(e) of the Federal Deposit Insurance Act (FDIA), which prohibits any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering (or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense) from holding certain positions with respect to a savings and loan holding company (SLHC). Specifically, OTS is reinstating and extending the expiration date of a temporary exemption granted to persons who held positions with respect to a SLHC as of the date of the enactment of section 19(e). The reinstated and revised expiration date for the temporary exemption is December 31, 2012.

DATES: *Effective Date:* The final rule is effective on December 28, 2010.

FOR FURTHER INFORMATION CONTACT: Donna Deale, Director, Holding Companies and International Activities, Examinations, Supervision and Consumer Protection, (202) 906–7488, Marvin Shaw, Senior Attorney, Regulations and Legislation Division, (202) 906–6639, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: On May 8, 2007, OTS published an interim final rule adding 12 CFR part 585. This new part implemented section 19(e) of the FDIA, which prohibits any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering (or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense) from holding certain positions with a SLHC. Section 19(e) also authorizes the Director of OTS to provide exemptions from the prohibitions, by regulation or order, if the exemption is consistent with the purposes of the statute.

The interim final rule described the actions that are prohibited under the statute and prescribed procedures for applying for an OTS order granting a case-by-case exemption from the prohibition. The rule also provided regulatory exemptions to the prohibitions, including a temporary exemption for persons who held positions with respect to a SLHC on October 13, 2006, the date of enactment of section 19(e). This temporary exemption expired on September 30, 2010, unless a case-by-case exemption was filed prior to that expiration date.¹

OTS has decided to reinstate the temporary regulatory exemption, with a new expiration date of December 31, 2012. OTS notes that the reinstated regulatory exemption applies from October 13, 2006 until December 31, 2012 and includes the period after October 1, 2010 until today. Given that this reinstatement of the temporary exemption will reduce needless disruptions of SLHC operations, OTS has concluded that reinstating the exemption is consistent with the purposes of section 19(e) of the FDIA.

Regulatory Findings

Notice and Comment and Effective Date

For the reasons set out in the interim final rule,² OTS has concluded that: notice and comment on this extension are unnecessary and contrary to the public interest under section 552(b)(B) of the Administrative Procedure Act (APA); there is good cause for making the extension effective immediately under section 553(d) of the APA; and the delayed effective date requirements of section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRIA) do not apply.

Regulatory Flexibility Act

For the reasons stated in the interim final rule,³ OTS has concluded that this rule does not require an initial regulatory flexibility analysis under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), and that this rule should not have a significant impact on a substantial number of small entities, as defined in the RFA.

Paperwork Reduction Act

OTS has determined that this rule does not involve a change to collections of information previously approved

¹ This temporary exemption originally was initially scheduled to expire on September 5, 2007. OTS has extended the expiration date several times, most recently to September 30, 2010 (74 FR 14457).

² 72 FR at 25953.

³ 72 FR at 25953–54.

under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*)

Unfunded Mandates Act of 1995

For the reasons stated in the interim final rule,⁴ OTS has determined that this rule will not result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year.

Executive Order 12866

OTS has determined that this rule is not a significant regulatory action under Executive Order 12866.

Plain Language

Section 722 of the Gramm-Leach-Bliley Act (12 U.S.C. 4809) requires the Agencies to use “plain language” in all final rules published after January 1, 2000. OTS believes that the final rule is presented in a clear and straightforward manner.

List of Subjects in 12 CFR Part 585

Administrative practice and procedure, Holding companies, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

■ For the reasons in the preamble, OTS is amending part 585 of chapter V of title 12 of the Code of Federal Regulations as set forth below:

PART 585—PROHIBITED SERVICE AT SAVINGS AND LOAN HOLDING COMPANIES

■ 1. The authority citation for 12 CFR part 585 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, and 1829(e).

■ 2. Amend § 585.100(b)(2) introductory text to read as follows:

§ 585.100 Who is exempt from the prohibition under this part?

* * * * *

(b) *Temporary exemption.* * * *

(2) This exemption expires on December 31, 2012, unless the savings and loan holding company or the person files an application seeking a case-by-case exemption for the person under § 585.110 by that date. If the savings and loan holding company or the person files such an application, the temporary exemption expires on:

* * * * *

Dated: December 21, 2010.

⁴ 72 FR at 25954.

By the Office of Thrift Supervision.

John E. Bowman,
Acting Director.

