

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR part 746

RIN 3133-AE68

Appeals Procedures

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule with request for comment.

SUMMARY: The NCUA Board (Board) proposes to adopt procedures to govern appeals to the Board that would apply to agency regulations that currently have their own embedded appeals provisions and will replace those current provisions. The procedures, to be codified at new part 746, Subpart B, would apply in cases in which a decision rendered by a regional director or other program office director is subject to appeal to the Board. The proposed procedures are intended to result in greater efficiency, consistency, and better understanding of the way in which matters under covered regulations may be appealed to the Board.

Excluded from the scope of this proposal are formal adjudications required under the Administrative Procedure Act (APA) to be accompanied by “notice and an opportunity for a hearing on the record.” Matters that are not covered include formal enforcement actions, challenges to orders imposing prompt corrective action and matters that are within the jurisdiction of the NCUA’s Supervisory Review Committee (SRC). With the issuance of this proposed rule, the Board is also proposing a new rule to govern the SRC, including the appeal to the Board of adverse determinations made by the SRC.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER 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: <https://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx>. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on Appeals Procedures” 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: All public comments are available on the agency's website at <http://www.ncua.gov/RegulationsOpinionsLaws/comments> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Michael J. McKenna, General Counsel, Ross P. Kendall, Special Counsel to the General Counsel, or Benjamin M. Litchfield, Staff Attorney, at the above address, or telephone: (703) 518-6540.

Supplementary Information

Brief Summary

If adopted, new Part 746, Subpart B will govern most authorized appeals to the Board of adverse determinations made at program office levels under agency regulations that permit such an appeal. The agency's discussion of the proposed changes details which rules would be affected but the Board specifically requests comments on any other agency rules that should provide for an appeal and thus be covered under the proposal.

The following actions or determinations would not be covered under the proposal because appeals relating to them are already covered under different agency procedures but the Board nonetheless seeks comments on their proposed exclusion:

- Formal enforcement actions;
- Creditor claims in liquidation, to the extent that the claimant has requested and the Board has agreed to consider the appeal formally on the record;
- Material supervisory determination within the jurisdiction of the Supervisory Review Committee, including appeals of SRC determination to the Board (addressed under a separate agency proposal issued with this proposal).
- Challenges to actions imposed under the prompt corrective action regime; and
- Appeals of matters that are delegated by rule to an officer or position below the Board for final, binding agency action.

I. Background

The Board is committed to providing credit unions, and other persons or entities that are affected by agency decisions, with an opportunity to obtain meaningful review of those decisions. At present, procedures for obtaining that review are embedded in and scattered throughout NCUA's regulations and, in many cases, are slightly different from one another. For example, time frames for seeking higher level review may differ and deadlines within which final agency action is to be rendered may also be different.¹ In this proposal, the Board has developed a more uniform set of procedures to govern those

¹ See, e.g., 12 CFR 701.32(b)(5), 701.34(a)(4), 741.11(d), 703.111(d).

rules in which an appeal to the Board is permitted. The Board seeks to strike a balance that will afford the appellant fair consideration of the issues while avoiding procedures that are overly burdensome, time consuming, and expensive for either the petitioner or the agency. The Board invites comment on all aspects of this proposal.

The proposed procedures would apply to federal credit unions (FCUs), federally insured, state-chartered credit unions (FISCUs), or certain institution-affiliated parties (IAPs) such as officers or directors when appealing an agency determination under one of the rules to which proposed part 746, Subpart B would apply. For example, FCUs and FISCUs appealing a waiver determination by a regional director under the loan participations rule would be subject to these procedures.² These procedures would also apply to an IAP appealing an adverse determination relating to a change in officials.³

II. Summary of Regulations Affected by Part 746.

Several NCUA regulations contain appeals procedures in addition to their substantive provisions. These procedures generally lack uniformity and may be confusing for those seeking an appeal. To improve the appeals process that applies under the covered rules, the Board proposes to promulgate a more uniform set of appeals procedures contained in Subpart B of part 746 to replace the current inconsistent appeals procedures that now apply to agency determinations under the affected regulations. The Board proposes to

² 12 CFR 701.22.

³ 12 CFR 701.14.

include in each of the affected rules a cross-reference to the proposed procedures to be located in Subpart B of part 746.

The following is a bulleted list of the various regulations that have appeals procedures that would be replaced by the proposed procedures in Subpart B of part 746.

- *Claims of a Creditor of an Insolvent FICU under an NCUA Alternative Resolution Dispute Process.* Within 60 days from the date that NCUA's Asset Management and Assistance Center (AMAC) issues a notice of disallowance, a creditor of an insolvent FICU may file or continue a lawsuit in U.S. district court or seek review by the Board.⁴ Claimants seeking Board review may request a hearing on the record in accordance with part 747 of NCUA's regulations and the formal adjudicatory procedures set forth in the APA.⁵ Alternatively, a claimant seeking review by the Board may submit to an alternative dispute resolution process.⁶ The proposed amendments supplant those procedures currently in part 709 of NCUA's regulations⁷ and replace them with a reference to new Subpart B to part 746.
- *Payment of Claims Regarding Federally Insured Shares or Deposits.* The FCU Act provides that the Board is to make payment of the insured shares or deposits as soon as possible following a liquidation.⁸ The FCU Act authorizes the Board to require a proof

⁴ 12 U.S.C. 1787(b)(6).

⁵ 12 U.S.C. 1787(b)(7)(A).

⁶ 12 U.S.C. 1787(b)(7)(B).

⁷ 12 CFR 709.8(c).

⁸ 12 U.S.C. 1787(d)(1).

of claim to be filed with it before making payment, and it contemplates that the Board may “approve or reject” such claims.⁹ The FCU Act also provides that the Board may, by regulation, prescribe procedures to resolve disputed claims.¹⁰ No conditions or limitations are imposed by statute on this resolution process, although the FCU Act does provide that the agency’s final determination of an insurance claim is subject to judicial review in accordance with the relevant provisions of the APA.¹¹ Subpart B to part 745 currently implements this authority. The proposed amendments would replace the current procedures.

- *Chartering and Field of Membership.* NCUA’s Office of Consumer Financial Protection and Access (OCFPA) is responsible for making certain determinations regarding chartering and field of membership, and these determinations are appealable to the Board. The FCU Act does not provide any specific right to a hearing on the record in connection with any of these determinations, and the procedures do not call for such a proceeding. The Board proposes to delete from NCUA’s Chartering and Field of Membership Manual all descriptions of the current procedures for challenging OCFPA determinations, such as the denial of initial charter applications (including proposed senior officials), requests for expansion or spinoff, requests to add an underserved area, and conversion requests. The Board proposes that all of these procedures be governed by new Subpart B to part 746.

⁹ 12 U.S.C. 1787(d)(2).

¹⁰ 12 U.S.C. 1787(d)(3).

¹¹ *Id.*

- *Community Development Loans.* In accordance with part 705 of NCUA’s regulations, qualifying credit unions may apply for loans from NCUA’s Community Development Revolving Loan Fund.¹² A credit union failing to qualify may appeal to the Board. Part 705 specifies that the appeal must be taken within 30 days of the notice of disqualification, and it provides that the Board’s review is limited to the threshold question of qualification.¹³ The Board proposes to replace these procedures with new Subpart B to part 746.
- *Golden Parachutes.* Pursuant to part 750 of NCUA’s regulations, FICUs are limited in the amount of severance plan arrangements that are permissible for senior level officials.¹⁴ Credit unions are permitted to request from the regional director or the Office of National Examinations and Supervision (ONES) Director, as appropriate, the authority to make an otherwise impermissible severance payment. If the request is denied, part 750 specifies a process by which the credit union may appeal to the Board.¹⁵ The Board proposes to replace that process with the procedures in Subpart B to part 746.
- *Investment Authority.* An FCU may appeal decisions by the regional director or ONES Director rejecting its request for expanded investment authority or authority to engage in derivatives investment activity.¹⁶ In each case, the investment rule is silent as to the

¹² 12 CFR part 705.

