

**3133-AD90**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 C.F.R. Part 703**

**Financial Derivatives Transactions to Offset Interest Rate Risk;**

**Investment and Deposit Activities**

**AGENCY:** National Credit Union Administration

**ACTION:** Advance Notice of Proposed Rulemaking

**SUMMARY:** Through this Advance Notice of Proposed Rulemaking (“ANPR”), the National Credit Union Administration (“NCUA”) requests public comments on whether and how to modify its rule on investment and deposit activities to permit a natural person credit union to engage in the purchase and sale of financial derivatives for the purpose of offsetting interest rate risk. Although permitted by law, NCUA currently allows only a limited number of credit unions, on a case-by-case basis, to engage in such transactions under an investment pilot program.

**DATES:** Comments must be received on or before [60 days after date of publication in the FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any one of the following methods

**(Please send comments by one method only):**

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web Site: [http://www.ncua.gov/RegulationsOpinionsLaws/proposed\\_regs/proposed\\_regs.html](http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html). Follow the instructions for submitting comments.
- E-mail: Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name] Comments on Part 703 ANPR, Financial Derivatives Transactions to Offset Interest Rate Risk” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

**FOR FURTHER INFORMATION CONTACT:** Jeremy Taylor, Senior Capital Market Specialist, telephone: 703/ 518-6628.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

A. Financial Derivatives Transactions. A financial “derivative” is a financial contract, the value of which is derived from the performance of an underlying asset or market index. An interest rate “swap,” for example, may be tied to short-term “LIBOR rates”, which are variable, and long-term “swap rates,” which are fixed. The parties to an interest rate “swap” transaction can agree to exchange fixed cash flows for variable cash flows. The purpose may be either speculative or to reduce risk.

A credit union may enter into a derivatives transaction to protect itself against interest rate risk. For example, a credit union that has invested its deposits in a portfolio of mortgages that pays a fixed rate of interest is exposed to risk of an upward movement in interest rates. On members’ variable rate deposits, the credit union will be forced to increase the rates it pays in order to stay competitive, while the cash flows received from its portfolio of fixed-rate mortgages remains static. As interest rates rise, the credit union’s net interest margin shrinks, and the value of the mortgages diminishes.

To offset the impact of rising interest rates, a credit union could enter into an interest rate “swap” in which it exchanges with a counterparty the fixed-rate cash flows it receives from its mortgages for variable-rate cash flows that fluctuate with the yield it must pay on members’ deposits. As a result, the credit union’s cost of funds remains the same regardless of interest rate movements.

Alternatively, a credit union could purchase an interest rate “cap” that would effectively fix the cost of funds at a pre-agreed ceiling. For a premium paid by the credit union, the counterparty agrees to make payments to the credit union when the referenced variable market rate exceeds the contractual ceiling rate. This payment

would occur at the end of each period in which a referenced rate, like LIBOR, exceeds the agreed ceiling rate. The interest rate “cap” acts as insurance against rising interest rates since the credit union’s cost of funds on the amount hedged will be offset by counterparty’s payments in excess of the interest rate ceiling. The counterparty thus absorbs the risk of significant interest rate increases above the contractual ceiling rate.

B. Authority to Invest in Financial Derivatives. The purchase and sale of financial derivatives, provided it is for the purpose of offsetting interest rate risk (“IRR”), is recognized as an “incidental power” granted by the Federal Credit Union Act (“the Act”) to enable a federally-chartered credit union (“FCU”) to carry on the business for which it was incorporated. 12 U.S.C. 1757(17); NCUA General Counsel Opinion No. 99-0229 (Feb. 23, 1999).

To implement the investment authorities of FCUs, part 703 of NCUA’s Rules and Regulations, 12 C.F.R. 703, identifies the investments and investment activities authorized by the Act and imposes requirements and restrictions in order to preserve the safety and soundness of the credit unions that hold the investments and engage in the activities. Id. §§703.13, 703.14. Part 703 further identifies certain investments that it prohibits for safety and soundness reasons even though they are authorized by the Act. Id. §§703.15, 703.16. Among these prohibited transactions, with certain exceptions, are financial derivatives such as futures, options, interest rate swaps and forward rate agreements. Id. §703.16(a). Hence, FCUs are generally prohibited from engaging in financial derivatives transactions that are utilized by many financial institutions for the purpose of offsetting their IRR.

