

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR part 704**

**RIN 3133-AE75**

**Corporate Credit Unions**

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

**ACTION** Final Rule.

**SUMMARY:** The NCUA Board (Board) is amending its regulations governing corporate credit unions (corporates) and the scope of their activities. Specifically, the amendments revise provisions on retained earnings and Tier 1 capital.

**DATES:** The rule is effective [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Yvonne Applonie, Director of Supervision, Office of National Examinations and Supervision, at 1775 Duke Street, Alexandria, Virginia 22314 or telephone (703) 518-6595; or Marvin Shaw, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6553.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### *The Financial Crisis of 2007-2009*

The financial crisis of 2007-2009 took a heavy toll on the corporate credit union system. The crisis, largely mortgage related, greatly affected the investment portfolios of many corporates, causing widespread liquidity problems, instability in the system, and failures. During this period, the NCUA took extraordinary short and mid-term measures to stabilize the corporate system. Among other things, it: (1) made capital injections; (2) approved the Temporary Corporate Credit Union Share Guarantee Program, which guaranteed uninsured shares at participating corporates; (3) retained an independent third party to analyze expected non-recoverable credit losses for distressed securities held by corporates; (4) conserved five corporates; and (5) created the NCUA Guaranteed Note Program.<sup>1</sup>

#### *The 2010 Amendments*

In 2010, the Board comprehensively revised the regulations governing corporates and their activities to provide longer term structural enhancements to the corporate system.<sup>2</sup> The 2010 rule established a regulatory framework that provides a foundation for a healthy corporate

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<sup>1</sup>As part of the corporate system resolution, the NCUA created the NCUA Guaranteed Note Program to provide long-term funding for distressed investment securities (Legacy Assets) from the five failed corporates. Legacy Assets consisted of over 2,000 investment securities secured by approximately 1.6 million residential mortgages, as well as commercial mortgages and other securitized assets.

<sup>2</sup> 12 CFR part 704; 75 FR 64786 (Oct. 20, 2010).

system that: (1) delivers important services to the corporates' natural person credit union members, such as payment systems and liquidity; and (2) builds and attracts sufficient capital.<sup>3</sup>

The 2010 rule also sought to prevent the recurrence of financial losses similar to those that led to the failure of the referenced five corporates and weakened the financial condition of others.

The 2010 rule curtailed several practices that contributed to the corporate failures. Specifically, it established investment concentration limits, limited asset maturities, and prohibited investments in subordinated and private label mortgage-backed securities. The 2010 rule also implemented a prompt corrective action (PCA) regime stipulating capital adequacy for corporates. Largely based on the Basel I requirements, the capital requirements of the 2010 rule emphasized corporates holding tangible and durable capital.

### *The Current Environment*

The provisions of the 2010 rule have successfully stabilized the corporate system and improved the corporates' ability to function and provide services to natural person credit unions.

Additionally, since 2010, the overall economy has improved greatly, thereby improving the economic landscape in which corporates operate. Further, the large concentration of troubled assets within the corporate system has been reduced through portfolio repositioning or the NCUA's intervention. The corporate system has significantly contracted and consolidated, with assets declining from approximately \$81.7 billion prior to the 2010 rule to approximately \$24.9

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<sup>3</sup> 75 FR 64787, 64787 (Oct. 20, 2010).

billion today. In that same time period, the number of corporates has decreased from 26 to 11.

Given these developments, the Board decided to revisit the 2010 rule's capital standards.

## **II. July 2017 Proposal**

As a result of its review of the corporate capital standards, in July 2017, the Board published amendments to the corporate rule, which primarily affect the calculation of capital after corporates consolidate and set a retained earnings ratio target in meeting PCA standards.<sup>4</sup>

Specifically, the Board proposed incorporating “GAAP equity acquired in a merger” as a component of retained earnings. This amendment to the definition of “retained earnings” in turn affects the definition of “Tier 1 capital,” which includes retained earnings as one component of Tier 1 capital. In the proposal, the Board stated that expressly including such equity acquired in a merger as retained earnings and referencing GAAP clarifies that this capital is available to cover losses, enhances transparency, and reduces ambiguity.<sup>5</sup> The Board also proposed deleting the phrase “the retained earnings of any acquired credit union, or an integrated set of activities and assets, calculated at the point of acquisition, if the acquisition is a mutual combination” from the current definition of “Tier 1 capital,” given that it would be redundant as a result of the proposal.