¹³ 12 CFR 705.6(f)(1).

¹⁴ 12 CFR part 750.

¹⁵ 12 CFR 750.6(b.)

¹⁶ 12 CFR 703.20(d); 111(d); 114(c)

appeals procedures other than timing. The Board proposes that these appeals be governed by the procedures in new Subpart B to part 746.

- *Change of Officials for Troubled or Newly Chartered Credit Unions.* A ‘troubled’ or newly chartered FICU may appeal an adverse determination regarding a change of an official or officials to the Board. Procedures governing this review are in §701.14 of NCUA’s regulations. The regulation refers to Subpart J of part 747 of NCUA’s regulations which contains explicit guidance on the appeals process.¹⁷ There is no express statutory right to a hearing on the record in this circumstance. The Board proposes to replace the current procedures with the procedures in new Subpart B to part 746. The 90-day time frame within which the Board must decide an appeal under §701.14 would be preserved, as would other shorter time frames currently included in Subpart J.
- *Conversions and Mergers.* NCUA administers the processes by which a FICU may convert to a mutual savings bank or merge into a bank.¹⁸ Part 708a specifies that the appropriate NCUA official will oversee the methods and procedures of the conversion or merger. If the appropriate NCUA official disapproves the methods by which the vote was taken or the procedures applicable to the vote, the FICU may appeal that disapproval to the Board.¹⁹ For conversions, a FICU may appeal a determination within 30 days and the Board must act within 90 days.²⁰ For mergers, a FICU may appeal a determination

¹⁷ 12 CFR 747.901 *et seq.*

¹⁸ 12 CFR Part 708a.

¹⁹ 12 CFR 708a.108(d).

²⁰ *Id.*

within 30 days and the Board must act within 120 days.²¹ The Board proposes to replace these procedures with the appeals procedures in new Subpart B to part 746. The Board specifically invites comment on whether the extension of these deadlines would pose an undue hardship on credit unions converting to mutual savings banks or merging with banks.

- *Other Miscellaneous Regulations Affected by Subpart B to part 746.* The following is a list of additional regulations that contain appeals procedures that would be replaced with the proposed appeals procedures in Subpart B of part 746.
 - NCUA's general lending rule.²²
 - NCUA's eligible obligations rule.²³
 - NCUA's loan participations rule.²⁴
 - Section 701.32 of NCUA's regulations regarding public unit and nonmember shares.²⁵
 - Section 701.34 of NCUA's regulations regarding the low income designation.²⁶

²¹ 12 CFR 708a.308(d).

²² 12 CFR 701.21(h)(3).

²³ 12 CFR 701.23(h)(3).

²⁴ 12 CFR 701.22(c).

²⁵ 12 CFR 701.32(b)(5).

²⁶ 12 CFR 701.34(a)(4).

- Section 741.11 of NCUA’s regulations regarding branch offices outside the United States.²⁷

III. Exclusions. New Subpart B to part 746 is designed to govern appeals under the regulations addressed above. There are five areas that are excluded from the scope of the proposed rule. Each of these is discussed below.

Enforcement Actions. Appeals that involve an agency hearing on the record and the development of an initial decision by a hearing officer or administrative law judge and are governed by formal procedural requirements described in §§7 and 8 of the APA.²⁸ These formal requirements are applicable only where the Federal Credit Union Act (FCU Act)²⁹ specifically calls for the agency’s adjudication “to be determined on the record after opportunity for an agency hearing.”³⁰

Section 206 of the FCU Act addresses enforcement actions that the NCUA may take against an insured institution or its IAPs.³¹ Of these, four specifically include an opportunity for the affected entity or individual to be heard before the action becomes effective. These include actions to terminate the institution’s insured status (§206(c)), cease and desist actions (§206(e)), removal actions (§206(g)), and civil money penalties

²⁷ 12 CFR 741.11(d).

²⁸ 5 U.S.C. 556, 557.

²⁹ 12 U.S.C. 1751 et seq.

³⁰ 5 U.S.C. 554(a).

³¹ 12 U.S.C. 1786.

(§206(k)), including any actions to obtain enforcement of an outstanding order issued under §206 or under the prompt corrective action provisions in §216 of the FCU Act.³²

There are two enforcement actions that may be taken by NCUA with immediate effectiveness and an agency hearing is not required (temporary cease and desist actions (§206(f)) and actions to appoint a conservator (§206(h)). Each of these carries with it an opportunity for the affected entity or individual to proceed immediately to court to file a challenge to the NCUA's action.

Other formal enforcement measures are found in §131 of the FCU Act, which provides that FCUs convicted of money laundering, cash transaction reporting, or certain other related offenses are subject to forfeiture of their charter after a pre-termination hearing conducted on the record.³³ In addition, FICUs fined for failure to file accurate call reports may request a hearing on the record under §202(a)(3) of the FCU Act.³⁴ Similarly, FISCUs fined for failure to submit accurate certified statements in connection with calculating National Credit Union Share Insurance Fund premium charges may request a hearing on the record under §202(d)(2)(E) of the FCU Act.³⁵ Finally, in accordance with §304(e)(3) of the FCU Act, the Board may terminate a FICU's membership in the Central Liquidity Facility (CLF) for non-compliance with statutory or regulatory requirements pertaining to the CLF, but only after providing the opportunity for an agency hearing.³⁶

³² 12 U.S.C. 1790d.

³³ 12 U.S.C. 1772d.

³⁴ 12 U.S.C. 1782(a)(3).

³⁵ 12 U.S.C. 1782(d)(2)(E).

³⁶ 12 U.S.C. 1795c(e)(3).

Actions under §206(i) of the FCU Act to suspend, remove, or prohibit individuals who have engaged in certain criminal acts are treated somewhat differently. In these instances, the affected individual is removed immediately, but is given the opportunity to appear before the Board to show that his or her continued service on behalf of the FICU does not pose a threat to the interests of the credit union or its members.³⁷ The FCU Act directs the Board to fix a time and place at which the party may appear, in person or through counsel, to submit written material and make oral presentations and, with the agreement of the Board, oral testimony.³⁸

For these types of actions, NCUA has promulgated explicit rules of procedure, which provide safeguards such as representation by counsel, document production, discovery, testimony from witnesses, an official record of the proceedings, and the development of a recommended decision by an administrative law judge for the consideration of the Board.³⁹ Such procedures regarding these enforcement actions would not be covered by new Subpart B to part 746.

Creditor claims in liquidation that are litigated or reviewed by the Board under formal agency adjudication procedures. The FCU Act specifies that a person appealing an initial creditor claim determination by the liquidating agent of an insolvent FICU may

³⁷ 12 U.S.C. 1786(i)(3).

³⁸ *Id.*; 12 CFR part 747, Subpart D. In a case involving a challenge to an immediate removal of a bank executive by the FDIC, acting under its similar authority, the Supreme Court held that the absence of the right to a pre-removal hearing was constitutionally sufficient and did not violate the due process clause of the Fifth Amendment. *FDIC v. Mallen*, 486 U.S. 230 (1988).

³⁹ 12 CFR part 747.

either: (1) file an action in federal court (or renew an action that had been pending before the liquidation began) seeking a de novo judicial determination of the merits of his claim; or (2) they may request that the Board review the claim.⁴⁰ The FCU Act also specifies that, if the Board agrees to the review request, the Board must consider the claim after opportunity for a hearing on the record.⁴¹ Part 709 of NCUA's regulations implements this provision by providing that the formal adjudication provisions set out in part 747, Subpart A will govern the process.⁴² These provisions remain in place and are not affected by new Subpart B to part 746. However, as discussed above, alternatively a petitioner may request an appeal under the proposed provisions in Subpart B to part 746.