Part 703 provides for an exemption from the prohibition against derivatives transactions in the form of an investment pilot program (“Pilot Program”) that “permit[s] a limited number of [FCUs] to engage in investment activities prohibited by this part but permitted by the Act.” Id. §703.19(a). An FCU seeking to establish a Pilot Program of its own to engage in a prohibited activity must obtain NCUA approval. Id. §703.19(b). To be eligible for approval, an FCU must have a minimum net worth classification of “well capitalized” and must document its Pilot Program’s benefits, costs, internal controls, monitoring systems, and impact on the financial performance, risk profile and asset-liability management strategies of the FCU. Id. Presently, there is no limit to the duration of an approved Pilot Program.

A third party seeking to establish a Pilot Program to engage in a prohibited activity on behalf of client FCUs also must obtain NCUA approval. Id. §703.19(c). To be eligible for approval, a third party must describe its Pilot Program’s activities and document the benefits and risks to FCU clients with whom it has contracted. Id. If the third party’s Pilot Program is approved, an FCU client generally does not need to obtain NCUA approval for itself to participate. Id. §703.19(d).

C. Pilot Programs to Engage in Derivatives Activities. Pilot Programs allowing investment activities prohibited by part 703 that are otherwise lawful have been available on a case-by-case basis since 1998. 62 FR 32989, 32999 (June 18, 1997). The NCUA Board has since approved Pilot Programs authorizing two FCUs to each independently engage in derivatives activities for IRR management purposes on its own behalf. Under NCUA’s *Standards for Participating Credit Unions and Third-Party*

*Derivatives Pilot Program Applicants* (“3<sup>rd</sup> party approval standards”),<sup>1</sup> the NCUA Board approved Pilot Programs authorizing three third-party entities to engage in such activities to manage the IRR of their client FCUs--Western Corporate FCU (“WesCorp”) in 2000, ALM First Financial Advisors, Inc. (“ALM 1st”) in 2002, and Southwest Corporate Investment Services, a credit union service organization (“Southwest CUSO”) in 2005.<sup>2</sup> Operating standards governing an FCU’s or a third party’s approved Pilot Program to engage in derivatives activities to offset IRR are set forth in the approvals for each of these Pilot Programs.

Since the inception of Pilot Programs allowing investment activities prohibited by part 703, the NCUA Board has generally limited its approval of FCUs seeking to independently engage in derivatives to offset IRR, primarily for two reasons. First, such derivatives present risks that generally are not familiar to FCUs. Second, FCU demand for such instruments has been low. Also for these reasons, the NCUA Board thus far has not reconsidered whether to permit derivatives activities on an elective basis, as other federal financial institution regulators do, instead of only under an approved Pilot Program.

D. Policy Alternatives to Existing Pilot Programs. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203,

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<sup>1</sup> The third party approval standards are available on NCUA website: <http://www.ncua.gov/Resources/ALManagementInvest/Investment.aspx>. Although FCU participation in a third party Pilot Program generally does require NCUA approval, 12 C.F.R. 703.19(d), FCUs participating in a third party’s Pilot Program to engage in derivatives activities must obtain Regional Office permission to participate. There are no approval standards that apply to an FCU seeking approval of its own Pilot Program to independently engage in derivatives transactions for its own benefit.

<sup>2</sup> The approval of WesCorp’s Pilot Program effectively terminated when WesCorp was liquidated in October 2010. ALM 1st presently has 9 FCU clients, 6 of whom migrated from WesCorp’s Pilot Program. The approval of Southwest CUSO’s Pilot Program survives despite the liquidation of Southwest Corporate FCU in October 2010. Upon information and belief, however, Southwest CUSO has never had any FCU clients.

124 Stat. 1376 (“Dodd-Frank”), to reduce risk, increase transparency and promote market integrity within the financial system. To that end, section 723(a)(3) of Dodd-Frank requires “financial entities” to clear their derivatives transactions through a “derivatives clearing organization,” i.e., a clearinghouse, unless an exception to mandatory clearing applies. 7 U.S.C. 2(h)(1)(A), 2(h)(7)(A)(i). That section directs the Commodity Futures Trading Commission (“CFTC”) to consider whether to exempt certain financial institutions, including credit unions with total assets of less than \$10 billion, from the clearing mandate’s “financial entity” definition. *Id.* §2(h)(7)(C)(ii)(III).

The CFTC recently issued for comment a proposed rule on “End-User Exception to Mandatory Clearing of Swaps.” 75 FR 80747 (December 23, 2010). The proposed rule introduces new requirements governing the elective exception to mandatory clearing of swaps available to swap counterparties, for which credit unions may qualify. Excepted institutions would be required under the rule to report derivative positions to a registered swap data repository, and to provide certain items of information. This information would describe how the excepted entity meets its financial obligations associated with non-cleared swaps, including methods used to mitigate credit risk. The information would also indicate the status of the entity that qualifies it for an “end-user exception” to the clearing mandate, and how the reported derivative is being used to mitigate commercial risk.

