

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 704**

**RIN 3133-AF13**

**Corporate Credit Unions**

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

**ACTION:** Final rule.

**SUMMARY:** The NCUA Board (Board) is issuing a final rule that amends the NCUA's corporate credit union regulation. The final rule updates the definitions in this regulation and makes clear that corporate credit unions may purchase subordinated debt instruments issued by natural person credit unions. The final rule also specifies the capital treatment of these instruments for corporate credit unions that purchase them.

**DATES:** The final rule is effective January 1, 2022.

**FOR FURTHER INFORMATION CONTACT:** *Policy and Analysis:* Robert Dean, National Supervision Analyst, Office of National Examinations and Supervision, (703) 518-6652; *Legal:* Rachel Ackmann, Senior Staff Attorney, Office of General Counsel, (703) 548-2601; or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

**a. Legal Authority and Background**

The Board is issuing this rule pursuant to its authority under the Federal Credit Union Act (FCU Act).<sup>1</sup> Under the FCU Act, the NCUA is the chartering and supervisory authority for Federal credit unions (FCUs) and the federal supervisory authority for federally insured credit unions (FICUs). The FCU Act grants the NCUA a broad mandate to issue regulations governing both FCUs and FICUs. Section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe regulations for the administration of the FCU Act.<sup>2</sup> Section 209 of the FCU Act is a plenary grant of regulatory authority to the NCUA to issue regulations necessary or appropriate to carry out its role as share insurer for all FICUs.<sup>3</sup> The FCU Act also includes an express grant of authority for the Board to subject federally chartered central, or corporate, credit unions to such rules, regulations, and orders as the Board deems appropriate.<sup>4</sup>

Part 704 of the NCUA's regulations implements the requirements of the FCU Act regarding corporate credit unions.<sup>5</sup> In 2010, the Board comprehensively revised the regulations governing corporate credit unions to provide longer-term structural enhancements to the corporate system in response to the financial crisis of 2007-2009.<sup>6</sup> The provisions of the 2010 rule successfully stabilized the corporate system and improved corporate credit unions' ability to function and provide services to natural person credit unions. Since 2010, and as part of the Board's continuous reevaluation of its regulation of corporate credit unions, the Board has amended part 704 on several occasions.<sup>7</sup> In 2017, the Board amended corporate credit union

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<sup>1</sup> 12 U.S.C. 1751 *et seq.*

<sup>2</sup> 12 U.S.C. 1766(a).

<sup>3</sup> 12 U.S.C. 1789.

<sup>4</sup> 12 U.S.C. 1766(a).

<sup>5</sup> 12 CFR part 704.

<sup>6</sup> 75 FR 64786 (Oct. 20, 2010).

<sup>7</sup> *See e.g.*, 80 FR 25932 (May 6, 2015), 80 FR 57283 (Sept. 23, 2015), and 82 FR 55497 (Nov. 22, 2017).

capital standards to change the calculation of capital after a consolidation and to set a retained earnings ratio target in meeting prompt corrective action (commonly referred to as PCA) standards.<sup>8</sup> In October 2020, the Board issued a final rule to amend several provisions relating to corporate credit union investments in credit union service organizations (CUSOs) and other provisions relating to corporate credit union governance and technical matters, as discussed in the following sections.

#### **b. February 2020 Proposed Rule on Part 704**

On February 20, 2020, the Board approved a notice of proposed rulemaking to update, clarify, and simplify several provisions of part 704 (proposed rule).<sup>9</sup> The proposed rule provided for a 60-day comment period, which the Board later extended by 60 days because of COVID-19.<sup>10</sup> The comment period ended on July 27, 2020.

#### **c. October 2020 Final Rule on Part 704**

The NCUA received 35 comment letters on the proposed rule. Comments were received from credit unions, both corporate and natural persons, credit union leagues and trade associations, individuals, corporate CUSOs, and an association of state credit union supervisors. In October 2020, the Board issued a final rule that: (1) Permits a corporate credit union to make a minimal investment in a CUSO without the CUSO being classified as a corporate CUSO and subject to heightened NCUA oversight; (2) expands the categories of senior staff positions at member credit unions eligible to serve on a corporate credit union's board; (3) removes the experience and independence requirement for a corporate credit

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<sup>8</sup> 82 FR 55497 (Nov. 22, 2017).

<sup>9</sup> 85 FR 17288 (Mar. 27, 2020).

<sup>10</sup> 85 FR 20431 (Apr. 13, 2020).

union's enterprise risk management expert; (4) clarifies the definition of a collateralized debt obligation; and (5) simplifies the requirement for net interest income modeling.<sup>11</sup>

The October 2020 final rule deferred final action on the provisions in the proposed rule that addressed the permissibility and capital treatment for corporate credit union purchases of subordinated debt instruments under the Board's January 2020 proposed rule on subordinated debt.<sup>12</sup> In the October 2020 final rule, the Board discussed the comments on this part of the proposed rule and noted that the commenters that addressed these provisions all supported them. The Board did not adopt the provisions at that time because it had not yet finalized the January 2020 proposed rule on subordinated debt.