Material Supervisory Determinations. As required by the Riegle Community Development and Regulatory Improvement Act of 1994,⁴³ NCUA established an SRC to provide a forum for FICUs to appeal an examiner's material supervisory determinations. Procedures followed by the SRC are described in Interpretive Ruling and Policy Statement (IRPS) 11-1, as amended by IRPS 12-1. Subjects that may be appealed to the SRC include examination ratings, the adequacy of loan loss reserve provisions, and loan classifications on loans that are significant to the institution.⁴⁴ The Board expanded the jurisdiction of the SRC in April 2011 by adding appeals of determinations by the Director of the Office of Small Credit Union Initiatives to deny a reimbursement request made in

⁴⁰ 12 U.S.C. 1787(b)(6), (7). The FCU Act also permits the Board to establish alternative dispute resolution procedures, which it has done in §709.8(c). As discussed below, those procedures will be replaced by new Subpart B to part 746.

⁴¹ 12 U.S.C. 1787(b)(7).

⁴² 12 CFR 709.8(b).

⁴³ Pub. L. No. 103-325, 108 Stat. 2160 (Sept. 23, 1994).

⁴⁴ *Id.*

connection with a technical assistance grant.⁴⁵ As proposed, the provisions in new Subpart B to part 746 would not apply to issues that are reviewable by the SRC. Along with the issuance of this proposed rule, the Board is seeking comments on a separate proposal that contains significant changes to the SRC, including how adverse determinations made by the SRC may be appealed to the Board. If adopted, those proposed changes to the SRC would be contained in a new Subpart A to part 746.

Prompt Corrective Action. Under the FCU Act, FICUs are subject to mandatory and discretionary supervisory actions, based on their net worth position.⁴⁶ Mandatory actions are not subject to appeal, but discretionary actions are. Under the FCU Act, these discretionary measures are considered “material supervisory determinations” and could have been made subject to the jurisdiction of the SRC.⁴⁷ The FCU Act, however, permits the Board to establish a separate appeals process regarding these determinations. Exercising this authority, the Board determined previously that challenges to determinations made by a regional director or ONES Director and imposed under the prompt corrective action regime are more appropriately covered by the procedures in Subpart L to part 747.⁴⁸ These procedures are informal but specialized, ranging from the submission of written materials (in the case of orders imposing discretionary supervisory action)⁴⁹ to requesting a hearing before a presiding officer designated by the Board (for orders reclassifying a credit union on safety and soundness criteria, as well as orders to

⁴⁵ 76 FR 3674 (Jan. 20, 2011).

⁴⁶ 12 U.S.C. 1790d; 12 CFR part 702.

⁴⁷ 12 U.S.C. 1790d(k).

⁴⁸ See 12 CFR 747, Subpart L.

⁴⁹ The affected credit union also has the option under this procedure to request the recommendation of NCUA’s Ombudsman concerning the matters at issue.

dismiss a director or senior executive officer). In the context of discretionary supervisory actions, the Board will respond to the written challenge.⁵⁰ In the context of challenges to reclassification and dismissal of officials or directors, the rules provide for a hearing at which the appellant is entitled to be represented by counsel, to introduce relevant documents, and to make oral presentations. Witness testimony is permissible with the consent of the presiding officer.⁵¹ The hearing is recorded, and the appellant is entitled to receive a transcript upon request and payment of the cost thereof. The presiding officer makes a recommendation to the Board, which has 60 days in which to decide the issue.⁵²

Because the determinations made by a regional director or the ONES Director and imposed under the prompt corrective action regime are addressed separately, they are not subject to proposed Subpart B to part 746. Similar determinations involving exclusively corporate credit unions are set forth in Subpart M to part 747 and are likewise unaffected by this proposal. However, the Board seeks specific comments as to whether appeals provisions relating to prompt corrective action are sufficient and whether such provisions should be consolidated with the proposed part 746.

Other Exclusions. By rule, appeals of adverse determinations under the Freedom of Information Act are decided by the General Counsel.⁵³ The General Counsel also decides on requests made under NCUA's *Touhy* regulation⁵⁴ and appeals of initial

⁵⁰ 12 CFR 747.2002.

⁵¹ The presiding officer is an individual designated by the NCUA Board to hold informal hearings under Subpart L to part 747.

⁵² 12 CFR 747.2003, 2004.

⁵³ 12 CFR 792.28.

⁵⁴ *Touhy* regulations prohibit the unauthorized release of information by current (and typically former) agency employees and provide a procedure for centralized agency decision-making concerning how the

determinations made under the Privacy Act.⁵⁵ None of these areas would be affected by this proposed rule but the Board seeks comments on their exclusion.

The proposed procedures in Subpart B to part 746 would also not affect how consumer complaints are processed by the NCUA.⁵⁶ On September 30, 2010, the Board delegated the authority to examine and supervise federal credit unions for compliance with consumer laws and regulations to OCFPA. As a result of this delegation, consumers may not appeal determinations by OCFPA's Director of the Division of Consumer Affairs to the Board. The Board invites comment on this exclusion.

IV. Section Analysis

Subpart B to part 746 – Informal Appeals Procedures

The Board is proposing to add Subpart B to part 746 to address procedures that govern informal appeals of agency decisions under specific regulations. As discussed above, the proposed rule would amend existing NCUA regulations to include a cross-reference to the procedures contained in this Subpart. The Board proposes to adopt these procedures to improve and streamline the appeals process as it applies to decisions under the covered rules.

agency will respond to a subpoena or other request for testimony or documents served on a current or former agency employee. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951); *see also* 5 U.S.C. 301.

⁵⁵ 12 CFR 792.46, 59.

⁵⁶ NCUA's current consumer complaint procedures are set forth in NCUA Letter to Credit Unions 15-CU-04 (June 2015).

Section 746.201 – Authority, Purpose, and Scope

The first section of proposed Subpart B to part 746 states the Board's authority for issuing the rule as well as its scope and purpose.

201(a) Authority

The Board is issuing this proposed rule pursuant to authority granted to it by §§120, 207, and 209 of the FCU Act. Section 120 of the FCU Act is a general grant of regulatory authority over FCUs. Section 207 of the FCU Act is a specific grant of authority over share insurance coverage, conservatorships, and liquidations. Section 209 of the FCU Act is a plenary grant of regulatory authority to issue rules and regulations necessary or appropriate to carry out its role as share insurer for all FICUs.

201(b) Purpose

As stated above, the purpose of the proposed rule is to provide uniform procedures for appeals to the Board under affected agency regulations. The Board believes the creation of uniform rules will help ensure that appellants receive appropriate due process and that agency decisions are made in a prompt and efficient manner.

201(c) Scope

Paragraph (c) first lists each of the regulations with current appeal procedures that would be covered under the new rule. The section would also clarify that there are five categories of agency actions that are excluded from the scope of the rule. Because this rule would only apply to informal agency adjudications, formal adjudications would be excluded. Likewise, creditor claim appeals where the claimant has requested a hearing on the record would be excluded. In addition, the rule would not cover appeals of prompt corrective action determinations or material supervisory determinations appealable to NCUA's SRC. Finally, the rule would not cover the appeal of FOIA determinations, Privacy Act determinations, or determinations made under NCUA's *Touhy* regulation.

Section 746.202 – Definitions

In §746.202, the Board proposes to define certain terms. Unless otherwise defined, the Board expects FICUs and other affected parties to interpret terms or phrases according to their plain meaning.

Initial Agency Determination

The proposed rule would define “initial agency determination” to clarify that the rule only applies to certain agency decisions made by personnel below the Board level. The rule does not apply to any action that results in the formulation of a rule, regulation, guidance document, or policy statement.

Petitioner

The term “petitioner” would refer to a natural person or legal entity seeking review of an initial agency determination. Several of NCUA’s regulations use different terminology when referring to parties appealing determinations to the Board. For example, a party appealing the denial a creditor claim is a “claimant,”⁵⁷ while a party appealing a denial of share insurance coverage is referred to as an “accontholder.”⁵⁸ Rather than use all of these different terms, the Board is proposing to adopt a uniform term to describe all classes of individuals or legal entities appealing determinations to the Board.