In view of the Dodd-Frank clearing mandate, and with the benefit of 12 years’ experience with Pilot Programs allowing derivatives activities, it is timely for the NCUA Board to reconsider, and resolve issues related to, whether and under what conditions it

should permit natural person FCUs to engage in derivatives transactions for the purpose of offsetting IRR, *i.e.*, whether through approved third parties or independently.

NCUA is disinclined to allow FCUs to engage in derivatives activities unconditionally for several reasons. First, NCUA must ensure that FCUs do not use derivatives for the unauthorized purpose of speculation. Second, the value of the cash flow streams from derivative transactions can be unusually volatile because the value is driven by the movement of interest rates and level of volatility in financial markets and this value can therefore itself be volatile. Finally, it is reasonable to condition participation in derivatives activities on the FCU's development of sufficient expertise and infrastructure to manage IRR and credit risks associated with derivatives in financial markets. For these reasons, NCUA is reconsidering permitting FCUs to engage in derivative activity only on the basis of a waiver of the existing regulatory prohibition, subject to compliance with appropriate conditions.

In reconsidering derivatives activity by FCUs for the purpose of offsetting IRR, the NCUA Board seeks public comment--in the form of answers to the specific questions set forth under "Issues for Comment" below--on five different policy alternatives: (A) Whether to discontinue allowing Pilot Programs for FCUs and third parties to engage in derivatives activity to offset IRR and, if so, whether to terminate such existing Pilot Programs; (B) Whether to allow FCUs to engage in such derivatives activities through a third party on a case-by-case basis (*i.e.*, by waiver) provided the FCUs meet prudential standards applicable to the third party and the FCU; (C) Whether to allow FCUs to independently engage in such derivatives activities by waiver provided they meet prudential standards; and (D) What approval standards should be established

to govern the evaluation of an FCU's request for approval to engage in derivatives through a third party; (E) What approval standards should be established to govern the evaluation of an FCU's request to engage in derivatives independently?

## **II. Issues for Comment**

To facilitate consideration of the public's views, please address your comments to the questions set forth below on each issue, and organize and identify them by corresponding question number so that each question is addressed separately. To maximize the value of public input on each issue, it is also important that commenters provide and explain the reasons that support each of their conclusions. There will be a further opportunity to comment on these issues should the NCUA Board issue a proposed rule modifying its present policies on financial derivatives activities to offset IRR.

### **A. Existing Pilot Programs**

NCUA believes it is timely to determine whether existing Pilot Programs are either to be terminated or incorporated as a permissible activity.

#### **Question No.**

1. Should existing Pilot Programs for FCUs to engage in derivatives for IRR management be permitted to continue? Explain why or why not.

2. Should such Pilot Programs for FCUs be permitted to continue by "grandfathering" the previous approvals into Part 703? Explain why or why not.

3. If FCUs seek an end-user exception from mandatory clearing as contemplated by the CFTC's proposed rule, they would need to provide items of information to a registered swap data repository. In view of this requirement, should NCUA permit FCUs to seek an end-user exception? Explain why or why not.

B. Third Party Derivative Authorization

In approving third party Pilot Programs, the NCUA Board sought to ensure that FCUs would engage in derivative activities in a safe and sound manner while allowing FCUs that lacked experience in derivatives to gain this experience. 62 FR at 32999. To achieve that goal, NCUA created standards for third party Pilot Programs (see note 2 *supra*) and expected an FCU to perform initial and ongoing due diligence of any third party provider that it uses. The standards cover requirements for the FCU and for the third-party providers. The requirements for an FCU applicant address its financial condition, required actions of the board of directors, accounting standards, counterparty credit quality, hedge transactions, modeling, internal controls, legal issues, transaction termination, and NCUA approval. The requirements for third-party applicant address contractual agreements, ongoing risk assessment, review of credit union internal controls, reporting to NCUA, credit union education, and the maximum number of participants with each third party.

The Pilot Program standards for an FCU engaging in third party derivatives activity are as follows:

Financial Condition. The FCU must have:

- Minimum net worth ratio of 7 percent or more; and

- Positive, stable earnings for preceding 12 months.

