

Dated: February 4, 2011.

**Lluana McCann,**

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## **NATIONAL CREDIT UNION ADMINISTRATION**

### **12 CFR Part 704**

**RIN 3133-AD80**

#### **Corporate Credit Unions**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final Interpretive Ruling and Policy Statement 11-02.

**SUMMARY:** The NCUA Board is issuing a final Interpretive Ruling and Policy Statement (IRPS) setting forth the requirements and process for chartering corporate Federal credit unions.

**DATES:** This IRPS is effective March 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Lisa Henderson, Staff Attorney, Office of General Counsel, at the address above or telephone: (703) 518-6540; or Dave Shetler, Deputy Director, Office of Corporate Credit Unions, at the address above or telephone: (703) 518-6640.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

NCUA recently finalized changes to its Corporate Credit Union Rule, 12 CFR part 704. 75 FR 64786 (October 20, 2010). These changes, as well as NCUA's other efforts to resolve the problems created by the legacy assets remaining in the corporate credit union (corporate) system, are likely to result in a fundamental restructuring of that system. As part of this restructuring, NCUA believes that some groups of natural person credit unions (NPCUs) may wish to form new corporates. Previous corporate chartering guidance had been withdrawn; accordingly, on September 24, 2010, the NCUA Board issued a proposed IRPS setting forth the requirements and process for chartering corporate Federal credit unions (FCUs). 75 FR 60651 (October 1, 2010).

The proposed IRPS set forth requirements for prospective new corporate FCUs and NCUA's standards for evaluating applications. It also included detailed timelines for processing charter applications.

The public comment period for the proposed IRPS closed on November 1, 2010. NCUA received six comment

letters on the proposed IRPS. The commenters generally supported the IRPS but asked for clarification regarding certain provisions and/or suggested minor changes.

#### **B. Comments**

##### *General Comments*

One commenter observed that the Board has suggested the possibility of permitting special purpose corporates and asked whether the IRPS would apply to an entity organized as a special purpose corporate. The Board notes that any entity chartered as a "corporate credit union" would be subject to the IRPS.

##### *Specific Comments*

##### Section II—Subscribers

This section of the proposed IRPS provided that seven or more natural person representatives of natural person credit unions (NPCUs)—"the subscribers"—may charter a corporate FCU.

Two commenters stated that it was not clear whether each natural person subscriber must represent a different NPCU. They recommended a clarification requiring at least seven subscribers from at least seven different NPCUs but that there be some latitude, on a case-by-case basis, for the subscribers to represent fewer NPCUs. The Board believes it is important that, without exception, each natural person subscriber represent a different NPCU, and has clarified the final IRPS accordingly. This requirement furthers the goal of developing broad membership support for any potential new charter and is consistent with the requirement in § 704.14(a)(4) of the NCUA Regulations that no individual may serve on the board if any corporate member would have more than one representative on the board. 12 CFR 704.14(a)(4).

##### Section III—Economic Advisability; Subsection B—Proposed Management's Character and Fitness

This subsection of the proposal provided that NCUA would conduct background and credit investigations on prospective officials and employees to establish each applicant's character and ability to effectively handle financial matters. The proposal listed some factors that could lead to disapproval of a prospective official or employee, including criminal convictions, indictments, acts of fraud and dishonesty, serious or unresolved past due credit obligations, and bankruptcies. This subsection also noted that NCUA needs assurance that

the management team would have the requisite skills—including leadership—to make the proposed corporate a success.

One commenter suggested that instead of providing factors NCUA may consider, the IRPS should state that these factors are the only ones NCUA will consider. The commenter further stated that an indictment alone should not be a factor, as an individual might not be convicted. The Board declines to change the list of factors or to make them exclusive. To help ensure that corporate officials and employees have the highest integrity, NCUA needs to have the flexibility to consider any and all matters that may bear on an applicant's character, including indictments and other factors that might not be listed. No one factor is necessarily dispositive, however, and depending on the circumstances, the fact that an applicant has been indicted might not lead to his or her disapproval.