Program Office

Similarly, the Board is proposing to adopt a uniform term “program office” to refer to all offices within NCUA responsible for making initial agency determinations. Several NCUA offices below the Board level are responsible for administering various NCUA regulations. For example, chartering and field of membership determinations are made by OCFPA, while waivers and safety and soundness determinations are made by the appropriate regional office or ONES. Rather than use different terminology, the Board is proposing to adopt “program office” as a uniform term to describe the different NCUA offices responsible for making initial agency determinations.

⁵⁷ See 12 CFR 709.7.

⁵⁸ See 12 CFR 745.202.

Section 746.203 – Request for Reconsideration

Proposed §746.203 would set forth procedures for requesting reconsideration from a program office prior to filing an appeal with the Board. Several regulations issued by the NCUA Board permit affected parties to request reconsideration. This process is a useful, relatively inexpensive, and efficient method of resolving most disputes. It also limits the overall number of matters appealed to the Board. Therefore, the Board proposes to make this optional procedure available for any matter that could otherwise be appealed to the Board under part 746, Subpart B and seeks comments on this approach.

203(a) Reconsideration

The reconsideration process promotes greater efficiency by allowing matters to be resolved at the program office level where possible. In general, the Board anticipates that the disposition of a request for reconsideration will either resolve the matter entirely or clarify the issues that remain for resolution at the Board level. Ordinarily, the Board anticipates that one request for reconsideration will be sufficient, and that the next appropriate step for a party still seeking resolution of the issues will be to appeal to the Board. The rule recognizes, however, that there may be cases involving extenuating circumstances, such as the discovery of new evidence or documentation, and that a second request for reconsideration may be appropriate in such circumstances. Absent such circumstances, a second request for reconsideration would be treated as an appeal to the Board.

203(e); (f); (g) Determination of Program Office; Notice of Determination; Failure to Make a Determination

Paragraph (e) would require the program office to issue a written determination within 30 calendar days of receiving a first request for reconsideration. Paragraph (f) would specify that the written determination must include a description of any right to appeal a determination to the Board. In the case of creditor claims, paragraph (f)(2) would require a description of the right to file or continue a lawsuit in federal court.

In the Board's experience, 30 calendar days is a sufficient amount of time for a program office to consider new information and reach a determination after reconsideration. If the program office fails to make a determination within 30 calendar days, proposed paragraph (g) would treat the request for reconsideration as if it had been denied. To avoid undue prejudice, the denial of a request for reconsideration is treated as an initial agency determination for purposes of the deadline to file an appeal with the Board in proposed §746.204. If the petitioner obtains new information or there are reasonable, mitigating circumstances that precluded the presentation of existing information in connection with the first request for reconsideration, as determined solely by the program office in its reasonable judgment, the petitioner may request a second reconsideration prior to a Board appeal.

Section 746.204 – Appeal to the Board

Proposed §746.204 would state the procedures for filing an appeal with the Board. The provision would also list the information that must be included as part of the appeal.

These requirements would be similar to the current requirements for creditor claims and share insurance claims, including the requirement that any appeal must be filed with the Secretary of the Board within 60 calendar days of the date of the initial agency determination or, if applicable, any determination following a request for reconsideration. However, the Board may grant extensions for timely filing in response to a petitioner's request based on the petitioner's reasonable, extenuating circumstances.

204(c) Failure to File a Timely Appeal

In order to establish subject matter jurisdiction, federal courts typically require affected parties to exhaust administrative remedies.⁵⁹ For example, in creditor and share insurance cases, the failure to exhaust administrative remedies is a jurisdictional bar preventing affected parties from seeking judicial review of their claims in federal court.⁶⁰ Proposed paragraph (c) would clarify that, absent mitigating circumstances, a petitioner who fails to file a timely request for an appeal would be considered to have waived claims that may be adjudicated under part 746, Subpart B.

⁵⁹ See *Avocados Plus, Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004); *Volvo GM Heavy Truck Corp. v. Dep't of Labor*, 118 F.3d 205, 209-211 (4th Cir. 1997).

⁶⁰ See *Freeman v. FDIC*, 56 F.3d 1394 (D.C. Cir. 1994).

204(d); (e); (f) Content of Request; Burden of Proof; Amending or Supplementing the Appeal

Proposed paragraph (d) would outline the content requirements for an appeal to the Board. To ensure the Board is able to review an appeal in a timely and efficient manner, this paragraph would require a petitioner to provide a statement of the facts on which an appeal is based, any objections to the basis on which the program office made its initial determination, and any additional evidence that may be relevant to the matter that was not previously provided to the program office. Proposed paragraph (e) would address the burden of proof at the appeal level.

Proposed paragraph (f) would describe the right of the petitioner to file supplemental materials within 45 calendar days of filing an appeal. In addition to the authority of the Board to request additional information, the petitioner may amend or supplement the written record. If the petitioner does amend or supplement the record, the Board is permitted to request additional information. A petitioner's failure to provide information requested by the Board could serve as a basis for denial of an appeal.

204(g) Request for Oral Hearing

Section 746.204(g) would specify that a petitioner may request an oral hearing before the Board and provides cross-references to proposed §746.207, which sets out the procedures that govern oral hearings. The petitioner may request to appear before the Board, in

person or through or with counsel. This request should be filed with the initial appeal documents. On his or her own initiative or at the request of the petitioner, the Chairman may in his or her sole discretion allow for a hearing to be conducted via teleconference or video conference facilities.

Section 746.205 – Preliminary Considerations Regarding the Appeal

This section of the proposed rule describes preliminary internal processes for reviewing appeals. Additional information from the petitioner may be requested by the agency in order to provide the Board with a more full and complete administrative record but such requests must be reasonable and timely to facilitate the processing of the appeal, not to delay it.

Section 746.206 Administration of the Appeal

Proposed §746.206 would set out the standard procedures followed by the Board when it receives a timely appeal. These proposed procedures would be, in some respects, a codification of informal practices that the Board currently follows when reviewing appeals.

206(a) Review by the Special Counsel

Proposed paragraph (a) would describe procedures followed by the Special Counsel when reviewing an appeal. After receiving a timely appeal, the Special Counsel would be responsible for gathering relevant evidence from the appropriate program office and conducting an independent review of these materials along with any materials provided by the petitioner. The Special Counsel would then provide a written recommendation to the Board and, at the request of the Board, make an oral presentation in an official meeting concerning the recommendation. The duties of the Special Counsel under this provision must be fulfilled in a timely manner and all requests for additional information must be reasonable, to facilitate the appeal.

206(b) Determination on Appeal

Proposed paragraph (b) would require the Board to render a written decision stating the reasons for the decision within 90 calendar days from the date of receipt of an appeal by the Secretary of the Board. Such a decision would constitute a final agency action permitting the petitioner to seek review in federal court under the APA. In the discretion of the Chairman, the time for the Board's decision may be extended as the Chairman may consider necessary or appropriate for a full and fair consideration of the issues, including accommodation of an oral hearing. If the Board does not reach a decision within 90 calendar days from the date of receipt, or within any extension of time as established by the Chairman, the appeal will be deemed to be denied. The deadline will help ensure that the Board has adequate time to decide a matter on appeal while avoiding any undue prejudice to petitioners from unnecessary delays.

Section 746.207 – Procedures for Oral Hearing

This section of the proposed rule sets out the process for requesting and conducting an oral hearing. The Board recognizes that, in some unusual cases, the opportunity to make a presentation in person is necessary or useful to assure a thorough understanding of the issues in a case.

207(a); (b); (c) Request for Oral Hearing; Action on Request; Effect of Denial

Paragraph (a) would describe the process for requesting an oral hearing. The request would accompany the notice of appeal itself, set out in a separate document entitled “Request for Oral Hearing.” The petitioner must show good cause as to why the NCUA should hold an oral hearing, stating reasons why the case cannot be presented adequately with only written statements. Proposed paragraph (b) would specify that an oral hearing would be scheduled provided at least one Board member agrees to hear the appeal, but specifies that the action by a Board member to approve an oral hearing must be taken within 20 days of the receipt of the appeal by the Board Secretary. The Special Counsel would notify the petitioner of the Board’s determination whether to approve a request for an oral hearing. Proposed paragraph (c) would specify that, in the event the request does not receive the support of at least one Board member, the appeal will proceed on the basis of the written record.

