

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 703 and 721

RIN 3133-AE17

Charitable Donation Accounts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule with request for comments.

SUMMARY: NCUA proposes to amend parts 703 and 721 of its regulations to clarify that a federal credit union (FCU) is authorized to fund a charitable donation account (CDA), a hybrid charitable and investment vehicle described below, as an activity incidental to the business for which an FCU is chartered, provided the account is primarily charitable in nature and meets other regulatory conditions.

DATES: Comments must be received on or before [Insert date 30 days following date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments by any 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/Legal/Regs/Pages/PropRegs.aspx>. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] – Comments on Notice of Proposed Rulemaking for Parts 703 and 721” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

Public Inspection: You may view all public comments, as submitted, on NCUA’s website at <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx>, except those we cannot post for technical reasons. NCUA will not edit or remove identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA’s law library at 1775

Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Steven W. Widerman, Senior Staff Attorney, Office of General Counsel, at the above address or by telephone: (703) 518-6540; or Rick Mayfield, Senior Capital Markets Specialist, Office of Examination and Insurance, at the above address or by telephone: (703) 518-6360.

SUPPLEMENTARY INFORMATION:

- I. Background**
- II. Summary of the Proposed Rule**
- III. Regulatory Procedures**

I. BACKGROUND

1. Federal Credit Union Authority to Make Charitable Contributions.

The Federal Credit Union Act (“the Act”) provides that an FCU may “exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.”¹ Under this authority, the Board has long recognized that making charitable contributions and donations is among an FCU’s incidental powers.²

¹ 12 U.S.C. 1757(17).

² 44 FR 56691 (Oct. 2, 1979); 64 FR 19441 (Apr. 21, 1999); 12 CFR 721.3.

Between 1999 and 2012, FCU donations were limited to two categories of charities: 1) non-profit organizations located or active in the community where the donor FCU had a place of business; and 2) tax-exempt organizations that “operated primarily to promote and develop credit unions.”³ An FCU’s donation to these kinds of charities was conditioned on a determination by its board of directors that the donation was in the best interests of the FCU and reasonable given its size and financial condition.⁴ In 2012, the Board repealed the restrictions on permissible charities and the conditions for making a donation.⁵ The Board then added charitable contributions and donations as a category of activities preapproved by regulation as “incidental powers necessary and requisite to carry on a credit union’s business.”⁶ Activities in this preapproved category include donations to nonprofit organizations and credit union-affiliated causes, and to create charitable foundations.

2. Federal Credit Union Investment Authority.

The Act grants FCUs the express power to invest in certain enumerated categories of investments.⁷ FCUs may invest only in those investments expressly authorized by the Act. Further, part 703, NCUA’s investment regulation, limits or prohibits FCUs from purchasing certain investments, otherwise permitted by the Act, for safety and soundness reasons.⁸ Investments authorized by the Act and not prohibited or limited by part 703 constitute the universe of permissible investments for FCUs.

³ 12 CFR 701.25(a) (2011).

⁴ Id. 12 CFR 701.25(b).

⁵ 77 FR 31981 (May 31, 2012).

⁶ 12 CFR 721.3(b); See also 12 CFR 721.2.

⁷ 12 U.S.C. 1757(7) & (15).

⁸ 12 CFR part 703.

3. Why is NCUA Proposing This Rule?

The Board proposes to amend its regulations to clarify that, under certain circumstances, an FCU is authorized to fund a CDA, which may hold investments that are impermissible for an FCU, as a charitable contribution or donation under its incidental powers authority.⁹ The purpose of permitting an FCU to fund a CDA as an incidental power is to help facilitate an FCU's charitable activities. However, for this activity to be considered an incidental power, instead of an impermissible investment, the proposed rule requires the CDA to be primarily charitable in structure. Any investment feature benefitting the FCU must be incidental to that charitable purpose. The CDA must also be structured to preserve safety and soundness and to limit an FCU's exposure to the risks of otherwise impermissible investments.

The details of how a CDA must be structured and how it would work under the proposed rule are discussed in more detail below.