In the 2010 rule, the Board encouraged corporates to build retained earnings, which has generally yielded positive results. Nevertheless, in the July 2017 proposal, the Board proposed amending

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<sup>4</sup> 82 FR 30774 (July 3, 2017).

<sup>5</sup> *Id.*

this aspect of the regulation for three reasons: (1) the 2010 rule’s language did not expressly reference “GAAP equity acquired in mergers” as a component of retained earnings ; (2) the 2010 rule’s language limited perpetual contributed capital (PCC) for regulatory capital purposes; and (3) the 2010 rule’s language was inconsistent with other capital regulations. Specifically, the Board proposed removing the requirement<sup>6</sup> to limit PCC counted as Tier 1 capital to the amount of retained earnings. Further, the Board proposed permitting a corporate to include in its Tier 1 capital all PCC that is sourced from an entity not covered by federal share insurance.

Further, as discussed in greater detail below, the Board proposed adding a definition of “retained earnings ratio” to the regulation. Under the proposal, that term would mean “the corporate credit union’s retained earnings divided by its moving daily average net assets.” The Board proposed requiring all corporates to achieve an eventual retained earnings ratio of 250 basis points, recognizing the importance of retained earnings to the corporate system and the National Credit Union Share Insurance Fund. Under the proposal, upon attaining this benchmark, a corporate would be permitted to include all PCC in its Tier 1 capital, regardless of source. Until a corporate achieved that benchmark, it would be required to deduct PCC exceeding retained earnings by 200 basis points from its Tier 1 capital. As noted in the proposal, the Board believes this requirement provides an inducement to build retained earnings and promotes clarity as to the minimum amount of retained earnings held by a corporate to account for potential losses.

Lastly, in Appendix B to part 704, the Board proposed adding a “retained earnings ratio” requirement to the Part I expanded investment authorities. The Board believed that by doing so,

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<sup>6</sup> This requirement would not have gone into effect until October 2020.

the retained earnings ratio requirement would limit the risk of the expanded investment portfolios. Specifically, the Board proposed to employ an indexed retained earnings requirement, thereby correlating with actual risk taking.

### **III. Summary of Comments on the July 2017 Proposal**

The NCUA received 38 comments on the proposal, including those from corporates, individual credit unions, trade associations, and credit union leagues. These commenters uniformly supported the proposed rule. No commenter opposed the proposal.

As an overview, commenters stated that the proposed rule: (1) enhances transparency; reduces ambiguity; and better aligns capital regulations with the financial marketplace, GAAP accounting standards, and treatment by other financial institutions and their regulators; (2) provides greater flexibility in calculating and treating capital and promotes increased certainty and stability in the credit union system; (3) enhances the safety and soundness of corporate credit unions, which are essential for the credit union system; (4) provides greater liquidity to the benefit of natural person credit unions; and (5) reflects the improved health of the economy, the credit union system, and the corporates since 2010.

Each specific proposal and the corresponding public comments are discussed below in more detail.

#### **A. Corporate Consolidations and Capital in Mergers – Definition of Retained Earnings**

As noted above, the Board proposed amending the definition of “retained earnings.” The definition of “retained earnings” prior to the proposal included undivided earnings, regular reserve, reserve for contingencies, supplemental reserves, reserve for leases, and other appropriations from undivided earnings as designated by management or the NCUA. The proposal added “GAAP equity acquired in a merger” to that list. The Board stated that expressly including equity acquired in a merger as retained earnings and referencing GAAP would clarify that this capital is available to cover losses, enhances transparency, and reduce ambiguity.