207(d) Procedures for Oral Hearing

(d)(1) Scheduling; location.

Oral hearings will be held at NCUA headquarters in Alexandria, Virginia, except that on his or her own initiative or at the request of the petitioner, the Chairman may in his or her sole discretion allow for a hearing to be conducted via teleconference or video conference facilities.

(d)(2) Appearances; Representation

At an oral hearing, the petitioner would be permitted to be represented by not more than two officers, employees, or other representatives (including counsel) unless the Chairman, in his or hers sole discretion, allows a greater number of participants. This proposed paragraph recognizes the general right granted in the APA for individuals appearing in person before an agency to be “accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative[s].”⁶¹ In general, courts have found the right to counsel to be a fundamental aspect of procedural due process in both informal and formal agency adjudications.⁶²

⁶¹ 5 U.S.C. 555(b).

⁶² See *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.”).

(d)(3) Conduct of Oral Hearing

Proposed paragraph (d)(3) addresses procedures at the oral hearing and would permit the use of presentations based on written evidence submitted as part of the appeal documents filed with the Secretary of the Board. The petitioner would be given the opportunity to present first, followed by a representative of the program office. The petitioner would be permitted to rebut information presented by the program office.

V. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (primarily those under \$100 million in assets). This proposed rule only provides enhanced voluntary opportunities for credit unions to appeal agency determinations.

Accordingly, it will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing

burden. 44 U.S.C. 3507(d). 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. Proposed new Subpart B to part 746 establishes procedures by which credit unions or other entities affected by an initial decision by an NCUA program office may seek and obtain the review of that decision by the NCUA Board.

The rule proposes to consolidate the information collection requirements of the informal appeals process under a new part; as such, NCUA intends to remove the burden allocated to the appeals process currently under OMB control numbers 3133-0141, -0127, -0114, -0117, -0133, and -0138, upon promulgation of this new rule, and requests a new OMB control number for the information collection requirements under part 746.

Estimated number of respondents:

Requests for reconsideration: 24; Appeals: 10.

Frequency:

Requests for reconsideration: 1; Appeals: 1

Estimated burden per response:

Requests for reconsideration: 10 hours; Appeals: 20 hours

Estimated annual burden:

Requests for reconsideration: 240 hours; Appeals: 200 hours

Total: 440 hours

The PRA and OMB regulations require that the public be provided an opportunity to comment on the paperwork requirements, including an agency's estimate of the burden of the paperwork requirements. The Board invites comment on: (1) Whether the paperwork

requirements are necessary; (2) the accuracy of NCUA's estimates on the burden of the paperwork requirements; (3) ways to enhance the quality, utility, and clarity of the paperwork requirements; and (4) ways to minimize the burden of the paperwork requirements.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

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).

Executive Order 13132

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

List of Subjects

12 CFR Part 701

Credit, Credit unions, Reporting and recordkeeping requirements.

12 CFR part 703

Credit unions, Investments.

12 CFR Part 705

Credit unions, grants, loans, revolving fund.

12 CFR Part 708a

Credit unions, Reporting and recordkeeping requirements

12 CFR Part 709

Claims, Credit unions.

12 CFR Part 741

Credit unions, Reporting and recordkeeping requirements, Share insurance.

12 CFR Part 745

Administrative practice and procedure, Claims, Credit unions, Share insurance.

12 CFR Part 746

Administrative practice and procedure, Claims, Credit Unions, Investigations.

12 CFR Part 747

Administrative practice and procedure, Claims, Credit unions, Investigations.

12 CFR Part 750

Credit unions, Golden parachute payments, Indemnity payments.

By the National Credit Union Administration Board, this ____ day of _____, 2017.

Gerard Poliquin
Secretary of the Board

For the reasons discussed above, the NCUA Board proposes to amend 12 CFR parts 701, 703, 705, 708a, 709, 741, 745, 747, and 750; and to add new Subpart B to 12 CFR part 746 as follows:

PART 701 – ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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

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

2. Amend §701.14(e) to read as follows:

§701.14 Change in official or senior executive officer in credit unions that are newly chartered or are in troubled condition.

* * * * *

(e) *Notice of disapproval.* NCUA may disapprove the individual serving as a director, committee member or senior executive officer if it finds that the competence, experience, character, or integrity of the individual with respect to whom a notice under this section is submitted indicates that it would not be in the best interests of the members of the credit union or of the public to permit the individual to be employed by, or associated with, the credit union. The Notice of Disapproval will advise the parties of their rights to request reconsideration from the regional director and/or file an appeal with the NCUA Board in accordance with the procedures set forth in Subpart B to part 746 of this chapter.

3. Amend §701.21(h)(3) to read as follows:

§701.21 Loans to Members and Lines of Credit to Members.

* * * * *

(h) * * *

(3) A regional director will provide a written determination on a waiver request within 45 calendar days after receipt of the request; however, the 45-day period will not begin until the requesting credit union has submitted all necessary information to the regional director. If the regional director does not provide a written determination within the 45-day period the request is deemed denied. A

credit union may request the regional director to reconsider a denied waiver request and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

* * * * *

4. Amend §701.22(c) to read as follows:

§701.22 Loan Participations.

* * * * *

(c) To seek a waiver from any of the limitations in paragraph (b) of this section, a federally insured credit union must submit a written request to its regional director with a full and detailed explanation of why it is requesting the waiver. Within 45 calendar days of receipt of a completed waiver request, including all necessary supporting documentation and, if appropriate, any written concurrence, the regional director will provide the federally insured credit union a written response. The regional director's decision will be based on safety and soundness and other considerations; however, the regional director will not grant a waiver to a federally insured, state-chartered credit union without the prior written concurrence of the appropriate state supervisory authority. A federally insured credit union may request the regional director to reconsider a denied waiver

request and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

* * * * *

5. Amend §701.23(h)(3) to read as follows:

§701.23 Purchase, Sale, and Pledge of Eligible Obligations.

* * * * *

(h) * * *

(3) *Appeal to NCUA Board.* A federal credit union may request the regional director to reconsider a denied request for expanded authority and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

6. Amend §701.32(b)(5) to read as follows:

§701.32 Payment on Shares by Public Units and Nonmembers.

* * * * *

(b) * * *

(5) The regional director will provide a written determination on an exemption request within 30 calendar days after receipt of the request. The 30-day period will not begin to run until all necessary information has been submitted to the regional director. A credit union may request the regional director to reconsider a denied exemption request and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

* * * * *

7. Amend §701.34(a)(4) to read as follows:

§701.34 Designation of Low Income Status; Acceptance of Secondary Capital Accounts by Low-Income Designated Credit Unions.

(a) * * *

(4) If NCUA determines a low-income designated federal credit union no longer meets the criteria for the designation, NCUA will notify the federal credit union in writing, and the federal credit union must, within five years, meet the criteria for the designation or come into compliance with the regulatory requirements

applicable to federal credit unions that do not have a low-income designation. The designation will remain in effect during the five-year period. If a federal credit union does not requalify and has secondary capital or nonmember deposit accounts with a maturity beyond the five-year period, NCUA may extend the time for a federal credit union to come into compliance with regulatory requirements to allow the federal credit union to satisfy the terms of any account agreements. A federal credit union may request NCUA to reconsider a determination that it no longer meets the criteria for the designation and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

8. Appendix B to part 701 is amended as follows:

- a. Section VII.D of Chapter 1 is revised.
- b. Section II.C.5 of Chapter 2 is revised.
- c. Section III.C.5 of Chapter 2 is revised.
- d. Section IV.C.5 of Chapter 2 is revised.
- e. Section V.C.5 of Chapter 2 is revised.
- f. Section IV.B of Chapter 3 is revised.
- g. Section II.C.6 of Chapter 4 is revised.
- h. Section II.D.2 of Chapter 4 is revised.
- i. Section III.D.6 of Chapter 4 is revised.