Board of Directors. The FCU's board of directors must:

- Approve the counterparty or counterparties.
- Update, at least quarterly, the credit rating and analysis of approved counterparties.
- Approve the proposed types of derivative transactions, the maximum limits for aggregate notional principal amounts permitted for each type of transaction deemed appropriate by the FCU's board of directors. The maximum limit on derivative exposure in notional terms should be stated as a percentage of net worth. The maximum notional limit for swaps plus the value of the underlying securities in option transactions must not exceed 250 percent of net worth.
  - Determine hedge objectives and parameters and designate what correlation measures will be utilized. Approve correlation targets and tolerance limits prior to execution of each individual transaction.
  - Understand, review and approve each transaction prior to execution and affirm that transactions will be used solely to reduce interest rate risk.
  - Ensure management monitors the effectiveness of the hedge on at least a quarterly basis (preferably monthly) and reports this information to the board.
  - Require management demonstrate it has adequate knowledge to understand and monitor hedge positions using derivative instruments.
    - a. Accounting Standards. The FCU will:
      - Commit to an annual independent audit of financial statements. The statements will be prepared in accordance with generally accepted accounting principles, including

FASB ASC 815 Derivatives and Hedging. The audits will be performed in accordance with generally accepted auditing standards by a certified public accountant or public accountant licensed by the appropriate state or jurisdiction to perform those services.

- Have external auditors review its accounting policies and procedures prior to the first transaction. The external auditors will opine that the policies are suitable for these transactions.

b. Counter-party Credit Quality. All counter-parties must be rated "AA-" (or equivalent) or better at the time of any transaction. Termination of the transaction is required once a counterparty is downgraded to "BBB" (or equivalent). When there is a split rating, the lower rating will prevail.

c. Hedge Transactions. The credit union will:

- Identify the circumstances leading to the decision to hedge; and
- Specify derivative transactions to be employed and definition of:
  - Hedge type (fair value, cash flow, etc); and
  - Analysis to demonstrate effectiveness of hedge.

Shock analysis will not demonstrate correlation. Hedge effectiveness requires correlation through time, must be set prospectively, and effectiveness must be assessed retrospectively. Hedge effectiveness reporting will be required of the participating credit union and validated by the applicant. Accounting rules require that hedges be linked to specific assets or liabilities and cannot be related to overall balance sheet risk. Reports of the macro effects of the hedge should be limited to the impact of this on the interest rate risk of the balance sheet.

d. Modeling. Any model used to evaluate any hedge transaction using derivatives must include the ability to capture all options embedded in the transaction. For example, option pricing or option adjusted spread modeling using simulation methods may be needed. It must be clear that the model functionalities capture the specific behavior of the instrument to be hedged and the hedge itself.

e. Internal Controls. The FCU must have the following procedures and controls in place prior to execution of the first transaction.

- Designation of the individual(s) with responsibility for purchasing derivative instruments.
- Designation of the individual(s) or departments that have accounting and risk reporting responsibilities for the derivative instruments and hedge transactions.
- Segregation of duties for the individual(s) obtaining the prices of the derivative instruments, hedged items, and other instruments associated with reporting the hedge transaction and of those that execute the transaction.
- Segregation of duties for the individual(s) with derivative instrument reporting and risk assessment responsibility and of those involved in the hedge execution.
- Requirement for monitoring hedge performance by the asset/liability committee and the board.
- Requirement that the derivative and the hedged item be priced by an independent third party.

f. Legal issues

- The FCU's legal counsel must opine that the proposed transactions are legal.

- There must be an International Swap and Derivatives Association (ISDA) agreement between the counter-party and the FCU.
- The ISDA agreement must be supplemented by a bilateral collateral agreement between counter-party and the FCU. The bilateral collateral agreements must require the posting of collateral by either party that is in a net deficit position on any derivative that has been transacted. The agreement should further specify that the collateral must be permissible for FCUs to hold and will be held by an independent third party.

g. Transaction Termination. Any cases where designated hedges fail the limits of hedge effectiveness must be reported to the board of directors and the transaction terminated as soon as practicable. Also, termination of the transaction is required as soon as practicable once a counterparty is downgraded to “BBB” (or equivalent) as noted above.

Question No.

1. These third party standards would require replacement of credit quality references by functional equivalents. With this change, are the third party operating standards required in NCUA’s Pilot Program generally appropriate to govern the use of derivatives by an FCU approved to engage in these activities through a third party?

Explain why or why not.

2. If FCUs lacking prior experience with derivatives were required to spend a period of time within a third party Pilot Program, what period of time and/or number of transactions is reasonable to a safe and sound understanding of derivatives? In your answer explain why this is sufficient minimum time or number of transactions.