#### **d. Final Rule on Subordinated Debt**

The Board has now adopted the January 2020 proposed rule on subordinated debt as final.<sup>13</sup> These changes include a reduction in the duration of required pro forma financial statements from five to two years, an adjustment to the definition of Accredited Investor, an increase in the expiration to issue period from one year to two years, clarifying the territorial restrictions on issuances, and clarifying when the Board will publish a fee schedule. The Board notes that none of these changes impact its rationale for requiring corporate credit unions to deduct natural person subordinated debt instruments. Therefore, the Board is now adopting the amendments that it proposed to the corporate credit union regulation in the February 2020 proposed rule.

## **II. This Final Rule**

### *Natural Person Credit Union Subordinated Debt Instruments*

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<sup>11</sup> 85 FR 71817 (Nov. 12, 2020).

<sup>12</sup> 85 FR 13982 (Mar. 10, 2020).

<sup>13</sup> See, <https://www.ncua.gov/files/agenda-items/AG20201217Item5b.pdf>.

As discussed previously, in January 2020, the Board issued a proposed rule to permit low-income designated credit unions, complex credit unions, and new credit unions to issue subordinated debt instruments for purposes of regulatory capital treatment.<sup>14</sup> Subsequently, in the February 2020 proposed rule on corporate credit unions, the Board proposed to address whether corporate credit unions may purchase such instruments and, if so, the treatment of the investments under part 704. In the October 2020 final rule on part 704, the Board discussed and analyzed the comments it received on this part of the February 2020 proposed rule but deferred final action in order to coordinate it with the final rule on subordinated debt. Because the Board has now issued the final rule on subordinated debt without any changes that affect the proposed revisions to part 704 on which the Board already solicited and received public comment, the Board is now also finalizing the proposed changes to part 704.

The February 2020 proposed rule created a new definition for the term natural person credit union subordinated debt instrument. The proposed rule defined a natural person credit union subordinated debt instrument as any debt instrument issued by a natural person credit union that is subordinate to all other claims against the credit union, including the claims of creditors, shareholders, and either the National Credit Union Share Insurance Fund (NCUSIF) or the insurer of a privately insured credit union. This definition is designed to include all instruments issued under the authority of the subordinated debt rule. No commenters to the February 2020 proposed rule objected to this proposed definition. Now that the Board has finalized the subordinated debt proposed rule without substantial changes from its proposed form, the Board is now adopting this proposed definition in part 704.

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<sup>14</sup> *Id.*

The February 2020 proposed rule also clarified that corporate credit unions may purchase the natural person credit union subordinated debt instruments. This authority is derived from their lending authority because subordinated debt instruments are issued under a natural person credit union's borrowing authority. Additionally, natural person credit unions are also permitted, subject to various restrictions and limits, to purchase such subordinated debt instruments from other natural person credit unions under their lending authority. Treating the purchase of such subordinated debt instruments as lending ensures consistent treatment between natural person credit unions and corporate credit unions. The Board is not making any amendment to the regulatory text in part 704 to this effect because corporate credit unions' current lending authority is sufficiently broad to include purchasing subordinated debt instruments. However, the Board reiterates that these purchases are permissible to avoid doubt.

In addition, the February 2020 proposed rule included a requirement for a corporate credit union to fully deduct the amount of the subordinated debt instrument from its Tier 1 capital to ensure consistent treatment between investments in the capital of other corporate credit unions and natural person credit unions. Under the current regulation, corporate credit unions are currently required to deduct from Tier 1 capital any investments in perpetual contributed capital and nonperpetual capital accounts that are maintained at other corporate credit unions.<sup>15</sup> The proposed rule also asked a question on whether it would be more appropriate to prohibit corporate credit unions from purchasing subordinated debt instruments. No commenter recommended restricting corporate credit union authority to purchase subordinated debt instruments.

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<sup>15</sup> 12 CFR 704.2 (definition of "Tier 1 capital").

The Board believes that investments in natural person credit union subordinated debt instruments should be treated similarly to investments in perpetual contributed capital and nonperpetual capital accounts that are maintained at other corporate credit unions as such instruments may qualify as regulatory capital for the natural person credit union. The Board is also concerned about systemic risk if corporate credit unions own a significant amount of natural person credit union issued subordinated debt. Finally, a natural person credit union subordinated debt instrument would be in a first loss position, even before the NCUSIF and any private insurance fund or entity. Therefore, an involuntary liquidation of the issuing credit union would potentially mean large, and likely total, losses for the holders of those subordinated obligations. The Board believes that fully deducting such instruments from Tier 1 capital ensures any potential losses do not affect the capital position of the investing corporate credit union. This measured approach strikes the right balance between providing corporate credit unions the flexibility to purchase natural person credit union subordinated debt instruments and avoiding undue systemic risk to the credit union system. As discussed previously, the Board's final rule on subordinated debt made no substantial changes to that rule to change this conclusion regarding corporate credit unions' purchases of the instruments. Therefore, the Board is adopting the Tier 1 capital deductions that it proposed in the February 2020 proposed rule.