The revisions read as follows:

Appendix B to Part 701 – Chartering and Field of Membership Manual

* * * * *

VII.D—Appeal of Office of Consumer Financial Protection and Access Director Decision

If the Office of Consumer Financial Protection and Access Director denies a charter application, in whole or in part, that decision may be appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the prospective group may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial.

* * * * *

II.C.5 – Appeal of Office of Consumer Financial Protection and Access Director

Decision

If the Office of Consumer Financial Protection and Access Director denies a field of membership expansion request, merger, or spin-off, that decision may be appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial.

* * * * *

III.C.5 – Appeal of Office of Consumer Financial Protection and Access Director

Decision

If the Office of Consumer Financial Protection and Access Director denies a field of membership expansion request, merger, or spin-off is denied, that decision may be

appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

* * * * *

IV.C.5 – Appeal of Office of Consumer Financial Protection and Access Director Decision

If the Office of Consumer Financial Protection and Access Director denies a field of membership expansion request, merger, or spin-off, that decision may be appealed to

the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

* * * * *

*V.C.5 – Appeal of Office of Consumer Financial Protection and Access Director
Decision*

If the Office of Consumer Financial Protection and Access Director denies a field of membership expansion request, merger, or spin-off, that decision may be appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

* * * * *

IV.B – Appeal of Office of Consumer Financial Protection and Access Director Decision

* * * * *

If the Office of Consumer Financial Protection and Access Director denies an “underserved area” request, the federal credit union may appeal that decision to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

* * * * *

*II.C.6 – Appeal of the Office of Consumer Financial Protection and Access Director
Decision*

If a conversion to a federal charter is denied by the Office of Consumer Financial Protection and Access Director, the applicant credit union may appeal that decision to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

* * * * *

II.D.2 – Application for a Federal Charter

When the Office of Consumer Financial Protection and Access Director has received evidence that the board of directors has satisfactorily completed the actions described above, the federal charter and new Certificate of Insurance will be issued.

The credit union may then complete the conversion as discussed in the following section. A credit union may request the Office of Consumer Financial Protection and Access Director to reconsider a denial of a conversion application and/or appeal a denial to the NCUA Board. For more information, refer to Section II.C.6 of this chapter.

* * * * *

III.D.6 – Appeal of Office of Consumer Financial Protection and Access Director Decision

If the Office of Consumer Financial Protection and Access Director denies a conversion to a state charter, the federal credit union may appeal that decision to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 business days from the date of the receipt of the request for reconsideration to make a final decision. If the application is again denied, the credit union may proceed with the appeal process to the NCUA Board within 60 days of the date of the last denial by the Office of Consumer Financial Protection and Access Director.

PART 703 – INVESTMENT AND DEPOSIT ACTIVITIES

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

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

10. Amend §703.20(d) to read as follows:

§703.20 Request for additional authority.

* * * * *

(d) *Appeal to NCUA Board.* A federal credit union may request the regional director to reconsider any part of the determination made under paragraph (c)

and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

11. Amend §703.111(d) to read as follows:

§703.111 NCUA approval.

* * * * *

(d) *Right to Appeal.* A federal credit union may request the regional director to reconsider a determination made under paragraph (a) or (c) of this section and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

12. Amend §703.112(c) to read as follows:

§703.112 Applying for additional products or characteristics.

* * * * *

(c) A federal credit union may request the regional director to reconsider a denial of an application for additional products or characteristics and/or file an appeal

with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

13. Amend §703.114(c) to read as follows:

§703.114 Regulatory violation.

* * * * *

(c) A federal credit union may request the regional director to reconsider a revocation of derivatives authority or an order to terminate existing derivatives positions and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

**PART 705 – COMMUNITY DEVELOPMENT REVOLVING LOAN FUND
ACCESS FOR CREDIT UNIONS**

14. The authority citation for part 705 continues to read as follows:

Authority: 12 U.S.C. 1756, 1757(5)(D), and (7)(I), 1766, 1782, 1784, 1785 and 1786.

15. Amend § 705.10(a) to read as follows:

§705.10 Appeals.

(a) *Appeals of non-qualification.* A qualifying credit union whose application for a loan or technical assistance grant has been denied under §705.7(f) for failure to satisfy any of the conditions set forth in §705.7(c), including any additional criteria set forth in the related notice of funding opportunity, may request the Director of the Office of Small Credit Union Initiatives to reconsider the denial and/or appeal that decision to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this title, subject to the following limitations:

(1) *Scope.* The scope of the Board’s review is limited to the threshold question of qualification and not the issue of whether, among qualified applicants, a particular loan or technical assistance grant is funded.

(2) *Appeals procedures inapplicable.* The foregoing procedure applies during an open period in which funds are available and NCUA has called for applications. NCUA will reject any application submitted during a period in which NCUA has not called for applications, except for applications submitted under §705.8. Such rejections are not subject to appeal or review by the NCUA Board.

* * * * *

PART 708a – BANK CONVERSIONS AND MERGERS

16. The authority citation for part 708a continues to read as follows:

Authority: 12 U.S.C. 1766, 1785(b), and 1785(c).

17. Amend §708a.108(d) to read as follows:

§708a.108 NCUA oversight of methods and procedures of membership vote.

* * * * *

(d) A converting credit union may request the regional director to reconsider a determination regarding the methods and procedures of the membership vote and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

18. Amend §708a.304(h) to read as follows:

§708a.304 Notice to NCUA and request to proceed with member vote.

* * * * *

(h) If the regional director disapproves a merger proposal, the credit union may request reconsideration and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

19. Amend §708a.308(d) to read as follows:

§708a.308 NCUA approval of merger.

* * * * *

(d) A merging credit union may request the regional director to reconsider the disapproval of a merger proposal and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

**PART 709 – INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS
AND ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY
INSURED CREDIT UNIONS IN LIQUIDATION**

20. The authority citation for part 709 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1767, 1786(h), 1787, 1788, 1789, 1789a.

21. Revise §709.7 to read as follows:

§709.7 Procedures for agency review or judicial determination of claims.

(a) *General.* A claimant may either request agency review of an initial determination of the liquidating agent to disallow a claim or seek a de novo judicial determination of claims. In order to receive agency review of an initial determination, a claimant must request an administrative appeal before the NCUA Board. In order to seek a judicial determination, a claimant must file suit (or continue an action commenced before the appointment of the liquidating agent) in the district or territorial court of the United States for the district within which the credit union's principal place of business is located or the United States District Court for the District of Columbia.

(b) *Procedures for Agency Review.* A claimant requesting an administrative appeal may request a hearing on the record conducted pursuant to the procedures set forth in subpart A of part 747. The determination of whether to agree to a request for a hearing on the record shall rest solely with the NCUA Board, which shall notify the claimant of its decision in writing. Alternatively, a claimant may request an appeal before the NCUA Board pursuant to the procedures set forth in subpart B to part 746 of this chapter.

(c) *Deadline to Request Agency Review or File Suit.* A claimant must request agency review of an initial determination or file suit (or continue an action commenced before the appointment of the liquidating agent) within 60 days from the mailing of the initial determination or the expiration of the time period for the liquidating agent to determine claims under §709.6(c), whichever is earlier. A

request for a hearing on the record will suspend the 60-day period for filing a lawsuit (or continuing an action commenced before the appointment of the liquidating agent) from the date of the claimant's request to the date of the NCUA Board's decision regarding that request. If a claimant fails to either request a hearing on the record or an appeal to the Board or file suit (or continue an action commenced before the appointment of the liquidating agent) within the 60-day period, any disallowance of claims shall be final and the claimant shall have no further rights or remedies with respect to such claims.