No commenter objected to this proposal. Approximately 30 commenters specifically supported it. These commenters stated that including such equity acquired in a merger as retained earnings and referencing GAAP provides consistency with other regulators and will help match regulatory principles with GAAP and other financial measurements within the industry. In turn, this enhances transparency of capital adequacy and eliminates confusion for users of financial statements. A few commenters stated that the change would not increase risk to the corporate system.

Consistent with the proposal and the comments, the Board amends the definition of “retained earnings” to incorporate “GAAP equity acquired in a merger” as proposed.

#### B. Retained Earnings Ratio

As mentioned above, in 2010, the Board comprehensively modified Part 704, with particular focus on providing incentives to increase retained earnings. The 2010 rule’s PCA provisions require corporates to meet a leverage ratio. This leverage ratio consists of retained earnings and

PCC.<sup>7</sup> While noting that this effort to increase retained earnings has been successful, the Board also stated that the language in the current rule is indirect and may disadvantage corporates working with third parties. Specifically, the limitation on PCC for regulatory capital purposes does not recognize the full value of PCC that stands to absorb losses and protect counterparties. Accordingly, in the 2017 proposal, the Board proposed modifying the manner in which PCC is treated during a ten-year phase-in period. The phase-in period for PCC is intended to provide an incentive to corporates to increase retained earnings.

In the 2017 proposal, the Board proposed to remove the current requirement<sup>8</sup> to limit PCC counted as Tier 1 capital to the amount of retained earnings. Further, the Board proposed to permit a corporate to include in its Tier 1 capital all PCC that is sourced from an entity not covered by federal share insurance. Recognizing that retained earnings is critical to the health of the corporate system and the share insurance fund, the Board proposed adding a provision to part 704 requiring all corporates to achieve eventual retained earnings of 250 basis points. To this end, the Board proposed adding a definition of *retained earnings ratio* to mean “the corporate credit union’s retained earnings divided by its moving daily average of net assets.” Upon attaining the benchmark of 250 basis points, a corporate would be permitted to include all PCC, regardless of its source, in its Tier 1 capital. Prior to attaining the benchmark, the corporate would be required to deduct the amount of PCC exceeding retained earnings by 200 basis points as an inducement to build retained earnings.

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<sup>7</sup> Perpetual Contributed Capital means accounts or other interests of a corporate credit union that are perpetual, non-cumulative dividend accounts; are available to cover losses that exceed retained earnings, and are not insured by the National Credit Union Share Insurance Fund.

<sup>8</sup> This requirement would not have gone into effect until 2020.



No commenter objected to this proposal. Approximately 30 commenters expressly supported it. These commenters stated that the 2010 amendments resulted in corporates accumulating sufficient retained earnings to meet or exceed adequate capitalization under PCA through the 2016 phase-in adjustment. Thus, they agreed with the NCUA's proposal to remove the requirement to limit PCC counted as Tier 1 capital, stating that the amendment enhances clarity, helps ensure capital adequacy, and provides the first layer of insulation to protect the share insurance fund. They stated that the change would better align a corporate's use of capital with the expectations of member credit unions.

One commenter requested modifying the proposed definition of Tier 1 capital as follows: "If a corporate credit union's retained earnings ratio is less than two and a half percent, deduct the amount of PCC received from federally insured credit unions less retained earnings that exceeds two percent of moving daily average net assets (MDANA)." It believed that this change would clarify the NCUA's acceptance of capital received by corporates from members. The Board has compared this recommended language with the proposed regulatory text and has determined that the Board's proposed language is more direct and more readily understandable. Accordingly, the Board is adopting the proposed language in the final rule without change.

Another commenter suggested that the corporate call report continue to clearly reflect the amount of PCC that is not being counted in the leverage ratio, as it currently does in the "PCC calculation" section of the call report. The Board notes that it will continue to require this information in the call report.