II. SUMMARY OF THE PROPOSED RULE

1. Part 721 -- Establishing and Funding a CDA.

Section 721.3 enumerates the categories of activities that are preapproved as incidental powers of an FCU. In order for the funding of a CDA to be characterized as a preapproved incidental power, the proposed rule provides that a CDA must be structured to satisfy the following seven conditions, including a definitions section.

⁹ 12 CFR 721.3(b).

a. Maximum Aggregate Funding. An FCU's investment in all CDAs, in the aggregate, must be limited to 3 percent of its net worth for the duration of the accounts. This means that regardless how many CDAs an FCU invests in, at all times, the aggregate book value of all such investments must not exceed 3 percent of net worth. Book value means the value at which the account is carried on your statement of financial condition prepared in accordance with GAAP. FCU's must monitor CDA exposure relative to net worth no less frequently than every quarterly call report cycle and will be expected to comply within 30 days of any breach of the maximum aggregate funding limit. The 3 percent net worth ceiling reflects an amount that generally would allow an FCU to generate income for the charity while ensuring the amount of risk taken will not pose safety and soundness issues.

b. Segregated Account. CDA assets must be held in a segregated custodial account or special purpose entity specifically identified as a CDA. This enables an FCU to better manage this activity and provides more transparency for supervisory purposes.

c. Regulatory Oversight. If an FCU chooses to establish a CDA using a trust vehicle, then the trustee must be an entity regulated by the Office of the Comptroller of the Currency, the U.S. Securities and Exchange Commission (“SEC”) or another federal regulatory agency. A regulated trustee or other person who is authorized to make investment decisions for a CDA (“manager”), other than the FCU itself, must be registered with the SEC as an investment advisor. This will help to ensure proper regulatory oversight of those professionals who owe fiduciary duties to the FCU, and to mitigate counterparty, credit, interest rate, liquidity, and reputational risks associated with funding a CDA.

d. Account Documentation. The parties to the CDA, typically the FCU and trustee or manager, must document the terms and conditions controlling the account in a written operating agreement, trust agreement or similar instrument. The terms of the agreement must be consistent with the requirements and conditions set forth in this proposal. Additionally, the board of directors of an FCU that wishes to fund a CDA must adopt written policies addressing this activity, which also must be consistent with this proposal, and which may be amended from time to time.

An FCU's CDA agreement and policies must provide that the FCU will donate only to charities exempt from taxation under section 501(c)(3) of the Internal Revenue Code, and they must name those charities. The agreement and policies must document the investment strategies the CDA trustee or other manager must follow, and provide that the FCU will account for all aspects of the CDA, including its distributions and liquidation, in accordance with generally accepted accounting principles.

e. Minimum Distributions to Charities. An FCU is required to distribute to one or more qualified charities, no less frequently than every 5 years, and upon termination of a CDA, a minimum of 51 percent of the CDA's total return on assets over the period of up to 5 years. If a CDA is terminated before the initial or a subsequent period of up to 5 years elapses, the minimum distribution of total return on assets for that period must be complete by the time the account is closed. Requiring at least one charitable distribution within a 5-year window emulates the structure of a trust that would expire at the end of a term as long as 5 years, triggering such a distribution. Consistent with a CDA's primarily charitable structure, the proposed rule permits an FCU to maintain its account in perpetuity as long as it makes the minimum charitable distribution over each 5-year window of its existence, through one or more individual distributions. The 5-year constraint

serves to provide periodic reassessment of risk and ensures timely distribution of charitable payments to the beneficiary.

The proposed rule defines “qualified charity” as a charitable organization or other non-profit entity recognized as exempt from taxation under section 501(c)(3) of the Internal Revenue Code, and “total return” as the actual rate of return of an investment, including realized interest, capital gains, dividends and distributions over a given period of up to 5 years. These minimum distribution frequency and amount requirements are a distinguishing feature of a CDIA. They are key to characterizing the funding of a CDA as primarily charitable and thus an incidental powers activity.