(d) *Reconsideration.* Prior to requesting agency review or filing or continuing a lawsuit, a claimant may request reconsideration of the initial determination of the liquidating agent in accordance with the procedures set forth in Subpart B to part 746 of this chapter. The deadline to request agency review or file suit (or continue an action commenced before the appointment of the liquidating agent) in paragraph (c) will be suspended from the date of the claimant's request to the date of the liquidating agent's decision regarding that request.

22. Remove §709.8 and redesignate §§709.9 through 709.13 as §§709.8 through 709.12, respectively.

PART 741 – REQUIREMENTS FOR INSURANCE

23. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766(a), 1781-1790, and 1790d; 31 U.S.C. 3717.

24. Amend §741.11(d) to read as follows:

§741.11 Foreign branching.

* * * * *

(d) *Revocation of approval.* A state regulator that revokes approval of the branch office must notify NCUA of the action once it issues the notice of revocation. The regional director may revoke approval of the branch office for failure to follow the business plan in a material respect or for substantive and documented safety and soundness reasons. If the regional director revokes the approval, the credit union will have six months from the date of the revocation letter to terminate the operations of the branch. The credit union can request reconsideration of the revocation and/or appeal this revocation to the NCUA Board in accordance with the procedures set forth in Subpart B to part 746 of this chapter.

* * * * *

PART 745 – SHARE INSURANCE AND APPENDIX

25. The authority citation for part 745 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; title V, Pub. L. 109-351, 120 Stat. 1966.

26. Amend §745.201(c) to read as follows:

§745.201 Processing of insurance claims.

* * * * *

(c) *Reconsideration and Appeals.* An account holder may request reconsideration from the Liquidating Agent of the initial determination and/or file an appeal with the NCUA Board in accordance with the procedures set forth in Subpart B to part 746 of this chapter.

27. Remove §745.202 and redesignate §745.203 as §745.202

PART 746 – APPEALS PROCEDURES THAT DO NOT BY LAW REQUIRE A BOARD HEARING

28. The authority citation for part 746 reads as follows:

Authority: 12 U.S.C. 1766, 1787, and 1789.

29. Add subpart B to part 746 to read as follows:

**SUBPART B – APPEALS PROCEDURES THAT DO NOT BY LAW REQUIRE A
BOARD HEARING**

Sec.

746.201 Authority, Purpose, and Scope

746.202 Definitions

746.203 Request for Reconsideration

746.204 Appeal to the Board

746.205 Preliminary Considerations Regarding the Appeal

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§746.201 Authority, Purpose, and Scope.

(a) *Authority.* This part is issued pursuant to sections 120, 207, and 209 of the Federal Credit Union Act (12 U.S.C. 1766, 1787, and 1789).

(b) *Purpose.* Part 746, Subpart B provides generally uniform procedures by which petitioners may appeal initial agency determinations to the NCUA Board under this part.

(c) *Scope.* This part covers the appeal of initial agency determinations by a program office which the petitioner has a right to appeal to the NCUA Board under the following regulations:

§§701.14(e), 701.21(h)(3), 701.22(c), 701.23(h)(3), 701.32(b)(5), 701.34(a)(4), Appendix B to §701, Chapters 1 – 4, 703.20(d), 703.111(d), 703.112(c), 703.114(c), 705.10(a), 708a.108(d), 708a.304(h), 708a.308(d), 709.7, 741.11(d), 745.201(c), subpart J to part 747, and 750.6(b).

This part does not apply to: (1) actions by the agency to develop regulations, policy statements, or guidance documents; (2) formal enforcement actions, the review of material supervisory determinations that come under the jurisdiction of NCUA’s Supervisory Review Committee, or the appeal of any agency determination made pursuant to part 792 of this chapter; (3) challenges to determinations under the prompt corrective action regime in parts 702 and 704 of this chapter and Subparts L and M to part 747; and (4) creditor claims arising from the liquidation of an insured credit union to the extent that the creditor has requested, and the NCUA Board has agreed, for the claim to be handled through a hearing on the record pursuant to 12 U.S.C. 1787(b)(7)(A) and subpart A of part 747 of this chapter.

§746.202 Definitions.

For purposes of this part:

Appeal means a process by which a petitioner may obtain the review by the Board of an initial agency determination.

Board means the NCUA Board.

Initial Agency Determination means an agency action taken at a level below the Board with respect to an application, request, claim, or other matter in which a determination of rights or resolution of issues is rendered and the party affected by the determination has been provided with a right to appeal the determination to the NCUA Board. The initial agency determination shall notify the Petitioner of the right to request reconsideration or to file an appeal with the Board, and shall include a description of applicable filing deadlines and time frames for agency responses. Agency determinations involving the formulation of a regulation, guidance document, or policy statement are excluded from this definition.

Oral Hearing means an opportunity, granted at the sole discretion of the Board, by which a petitioner may make an oral presentation to the Board concerning issues pertinent to an appeal.

Petitioner means the person or entity seeking Board review of an initial agency determination.

Program Office means the office within NCUA responsible for making an initial agency determination.

Special Counsel to the General Counsel means an individual (referred to herein as the “Special Counsel”) within NCUA’s Office of General Counsel charged with administering appeals in accordance with the procedures set forth in this part.

§746.203 Request for Reconsideration.

- (a) *Reconsideration.* Prior to submitting an appeal in accordance with §746.204, the petitioner may in its sole discretion make a written request to the appropriate program office to reconsider the initial agency determination.
- (b) *Deadline to File.* A request for reconsideration must be sent to the appropriate program office within 30 calendar days of the date of the initial agency determination. A petitioner who does not file a request for reconsideration in a timely manner is considered to have waived the right to request reconsideration.
- (c) *Special Rule Regarding Change in Officials.* Notwithstanding paragraph (a), a request for reconsideration of an initial agency determination disapproving an individual serving as a director, committee member or senior executive officer pursuant to §701.14 must be sent to the

appropriate program office within 15 calendar days of the date of the initial agency determination.

(d) *Content of Request.* Any request for reconsideration must include:

- (1) A statement of the facts on which the request for reconsideration is based;
- (2) A statement of the basis for the initial agency determination to which the petitioner objects and the alleged error in such determination; and
- (3) Any other support or evidence relied upon by the petitioner which was not previously provided to the appropriate program office.

(e) *Determination of Program Office.* The appropriate program office will review its initial agency determination and reconsider the position initially taken in the light of the arguments and additional materials provided in the request for reconsideration. Within 30 calendar days of its receipt of a request for reconsideration, the appropriate program office shall issue its determination either affirming in whole or in part the initial agency determination or rejecting it.

(f) *Notice of Determination.* The appropriate program office shall provide its decision concerning the reconsideration request to the petitioner in writing, stating the reasons for the decision. The decision shall be treated as an initial agency determination for purposes of paragraph (a) of §746.204.

- (1) In addition to a written statement of reasons for the decision, the appropriate program office shall provide the petitioner with written notice of the right to appeal the decision, in whole or in part, to the Board in accordance with the procedures set forth in §746.204.
- (2) For creditor claims brought pursuant to §207 of the Federal Credit Union Act (12 U.S.C. 1787), the appropriate program office shall provide the petitioner with written notice of the right, in the alternative to filing an appeal with the Board, to file suit or continue an action commenced before the appointment of the liquidating agent in the district or territorial court of the United States for the district within which the credit union's principal place of business was located or the United States District Court for the District of Columbia. For such claims, the 60-day period for filing a lawsuit in United States district court provided in 12 U.S.C. 1787(b)(6) shall be tolled from the date of the petitioner's request for reconsideration to the date of a determination pursuant to paragraph (e).
- (3) Upon a showing of extenuating circumstances, as determined by the program office in its reasonable judgment, a petitioner may be allowed to submit a second reconsideration request before filing an appeal with the Board. In such cases, the deadline for filing an appeal with the Board shall begin to run from the earlier of the date of the decision of the program office regarding the second

reconsideration request or thirty calendar days from the date the second reconsideration request was accepted by the program office.

(g) *Failure to Make a Determination.* Failure by the appropriate program office to issue a decision within the timeframe specified in subsection (e) shall be an affirmation of the original initial agency determination and shall be treated as an initial agency determination for purposes of paragraph (a) of §746.204.