One commenter stated that "leadership" should not be included as a factor, as the IRPS does not provide the criteria NCUA would use to assess leadership quality. The commenter pointed to § 701.14 of the NCUA Regulations, governing change in officials of newly-chartered or troubled condition credit unions. Paragraph (e) of that section allows NCUA to disapprove an individual's service based on his or her "competence, experience, character, or integrity." The commenter suggested that these criteria should be the focus of NCUA's evaluation of prospective corporate officials. The Board disagrees. As noted above, the IRPS already provides for NCUA consideration of a prospective official or employee's character and ability to handle financial matters. Leadership is an additional quality that includes the demonstrated ability to establish an organizational vision, prioritize activities, and lead the organization to successfully accomplish its goals.

##### Section III, Subsection C—Member Support

This subsection required that subscribers demonstrate a sufficient customer base for the proposed corporate in the form of membership applications, capital and share commitments, and commitments to use the corporate's services. Specifically, it stated that the capital plan must show how the corporate would keep its total capital at 4 percent or more of its moving daily average net assets (MDANA) at all times beginning when NCUA issues the charter.

Several commenters questioned how this could be calculated on the day the

charter is issued, given that MDANA is defined as “the average of daily average net assets for the month being measured and the previous 11 months.” The Board agrees, and has clarified the IRPS to say that MDANA at the time of charter will be calculated as the corporate’s net assets on the date of charter, and MDANA for successive months consists of the average of DANA for the month being measured and the previous months back to the date of charter.

Two commenters felt that a newly-chartered corporate should be given more time to reach 4 percent. The Board disagrees. It is imperative that a corporate be adequately capitalized from the date of charter. A corporate with inadequate capital presents a risk both to its members and to the corporate system as a whole.

#### Section III, Subsection C—Present and Future Market Conditions—Business Plan

This subsection requires subscribers to submit a business plan based on realistic and supportable projections and assumptions that address a number of specific elements.

One commenter stated that some elements of the required business plan were too specific and duplicative of other information. The commenter also expressed concern about NCUA keeping a charter application’s business plan information confidential. The Board disagrees with these comments, believing that all of the information requested in the application is necessary and that NCUA has systems in place to keep application information confidential.

Another commenter expressed concern that NCUA would not be sufficiently vigorous in its review of any proposed new corporate FCU’s business plan to ensure that the plan is founded upon realistic and supportable projections and assumptions. The Board has directed staff to closely scrutinize any new charter application to determine that a proposed corporate is economically viable.

#### Section VI—NCUA Review

This section of the proposal set out the process and timeline NCUA would follow in evaluating a charter application. Generally, NCUA’s Office of Corporate Credit Unions (OCCU) field and central office staff would review an application and give it to the Board for the final decision. Two commenters argued that under the proposed timeline, it could take up to six months for the review and decision and that this was too long. While the Board believes it is important for NCUA to take time to

fully evaluate all aspects of an application, it understands that there may be a situation in which corporate restructuring requires expedited consideration of an application. The Board pledges that NCUA will work diligently to ensure the needs of the corporate system are met.

The proposed review process contemplated that OCCU staff and subscribers would work together at every step to ensure a complete application package that could be forwarded to the NCUA Board for a vote. One commenter, however, was concerned that OCCU staff might exercise a veto over any particular application by deciding not to forward it to the NCUA Board. To assuage this concern, the final IRPS provides subscribers with the right to petition the Board directly for a vote on a charter application where either (1) the OCCU Director has determined that the application does not merit approval, or (2) the subscribers believe, after some sufficient time to process the initial application, OCCU has moved too slowly on pushing the application to the Board. Accordingly, subscribers will have a 90 day window—beginning from the date of an OCCU disapproval letter or 180 days from the date of initial application, whichever is earlier—to petition the Board for a direct vote on the application.