An FCU may choose to donate in excess of the minimum distribution frequency and amount. Also, the proposed rule allows an FCU to decide how frequently to make distributions. For example, an FCU may choose to make periodic distributions over a period of up to 5 years, or a single distribution at the end of that period. These choices should be documented in the CDA agreement and internal policies.

f. Liquidation of Assets Upon CDA Termination. Upon termination of the CDA, the funding FCU may receive a distribution of the remaining assets in cash or a distribution in kind of the remaining assets but only if those assets are permissible investments for FCUs pursuant to the Act and part 703.

g. Definitions. The proposed rule includes a definitions section to ensure consistent usage of key terms in the proposed rule.

2. Part 703 -- Exclusion of CDAs from Investment Rules.

The proposed rule revises part 703 to clarify that the funding of a CDA satisfying the above conditions is a preapproved incidental power of an FCU, even if the investments in the account are otherwise impermissible for FCUs, and it is not a violation of part 703 or the investment provisions of the Act.

III. 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 (primarily those under \$50 million in assets). This proposed rule does not impose any mandatory requirements on small credit unions, and NCUA does not anticipate many small credit unions will fund CDAs with significant amounts of money. NCUA has determined this proposed rule will not have a significant economic impact on a substantial number of small credit unions.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings 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 either a reporting or a recordkeeping requirement, both referred to as information collections. The proposed changes to parts 703 and 721 would clarify that CDAs are an option for FCUs. NCUA has determined that the procedures for an FCU to open, maintain, and monitor a CDA would create a new information collection requirement. As

required, NCUA has applied to the Office of Management and Budget (OMB) for approval of the information collection.

To establish a CDA, an FCU must produce an internal policy and board of directors' resolution authorizing the funding of the CDA, must apply to open a segregated account, must engage a regulated trustee or registered investment advisor ("RIA") to manage the CDA, and must enter into an operating agreement with the chosen trustee or RIA.

To maintain its CDA once it begins operating, an FCU will receive and review periodic activity statements and reports on the account in order to properly monitor, and account for, its performance. The FCU also must determine which qualified charities will receive charitable distributions.

NCUA estimates that, if this proposed rule were to become effective, approximately 100 FCUs would fund CDAs. NCUA further estimates that, on average, it would take an FCU's staff approximately 20 hours to draft, review, and retain the documentation associated with opening a CDA. NCUA also estimates that maintaining and monitoring a CDA and performing all other functions associated with the CDA will take an FCU's staff an additional 8 hours annually. Accordingly, NCUA estimates the aggregate information collection burden for FCUs funding CDAs would be 28 hours times 100 FCUs for a total of 2800 hours for the first year and 8 hours times 100 FCUs for a total of 800 hours annually thereafter.

Organizations and individuals wishing to submit comments on this information collection requirement should direct them to the Office of Information and Regulatory Affairs, OMB, Attn:

Shagufta Ahmed, Room 10226, New Executive Office Building, Washington, DC 20503, with a copy to the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428. The PRA requires OMB to make a decision concerning the collection of information contained in the proposed regulation between 30 and 60 days after publication of this document in the Federal Register.

NCUA considers comments by the public on this proposed collection of information in:

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the NCUA, including whether the information will have a practical use;
- Evaluating the accuracy of NCUA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submission of responses).

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. 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. This proposed rule applies only to federally chartered credit unions. Accordingly, the rule will 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. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

Treasury and General Government Appropriations Act, 1999

NCUA has determined that this proposed rule will 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).

List of Subjects

12 CFR part 703

Credit unions, investments.

12 CFR part 721

Credit unions, functions, implied powers.

By the National Credit Union Administration Board on September 12, 2013.

Gerard Poliquin

Secretary of the Board

For the reasons set forth above, NCUA proposes to amend 12 CFR parts 703 and 721 as follows:

PART 703 -- INVESTMENTS

1. The authority citation for part 703 continues to read as follows:

Authority: 12 U.S.C. 1757(7), 1757(8), 1757(15).

2. Amend §703.1(b)(5) by removing the word “or”.
3. Amend §703.1(b)(6) by removing the period at the end of the paragraph and inserting “; or” in its place.

4. Amend §703.1(b) by adding a paragraph (7) to read as follows:

§703.1 Purpose and Scope.

* * * * *

(b) * * *

- (7) Funding a Charitable Donation Account pursuant to § 721.3(b) of this chapter.