C. Independent Derivatives Authorization

Even if the NCUA Board allows FCUs having little or no derivatives exposure to participate in derivatives activities only through a third-party provider, it is anticipated that such FCUs may, after a time, seek to engage in derivative activities independently of a third party. In that event, however, further assessment of the FCU's knowledge, expertise, experience and infrastructure would be necessary, prior to granting such permission, to determine if the FCU is able to perform all aspects of derivatives activity for which the FCU may have previously relied on the third-party provider. The NCUA Board expects that, during any period of time when the FCU was acting with a third-party provider, the FCU would enhance its abilities to address asset liability analysis and modeling, dynamic hedging functionality, the pricing of any derivatives purchased, and the impact of marking-to-market on the value of derivatives and any hedged items. This enhanced expertise would serve as the basis for an application to engage in derivatives activity independently for the purpose of offsetting IRR.

Question No.

1. Should the NCUA Board consider allowing credit unions to engage in derivatives activity independently? Explain why or why not.
2. What are the attendant criteria, such as, asset size, capital adequacy, the balance sheet composition of a credit union, or risk exposure with and without derivatives, that NCUA should take into consideration in evaluating an FCU's request for approval to engage in derivatives independently? Specify and explain any criteria that are essential.

3. Are there specific actions an FCU should expect to take in preparation for applying to engage in derivatives activities independently? Specify and explain any actions which are needed.

D. Approval Standards for Derivatives Activities Through an Approved Third Party.

An FCU that seeks to engage in derivatives activity through a third party Pilot Program must request permission from its Regional Office to participate (see note 2 *supra*), must demonstrate adequate expertise and infrastructure to engage in these transactions prior to doing so, and must provide documentation to the Pilot Program provider. An FCU must operate according to the third party pilot program standards when it is approved to engage in derivatives activities through an approved third party. NCUA therefore seeks comment on the approval standards for an FCU seeking to engage in derivatives activity through a third party.

Question No.

1. Should NCUA require an FCU to state a balance sheet management plan to hedge IRR based on risk management objectives as a condition for approval? Explain why or why not.

2. Is it useful for an FCU to rely on the expertise of a third party to assess the effectiveness of derivatives to hedge IRR on an ongoing and dynamic basis or should the FCU be required to demonstrate it has this expertise internally as a condition for approval? In either case explain why or why not.

3. Is it useful for an FCU to rely on the expertise of a third party to assess the credit quality of derivative counterparties? Explain why or why not.

E. Approval to Engage Independently. NCUA expects that approving an FCU to independently engage in derivatives activity would require extensive examination of the applicant FCU and also would require enhanced supervision. This approval would be similar to the granting of expanded authority for a corporate credit union under recently revised Part 704, 75 FR 64786 (Oct. 20, 2010) and would require a self-assessment by the FCU to support its request. The NCUA Board would expect an FCU to address the following items prior to granting approval for that FCU to engage in derivatives activities independently:

- i. Board of directors' policy identifying the specific purposes of specified derivatives activities and stating limits on maximum exposure in terms of notional principal amounts and mark-to-market values of individual and aggregate swaps;
- ii. Ongoing assessment and reporting to the FCU's board of directors of derivative performance in achieving explicit interest rate risk management objectives;
- iii. Selection criteria for eligible counterparties that address the process of identification and credit monitoring; posting of bilateral collateral and process for maintenance of available collateral;
- iv. Disclosure of derivative price at time of purchase expressed as dollar values of a basis point on each derivative instrument;
- v. Disclosure of costs of terminating any derivatives in the course of pursuing any exit strategy.

NCUA would expect the FCU's board of directors to review policy periodically, to review the FCU's derivatives positions on an ongoing basis, and to actively enforce compliance with the stated IRR management purpose of derivative activities.

Question No.

1. Should approval of an FCU to engage in derivatives activities be in the form of additional authorization similar to the expanded authority available under Appendix B to Part 704 – Expanded Authorities and Requirements? Explain why or why not.

2. Should an FCU demonstrate enhanced credit functionality in terms of the experience of the FCU's personnel, credit analysis and reporting infrastructure in order to evaluate the creditworthiness of derivative counterparties? Explain why or why not and describe any minimum expectation.

3. Should an FCU demonstrate enhanced hedging expertise based on the experience of FCU's personnel or on additional derivatives management infrastructure? Explain why or why not, and describe any minimum expectation.

4. Is one year a sufficient amount of time for an FCU to fully prepare a self-assessment and application for approval to independently engage in derivatives to offset IRR? Explain why it is sufficient or why more time may be required

5. Are there any additional aspects of the FCU besides items (i)-(v) above which NCUA should consider in its approval for the FCU to engage in derivatives activity independently? If so, explain why the item should be considered.

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

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Mary F. Rupp

Secretary of the Board