Section VI also provided that if the Board approved a charter application, the officials must sign a Letter of Understanding and Agreement (LUA) imposing certain restrictions and requirements. Two commenters stated that the IRPS should clarify that the LUA will not impose any arbitrary restrictions that could hamper a corporate’s growth. The Board assures the commenters that NCUA is committed to the success of any corporate it charters and will not act to harm the corporate.

### C. 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 \$10 million in assets). The IRPS only applies to corporate credit unions, all of which have assets well in excess of \$10 million. Accordingly, the Board certifies that this final rule will not have a significant economic impact on a substantial number of small credit unions and, therefore, a regulatory flexibility analysis is not required.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d); 5 CFR part 1320. For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections.

NCUA identified and described some information collection requirements in the proposed chartering process. As required by the PRA, NCUA has submitted a copy of this IRPS to the Office of Management and Budget (OMB) for its review and approval. While NCUA received comments on the proposed rule, no commenters specifically addressed the agency’s estimates of burden hours as set out in the preamble to the proposed rule. Accordingly, NCUA anticipates that OMB will approve NCUA’s submission and assign a collection number.

#### *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 final rule will not have substantial direct effects on the States, on the connection 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 final rule 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

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, Public Law 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) 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 Procedure Act, 5 U.S.C. 551. OMB's determination about whether this rule is a major rule is pending.

By the National Credit Union Administration Board on February 17, 2011.

**Mary F. Rupp,**

*Secretary of the Board.*

**Authority:** 12 U.S.C. 1753, 1754, 1758, 1766.

## **Corporate Federal Credit Union Chartering Guidelines**

### **I—Goals of NCUA Corporate Chartering Guidelines**

These guidelines are intended to achieve the following goals:

- Uphold the provisions of the Federal Credit Union Act (Act);
- Promote safety and soundness within the credit union industry; and
- Provide quality services to members.

NCUA will consider the above criteria as the primary factors in determining whether to approve a corporate Federal credit union (FCU) charter. In unusual circumstances, NCUA may consider other information in deciding if a charter should be approved, such as other Federal law or public policies.

### **II—Subscribers**

Seven or more natural person representatives of different natural person credit unions (NPCUs)—“the subscribers”—must present to NCUA for approval a sworn organization certificate stating at a minimum:

- The name of the proposed corporate FCU;
- The location of the proposed corporate FCU;
- The names and addresses of the subscribers to the certificate and the number of shares subscribed by each;
- The initial par value of the shares; and
- The proposed field of membership.

False statements on any of the required documentation filed in obtaining an FCU charter may be grounds for Federal criminal prosecution.

### **III—Economic Advisability**

#### *A—General*

Before chartering a corporate FCU, NCUA must be satisfied that the institution will be viable and that it will provide needed services to its members. NCUA will conduct an independent investigation of each charter application to ensure that the proposed corporate credit union can be successful. In general, the success of any credit union

depends on: (a) The character and fitness of management; (b) the depth of the members' support; and (c) present and projected market conditions.

#### *B—Proposed Management's Character and Fitness*

The Act requires NCUA to ensure that the subscribers of Federal charters are of good “general character and fitness.” In addition, employees and officials must be competent, experienced, honest, and of good character.

NCUA will conduct background and credit investigations on prospective officials and employees, and the reports must establish each applicant's character and ability to effectively handle financial matters. Factors that may lead to disapproval of a prospective official or employee include criminal convictions, indictments, and acts of fraud and dishonesty. Other factors, such as serious or unresolved past due credit obligations and bankruptcies disclosed during credit checks, may also disqualify an individual.

NCUA also needs reasonable assurance that the management team will have the requisite skills—particularly in leadership, accounting, funds management, and payment systems risk—and the commitment to dedicate the time and effort needed to make the proposed corporate FCU a success.