PART 721 – INCIDENTAL POWERS

5. The authority citation for part 721 continues to read as follows:

Authority: 12 U.S.C. 1757(17), 1766, 1789.

6. Redesignate §721.3(b) as §721.3(b)(1) and add a paragraph §721.3(b)(2) to read as follows:

(b)(2) *Charitable Donation Accounts.* A charitable income account (“CDA”) is a hybrid charitable and investment vehicle, satisfying the conditions in paragraphs (b)(2)(i)-(vii) of this section, that you may fund as a means to provide charitable contributions and donations to qualified charities. If you fund a CDA that satisfies all of the following conditions, then you may do so free from the investment limitations of the Federal Credit Union Act and part 703 of this chapter:

(i) *Maximum Aggregate Funding.* The book value of your investments in all CDAs, in the aggregate, as carried on your statement of financial condition prepared in accordance with GAAP, must be limited to 3 percent of your net worth at all times for the duration of the accounts, as measured at least every quarterly call report cycle. This means that regardless of how many CDAs you invest in, the combined book value of all such investments must not exceed 3 percent of your net worth. You must bring your aggregate accounts into compliance with the maximum aggregate funding limit within 30 days of any breach of this limit.

- (ii) *Segregated Account.* The assets of a CDA must be held in a segregated custodial account or special purpose entity and must be specifically identified as a CDA;
- (iii) *Regulatory Oversight.* If you choose to establish a CDA using a trust vehicle, the trustee must be regulated by the Office of the Comptroller of the Currency, the U.S. Securities and Exchange Commission (“SEC”) or another federal regulatory agency. A regulated trustee or other person or entity that is authorized to make investment decisions for a CDA (“manager”), other than the credit union itself, must be a Registered Investment Advisor.
- (iv) *Account Documentation and Other Written Requirements.* The parties to the CDA, typically the funding credit union and trustee or other manager of the account, must document the terms and conditions controlling the account in a written trust agreement or other similar instrument. The terms of the agreement must be consistent with this section. Your board of directors must adopt written policies addressing this funding activity that are consistent with this section, must review the policies annually, and may amend them from time to time.

Your CDA agreement and policies must at a minimum: (1) provide that the CDA will make charitable contributions and donations only to charities you name therein that are exempt from taxation under section 501(c)(3) of the Internal Revenue Code; (2) document the investment strategies and risk tolerances the CDA trustee or other

manager must follow in administering the account; (3) provide that you will account for all aspects of the CDA, including distributions to charities and liquidation of the account, in accordance with generally accepted accounting principles; and (4) indicate the frequency with which the trustee or manager of the CDA will make distributions to qualified charities as provided in subparagraph (v) of this section;

(v) *Minimum Distribution to Charities.* You are required to distribute to one or more qualified charities, no less frequently than every 5 years, or upon termination of a CDA in less than 5 years, a minimum of 51 percent of the account's total return on assets over the period of up to 5 years. You may choose how frequently distributions will be made during each period of up to 5 years. For example, you may choose to make periodic distributions over a period of up to 5 years, or a single distribution at the end of that period. You may choose to donate in excess of the minimum distribution frequency and amount;

(vi) *Liquidation of Assets Upon CDA Termination.* Upon termination of the CDA, you may receive a distribution of the remaining account assets in cash or you may receive a distribution in kind of the remaining account assets but only if those assets are permissible investments for federal credit unions under the Federal Credit Union Act and part 703 of this chapter; and

(vii) *Definitions.* For purposes of this section, the following definitions apply:

(A) *Distribution in kind* is your acceptance of remaining CDA assets, upon termination of the account, in their original form instead of in cash resulting from the liquidation of the assets.

(B) *Qualified charity* is a charitable organization or other non-profit entity recognized as exempt from taxation under section 501(c)(3) of the Internal Revenue Code.

(C) *Registered Investment Advisor* is an investment advisor registered with the SEC pursuant to the Investment Advisers Act of 1940.

(D) *Total return* is the actual rate of return on all investments in a CDA over a given period of up to 5 years, including realized interest, capital gains, dividends, and distributions.