

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION**12 CFR part 701****Organization and Operations of Federal Credit Unions**

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule with request for comments.

SUMMARY: NCUA proposes to amend its rule that permits a federal credit union to provide reasonable retirement benefits to its employees and officers. The amendments clarify the scope of the rule.

DATES: Comments must be received on or before February 19, 2002.

ADDRESSES: Direct comments to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428. **You are encouraged to fax comments to (703) 518-6319 or email comments to regcomments@ncua.gov instead of mailing or hand-delivering them.** Whatever method you choose, please send comments by one method only.

CONTACT: For further information, contact Frank Kressman, Staff Attorney, Office of General Counsel, at the above address, or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

Section 701.19(a) states that a federal credit union (FCU) may provide reasonable retirement benefits for its employees and officers. 12 CFR §701.19(a). NCUA wishes to clarify that the scope of §701.19(a) is not limited only to retirement benefits, but is more broadly applicable to other employee benefit plans.

As competition to attract and retain highly qualified employees has increased and the employee benefits marketplace has become more sophisticated, FCUs are increasingly providing more diverse and less traditional forms of employee benefits including, for example, deferred compensation plans and stock option plans. As a result, FCUs need flexibility to use safe, reasonable and efficient methods to fund their employee benefit obligations. In addition to providing this flexibility, the proposed rule updates the regulatory language to reflect current employee benefits terminology including renaming the rule “Benefits for Employees of Federal Credit Unions.”

An FCU investing on its own behalf is subject to the investment provisions of the Federal Credit Union Act (Act) and NCUA regulations. 12 U.S.C. 1757(7), (8), (15); 12 CFR part 703. In legal opinion letters, the NCUA’s Office of General Counsel has stated that these investment provisions do not apply when an FCU is acting under its authority to provide and fund retirement or other employee benefits. 12 U.S.C. 1761b(12); 12 CFR §701.19. **NCUA’s long-standing position is that an FCU may purchase an otherwise impermissible investment to fund an employee benefit obligation as long as there is a direct connection between the investment and the employee benefit obligation it serves to fund. In that context, NCUA has also stated that once the obligation ceases to exist, the FCU must divest itself of the impermissible investment.**

For example, an FCU is generally not permitted to purchase equity investments when investing for its own account. An FCU that is obligated under an employee benefit plan to provide an employee with 100 shares of XYZ Corporation stock on a specific date, however, may purchase and hold 100 shares of that stock for that purpose. It may not, however, purchase 100 shares of ABC Corporation stock. In that instance, there would not be a sufficient connection between the investment and the obligation to be funded.

NCUA is aware that it is not uncommon for for-profit corporations to provide employee benefits that contain investment options the employee may exercise after he or she has separated or retired from the employer. For example, an employer may grant an employee the option to purchase a fixed number of shares in a mutual fund for a fixed price on a specific date after the employee separates or retires from the employer. These post-separation or post-retirement options would require a prudent FCU to buy and hold shares in that mutual fund to fund the potential obligation it faces after its employee has separated or retired. In legal opinion letters, the NCUA's Office of General Counsel has also taken the position that an FCU may hold an impermissible investment to fund an ongoing employee benefit obligation after the employee separates or retires provided the investment option period is reasonable. Upon the exercise or expiration of the option, the FCU must divest itself of the impermissible investment. The proposed regulation incorporates the positions taken by the Office of General Counsel in these legal opinion letters.

An FCU must comply with safety and soundness standards by ensuring that the kind and value of employee benefits it offers are reasonable given its size and financial condition. Furthermore, an FCU's authority to offer and fund an employee benefit plan does not guarantee the permissibility of the plan under other laws, such as the Employee Retirement Income Security Act (ERISA) or the Internal Revenue Code. 29 U.S.C. 1001; 26 U.S.C. 1.

Additionally, FCUs with assets over \$10 million are reminded that they are required to account for their employee benefit plans in accordance with generally accepted accounting principles (GAAP). FCUs with assets under \$10 million are not required to follow GAAP, but are encouraged to do so in this context. All FCUs are encouraged to seek the advice of an independent accountant if they have questions regarding the proper accounting for these benefit plans.

Finally, §701.19(b) provides that an FCU acting as a fiduciary, as defined in ERISA, must obtain appropriate liability coverage as provided in §410(b) of ERISA. NCUA wishes to clarify that §410(b) of ERISA describes certain kinds of insurance coverage and permits certain parties to purchase that insurance, but does not require any party to purchase insurance. 29 U.S.C. 1110.

REGULATORY PROCEDURES:Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under one million dollars in assets). The proposed rule only clarifies that credit unions have additional options and flexibility to manage their employee benefit obligations without imposing any regulatory burden. The proposed rule would 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

NCUA has determined that the proposed rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would 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 proposed 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

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

Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed rule is understandable and minimally intrusive.