Section 701.14 of NCUA's Rules and Regulations sets forth the procedures for NCUA approval of officials of newly chartered FCUs, including corporate FCUs. If the application of a prospective official or employee to serve is not acceptable to NCUA's Director, Office of Corporate Credit Unions (OCCU), the group can propose an alternate to act in that individual's place. If the charter applicant feels it is essential that the disqualified individual be retained, the individual may appeal the OCCU's decision to the NCUA Board. If an appeal is pursued, action on the application may be delayed. If the appeal is denied by the NCUA Board, an applicant acceptable to NCUA must be provided before the charter can be approved.

#### *C—Member Support*

An important chartering consideration is the degree of support from the field of membership. The charter applicant must demonstrate a sufficient customer base from which to draw business in the form of membership applications, capital and share commitments, and commitments to use the corporate FCU's services. The applicant must provide surveys and/or written commitments certifying to this

potential membership base and capital commitment to the levels required by Part 704 of NCUA's Rules and Regulations. Although NCUA may work with a newly chartered corporate on a plan to meet the retained earnings requirements of Part 704, the newly chartered corporate must have a viable plan to solicit and maintain sufficient contributed capital. Generally, the plan must show how the corporate FCU will keep its total capital at 4 percent or more of its moving daily average net assets (MDANA) at all times beginning on the date NCUA issues the charter. MDANA at the time of charter will be calculated as the corporate's net assets on the day of charter. MDANA for month one consists of the DANA for that month. MDANA for months two through eleven consists of the average of DANA for the month being measured and the previous months back to the date of charter.

#### *D—Present and Future Market Conditions—Business Plan*

The ability to provide effective service to members, compete in the marketplace, and adapt to changing market conditions are key to the survival of any enterprise. Before NCUA will charter a corporate credit union, a charter applicant must submit a business plan based on realistic and supportable projections and assumptions. The business plan should contain, at a minimum, the following elements:

- (1) Mission statement;
- (2) Analysis of market conditions (*i.e.*, economic prospects for the corporate credit union and availability of proposed financial services from alternative depository institutions);
- (3) Summary of survey results and/or customer base analysis;
- (4) Proposed financial services to be offered;
- (5) How and when services are to be implemented;
- (6) Anticipated corporate credit union staffing and credentials of key employees;
- (7) Physical facility—office and equipment;
- (8) Proposed recordkeeping, data processing, and communications systems and/or vendors;
- (9) Budget for the first three years;
- (10) Semiannual pro-forma financial statements for the first three years, including a listing of the assumptions used to develop the financial statements;
- (11) Goals for the number of members and shares under various scenarios;
- (12) Projected break-even or date of achieving independent operations;

(13) Source of funds to pay expenses during the initial setup and early months of operation;

(14) Written policies for shares, lending, investments, funds management, capital accumulation as required by Part 704, payment systems, and EDP;

(15) Plan for continuity—directors, committee members, and senior management;

(16) Evidence of commitment (*i.e.*, letters and/or contracts used to substantiate projections); and

(17) Services and marketing strategies for financial and correspondent services, including the ability of the proposed corporate credit union to efficiently deliver these products.

#### **IV—Organizing a Corporate Federal Credit Union**

The subscribers must submit the following documentation to the NCUA Office of Corporate Credit Unions (OCCU) for processing:

(1) NCUA Form 4001—Federal Credit Union Investigation Report. In completing the form, subscribers may disregard any reference to “common bond.” In addition, where Section B.2 of the form requires a potential interest survey sample of at least 250 potential members, subscribers may use a sample of at least 30 potential members.

(2) NCUA Form 4008—Organization Certificate. This document establishes the seven criteria required of subscribers by the Act and is signed by the subscribers and notarized. This document should be executed in duplicate.

(3) NCUA Form 4012—Report of Officials and Agreement to Serve. This form documents general background information for each official and employee of the proposed corporate credit union. Each designee must complete and sign this form.