(h) *Burden of Proof.* The burden of proof to lead the appropriate program office to modify or reverse an initial agency determination shall rest solely upon the petitioner.

§746.204 Appeal to the Board.

(a) *Filing.* Within 60 calendar days of the date of an initial agency determination, or, as applicable, a determination by the program office on any request for reconsideration, a petitioner may file an appeal seeking review of the determination by the Board. The request must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Special Rule Regarding Change in Officials.* Notwithstanding paragraph (a), an appeal of an initial agency determination disapproving an individual serving as a director, committee member or senior executive

officer pursuant to §701.14 must be filed with the Secretary of the Board within 15 calendar days of the date of the initial agency determination.

(c) *Failure to File a Timely Appeal.* Absent extenuating circumstances, as determined by the Board in its sole discretion, a petitioner who fails to file an appeal within the specified 60-day period shall be deemed to have waived all claims pertaining to the matters in issue.

(d) *Content of Request.* Any appeal filed with the Board must include:

(1) A statement summarizing the underlying facts that form the basis of the appeal, together with copies of all pertinent documents, records, and materials on which the petitioner relies in support of the appeal.

(2) A statement outlining why the petitioner objects to the conclusions in the initial agency determination, including any errors alleged to have been made by the program office in reaching its determination.

(3) Any other materials or evidence relied upon by the petitioner that were not previously provided to the appropriate program office.

(e) *Burden of Proof.* The burden of proof to lead the Board to modify or reverse an initial agency determination shall rest solely upon the petitioner.

(f) *Amending or Supplementing the Appeal.* Within 45 calendar days from the date the Secretary of the Board receives an appeal, the petitioner may amend or supplement the appeal in writing.

(g) *Request for Oral Hearing.* In accordance with §746.207, the petitioner may request an opportunity to appear before the Board, in person, or via teleconference or videoconference, to make an oral presentation in support of the appeal.

§746.205 Preliminary Considerations Regarding the Appeal.

- (a) *Initial Review.* The Special Counsel shall review all appeals filed with the Secretary of the Board and make a recommendation for their disposition to the Board. The Special Counsel shall have the authority to dismiss an appeal upon the request of the petitioner.
- (b) *Supplemental Materials.* Within 30 calendar days from the date the Secretary of the Board receives an appeal, the Special Counsel may request in writing that the petitioner submit additional evidence in support of the appeal. If additional evidence is requested, the petitioner shall have 30 calendar days from the date of issuance of such request to provide the requested information. Failure by the petitioner to provide such information may result in denial of the petitioner's appeal. The Special Counsel shall have the authority to request additional information from any other relevant source in order to provide the Board with a full and complete administrative record. All requests by the Special Counsel pursuant to this section must be reasonable and designed to facilitate the processing of the appeal, not to delay it.

§746.206 Administration of the Appeal.

(a) *De Novo Review by Special Counsel.* After receipt of a timely appeal, the Special Counsel shall contact the relevant NCUA program office and request a complete set of all pertinent materials, including internal memoranda, correspondence, and records having a bearing on the initial agency determination being appealed. The Special Counsel will conduct an independent review of these materials, along with all materials submitted by the petitioner in support of the appeal. The Special Counsel will make a recommendation to the Board as to the appropriate disposition of the appeal after having evaluated the applicable legal arguments and considered the facts and circumstances that pertain to the appeal. As directed by the Board, the Special Counsel may provide his or her recommendation in writing to the Board and may make an oral presentation before the Board.

(b) *Determination on Appeal.* Within 90 calendar days from the date of receipt of an appeal by the Secretary of the Board, or within any extension of time as established by the Chairman, the Board shall issue a decision allowing, in whole or in part, or disallowing the petitioner's appeal. The decision by the Board shall be in writing, stating the reasons for the decision, and shall constitute a final agency action for purposes of chapter 7 of title 5 of the United States Code. Failure by

the Board to issue a decision on an appeal within the 90-day period or within any extension of time as established by the Board shall be deemed to be a denial of the appeal.

- (c) *Extension of Time.* In the discretion of the Chairman, the time frame for the Board's decision may be extended as the Chairman may consider necessary or appropriate for a full and fair consideration of the issues. For purposes of this subsection, the Special Counsel is authorized to act on behalf of the Chairman and may, in that capacity, grant an extension of time.

§746.207 Procedures for Oral Hearing.

- (a) *Request for Oral Hearing.* The petitioner may request to appear before the Board to make an oral presentation in support of the appeal. The request must be submitted with the initial appeal documents and should be in the form of a separate written document titled "Request for Oral Hearing." The request must show good cause for an oral presentation and state reasons why the appeal cannot be presented adequately in writing.
- (b) *Action on the Request.* The Board shall determine whether to grant the request for oral hearing and shall direct the Special Counsel to serve notice of the Board's determination in writing to the petitioner. A request for oral hearing shall be granted with the approval of any Board member. The determination by

a Board member approving an oral hearing must be taken within 20 days of the Board Secretary's receipt of the appeal.

(c) *Effect of Denial.* In the event no Board member approves of holding an oral hearing, the request for an oral hearing is deemed to be denied, and the appeal shall be reviewed and determined by the Board on the basis of the written record.

(d) *Procedures for Oral Hearing.* The following procedures shall govern the conduct of any oral hearing:

(1) *Scheduling of Oral Hearing; Location.* The Special Counsel shall notify the petitioner and the program office of the date and time for the oral hearing, making sure to provide reasonable lead time and schedule accommodations. The oral hearing will be held at NCUA headquarters in Alexandria, Virginia; *provided, however*, that on his or her own initiative or at the request of the petitioner, the Chairman may in his or her sole discretion allow for a hearing to be conducted via teleconference or video conference facilities.

(2) *Appearances; Representation.* The petitioner and the NCUA program office shall submit a notice of appearance identifying the individual(s) who will be representing them at the oral presentation. The petitioner shall designate not more than two officers, employees, or other representatives (including counsel), unless otherwise authorized by the Board. The NCUA program office shall designate not more than two individuals (one of whom may be a litigation and enforcement attorney

from NCUA's Office of General Counsel), unless otherwise authorized by the Chairman.

(3) *Conduct of Oral Hearing.* The oral hearing shall consist entirely of oral presentations. The introduction of written evidence or witness testimony at the hearing shall not be permitted. The petitioner shall present first, followed by the NCUA program office. Each side shall be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Board and will be based on the complexity of the appeal. Members of the Board may ask questions of any individual appearing before the Board.

(4) *Transcript.* The oral hearing shall be on the record and transcribed by a stenographer, who will prepare a transcript of the proceedings. The stenographer will make the transcript available to the petitioner upon payment of the cost thereof.

(e) *Confidentiality.* An oral hearing as provided for herein constitutes a meeting of the Board within the meaning of the Government in the Sunshine Act (5 U.S.C. 552b). The NCUA Chairman shall preside over the conduct of the oral hearing. The meeting will be closed to the public to the extent that one or more of the exemptions from public meetings apply as certified by NCUA's Office of General Counsel. The Board shall maintain the confidentiality of any information or materials submitted or otherwise obtained in the course of the procedures outlined herein, subject to applicable law and regulations.

(f) *Conclusion of the Oral Hearing.* The Board shall take the oral presentations under advisement. The Board shall render its decision on the appeal in accordance with §746.206.

PART 747 - ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

30. The authority citation for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Pub. L. 101-410; Pub. L. 104-134; Pub. L. 109-351; Pub. L. 114-74.

31. Remove and reserve subpart J of part 747.

PART 750 – GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

32. The authority citation for part 750 continues to read as follows:

Authority: 12 U.S.C. 1786(t).

33. Amend §750.6(b) to read as follows:

§750.6 Filing instructions; appeal.

* * * * *

(b) A FICU whose request for approval by NCUA, in accordance with paragraph (a) of this section, has been denied may seek reconsideration of the request and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

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