**List of Subjects
12 CFR part 701**

Credit unions.

By the National Credit Union Administration Board on December 13, 2001.

Becky Baker
Secretary of the Board

Accordingly, NCUA proposes to amend 12 CFR part 701 as follows:

PART 701 – ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

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

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717.

Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Revise §701.19 to read as follows:

§701.19 Benefits for Employees of Federal Credit Unions. (Change 5 / August 2003)

- (a) General authority. A federal credit union may provide employee benefits, including retirement benefits, to its employees and officers who are compensated in conformance with the Act and the bylaws, individually or collectively with other credit unions. The kind and amount of these benefits must be reasonable given the federal credit union's size and financial condition and duties of employees.
- (b) Plan trustees and custodians. Where a federal credit union is the benefit plan trustee or custodian, the plan must be authorized and maintained in accordance with the provisions of part 724 of this chapter. Where the benefit plan trustee or custodian is a party other than a federal credit union, the benefit plan must be maintained in accordance with applicable laws governing employee benefit plans, including any applicable rules and regulations issued by the Secretary of Labor, the Secretary of the Treasury or any other federal or state authority exercising jurisdiction over the plan.
- (c) Investment authority. A federal credit union investing to fund an employee benefit plan obligation is not subject to the investment limitations of the Act and part 703 or, as applicable, part 704, of this chapter and may purchase an investment that would otherwise be impermissible if the investment is directly related to the federal credit union's obligation or potential obligation under the employee benefit plan and the federal credit union holds the investment only for as long as it has an actual or potential obligation under the employee benefit plan.
- (d) Defined benefit plans. Under paragraph (c) of this section, a federal credit union may invest to fund a defined benefit plan if the investment meets the conditions provided in that paragraph. If a federal credit union invests to fund a defined benefit plan that is not subject to the fiduciary responsibility provisions of part 4 of the Employee Retirement Income Security Act of 1974, it should diversify its investment portfolio to minimize the risk of large losses unless it is clearly prudent not to do so under the circumstances.

- (e) Liability insurance. No federal credit union may occupy the position of a fiduciary, as defined in the Employee Retirement Income Security Act of 1974 and the rules and regulations issued by the Secretary of Labor, unless it has obtained appropriate liability insurance as described and permitted by Section 410(b) of the Employee Retirement Income Security Act of 1974.
- (f) Definitions. For this section, defined benefit plan has the same meaning as on 29 U.S.C. 1002(35) and employee benefit plan has the same meaning as in 29 U.S. C. 1002(3).

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*** THIS SECTION IS CURRENT THROUGH THE DECEMBER 26, 2007 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 12 -- BANKS AND BANKING
CHAPTER VII -- NATIONAL CREDIT UNION ADMINISTRATION
SUBCHAPTER A -- REGULATIONS AFFECTING CREDIT UNIONS
PART 701 -- ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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12 CFR 701.19

§ 701.19 Benefits for Employees of Federal Credit Unions.

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

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

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

(d) Defined benefit plans. Under paragraph (c) of this section, a federal credit union may invest to fund a defined benefit plan if the investment meets the conditions provided in that paragraph. If a federal credit union invests to fund a defined benefit plan that is not subject to the fiduciary responsibility provisions of part 4 of the Employee Retirement Income Security Act of 1974, it should diversify its investment portfolio to minimize the risk of large losses unless it is clearly prudent not to do so under the circumstances.

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

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

HISTORY: [40 FR 25582, June 17, 1975, as amended at 48 FR 55423, Dec. 13, 1983; 63 FR 14025, 14026, March 24, 1998; 63 FR 52146, 52147, Sept. 30, 1998; 68 FR 23025, 23027, Apr. 30, 2003]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by *15 U.S.C. 3717.* Section 701.31 is also authorized by *15 U.S.C. 1601* et seq.; *42 U.S.C. 1981* and 3601-3610. Section 701.35 is also authorized by *42 U.S.C. 4311-4312.*

NOTES: [EFFECTIVE DATE NOTE: *68 FR 23025, 23027*, Apr. 30, 2003, revised this section, effective May 30, 2003.]

NOTES APPLICABLE TO ENTIRE TITLE:

CROSS REFERENCES: Farmers Home Administration: See Agriculture, 7 CFR, chapter XVIII.

Office of Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development: See Housing and Urban Development, 24 CFR, chapter II.

Fiscal Service: See Money and Finance: Treasury, 31 CFR, chapter II.

Monetary Offices: See Money and Finance: Treasury, 31 CFR, chapter I.

Commodity Credit Corporation: See Agriculture, 7 CFR, chapter XIV.

Small Business Administration: See Business Credit and Assistance, 13 CFR, chapter I.

Rural Electrification Administration: See Agriculture, 7 CFR, chapter XVII.

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