(4) NCUA Form 9500—Application and Agreements for Insurance of Accounts. This document contains agreements FCUs must comply with in order to obtain NCUA insurance coverage of member accounts. The document must be completed and signed by both the chief executive officer and chief financial officer.

(5) NCUA Form 9501—Certification of Resolutions. This document certifies the board of the proposed corporate credit union has resolved to apply for Federal insurance of member’s accounts and has authorized the chief executive officer and chief financial officer to execute the Application and Agreements for Insurance of Accounts. Both the chief executive officer and recording officer of

the proposed corporate credit union must sign this certification.

#### **V—Name Selection**

It is the responsibility of the corporate FCU organizers to ensure that the proposed corporate FCU name does not constitute an infringement on the name of any corporation in its trade area. This responsibility also includes researching any service marks or trademarks used by any other corporation (including credit unions) in its trade area. NCUA will ensure, to the extent possible, that the corporate credit union’s name:

- Is not already officially being used by another FCU;
- Will not be confused with NCUA or another Federal or State agency, or with another credit union; and
- Does not include misleading or inappropriate language.

The last three words in the name of every credit union chartered by NCUA must be “Federal Credit Union.”

#### **VI—NCUA Review**

##### *A—General*

OCCU will conduct an independent investigation of the corporate credit union’s charter application to assess the economic and long-term viability of the proposed corporate credit union. OCCU field staff will conduct the review and, if necessary, perform an on-site contact with selected officials and others having an interest in the proposed corporate credit union.

The review will include evaluation of proposed management’s experience and suitability, commitment of proposed officials, and assessment of economic viability. OCCU field staff may also be called upon to assist subscribers in the proper completion of required forms and the Organization Certificate—NCUA Form 4008.

OCCU field staff will thoroughly analyze the prospective corporate credit union’s business plan for realistic projections, attainable goals, and time commitment. Any concerns will be reviewed with the subscribers and discussed with prospective officials.

NCUA will follow the timeline set forth below in processing corporate charter applications:

1. Within 30 days of receipt of the application, OCCU field staff will meet with the proposed officials and management team to evaluate the adequacy of management and the information provided and to discuss the corporate credit union’s ability to begin operations and meet financial projections if the charter is approved.

2. On completion of all required reviews, but no later than 60 days after

the meeting described above, OCCU field staff will make a recommendation to the OCCU Director regarding the application. The recommendation may include provisional requirements to be completed prior to final approval of a corporate FCU charter.

3. Within 30 days of receiving the OCCU field staff recommendation, the OCCU Director will determine if the application can be forwarded to NCUA Board for action or if it should be returned to the subscribers for more information.

4. If the OCCU Director, after reviewing any additional information, believes the application has no merit, the OCCU Director may return the application to the subscribers as disapproved. If the OCCU Director believes the application has merit, the Director will forward the application to the Board, and the Board then has 60 days to vote on the proposed charter.

5. Notwithstanding the above timeline, the subscribers may petition the Board directly for a vote on a pending application. The right to petition begins upon the earlier of these two dates:

- (a) The date of any OCCU disapproval described in paragraph 4 above, or
- (b) 180 days from the date of initial charter application.

Subscribers must ensure the Board receives any petition no later than 90 days following the earlier of these two dates. The Board will act on a timely petition no later than 60 days from the date of petition receipt.

6. If the charter is approved, the officials must sign a “Letter of Understanding and Agreement” (LUA) before the corporate credit union can commence operations. This LUA will impose certain operational restrictions, require compliance with NCUA’s Rules and Regulations and adoption of the standard Corporate FCU Bylaws, and contain several financial performance milestones that the new charter must meet, consistent with Part 704.

##### *B—Finalization of New Charter*

If NCUA approves the charter application, the subscribers, as their final duty, will elect the board of directors for the newly chartered corporate FCU. The new board of directors will subsequently appoint the supervisory committee. The corporate FCU must then submit a report of officials to OCCU.

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