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 708a, and 708b

RIN 3133-AD40

Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions

AGENCY: National Credit Union
Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is issuing final amendments to its regulations covering several related subjects. The final rule documents and clarifies the fiduciary duties and responsibilities of Federal credit union (FCU) directors. The final rule amends NCUA's indemnification regulation limiting indemnification of FCU officials and employees for liability arising from improper decisions that affect the fundamental rights of credit union members, and makes conforming changes to the standard FCU and corporate credit union bylaws. In addition, the final rule adds new provisions establishing the procedures for insured credit unions merging into banks. The final rule also amends some of NCUA's existing regulatory procedures applicable to insured credit union mergers with other credit unions, conversions to mutual savings banks (MSBs), and termination of share insurance.

DATES: This rule is effective January 27, 2011.

FOR FURTHER INFORMATION CONTACT: Paul Peterson, Associate General Counsel; Elizabeth Wirick, Staff Attorney; or Jacqueline Lussier, Staff Attorney; Office of General Counsel, at the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428 or telephone (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

On March 18, 2010, the NCUA Board issued a Notice of Proposed Rulemaking (NPR or Proposal) to amend parts 701, 708a, and 708b of NCUA's rules. 75 FR 15574 (March 29, 2010).

The Proposal would have:

- Added a new § 701.4 clarifying the authorities and duties of FCU directors

in managing the affairs of their credit unions and revising § 701.33 limiting indemnification of FCU officials and employees for liability arising from improper decisions that affect the fundamental rights of credit union members.

- Revised the existing provisions of Part 708a on insured credit union to MSB conversions.
- Added a new subpart C to Part 708a setting forth procedural and substantive requirements for converting an insured credit union to a bank by merger.
- Revised the existing provisions of Part 708b on insured credit union mergers with other credit unions and the termination of Federal share insurance.

The public comment period for the NPR closed on May 28, 2010. NCUA received comments from 40 commenters including ten Federal and State credit unions, 16 credit union trade organizations (which included 13 State credit union leagues), one State credit union regulators' association, six law firms, two credit union consultants, an individual credit union member, an election teller, a private deposit insurer, an association representing the interests of converting credit union members, and one bank trade association. The most significant comments on each part of the Proposal are discussed in the following section-by-section analysis of the revisions in this final rule.

II. Section-by-Section Analysis

A. Duties of Federal Credit Union Boards of Directors (§ 701.4)

The Proposal included a new § 701.4, titled "General authorities and duties of Federal credit union boards of directors."

Sec. 701.4(a) Management of a Federal Credit Union

Proposed paragraph (a) provided that the management of each Federal credit union is vested in its board of directors, and that while a Federal credit union board of directors may delegate the execution of operational functions to Federal credit union personnel, the ultimate responsibility of each Federal credit union's board of directors for that Federal credit union's management is non-delegable. The language of the proposal mirrors the duties of the Federal Home Loan Bank directors, as expressed in a rule promulgated by the Federal Housing Finance Agency (FHFA). 12 CFR 917.2(b)(1).

Some commenters stated that NCUA should clarify that while an FCU's board of directors has the ultimate responsibility for the management of the

credit union, this responsibility does not include day-to-day management. One commenter said that NCUA should withdraw the language in the second sentence of proposed paragraph (a) making the board's ultimate responsibility for the credit union's management non-delegable. This commenter stated the FCU Act vests the management of each FCU in the board of directors, but it does not prohibit the board from delegating the management of the credit union. The commenter further stated that since an FCU's board is composed primarily of unpaid volunteers the board of directors should be allowed to delegate the management to compensated executives. The commenter recommended NCUA substitute language that the board of directors provides the general direction for the credit union, which would better reflect the policy-making role of the board.

The NCUA Board agrees that paragraph (a) should more closely track the language of section 113 of the FCU Act, which employs the language "general direction and control." Accordingly, the final rule substitutes "general direction and control" for "management." This amendment clarifies that the directors do not actually manage the credit union. The board of directors, however, may not and cannot delegate its ultimate statutory responsibility for the proper management of the credit union.

Sec. 701.4(b) Duties of Federal Credit Union Directors

Proposed paragraph (b) set forth the fiduciary duties of FCU directors. It charged each director to:

- Carry out his or her duties as a director in good faith, in a manner reasonably believed to be in the best interests of the membership of the FCU, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances (paragraph (b)(1));
- Administer the affairs of the FCU fairly and impartially and without discrimination in favor of or against any particular member (paragraph (b)(2));
- Understand the FCU's balance sheet and income statement and ask, as appropriate, substantive questions of management and the internal and external auditors (paragraph (b)(3)); and
- Direct the operations of the FCU in conformity with the requirements set forth in the Federal Credit Union Act, the NCUA's regulations, other applicable law, and sound business practices (paragraph (b)(4)).