### C. Appendix B to Part 704 - Expanded Authorities

Appendix B to part 704 enumerates the expanded authorities available to corporates and procedures that a corporate must follow to be granted such authorities. Specifically, the Board proposed adding a *retained earnings ratio* requirement to the expanded investment authorities. The Board believed such an addition would limit the risk of the expanded investment portfolios.

No commenters addressed this issue. The Board is adopting this amendment as proposed.

### D. Miscellaneous Comments Beyond the Scope of the Final Rule

Several commenters requested that the NCUA conduct a comprehensive review of Part 704 in 2018. The commenters stated that such a review is overdue considering the last comprehensive review of the corporate rule occurred in 2010. The commenters stated that such a review would allow stakeholders to explore other rule modernization opportunities. One commenter suggested such a review might result in “thoughtful loosening” of the corporate rules. One commenter requested that the NCUA improve coordination with state credit union regulators and reinforce the dual chartering system and joint supervision.

## IV. **Regulatory Procedures**

### 1. *Regulatory Flexibility Act.*

The Regulatory Flexibility Act requires the NCUA to prepare an analysis of any significant economic impact a regulation may have on a substantial number of small entities (primarily those under \$100 million in assets).<sup>9</sup> This rule only affects corporate credit unions, all of which

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<sup>9</sup> 5 U.S.C. 603(a).

have more than \$100 million in assets. Accordingly, the NCUA certifies the rule will not have a significant economic impact on a substantial number of small credit unions.

## *2. Paperwork Reduction Act.*

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden or modifies the existing burden.<sup>10</sup> For purposes of the PRA, a paperwork burden may take the form of a reporting or recordkeeping or third party disclosure requirement, both referred to as information collections. The rule does not contain information collection requirements that require approval by OMB under the PRA (44 U.S.C. 3501).

## *3. 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. After reviewing the rule and its likely impacts, NCUA believes that the rule is mostly technical and will not lead to a measurable change to (1) credit union lending to consumers or businesses, (2) net worth of natural person credit unions, or (3) interest rates paid or received by natural person credit unions. Accordingly, NCUA believes this final rule is a not “major rule” within the meaning of the relevant sections of SBREFA. As required by SBREFA, NCUA has filed the appropriate reports so that this final rule may be reviewed.

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<sup>10</sup> 44 U.S.C. 3507(d); 5 CFR part 1320.

4. *Executive Order 13132.*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The rule does not have substantial direct effects 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. The NCUA has, therefore, determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

5. *Assessment of Federal Regulations and Policies on Families.*

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

**List of Subjects**

**12 CFR part 704**

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

By the National Credit Union Administration Board on \_\_\_\_\_.

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Gerard Poliquin

Secretary of the Board

For the reasons discussed above, the National Credit Union Administration 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. Amend §704.2 by:

a. Revising the definition of “Retained earnings”;

b. Adding a definition of “Retained Earnings Ratio”; and

c. Revising the definition of “Tier 1 capital” to read as follows:

**§704.2 Definitions**

\* \* \* \* \*

*Retained earnings* means undivided earnings, regular reserve, reserve for contingencies, supplemental reserves, reserve for losses, GAAP equity acquired in a merger, and other appropriations from undivided earnings as designated by management or the NCUA.

*Retained earnings ratio* means the corporate credit union's retained earnings divided by its moving daily average net assets.

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*Tier 1 capital* means the sum of items (1) through (2) of this definition from which items (3) through (6) 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.

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3. Amend sections (b)(2) and (b)(3) of Part I of Appendix B to part 704 to read as follows:

**Appendix B to Part 704 – EXPANDED AUTHORITIES AND REQUIREMENTS**

\* \* \* \* \*

(b)(1) \* \* \*

(2) 28 percent if the corporate credit union has a seven percent minimum leverage ratio and a two and a half percent retained earnings ratio, and is specifically approved by the NCUA; or

(3) 35 percent if the corporate credit union has an eight percent minimum leverage ratio and a three percent retained earnings ratio and is specifically approved by the NCUA.

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