### **III. Regulatory Procedures**

#### *Final Rule under the Administrative Procedure Act*

The Administrative Procedure Act generally requires agencies to issue a notice of proposed rulemaking and give interested persons an opportunity to participate in the rule making

through submission of comments.<sup>16</sup> As detailed in the background section of this preamble, the Board provided notice and an opportunity to comment on the changes made in this final rule in the proposed rule issued in February 2020. The Board deferred final action on certain provisions of the February 2020 proposed rule to coordinate with the separate rulemaking on subordinated debt. The final rule on subordinated debt is substantially similar to its proposed form, which means that commenters on the February 2020 proposed rule received notice and an opportunity to comment on these provisions. Therefore, the Board is adopting the amendments in this final rule without issuing a new notice of proposed rulemaking, which would be duplicative in this case.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of a final rule on small entities (defined for purposes of the RFA to include credit unions with assets less than \$100 million).<sup>17</sup> A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the *Federal Register* together with the rule.

This final rule does not have a significant economic impact on a substantial number of small entities. There are no corporate credit unions under \$100 million in assets. Therefore, the Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.

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<sup>16</sup> 5 U.S.C. 553.

<sup>17</sup> See 80 FR 57512 (Sept. 24, 2015).

### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) applies to information collection requirements in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden. For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or third-party disclosure requirement, each referred to as an information collection. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The final rule amends 12 CFR part 704 to address the permissibility and capital treatment of natural person subordinated debt instruments purchased by corporate credit unions. The amendments to part 704 revise the Corporate Credit Union Call Report cleared under OMB Control number 3133-0067. Public comments were solicited in a separate *Federal Register* notice (85 FR 65435) and no comment were received. The information collection request has been submitted to the Office of Management Budget for approval.

### *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, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the principles of the Executive Order. This rulemaking will not have a substantial direct effect 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. The NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

### *Assessment of Federal Regulations and Policies on Families*

The NCUA has determined that this final rule does not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.<sup>18</sup>

### *Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) generally provides for congressional review of agency rules.<sup>19</sup> A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by Section 551 of the APA.<sup>20</sup> An agency rule, in addition to being subject to congressional oversight, may also be subject to a delayed effective date if the rule is a “major rule.”<sup>21</sup> The NCUA does not believe this rule is a “major rule” within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA will submit this final rule to OMB for it to determine if the final rule is a “major rule” for purposes of SBREFA. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

### **List of Subjects**

12 CFR Part 704

Credit unions, Corporate credit unions, Reporting and recordkeeping requirements.

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<sup>18</sup> Pub. L. 105-277, 112 Stat. 2681 (1998).

<sup>19</sup> 5 U.S.C. 801-804.

<sup>20</sup> 5 U.S.C. 551.

<sup>21</sup> 5 U.S.C. 804(2).

By the National Credit Union Administration Board on January 14, 2020.

**Melane Conyers-Ausbrooks,**

*Secretary of the Board.*

For the reasons discussed in the preamble, the Board amends 12 CFR Part 704, as follows:

**PART 704—CORPORATE CREDIT UNIONS**

1. The authority citation for part 704 continues to read as follows:

**Authority:** 12 U.S.C. 1766(a), 1781, and 1789.

2. In § 704.2:

a. Add a definition of “*Natural person credit union subordinated debt instrument*”; and

b. Revise the definition of “*Tier 1 Capital*”.

The addition and revision read as follows:

**§ 704.2 Definitions.**

\* \* \* \* \*

*Natural person credit union subordinated debt instrument* is any debt instrument issued by a natural person credit union that is subordinate to all other claims against the credit union, including the claims of creditors, shareholders, and either the National Credit Union Share Insurance Fund or the insurer of a privately insured credit union.

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*Tier 1 capital* means the sum of items in paragraphs (1) and (2) of this definition from which items in paragraphs (3) through (7) are deducted:

(1) Retained earnings;

(2) Perpetual contributed capital;

(3) Deduct the amount of the corporate credit union's intangible assets that exceed one half percent of its moving daily average net assets (however, the NCUA may direct the corporate credit union to add back some of these assets on the NCUA's own initiative, or the NCUA's approval of petition from the applicable state regulator or application from the corporate credit union);

(4) Deduct investments, both equity and debt, in unconsolidated CUSOs;

(5) Deduct an amount equal to any PCC or NCA that the corporate credit union maintains at another corporate credit union;

(6) Deduct any amount of PCC received from federally insured credit unions that causes PCC minus retained earnings, all divided by moving daily average net assets, to exceed two percent when a corporate credit union's retained earnings ratio is less than two and a half percent; and

(7) Deduct any natural person credit union subordinated debt instrument held by the corporate credit union.

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